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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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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 5680 words (reply brief does not exceed 5700 words).

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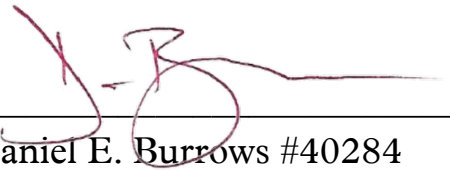

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REPLY ARGUMENT

1. INTRODUCTION.

The Answer Brief shows that the parties agree on several underlying points. The problem is that, over and over, the conclusions of Petitioner–Appellee, the Department of Labor and Employment, either do not follow from its premises or are beside the point.

Ultimately, despite filing a brief twice as long as the one to which it was responding, the Department fails to provide a convincing argument on the key issue in the case: what the phrase "added tax or surcharge" means in article X, section 20(8)(a) of the Colorado Constitution. And this failure is fatal to Proposition 118 because, under the reasonable, plain-language explanation offered in the Opening Brief, the proposition's "premium" is an unlawful "surcharge."

2. THE ANSWER BRIEF PRESENTS A STRAINED READING OF THE TAXPAYER'S BILL OF RIGHTS (TABOR).

The part of TABOR at issue here reads: "Any 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." Art. X, § 20(8)(a).

The Opening Brief included a thorough, convincing analysis of this sentence. That analysis gave natural, common definitions to every word in the constitutional provision, *see* Opening Br. 9–10, 16; adhered to both

substantive and textual canons, *see id.* at 12–14, 16–17; and maintained TABOR's purpose of restraining the growth of government, *see id.* at 10–11, 17, 18. In response to this, the Department attempts its own textual analysis, relying on two basic themes: a structural argument and a contextual one.

The Department's analysis is not absurd, but it is wrong. The Court should not stretch itself to adopt these arguments.

2.1. *The Department's Structural Analysis Relies on a Meaning of "With" that Is Neither the Most Common nor the Most Obvious Definition of that Word.*

The Department's structural argument can be broken into two sub-arguments. First, the Department says that the sentence's subject ("income tax law change") means "the sentence only concerns income tax law changes." Answer Br. 33. In this, the parties agree.[1]

The Department's next structural contention, however, is questionable. According to the Department, "with no added tax or surcharge" is an adverbial, prepositional phrase that modifies the earlier infinitive phrase "to be taxed." Answer Br. 33. Thus, it can only apply when people are "taxed," not when they are subject to a mere "fee" like Proposition 118's "premium."

Particularly in a sentence that does not itself strictly adhere to every

[1] The disagreement comes in what the phrase "income tax law change" means. More on this in Part 3, *infra*.

rule of grammar,[2] it's questionable whether one can expect the perfect, restrictive references that the Department wishes to impose on the text.

Nevertheless, even accepting the Department's demand for perfect grammar, the analysis fails because it assumes the wrong meaning of "with." "With" can be a tricky word in legal interpretation. *See State v. Hawker*, 374 P.3d 1085, 1087 (Utah Ct. App. 2016). Here, the Department wants it to carry a sense of being the way the previous phrase "to be taxed" is executed. That is a permissible use of the word "with," but it is only one of many possible interpretations. Indeed, "with" meaning "by means of; using" or "by the use, presence, etc. of" is only the thirteenth of twenty-two definitions of "with" in *Webster's New World Dictionary* (3d ed. 1988). Several other definitions connote occurring alongside but *not* being a part of something. For example: "alongside of; near to," "in the company of," "as an associate, or companion, of," "accompanied by, attended by," etc. Thus, the relationship between "to be taxed" and "with no added tax or surcharge" needn't mean that surcharges must be part of the taxation itself. Under the

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[2] It's missing an obvious comma after "1992." *See* Diana Hacker, *A Writer's Reference* 153 (2d ed. 1981). And though the drafters added a hyphen to the phrasal adjective "voter-approved," they missed "income-tax-law change" at the beginning of the sentence. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 657–59 (2d ed. 1995). Or should it be "income-tax law change"? Grammar is hard.

definitions just laid out, a surcharge like Proposition 118's—which is calculated just like an income tax but is not itself a "tax"—very much operates "with" the taxation. *Cf. Erdman v. Cochise Cty.*, 926 F.2d 877, 879–80 (9th Cir. 1991) (interpreting offer of $7500 "with costs now accrued" to mean the $7500 was to be accompanied by costs, not inclusive of them, and calling such interpretation a "plain language" reading of the offer); *Dennis v. Gocom Media of Ill., LLC*, No. 10-3125, slip op. at 6–8 (C.D. Ill. Jan 15, 2014) (attached) (similar).

2.2. *The Department's Contextual Analysis Not Only Violates the Presumption that a Variation in Words Implies a Variation in Meaning, but Also Mixes Up Which Subsection of TABOR Is at Issue.*

The Department's contextual analysis is even less convincing. While the structural analysis at least presents a semi-plausible reading of the text (if not the best or most natural one), the contextual analysis doesn't even do that. Rather, it violates contextual canons and can't even keep straight which subsection of TABOR controls this case.

2.2.1. *Because the drafters of TABOR used the word "tax" repeatedly, the decision to say "surcharge" instead is a meaningful change.*

To start, the Department points out that "the term 'tax'" and its derivatives "appear twelve times in subsection 8(a)." Answer Br. 30. Because of this ubiquity, says the government, "surcharge" must be referring to some sort of tax as well. *See id.* at 31.

