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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Certiorari to Colorado Court of Appeals
Case No. 2022 CA 91

Appeal from the Denver District Court
Hon. Michael Martinez, Judge
Case No. 2021 CV 32203

CHRONOS BUILDERS, LLC,

Petitioner-Appellant,

v.

DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF FAMILY AND MEDICAL LEAVE INSURANCE,

Petitioner-Appellee.

▲ COURT USE ONLY ▲

Case Number: 2022 SC 78

Attorney for *Amicus Curiae*

Tyler Martinez (Colo. Att'y No. 42305)
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street NW, Suite 650
Washington, DC 20001
(703) 683-5700
tmartinez@ntu.org

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF CHRONOS BUILDERS, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☑ It contains 2385 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

s/ Tyler Martinez
Signature of attorney or party

Dated: March 7, 2022

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INTEREST OF AMICUS CURIAE

Founded in 1973, the National Taxpayers Union Foundation ("NTUF" or "Foundation") is a non-partisan research and educational non-profit organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts nation-wide and produces scholarly analyses upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

SUMMARY OF THE ARGUMENT

This case presents an important question of first impression for the Colorado Courts: whether a premium calculated on a percentage of wages violates the flat tax provisions of the Taxpayer Bill of Rights ("TABOR"), codified at Colorado Constitution article X, section 20(8)(a). Much depends, therefore, on the standard of review for testing the constitutionality of the new Family and Medical Leave Insurance statute.

The Constitution itself commands that "preferred interpretation" of such laws "shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). To help effectuate the Constitution's command, *Amicus Curiae* presents this Court with an analysis showing that this state and other states have resolved statutory ambiguities in favor of the taxpayer, which aligns well with the test of TABOR Section 1. Therefore, the Denver District Court's "beyond a reasonable doubt" standard of review is inappropriate for resolving this controversy.

ARGUMENT

I. Forty-Nine States, Including Colorado, Construe Ambiguous Tax Statutes in Favor of the Taxpayer.

This case presents a question of first impression: whether a premium calculated on a percentage of wages—rather than a flat fee—violates the Taxpayer Bill of Rights' ("TABOR") mandate of flat taxes. Colo. Const. art. X § 20(8)(a). Specifically, this case asks whether TABOR's phrase "with no added tax or surcharge" applies only to income tax provision or should be read to apply to other state fees.

TABOR itself provides a standard of review, stating that the "preferred interpretation" of such laws "shall reasonably restrain most

the growth of government." Colo. Const. art. X § 20(1). But the Denver District Court chose not to follow the Constitutional command and instead applied a "beyond all reasonable doubt" standard instead. *See Chronos Builders, LLC v. Dept. of Labor and Emplymnt. Div. of Fam. And Med. Leave Ins.*, No. 2021 CV 322203, Slip Op. at 4 (Den. Dist. Ct. Dec. 13, 2021).

Beyond TABOR's express language, this Court has long construed ambiguity in tax statutes in favor of the taxpayer, not requiring a heightened burden for relief. In *Transponder Corporation of Denver, Inc. v. Property Tax Administrator*, for example, this Court recognized a "long-standing rule of statutory construction" in Colorado that tax statutes "will not be extended beyond the clear import of the language used, nor will their operation be extended by analogy…. All doubts will be construed against the government and in favor of the taxpayer." 681 P.2d 499, 504 (Colo. 1984) (quoting *Assoc'd Dry Goods v. City of Arvada*, 593 P.2d 1375, 1378 (Colo. 1979)) (ellipsis in *Transponder*).

Transponder involved a company that transmitted electronic signals but did not provide a communication service could be taxed as a

telephone company. *Id.* at 501. Ultimately, because appellant "urg[ed] that it was not a 'telephone company' within the meaning of the statute in question" meant that the Colorado Supreme Court resolved the statute's ambiguity in favor of appellant, sending a strong signal that ambiguous tax statutes in Colorado are construed strictly in favor of the taxpayer. *Id.* at 504. *Transponder* was pre-TABOR, but the two standards are similar in effect—restraining the scope of government, and its attendant tax and fees needed to support it, aids the taxpayer.

