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| <p>COLORADO SUPREME COURT</p> <p>2 East 14th Avenue, 4th Floor Denver, Colorado 80203</p> | |
| <p>C.A.R. 50 Certiorari to Colorado Court of Appeals Case No. 2022CA91</p> | |
| <p>Appeal from the Denver District Court, Honorable Judge Michael Martinez, Judge Case No. 2021CV32203</p> | |
| <p>In the Case of:</p> <p>CHRONOS BUILDERS, LLC,</p> <p>Petitioner</p> <p>v.</p> <p>DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF FAMILY AND MEDICAL LEAVE INSURANCE</p> <p>Respondent</p> | <p>▲ COURT USE ONLY ▲</p> |
| <p>Attorney for Amici Curiae</p> <p>Natalie Petrucci, Atty Reg. No. 51375 A Better Balance 303 E. 17th Ave., Suite 400 Denver, CO 80203 Phone: 720-640-9870 Email: npetrucci@abetterbalance.org</p> | <p>Case Number 22SC78</p> |
| <p>BRIEF OF AMICI CURIAE LABOR AND POLICY ORGANIZATIONS AND BALLOT PETITION FILERS IN SUPPORT OF RESPONDENT</p> | |

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 *amici curiae* brief complies with the application word limit set forth in C.A.R. 29(d). It contains 4724 words.

The *amici curiae* 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. 28 and C.A.R. 32.

By: s/Natalie Petrucci

TABLE OF CONTENTS

STATEMENTS OF INTEREST.....1

SUMMARY OF THE ARGUMENT.....3

LEGAL ARGUMENT.....4

 I. The District Court Correctly Ruled that Article X, Section 20(8)(a) of the Colorado Constitution is Inapplicable to the Premiums Established by the FAMLI Act4

 II. Precedent Requires the Court to Avoid Constitutional Interpretations That Will Cripple the Government’s Ability to Provide Services.....6

 A. The FAMLI Act Will Provide Critically Needed Services to Coloradans.7

 i. The Scope of the FAMLI Act.....7

 ii. The Critical Need for the Services Provided by the FAMLI Act....10

 iii. The FAMLI Act Addresses Key Social and Economic Disparities, Promotes Gender and Racial Equity in Colorado, and Provides Significant Benefits to Society16

 iv. Once Fully Implemented, The FAMLI Act Will Also Provide Important Benefits to Employers of All Sizes and the Self-Employed18

 v. The FAMLI Act is Backed by Extensive Research and is Based on Proven and Time-Tested Models.....19

 B. An Alternative Interpretation of Section 20(8)(a) Could Lead to Unintended Consequences, Including the Crippling of Other Government Services.....21

CONCLUSION23

TABLE OF AUTHORITIES

Cases

| | |
|--|----|
| <i>Barber v. Ritter</i> , 196 P.3d 238 (Colo. 2008) | 6 |
| <i>Bolt v. Arapahoe County Sch. Dist. No. Six</i> , 898 P.2d 525 (Colo. 1995)..... | 6 |
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Statutes

| | |
|---|-------------|
| Family and Medical Leave Act, 29 U.S.C. §2601-2654 | 8 |
| Family and Medical Leave Implementation, C.R.S. §8-13.3-301, <i>et seq.</i> | 20 |
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Constitutional Provisions

| | |
|------------------------------------|--------------|
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|------------------------------------|--------------|

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STATEMENTS OF INTEREST

Amici curiae are organizations who have worked to advance paid family and medical leave insurance in Colorado, in addition to individual voters who filed the initiative petition for Proposition 118. Additional information on these organizations and individuals is available in the motion for leave to file as *amici curiae*.

9to5 Colorado is a member-based, economic justice nonprofit organization centered in gender and racial justice. Through grassroots organizing, political advocacy, and public education, 9to5 advances community-led solutions to systemic problems.