The government's word count is accurate, but its conclusion does not follow. "[A] material variation in terms suggests a variation in meaning." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 69, 467 P.3d 314, 330 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)). TABOR's drafters knew how to talk about taxes when they wanted to. By choosing to use the word "surcharge" here, then, they must have meant something other than a tax. *Accord id.*

2.2.2. *The Department's discussion of subsection 8's heading confuses that subsection with another one.*

Moving to its next point, the Department refers to subsection 8's heading: "*Revenue limits*." Because "TABOR's revenue limitation does not include enterprise revenue," the government says, subsection 8 shouldn't apply to enterprises like the Division of Family and Medical Leave Insurance. Answer Br. 31 (emphasis omitted).

Section headings can be permissible indicators of meaning.[3] The

[3] This general rule comes with a note of caution, though.

> [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner . . . . As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles.

Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528 (1947); *accord*

problem here is that the phrase "revenue limits" headlining subsection 8 doesn't mean what the Department thinks it does. The heading refers to limits in the *method or form* of revenue collection, not limits in the total amount collected. This is evident from the text of the subsection: it prohibits new real estate transfer taxes and local income taxes; authorizes local governments to reduce or end business personal property taxes; dictates how county assessors must perform property valuations; etc.

What the Department calls "TABOR's revenue limitation," Answer Br. 31, is, under the Constitution, a "*Spending limit*[]." Colo. Const. art. X, § 20(7). And it appears in a different subsection entirely. Enterprises are mentioned in the spending-limit section, but *not* in the revenue-limit one. And while TABOR excludes enterprises from its spending limits, *see id.* § 20(2)(b), (e), nothing is said about how the "revenue limits" apply to them.

Thus, subsection 8's heading provides no support for the Department's interpretation.

2.3. *Even with All the Effort It Has Expended, the Department's Reading of TABOR Still Suffers from a Surplusage Problem.*

As Petitioner–Appellant, Chronos Builders, LLC, has emphasized from the beginning, the Department's supposedly grammatical interpretation would render the sentence's final phrase—"with no added tax

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Dalby v. City of Longmont, 81 Colo. 271, 274 (1926) (citations omitted).

or surcharge"—a nullity.

The Department dismisses that final phrase as a mere "catch-all." Answer Br. 30, 38, 39, 41. But even if that is the case, one must question what this provision is "catching" under the government's reading.

Everything that the Department thinks that the relevant sentence does could be accomplished without including the final prepositional phrase. According to the Department, the phrase is merely intended to stop sneaky lawmakers from passing income taxes and calling them something else in the statute. Answer Br. 39. That might be a reasonable understanding if "added tax" stood alone, but it leaves "surcharge" out in the cold.

Furthermore, it has been "a familiar and well documented rule of law" since well before TABOR "that taxation is concerned with realities and that, in considering tax matters, substance and not form should govern." *People v. Becker*, 413 P.2d 185, 186 (Colo. 1966). "The nature of a tax must be determined by its operation rather than by particular descriptive language that may have been applied to it." *Educ. Films Corp. of Am. v. Ward*, 282 U.S. 379, 387 (1931), *quoted in Rancho Colo., Inc. v. City of Broomfield*, 586 P.2d 659, 663 (Colo. 1978), *Golden State Bank v. Dolan*, 37 Colo. App. 29, 31 (App. 1975)). Given this longstanding rule, voters would have known that functional income taxes with misleading names could be easily struck down as a violation of the "one rate" requirement, with no need to discuss "added

tax[es] or surcharge[s]." [4] Thus, the Department has not overcome the surplusage problem that has plagued its position from the beginning.

3. The Department's Attempt to Discredit Chronos' Reading of the Relevant Provision Is Ineffective.

The Opening Brief outlined a reading of the relevant constitutional provision that was better than anything the Department has offered. The Department, however, challenges Chronos' reading, saying its construal of the phrase "income tax law change" is inaccurate.

The argument starts with something on which the parties agree: that this phrase is restrictive on the rest of the sentence—in other words, that if Proposition 118 isn't an "income tax law change," the rest of the sentence is irrelevant.

Chronos argues that the phrase "income tax law change" "must refer to any [change in the] 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.'" Opening Br. 15. That is because this is the only reading that "makes every word of the provision effective" and "protects the purpose of the provision." *Id.* at 15–16.

The Department, however, argues that Chronos' reading "ignores the

[4] As the Department points out, "voters are 'presumed to know the existing law' when they approve [new laws]." Answer Br. 21 (quoting *Common Sense All. v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)).

word 'tax.'" Answer Br. 34. According to the Department, "tax" has a limited, technical meaning: it can only refer to a charge "intended to raise revenues to pay for general government expenses" rather than "to pay for a particular governmental service." Answer Br. 37. The virtue of this position is that it fits with how this Court has interpreted "tax" in TABOR's subsection 4(a) (where the Constitution requires the government to "have voter approval in advance for" various tax increases). *See Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶¶ 28–33, 418 P.3d 506, 514–15. Thus, under a presumption of consistent usage, the Department says, "tax" should have the same definition in subsection 8(a).

But, "more than most other canons, [the presumption of consistent usage] assumes a perfection of drafting that, as an empirical matter, is not often achieved. Though one might wish it were otherwise, drafters more than rarely use the same word to denote different concepts . . . ." Scalia & Garner, *supra*, at 170. Thus, the Department's desire to give "tax" exactly the same definition everywhere it appears, regardless of context, is unrealistic.