All of Colorado's neighboring states have taken a similar approach to resolving standards of review in favor of the taxpayer. In Wyoming, a taxpayer placed disputed tax payments in an escrow account pending a fight about the right property tax assessment. *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d 503, 506 (Wyo. 1999). The county unilaterally took funds out of the account and dispersed it to the tax district because it believed these funds not part of the tax disputed. *Id.* The Wyoming Supreme Court held that "[t]ax statutes are to be construed in favor of the taxpayer and are not to be extended absent clear intent of the legislature." *Id.* at 509. Ultimately, because the tax statute was

ambiguous on the amount of money that the taxpayer must place in escrow, the funds had to remain in escrow. *Id*. at 510.

In New Mexico, a corporation was allowed to apply for a franchise tax refund because New Mexico had an ambiguous statute about the deadline needed to challenge an erroneous tax assessment. *See Molycorp, Inc. v. State Corp. Comm'n*, 624 P.2d 1010, 1011 (N.M. 1981). The Court recognized the illogical result that would occur if the state's interpretation of the statute was applied because it would mean that a corporation could not challenge an assessment that it initially believed to be correct but was later found out to be erroneous. *Id*. Therefore, the state supreme court held that a "statute is to be construed strictly against the state where the applicability of a tax statute is ambiguous or doubtful in meaning or intent." *Id*. The statute's ambiguity combined with the absurd result that the state's interpretation would result in helped preserve taxpayer's critical right of not being punished by an ambiguous tax statute.

A close neighbor of Colorado, Arizona, has repeatedly upheld this critical right. A gross receipts tax levied on a contractor on equipment

received was vacated by the court because gross receipts usually ordinarily mean cash received, and it was ambiguous whether equipment could be considered a "gross receipt." *See Ebasco Serv., Inc. v. Ariz. State Tax Comm'n*, 459 P.2d 719, 720-21 (Ariz. 1969). The Arizona court there held that "where there is ambiguity, a revenue statute should be construed liberally in favor of the taxpayer and strictly against the state." *Id.* at 722.

Utah, Oklahoma, Nebraska and Kansas have similar standards. *See*, *e.g.*, *Ivory Homes, Inc. v. Utah State Tax Comm'n*, 266 P.3d 751, 759-60 (Utah 2011) ("We generally construe tax imposition statutes liberally in favor of the taxpayer."); *W. Auto Supply Co. v. Okla. Tax Comm'n*, 328 P.2d 414, 420 (Okla. 1958) ("We are aware of the rule that where a tax statute is ambiguous and its meaning doubtful, it is usually to be construed against the government, and in favor of the taxpayer.") (citing 51 Am. Jur. Taxation § 316); *Foote Clinic, Inc. v. City of Hastings*, 580 N.W.2d 81, 84 (Neb. 1998) ("We have continuously held that the power and authority delegated to municipalities to construct improvements and levy special assessments for their payment is to be strictly construed, and

every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved against the city and in favor of the taxpayer.") (collecting cases); *In re City of Wichita*, 59 P.3d 336, 343 (Kan. 2002) ("'On the other hand, tax statutes will be construed favorably to the taxpayer where there is a reasonable doubt as to [their] meaning.'" (bracket in *Wichita*, citation omitted).

But this is not simply a Western value. In Illinois, for example, an engineer's sale of custom machinery was not held to be a taxable sale because the skill in creating the machine was more akin to a service and it was ambiguous on whether "tangible property" could include a machine that was incidental to the services rendered. *Ingersoll Milling Mach. Co. v. Dep't of Rev.*, 90 N.E.2d 747, 748, 750-51 (Ill. 1950). The state court held that "[t]axing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer." *Id.* at 751. Similarly, Connecticut read ambiguity in favor of the taxpayer and declared that a widow was still entitled to preferential tax status because

it was ambiguous whether a widow was a "wife" who was eligible for the tax-favored treatment. *See Sullivan v. Union & New Haven Trust Co.*, 158 A.2d 174, 176 (Conn. 1960).