A Better Balance (“ABB”) is a national legal nonprofit, with an office in Colorado, dedicated to promoting fairness in the workplace. ABB has co-drafted model legislation that has been used in the 10 jurisdictions that have enacted paid family and medical leave insurance laws.

The Bell Policy Center is a statewide nonpartisan, nonprofit organization that works to ensure economic mobility for every Coloradan.

Clayton Early Learning (“CEL”) is a non-profit based in Denver. As one of the largest Head Start providers in the state, CEL is an innovation hub that fosters thriving, equitable communities by partnering with families to nurture a

whole child, whole family approach to the early years, discover what works, and advance systems change.

The Colorado Fiscal Institute is a statewide nonpartisan nonprofit that uses quality research, strategic communications, statewide education, and advocacy, to inform and influence policy debates and contribute to sound fiscal and economic policies that advance equity and widespread economic prosperity.

The Colorado AFL-CIO is a statewide organization made up of over 130,000 hardworking union members across 180 affiliate unions.

Communications Workers of America District 7 is a labor organization representing 3,500 members in the state of Colorado.

Rev. Dr. Timothy E. Tyler, a Colorado voter, co-filed the petition for Proposition 118 in an individual capacity.

Violence Free Colorado is Colorado's federally recognized anti-domestic violence coalition and works to advance the well-being of all Coloradans through relationships free from abuse and oppression.

Wendy Howell, a Colorado voter, co-filed the petition for Proposition 118 in an individual capacity.

SUMMARY OF THE ARGUMENT

In November 2020, voters approved Proposition 118 with over 57% of the vote, enacting the Colorado Paid Family and Medical Leave Insurance Act (“FAMLI Act”). § 8-13.3-501 et seq., C.R.S. The initiative, poised to positively impact the lives of millions of Coloradans and their families, won rural, suburban, and urban counties across the State—from Las Animas County to Weld County, from Garfield County to Arapahoe County, and from Denver County to El Paso County. *Colorado Election Results November 3, 2020, 2020 General Election: Proposition 118 (Statutory)*, GOVOTECOLORADO.GOV (May 5, 2021), <https://results.enr.clarityelections.com/CO/105975/web.264614/#!/detail/1151>.

Petitioner Chronos Builders, LLC, (“Petitioner”) filed a complaint against the Division of Family and Medical Leave Insurance, (“FAMLI Division” or “Respondent”) arguing that the FAMLI Act’s funding structure, which involves fees or “premiums” that are tied to employee wages, violates Section 20(8)(a) of the Taxpayer’s Bill of Rights (“TABOR”). Colo. Const. Art. X §20(8)(a). The District Court dismissed Petitioner’s complaint for failure to state a claim for relief, and held that the TABOR language at question does not apply to the FAMLI Act because it is not an income tax law. We agree with this decision and urge the Court to uphold the District Court’s decision.

Precedent also requires this Court to avoid interpretations of TABOR which will cripple the government's ability to provide services. The FAMLI Act will provide critically needed services to Colorado workers, promote public health, and address economic, social, and health disparities. The program will also offer tangible benefits to businesses and self-employed individuals across the State. Failure to rule in Respondent's favor would not only represent a departure from Colorado precedent and cripple the provision of government services, but would also jeopardize the State's current and future ability to provide services with similar fee-for-service models.

LEGAL ARGUMENT

I. The District Court Correctly Ruled that Article X, Section 20(8)(a) of the Colorado Constitution is Inapplicable to the Premiums Established by the FAMLI Act

In its decision, the Denver District Court considered the scope of Section 20(8)(a) of TABOR, and the meaning of the specific sentence within that subsection which reads: "Any income tax law change after July 1, 1992, shall also require all taxable net income to be taxed at one rate ... with no added tax or surcharge." Colo. Const. Art. X §20(8)(a). The Court properly found that Section 20(8)(a) only applies to income tax law changes.