The average layman could reasonably refer to an "income tax" in the broader way that Chronos urges here[5]—i.e., any government extraction

[5] The Department bucks against the idea that citizen-initiated constitutional provisions are interpreted less strictly than statutes that emanate from the legislature. Answer Br. 27–28. And it tries to explain away statements to that effect in *Bruce v. City of Colorado Springs*, 129 P.3d 988 (Colo. 2006), by

assessed as a measure of income as an "income tax." Indeed, even lawyers sometimes use the term that broadly. *See Tax*, Black's Law Dictionary (abridged 10th ed. 2015) ("Most broadly, the term embraces all government impositions on the person, property, privileges, occupations, and enjoyment of the people . . . .").

And there are good reasons why the word "tax" might be broader in subsection 8(a) than it is in subsection 4(a). For one thing, the phrases "income tax" and "income tax law change" appear nowhere in TABOR

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reference to an obscure publication that—so far as undersigned counsel can tell—this Court has cited only once, *see Stamp v. Vail Corp.*, 172 P.3d 437, 443 n.7 (Colo. 2007). Answer Br. 27 n.6. But *Bruce*'s rule—which is essentially that when dealing with citizen-initiated constitutional provisions, the Court construes the text as a common man, not a nitpicky lawyer, would, 129 P.3d at 993—is merely a restatement of a standard rule for constitutional interpretation:

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 451 (1833); *accord City & Cty. of Denver v. Mountain States Tel. & Tel. Co.*, 184 P. 604, 606 (1919); *see also Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004) ("Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate.").

besides subsection 8(a). So the context, at least, is unique.

The policy considerations are also different in the two sections. In subsection 4(a), a government that wants to raise taxes has to hold an expensive election, which can be held only on a limited set of dates and has stringent notice requirements. *See* Colo. Const., art. X, § 20(3) (setting requirements for subsection 4(a) elections). Subsection 8(a), however, doesn't impose any costs or administrative burdens on government. It merely prohibits certain revenue-raising schemes as a per se matter. So while it would be odd and counterproductive to require a TABOR election every time, for example, the city pool wants to increase its admission fee, it is reasonable to think that citizens might want to stop that same city pool from charging income-based admission fees.

Even so, the Department adheres to the position that the purpose of the extraction controls TABOR's application, not the form. Answer Br. 34. But "[t]he flaw in the State's argument is apparent in what its reasoning would allow." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011). Under the Department's reasoning, the state could eliminate taxes entirely and instead establish a series of enterprises to provide various services that used to be funded by taxes—all of which are funded by an income-variable fee: a "public-safety enterprise" for police and fire protection, a "schools enterprise" for K–12 education, and even a

"revenue enterprise" to collect all these fees. The graduated fees would be justified by the argument that higher-income individuals have more valuable property for the public-safety enterprise to protect, benefited most from the education now provided by the schools enterprise, and will pay more fees to the revenue enterprise.

Any reasonable person would describe this as an "income tax" regime. But the Department would say the setup is legal—it's simply a fee-for-service system. It is unlikely that voters in 1992 thought this was what they were approving.

4. The Department Misuses the Rule of Thumb that TABOR Is Not Meant to "Hinder Basic Government Functions or Cripple the Government's Ability to Provide Services."

The Department also runs to the familiar shibboleth that TABOR should not be interpreted to "hinder basic government functions or cripple the government's ability to provide services." Answer Br. 43 (internal quotes omitted). This, of course, is the quote from *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008), that the government always throws up when it is out of better arguments. The reasoning goes like this: (A) The government needs money for a certain task. (B) If TABOR prohibits the particular revenue-collection device the state wants to use, then there will be no money to perform that task. (C) But the government needs that money; TABOR is

therefore crippling government functions. (D) Thus, TABOR does not apply. If this were an acceptable argument, it would make the Constitution a nullity. *Accord* Br. of Indep. Inst. 10–11. This cannot be what the *Barber* Court meant.

Rather, one must understand the context in which the Court was speaking. *Barber* cited three other cases for its warning about crippling government functions: *In re Interrogatories on House Bill 99-1825*, 979 P.2d 549 (Colo. 1999); *Havens v. Board of County Commissioners*, 924 P.2d 517 (Colo. 1996); and *Bolt v. Arapahoe County School District Number Six*, 898 P.2d 525 (Colo. 1995). In the *Interrogatories* case, the Court rejected an interpretation of TABOR that could have required an election every time the government wanted to buy a copy machine or computer, even if "the cost of the election could exceed the cost of the item purchased." 979 P.2d at 557. In *Havens*, the plaintiff was arguing that if voters approved a municipality retaining excess revenues in one year, the municipality had to make deep cuts to revenue in future years. 924 P.2d at 521. And in *Bolt* the Court turned down an interpretation of TABOR that would have prevented districts funded by property taxes from ever meeting their budgets, resulting in "a shortfall in tax revenues . . . every year." 898 P.2d at 537.

The situations in those three cases are a far cry from the present situation. Chronos is not asking for an interpretation that would flood the

ballot with elections over minor expenditures, require perpetual cuts in government services, or prevent the state from being able to reasonably forecast revenue and pass a budget. It is merely arguing that if the state wants to raise $1.2 billion annually to fund a program that it has managed to do without for 146 years, it should do so with a legal revenue-raising method, not an illegal one.