In fact, every state except Oregon construes tax statutes in favor of the taxpayer in situations where the statute is ambiguous. From Alaska and Hawaii to Massachusetts and the District of Columbia, courts choose the construction that favors taxpayers. *See*, *e.g.*, *Union Oil Co. of Cal. v. Dep't of Rev.*, 560 P.2d 21, 25 (Alaska 1977) ("[W]e follow the general rule of construction of tax statutes which requires that, where possible, doubts be resolved in favor of the taxpayer."); *Matter of Hawaiian Tel. Co.*, 608 P.2d 383, 388 (Haw. 1980) ("It is a cardinal rule of construction that a statute imposing taxes is to be construed strictly against the government and in favor of the taxpayers and that no person and no property is to be included within its scope unless placed there by clear language of the statute"); *Prudential Ins. Co. of Am. v. Comm'r of Rev.*, 709 N.E.2d 1096, 1100 (Mass. 1999) ("Tax statutes are to be construed strictly, and all ambiguities are resolved in favor of the taxpayer.") (collecting cases); *Sch. St. Assocs. Ltd. v. District of Columbia*, 764 A.2d 798, 805 (D.C. 2001)

("We focus on the settled rule that tax laws are to be strictly construed against the state and in favor of the taxpayer….") (citation omitted, cleaned up).[1]

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[1] *See also Ex Parte HealthSouth Corp.*, 978 So.2d 745, 756 (Ala. 2007); *Miss. River Transmission Corp. v. Weiss*, 65 S.W.3d 867, 873 (Ark. 2002); *Cal. Motor Transp. Co. v. State Bd. of Equal.*, 187 P.2d 745, 749 (Cal. 1948); *Arbern-Wilmington, Inc. v. Dir. of Rev.*, 596 A.2d 1385, 1388 (Del. 1991); *Lee v. Walgreen Drug Stores Co.*, 28 So. 2d 535, 536 (Fla. 1942); *State v. Camp*, 6 S.E.2d 299, 216-17 (Ga. 1939); *Dep't of Emp't v. Diamond Int'l Corp.*, 529 P.2d 782, 783 (Idaho 1974); *Dep't of State Rev. v. Crown Dev. Co.*, 109 N.E.2d 426, 428 (Ind. 1952); *Naumann v. Iowa Prop. Ass'mnt. Appeal Bd.*, 791 N.W.2d 258, 262 (Iowa 2010); *George v. Scent*, 346 S.W. 2d 784, 789 (Ky. 1961); *United Gas Corp. v. Fontenot*, 129 So.2d 776, 782 (La. 1961); *Commty. Telecomm. Corp. v. State Tax Ass'r*, 684 A.2d 424, 426 (Me. 1996); *State Dep't of Ass'mnts & Taxation v. Consol. Coal Sales Co.*, 855 A.2d 1197, 1207 (Md. 2004); *Mich. Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808, 811 (Mich. 1994); *McLane Minn., Inc. v. Comm'r of Rev.*, 773 N.W.2d 289, 296 (Minn. 2009); *State ex rel. Knox v. Union Tank Car Co.*, 119 So. 310, 312 (Miss. 1928); *United Air Lines, Inc. v. State Tax Comm'n*, 377 S.W.2d 444, 449 (Mo. 1964); *W. Energy Co. v. State Dep't of Rev.*, 990 P.2d 767, 769 (Mont. 1999); *State Dep't of Taxation v. Visual Comm., Inc.*, 836 P.2d 1245, 1247 (Nev. 1992); *First Berkshire Bus. Trust v. Comm'r, N.H. Dep't of Rev. Admin.*, 13 A.3d 232, 235 (N.H. 2010); *Suffolk County Fed. Sav. & Loan Ass'n v. Bragalini*, 159 N.E.2d 164, 166 (N.Y. 1959); *Appeal of Clayton-Marcus Co.*, 210 S.E.2d 199, 202 (N.C. 1974); *Zimmer v. Hagerman*, 91 N.E.2d 254, 256 (Ohio 1950); *Ne. Pa. Imaging Ctr. v. Pennsylvania*, 35 A.3d 752, 758 (Pa. 2011); *Bassett v. DeRentis*, 446 A.2d 763, 764-65 (R.I. 1982); *Hay v. Leonard*, 46 S.E.2d 653, 658 (S.C. 1948); *Sioux Valley Hosp. Ass'n v. State*, 519 N.W.2d 334, 336 (S.D. 1994); *White v. Roden Elec. Supply Co., Inc.*, 536 S.W.2d 346, 348 (Tenn. 1976); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977); *Portland Pipe Line Corp. v. Morrison*,