Having already conceded in its principal brief in the District Court that the FAMLI premiums are a "fee" and not a "tax" under Colorado law, Petitioner then

argued that FAMLII premiums constitute a non-uniform “surcharge” prohibited by Section 20(8)(a). By making this argument, Petitioner seeks to collapse this Court’s well-established distinctions between a “fee” and a “tax,” by using Section 20(8)(a) to re-classify program “fees” based on employee wages as “surcharges” that are restricted by TABOR.

However, Petitioner’s reading of Section 20(8)(a) fails to properly acknowledge that the reference to “surcharge” in Section 20(8)(a) is contained within a sentence dedicated entirely to income tax changes and income tax rates. Therefore, in accordance with grammatical rules and well-established canons of statutory construction, the reference to “surcharge” in Section 20(8)(a) only applies to surcharges on income within an income tax law.

The FAMLII Act premium is a fee for a specific paid family and medical leave (PFML) program, which will benefit the employees and employers who contribute to it. In addition to establishing the FAMLII Division as an enterprise in Section 8-13.3-508, the FAMLII Act is clear that FAMLII premiums cannot be used for general revenue purposes: "Money in the [FAMLII] fund may be used only to pay revenue bonds; to reimburse employers who pay family and medical leave insurance benefits directly to employees in accordance with section 8-13.3-515(1); and to pay benefits under, and to administer, the program pursuant to this part 5, including technology costs to administer the program and outreach

services...." C.R.S. §8-13.3-518. Therefore, the FAMILI Act is not an income tax law, and the program's premium is a "fee" and not a "tax." As a result, Petitioner's argument that the FAMILI premium constitutes a "surcharge" subject to Section 20(8)(a) of TABOR is untenable.

II. Precedent Requires the Court to Avoid Constitutional Interpretations that Would Cripple the Government's Ability to Provide Services

In Colorado, statutes are presumed to be constitutional, and can only be struck down by showing that the enactment is unconstitutional beyond a reasonable doubt. *Colo. Ass'n of Pub. Employees v. Bd. of Regents of Univ. of Colo.*, 804 P.2d 138, 143 (Colo. 1990). In this case, Petitioner pins its arguments on a strained interpretation of constitutional language contained in Section 20(8)(a). Regardless, this Court's precedents require a finding in the Respondent's favor that the FAMILI Act should be upheld.

In several decisions, this Court has rejected interpretations of TABOR that "would hinder basic government functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008); *see also Havens v. Bd. Of County Comm'rs*, 924 P.2d 517, 519-20 (Colo. 1996) (declining to adopt a "rigid interpretation of [Amendment] 1, which would have the effect of working a reduction in government services") (quoting *Bolt v. Arapahoe County Sch. Dist. No. Six*, 898 P.2d 525, 537 (Colo. 1995); *In re Submission of*

Interrogatories on House Bill 99-1825, 979 P.2d 549, 557 (Colo. 1999) (rejecting an interpretation of Amendment 1 that would "cripple the everyday workings of government"). The FAMLI Act will provide critically necessary services to Coloradans, and the Court should avoid an interpretation of TABOR that would gut the program and threaten the State's ability to provide existing and future government services.

A. The FAMLI Act Will Provide Critically Needed Services to Coloradans

The FAMLI program will provide essential services to Coloradans by establishing a paid family and medical leave (PFML) insurance program that will fill significant gaps in current workplace practices and protections.