Similarly, the Department's (and amici's) hand wringing over unemployment insurance is beside the point. "The short response . . . is, of course, that prior unconstitutional enactments do not justify later ones. Giving the argument more credit than perhaps it is due, it is significant to note that most of the requirements cited by the [Department] are not analogous to those at issue here." *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1211 (Colo. 1994).

If recent changes[6] to the unemployment system are unconstitutional,

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[6] TABOR's anti-surcharge provisions apply only to post-1992 enactments. Art. X, § 20(8)(a). The unemployment system started in Colorado in 1936, Act of Nov. 20, 1936, 1936 Colo. Sess. Laws 27, and has existed in largely its present form since 1951, *see* Act of Mar. 15, 1951, 1951 Colo. Sess. Laws 806. The Department stresses that it was changed into an "enterprise" in 2009, but this was solely an accounting maneuver. The Department also points out that the 2009 bill changed its funding source from "taxable wages" to "chargeable wages," but the definitions of those terms are identical save a single word (referring to "premiums" for the enterprise, rather than "taxes"). *See* Act of June 1, 2009, ch. 363, sec. 2, § 8-70-103,

so be it. But it seems unlikely. There are significant differences between Proposition 118 and that older program.

The fees funding the unemployment system are not as intimately connected to taxable income as the Proposition 118 premiums are. Rather, an employer's payments into the unemployment system are based on a complicated calculation that involves the employer's total payroll as of the previous July 1, an average of the employer's prior three fiscal years' payroll, and how the employer's total payroll compares to all other payrolls in the state. *See* Colo. Rev. Stat. § 8-76-102.5(3) (2021). This is far more removed from actual income than is the straightforward 0.9% of current wages that constitutes Proposition 118's premium.

At any rate, the Court need not address the unemployment system here. It is enough to say it can be distinguished. The program that is *actually* before the Court—Proposition 118's funding mechanism—is so intimately connected to earned income that it is easy to say it is an unconstitutional surcharge.

2009 Colo. Sess. Laws 1876, 1877–78. Furthermore, the new "premium" is calculated identically to how the old "tax" was. *See id.*, sec. 12, § 8-76-102(4), 2009 Colo. Sess. Laws at 1884–85. If anything about the unemployment system might be unconstitutional, it is, at worst, the two later increases in the cap on "chargeable wages," *see* Answer Br. 45, not the system as a whole or even its fundamental funding mechanism.

5. TABOR's Interpretive Guidance Mandates a Holding in Chronos' Favor.

The Department's reading of subsection 8(a) is faulty for all the reasons stated above. Chronos' reading, however, makes sense of the entire provision, follows common definitions of common words, and adheres to the likely understanding of voters when they added TABOR to the Constitution in 1992.

But even if the Department has presented a plausible reading of an ambiguous text,[7] it's a reading that could lead to an explosion in the size of government. Opening Br. 17–19. Because TABOR's "preferred interpretation" is the one that will "reasonably restrain most the growth of government," Colo. Const. art. X, § 20(1), Chronos' position must prevail.

The Department rejects this argument, claiming that "enterprises" are not really part of "government" and so the growth of enterprises is none of TABOR's concern. Answer Br. 26 n.5.

This is a facile distinction. An "enterprise" is not a "district" as those

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[7] It is nothing new to note "that TABOR suffers from a number of serious drafting deficiencies: disorganization, gaps in coverage and unclear meaning." Robert G. Natelson, *The Colorado Taxpayer's Bill of Rights* § 2.2 (2016); *accord* Colo. Rev. Stat. § 1-41-101 (2021); Colo. Mun. League, *TABOR: A Guide to The Taxpayer's Bill of Rights* 2 (2018 ed.). That the language might reasonably support multiple plausible interpretations is unsurprising. But that is why TABOR's interpretive guidance exists.

terms are defined in TABOR. But that is irrelevant to whether it is part of "government."

An "enterprise" is explicitly defined as a "a government-owned business." Colo. Const. art. X, § 20(2)(d). Just using the Division of Family and Medical Leave Insurance as an example, it exists inside a principal state agency with a Governor-appointed executive director, Colo. Rev. Stat. §§ 8-13.2-508(1), 24-1-110(1), 24-1-121(1) (2021), who in turn appoints the director of the Division, *see* Colo. Const. art. XII, § 13(7). It must submit annual reports to the General Assembly. *Id.* § 8-13.3-519 (2021). In this very litigation, it's represented by the Attorney General, "the chief legal representative of the state," *id.* § 24-31-101(1)(a). That an entity with such characteristics could somehow not be part of the "government" is baffling. Notwithstanding the Department's arguments otherwise, the creation of the Division was growth in government, and future enterprises funded by income-dependent fees would constitute government growth as well.

6. The Court Need Not Wade into the Fight About Presumptions of Constitutionality.

6.1. *Chronos Has the Better Argument in the Debate Over the "Beyond a Reasonable Doubt" Standard.*

In its brief, Chronos pointed out that this Court had never required a plaintiff challenging a citizen-initiated statute to prove that the statute was unconstitutional "beyond a reasonable doubt."