Construing ambiguous tax statutes in this way makes each state's tax codes more stable by assuring the average citizen, business, or even passing traveler that ambiguous fiscal laws will be construed more in their favor. More stability in the tax code makes Colorado a better state to start a business in, invest in, and work in because people know what is in the tax code is what will be enforced and nothing more. Stability in the code lowers the risk for investors, businessmen, and ordinary taxpayers to make the long-term economic investments that grow the economy.

It is the duty for the Colorado legislature, or the people themselves when passing statutes via ballot issues, to write clear language on fiscal matters. Undermining existing Colorado precedent to force taxpayers to prove beyond a reasonable doubt that the statute is unconstitutional

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110A.2d 700, 701 (Vt. 1955); *Commonwealth v. Carter*, 92 S.E.2d 369, 373 (Va. 1956); *Ski Acres, Inc. v. Kittitas County*, 827 P.2d 1000, 1003 (Wash. 1992); *Consolidation Coal Co. v. Krupica*, 254 S.E.2d 813, 816 (W.Va. 1979); *Midland Fin. Corp. v. Wis. Dep't of Rev.*, 341 N.W.2d 397, 400 (Wis. 1983). A couple states consider legislative intent but still start with the rule that ambiguous tax statutes are construed in favor of the taxpayer. *See Hudson Cnty. Chamber of Comm. v. City of Jersey City*, 708 A.2d 690, 697 (N.J. 1998); *W. Gas Res., Inc. v. Heitkamp*, 489 N.W.2d 869, 873 (N.D. 1992).

would put Colorado at an economic disadvantage compared to its neighbors where taxpayers can always rely that the tax statutes on the books is what will be enforced, which would make Colorado a riskier state to do business in and work in. Legal stability is especially important in the tax content where potential tax consequences are critical factors for important economic decisions.

Regardless of state political identity or demographics, every state besides one recognizes the importance of this taxpayer collection on the economy and administrability of the tax collection system. Becoming a national outlier with Oregon as the only states that do not fully protect taxpayers from revenue agencies enforcing ambiguous tax statutes on them, would lead to Colorado courtrooms being one of the most unfriendly places in the nation for taxpayers.

CONCLUSION

For the forgoing reasons, this Court should reverse the District Court's opinion and remand for further proceedings based upon a standard of review that comports with TABOR's plain text and the

overwhelming consensus that statutory ambiguities should be resolved in favor of the taxpayer.

Respectfully submitted,

/s/ Tyler Martinez

Tyler Martinez
(Colo. Att'y No. 42305)
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street NW, Suite 650
Washington, DC 20001
(703) 683-5700
tmartinez@ntu.org

Dated: March 7, 2022

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing upon all parties herein by depositing copies of the same via the Colorado Court's E-Filing System.

For Petitioner-Appellant

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

For Petitioner-Appellee

Philip J. Weiser
Attorney General
Noah C. Patterson
Assistant Solicitor General
Davin W. Dahl
Senior AAG
Shelby A. Krantz
AAG
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 8th Floor
Denver, CO 80203
noah.patterson@coag.gov
davin.dahl@coag.gov
shelby.krantz@coag.gov

/s/ Tyler Martinez
Tyler Martinez

Dated: March 7, 2022