The Department pushes back on this point. "Chronos cites no case stating that citizen-initiated statutes are *not* presumed constitutional," it says. Answer Br. 20. True enough. But the Department cites only dicta for its opposite position, which is no more convincing.[8] *Accord Hedges v. Schler* (*In re Title, Ballot Title & Submission Clause for 2019–2020 #3*), 2019 CO 57, ¶¶ 27–33, 442 P.3d 867, 871–72 (refusing to follow otherwise-dispositive statements from three other cases because the issue addressed was not actually presented in those decisions). And Chronos *does* cite cases, spanning several decades, dealing with the constitutionality of citizen-initiated laws; not one of them mentions a "beyond a reasonable doubt" standard. Opening Br. 7. This is not dispositive, true, but it is a curious omission given what the Department terms the "well-worn" nature of the rule when applied to statutes emanating from the legislature, Answer Br. 20. *See generally People v.*

[8] The Department's attempt to show that *Huber v. Colorado Mining Association*, 264 P.3d 884 (Colo. 2011), was not venturing into obiter dictum by discussing citizen-initiated statutes, Answer Br. 19–20, is unavailing. No case applies the disputed "beyond a reasonable doubt" standard to a citizen-initiated statute. This includes *Huber*, which dealt with a legislatively enacted law. When language in an opinion is "not necessary to the disposition of the issues presented," such language is "dictum without precedential effect." *Ex rel. Clinton*, 762 P.2d 1381, 1385 (Colo. 1988). Despite the Department's protestations otherwise, this rule applies to *Huber*, and the Department's inability to find another on-point case confirms that the issue has never been squarely presented to this Court.

Griego, 2018 CO 5, ¶ 30, 409 P.3d 338, 343 (fact that rule had never been applied as urged despite its frequent use weighs against extending rule to new context).

Choosing not to extend a rule to a new context is a different thing from overruling the cases that established the rule in its original context. *See People ex rel. Pub. Utils. Comm'n v. Mountain States Tel. & Tel. Co.*, 243 P.2d 397, 399 (Colo. 1952). As noted in the opening brief, the "beyond a reasonable doubt" standard is problematic to begin with, and its most weighty justification doesn't apply in the context of citizen-initiated statutes. Opening Br. 7, 8 n.4; *see also* Br. of Indep. Inst. 5 n.1 (raising additional criticisms of the standard). There is no good reason to apply that requirement here.

6.2. *The Court Can Decide This Case Without Resolving the Presumption Issue.*

Standards of review are important, and the rules require the parties to argue for particular standards. C.A.R. 28(a)(7)(A). That said, the dispute over "beyond a reasonable doubt" does have a bit of red herring in it—because no matter what standard applies, Proposition 118 is unconstitutional.

The reason is found in something the Department itself points out: the proper interpretation of the Constitution and the constitutionality of a statute are *two different questions*. *See* Answer Br. 25. Dealing with a

constitutional challenge is therefore a two-step process: first, determine what the Constitution says and, then, second, determine whether the statute complies with the Constitution.[9]

In this case, the facts are so stark that the entire case rises or falls on the first question alone. If TABOR in fact prohibits any "surcharge" measured like an income tax, as Chronos argues, then Proposition 118's funding mechanism is clearly—even beyond a reasonable doubt—unconstitutional. If, as Appellant argues, TABOR instead is limited to narrowly defined "taxes" alone, then Proposition 118 just as clearly survives this challenge.

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[9] The Department faults amicus Independence Institute for allegedly "conflat[ing] . . . the reasonable doubt standard with TABOR's 'preferred interpretation' provision." Answer Br. 23 n.3. But despite the formal separation of the two tests, they tend to merge in real-world application. Br. of Indep. Inst. 5–7; *accord Mesa Cty. Bd. of Cty. Comm'rs v. State*, 203 P.3d 519, 539 (Colo. 2009) (Eid, J., dissenting). And the Court's elucidation of the TABOR standard in *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994), is arguably the source of some of that mischief. *See* Br. of Indep. Inst. 7–9. At any rate, such merger is difficult to avoid as a practical matter. Most of the time, there is scant daylight between using the facts of the case as an example of what a particular interpretation would or would not allow and arguing that the particular government action at issue in the case should or should not be declared unconstitutional. It is unsurprising that some courts and commentators have found the distinction illusory.

7. The Supposedly Independent Portions of Proposition 118 Are Nothing of the Sort; the Statute's Unconstitutional Funding Mechanism Is Inseverable from the Rest of the Law.

The Department argues that even if the funding mechanism in Proposition 118 is unconstitutional, several portions of the law remain operable and so the Court should not strike down the statute as a whole.

But the Department is wrong. Every supposedly independent provision it points to is connected to the statute's "premium" requirement.

The Answer Brief points to two pieces of the statute that remain "fully operable" without a premium: (1) a supposed "right to take leave and receive benefits in specific situations" and (2) an employer obligation to provide leave benefits using a non-governmental plan. Answer Br. 47–48. But neither of these provisions has any force without the premium.

The supposed right to take leave is not extended broadly to all Coloradans. Rather, it only applies to "covered individual[s]." Colo Rev. Stat. §§ 8-13.3-504, -509 (2021). And to be a "covered individual," a person must have "[e]arned at least $2,500 in wages *subject to premiums* under" the statute. *Id.* § 8-13.3-503(3). If there is no premium, there are no covered individuals. Similarly, various ancillary rights (such as the right to maintain health benefits and the right against retaliation) are triggered not simply by the act of taking leave but by taking leave "pursuant to" or "under" Proposition 118. § 8-13.3-509. The only leave programs operating "pursuant

to" or "under" Proposition 118 are the government-run one funded by premiums and private plans approved by the Division. Without premiums funding the Division, however, no government-run plan will exist and no private-plan approvals will be forthcoming.

As for the employer obligation that the Department refers to, it does not exist. An employer's obligation under Proposition 118 is to pay premiums, not to provide a leave program.[10] *See* Colo. Rev. Stat. § 8-13.3-507(2) (2021). Providing a private plan is another way to meet this obligation, but an employer can only do so with the approval of the Division. Colo. Rev. Stat. § 8-13.3-521(1) (2021). And, again, without funding from premiums, the Division cannot approve any such alternate option for anyone.

It is evident, then, that the premium is an indispensable part of the statutory scheme. "[T]he valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the" illegal premium "that it cannot be presumed the [People] would have enacted the valid provisions without the" premium, Colo. Rev. Stat. § 2-4-204 (2021). The remaining parts of Proposition 118 "are incomplete and . . . incapable of

[10] The only other obligation on employers is to post a notice developed by the Division (which the Division cannot do without funding) and notify employees of their rights under the statute (which do not exist without them being "covered individuals"). Colo. Rev. Stat. § 8-13.3-511 (2021).

being executed" once the premium is removed, § 2-4-204. The remaining portions of the statute are therefore invalid as well. *See id.*[11]

REQUEST FOR ATTORNEY FEES

Finally, Chronos renews its request for an attorney-fee award. TABOR allows such an award to a victorious plaintiff. Art. X, § 20(1).

Because there is only one published decision from this Court about TABOR's fee award provision, the Opening Brief reasoned by analogy from cases interpreting a similar federal fee-shifting provision. The Department complains that the cited federal law applies to civil-rights cases, which the Department thinks this case is not.

The Department's attempt to distinguish the present suit does not hold water. Chronos is pursuing rights protected by the state constitution. Were there a federal analogue to TABOR, it would be enforced under the same statute as the civil-rights provisions and fees would be awarded under the same statute construed in the cases Chronos cited. *See* 42 U.S.C. § 1983

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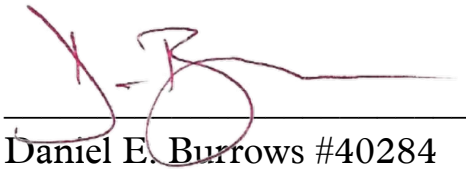
[11] The Department also suggests that the Court "remand to the district court for consideration of the severability question," Answer Br. 50 n.12, but it's unclear what value that would bring. Severability is a question of law Opening Br. 19–20, reviewed de novo and "limited to the four corners of the statue under consideration," *People v. District Court*, 834 P.2d 181, 190 (Colo. 1992). And as for the claim that "this Court didn't grant certiorari over [the severability] question," Answer Br. 50 n.12, Chronos already explained how severability is part of the granted issue, Opening Br. 20.

(2018) (authorizing suits for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws); *id.* § 1988(b) (authorizing attorney fees for successful § 1983 suits). Thus, the cases Chronos cited are analogous to this case. Because an attorney fee award would be appropriate under those cases, it would be appropriate under TABOR as well.

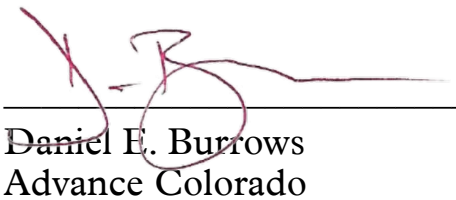


Daniel E. Burrows #40284
Advance Colorado

Certificate of Service

I certify that the foregoing document was delivered to the Clerk of the Court on April 18, 2022, via electronic filing. Consistent with C.A.R. 30(e), service will be accomplished by the Court's E-System, with the document delivered to:

Davin W. Dahl, Senior Assistant Att'y Gen., counsel for Petitioner–Appellee
Noah C. Patterson, Assistant Solicitor Gen., counsel for Petitioner–Appellee
Shelby A. Krantz, Assistant Att'y Gen., counsel for Petitioner–Appellee
Tyler L. Martinez, counsel for amicus Nat'l Taxpayers Union Found.
David B. Kopel, counsel for amicus Indep. Inst.
Richard A. Westfall, counsel for amicus Indep. Inst.
Martha M. Tierney, counsel for amici Good Bus. Colo. *et al*
Natalie A. Petrucci, counsel for amici 9to5 Colo. *et al*



Daniel E. Burrows
Advance Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

GERALDINE DENNIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 10-3125
	)	
GOCOM MEDIA OF ILLINOIS, LLC,	)	
	)	
	)	
Defendant.	)	

OPINION

RICHARD MILLS, U.S. District Judge:

Pending before the Court is the Plaintiff's Motion for an Award of Attorney's Fees and Costs.

I. BACKGROUND

Plaintiff Geraldine Dennis filed suit against Defendant GOCOM Media of Illinois, LLC. The Plaintiff's Amended Complaint asserted three violations of Title VII of the Civil Rights Act of 1964, based on gender discrimination, *see* 42 U.S.C. § 2000e-2, and retaliation, *see* 42 U.S.C. § 2000e-3(a).

Following the Defendant's Answer, the parties filed a Joint Motion for

Referral to Mediation with the Court. The parties were referred to United States Magistrate Judge Byron G. Cudmore for the purposes of mediation.

The parties participated in a mediation session facilitated by Judge Cudmore. They engaged in cooperative negotiation in an attempt to reach agreement and avoid litigation. Eventually, the Defendant offered to settle the matter for $70,000. The Defendant informed the Plaintiff that if this sum was not accepted, an Offer of Judgment under Rule 68 of the Federal Rules of Civil Procedure would be entered immediately thereafter in that proposed amount. The Plaintiff refused the offer. The docket reflects that the mediation ended without success.

Consistent with its promise, the Defendant filed an Offer of Judgment, which was accepted by the Plaintiff.[1] *See* Doc. Nos. 16 & 17. The Offer stated:

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[1]Federal Rule of Civil Procedure 68(a) provides:
At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

> NOW COMES Defendant, GOCOM Media OF Illinois LLC, by and through its attorneys, Brown, Hay & Stephens, LLP, pursuant to Rule 68 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 68), and submits to Plaintiff Geraldine Dennis an Offer of Judgment in the amount of $70,000, with costs accrued.

Following the Plaintiff's acceptance of the Offer of Judgment, the Court entered an Order which stated:

> Pursuant to Federal Rule of Civil Procedure 68(a), the Clerk of Court is directed to enter judgment in favor of Plaintiff Geraldine Dennis and against Defendant GOCOM Media of Illinois LLC in the amount of $70,000, with costs accrued.

See Doc. No. 18. Judgment was entered pursuant to the Order. *See* Doc. No. 19. The Defendant states that Plaintiffs' Counsel requested that payment be made to the Plaintiff and Plaintiff's Counsel's firm. Accordingly, the check was made payable to Geraldine Dennis and the firm of Baker, Baker & Krajewski, LLC.

Subsequently, the Plaintiff moved for an award of attorney's fees and costs.

II. DISCUSSION

A. Plaintiff's entitlement to fees

The Plaintiff's claims were brought pursuant to Title VII, which includes a provision for the recovery of attorney's fees as part of the costs of litigation. ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs[.]" 42 U.S.C. § 2000e-5(k)). "In order to be considered a prevailing party in a civil rights action, a plaintiff must obtain at least some relief on the merits." *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 194 (7th Cir. 1994) (internal quotation marks and citation omitted). If costs are defined in the underlying statute to include attorney's fees, "the court may award fees as part of costs as well." *Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998).

In *Marek v. Chesny*, 473 U.S. 1 (1985), the United States Supreme Court considered whether "costs" are necessarily included in a Rule 68 offer. *See id.* at 6. The Court determined it depends on the how the offer is worded:

> The critical feature of this portion of the Rule is that the offer be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued. In other words, the

> drafters' concern was not so much with the particular components of offers, but with the judgments to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, it determines to be sufficient to cover the costs.

Id. (internal citation omitted).

In *Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689 (7th Cir. 2013), the United States Court of Appeals for the Seventh Circuit considered "the problems posed by ambiguous offers of judgment under Rule 68 of the Federal Rules of Civil Procedure." *See id*. at 690. The court emphasized the importance of being "specific and clear" in making the offers because "[a]ny ambiguities will be resolved against them." *Id*.

In *Sanchez*, the offer referred to the plaintiff's "claims for relief." *See id.* at 692. The defendant argued that because the plaintiff requested attorney's fees and costs in her amended complaint, attorney's fees were thus included in the Rule 68 offer. *See id*. The Seventh Circuit noted that because the offer did not specify what the "claims" were, the plaintiff would

have had to guess the meaning of the offer. *See id*. at 692-93. This rendered the offer ambiguous. *See id*. at 693. The court concluded that because attorney's fees are not part of a plaintiff's claim, the defendant's offer of judgment was silent as to attorney's fees. *See id*.

The Offer of Judgment at issue here provides for the amount ($70,000), "with costs accrued." The Defendant contends that, during the parties' negotiations, every demand, offer and counteroffer exchanged was intended and understood by the parties to constitute a lump sum for settlement of all claims and any costs, fees, and expenses incurred as a result of the litigation. After accepting the Offer, the Plaintiff's counsel requested that the $70,000 check be made payable to his law firm and to the Plaintiff. The Defendant asserts this method of payment supports its understanding that the amount was inclusive of all costs, including attorney's fees, then accrued.

It may well have been the parties' understanding that the $70,000 included all costs, including attorney's fees. However, the Offer did not specify that the amount was inclusive of costs. Given one of the definitions

of "with," the phrase "$70,000, with costs accrued" can be read as $70,000, accompanied by costs.[2] As the drafter of the Offer, any ambiguity is resolved against the Defendant. *See Sanchez*, 709 F.3d at 694.

The Plaintiff points to *Erdman v. Cochise County, Arizona*, 926 F.2d 877 (9th Cir. 1991), wherein the offer contained language very similar to the Offer in this case. The offer of judgment in *Erdman* stated:

> The City of Douglas, pursuant to Rule 68, Federal Rules of Civil Procedure, offers to allow judgment to be taken against the City of Douglas for the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00) with costs now accrued.

Id. at 878. The defendant claimed the offer had been "inartfully drafted" and that the attorney's fees were meant to be included in the lump sum amount. *See id*. at 879. The Ninth Circuit rejected the defendant's argument and held that plaintiff was "entitled to rely on the plain language of the offer he accepted, '$7,500 with costs now accrued,' which under *Marek* . . . entitled him to a reasonable attorney's fee award in addition to the lump sum named in the offer." *Id*.

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[2]The first definition of "with" at dictionary.com is "accompanied by; accompanying: I will go with you. He fought with his brother against the enemy." http://dictionary.reference.com/browse/with (last visited January 7, 2014).

It appears that the Offer in this case was inartfully drafted as well. The Defendant may well have intended the Offer to be inclusive of any fees and costs. However, the language of the Offer is not consistent with that intent. Because the Seventh Circuit emphasized the importance of clarity in drafting Rule 68 offers and stated that any ambiguities will be resolved against the drafter, *see Sanchez*, 709 F.3d at 690, this Court agrees with the Ninth Circuit's interpretation of very similar language in *Erdman* and concludes that based on the plain language of the Offer, the Plaintiff is entitled to an award of her costs which under Title VII includes reasonable attorney's fees.

B. Amount of fees

The Plaintiff's Motion included an Affidavit of Counsel, the Representation Agreement between the law office and the Plaintiff and a copy of the billing statement. *See* Doc. No. 20. At the Court's Direction, the Plaintiff filed a supplemental billing statement and Affidavit of Counsel.

In cases in which attorney's fees are authorized, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances

would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Generally, a plaintiff is determined to be a "prevailing party" if she succeeds on any significant issue which achieves some of the benefit she sought in pursuing litigation. *See id*. at 433.

The Defendant contends that Plaintiff is not a prevailing plaintiff entitled to an award of costs and fees under Title VII. In *Fletcher v. Fort Wayne*, 162 F.3d 975 (7th Cir. 1998), the Seventh Circuit upheld the district court's determination that a plaintiff who demanded $150,000 to settle the case under Rule 68 before accepting $5,000 plus costs and another who demanded $30,000 but accepted $2,500 would not be considered prevailing plaintiffs. *See id*. at 976-77. Rather, the settlements reflected nuisance value. *See id*. at 978.

In *Fisher v. Kelly*, 105 F.3d 350 (7th Cir. 1997), the plaintiff filed a civil rights action under 42 U.S.C. § 1983 and initially demanded $80,000 based on several claims. *See id*. at 352. After the defendant's settlement offer of $10,000 was rejected, the plaintiff accepted the defendant's Rule 68 offer of judgment. *See id*. The district court granted $120 in costs, but

denied an award of attorney's fees because it found the plaintiff's victory was "technical or de minimis" and the case was settled because of its "nuisance value." *See id*.

The Defendant claims its Rule 68 offer was based on a cost-of-defense analysis after recognizing that substantial costs and attorney's fees would be expended because, due to factual disputes in the record, the case did not appear to be a likely candidate for summary judgment. The offer was not made because of a belief that the Plaintiff had a likelihood of success on the merits.

After considering the record, the Court concludes that the Plaintiff is a prevailing party entitled to an award of costs and fees pursuant to Title VII. Although the Amended Complaint does not include a monetary demand, it is likely that Plaintiff would have sought significantly more than $70,000 had this case proceeded to trial. However, $70,000 is still a significant amount. Both parties would have risked something by proceeding to trial. If the jury were to return a verdict for the Defendant, then the Plaintiff would have received nothing. Undoubtedly, the

Defendant considered attorney's fees and costs if the case proceeded to trial. However, by going to trial, the Defendant would have incurred those costs and risked a significant verdict in favor of the Plaintiff.

Although it is not always easy to determine what constitutes a "nuisance value settlement," the Court believes that the Defendant would have a stronger argument if the Offer of Judgment had been approximately half the amount of the $70,000 actually offered. Based on all of the circumstances, the Court concludes that Plaintiff is a "prevailing plaintiff" who is entitled to fees under Title VII.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* "[A]n attorney's actual billing rate for comparable work is presumptively appropriate for use as a market rate when making a lodestar calculation." *Jeffcoat, LLC v. Director, Office of Workers' Compensation Programs*, 553 F.3d 487, 490 (7th Cir. 2009).

The agreement between the Plaintiff and Counsel was that she would pay $250 per hour if there were a successful settlement. Although this case

resulted in an Offer of Judgment under Rule 68, the Plaintiff acknowledges that a Rule 68 Offer is more like a settlement than a verdict. Consequently, the Plaintiff is requesting a fee based upon the $250.00 rate.[3]

The Court has reviewed Counsel's Affidavit and finds that his hourly rate is reasonable. Moreover, the number of hours expended by Counsel appear to be properly documented and reasonably incurred. The Plaintiff is requesting a total of $24,049.81, which includes $23,606.25 for professional services rendered and total costs of $443.56.

The Court does not doubt the Defendant honestly believed that the $70,000 was intended to represent a firm and all-inclusive offer. Unfortunately for the Defendant, the ambiguity must be resolved against the drafter of the language.

Because of these special circumstances–the Defendant's apparent honest mistake and good faith belief that $70,000 represented the entire amount of the Offer–the Court will reduce the amount awarded for professional services by $5,901.56, which is 25% of the amount requested

[3]The Plaintiff's Counsel is requesting that his paralegal be billed at a rate of $75 per hour.

by the Plaintiff. This results in an award of $17,704.69 for professional services rendered. When $443.56 is added for costs, the total amount is $18,148.25.

Ergo, the Plaintiff's Motion for an Award of Attorney's Fees and Costs [d/e 20] is ALLOWED.

The Defendant shall pay the Plaintiff's attorney's fees and costs in the amount of $18,148.25.

The Clerk shall enter an Amended Judgment accordingly.

ENTER: January 15, 2014

FOR THE COURT:

s/Richard Mills
Richard Mills
United States District Judge