i. The Scope of the FAMLI Act

The FAMLI Act establishes an affordable social insurance program to ensure Coloradans can take paid, job-protected time off to care for themselves or a family member when they need it most. Workers can access the program's benefits when recovering from serious illnesses, caring for a seriously ill loved one, bonding with a new child, addressing military family needs, or responding to domestic or sexual violence. Employers and employees share the cost of the program, paying a small percentage of each employee's wages into the FAMLI Fund that can only be used for the program's administration and benefits; the smallest businesses, as in several other state programs, are not required to pay the

employer portion of premiums, but may choose to cover premium costs for their employees. When Coloradans have a qualifying need under the FAMLI Act, they can receive up to 90% of their wages, up to a statutory cap, directly from the FAMLI Fund. The law will cover nearly all workers in the State, including State employees, and allows self-employed individuals to elect coverage. Local governments can opt out of the program, although their employees can individually elect FAMLI coverage. Employers can also seek approval to meet the law's requirements through use of a private plan, so long as the plan is equal to or more generous than the FAMLI Act's protections. FAMLI Act, C.R.S. §8-13.3-501, *et seq.*

The FAMLI Act fills a major gap in the widespread need for leave among Colorado workers. Prior to passage of Proposition 118, Coloradans lacked the legal right to any *paid* leave when welcoming a new child or facing a personal or family member's serious illness. The only law covering such absences was the federal Family and Medical Leave Act of 1993 ("FMLA") which provides up to 12 weeks of *unpaid* leave and only covers a portion of the workforce; half of all working parents and 43% of women of child-bearing age are ineligible for even this unpaid FMLA leave, with low-income workers especially likely to be excluded from coverage. Family and Medical Leave Act of 1993, 29 U.S.C. §§2601-2654; Elisabeth Jacobs, *An Evidence-Backed Policy Framework for Paid Family and*

Medical Leave in Colorado, URBAN INSTITUTE (Sept. 16, 2019), <https://www.abetterbalance.org/resources/urban-institute-report-an-evidence-backed-policy-framework-for-paid-family-and-medical-leave-in-colorado/>, (hereinafter, “URBAN INSTITUTE REPORT”); Pamela Joshi et al., *Unequal Access to FMLA Leave Persists*, DIVERSITY DATA KIDS (Jan.16, 2020), <https://www.diversitydatakids.org/research-library/data-visualization/unequal-access-fmla-leave-persists>. Even for those who qualify for unpaid FMLA leave, many employees cannot afford to take unpaid leave when there is a qualifying need. At the same time, relatively few employers voluntarily offer PFML. The federal government reports that 77% of workers in the U.S. lack paid family leave. *National Compensation Survey: Employee Benefits in the United States*, U.S. BUREAU OF LABOR STATISTICS, Table 33 at 315 (Sept. 2021), <https://www.bls.gov/ncs/ebs/benefits/2021/employee-benefits-in-the-united-states-march-2021.pdf>. Moreover, only 35% of workers in the Mountain West have access to short-term disability, and these benefits can be very limited in scope and are less likely among lower-wage workers. *Id.* at Table 17. As a result, without FAMILI, workers face impossible choices when they have a need for family and medical leave, and often have no choice but to cobble together limited sick or vacation days or leave the workforce altogether.

ii. The Critical Need for the Services Provided by the FAMLI Act

The FAMLI Act will ensure that workers facing their own or a family member's serious health needs can afford to take leave and keep their jobs. Colorado's FAMLI program will provide a lifeline to workers experiencing an acute crisis like cancer, managing a chronic health condition like diabetes or kidney disease, recovering from a serious accident, or seeking treatment for substance abuse. *At A Glance: The Case for Paid Medical Leave*, A BETTER BALANCE (Nov. 30, 2021), <https://www.abetterbalance.org/resources/at-a-glance-the-case-for-paid-medical-leave/>. Furthermore, as Colorado's population ages, the FAMLI Act's coverage for family caregiving will become even more critical. URBAN INSTITUTE REPORT, at 17.

For many Coloradans, the lack of access to paid leave to care for one's own serious health condition or a family member's serious illness can be catastrophic. Nearly one in three seriously ill workers either lose or change their jobs as a result of their illness, which can lead to devastating financial consequences and disrupt access to employer-provided health insurance. *Being Seriously Ill in America Today*, THE COMMONWEALTH FUND, THE NEW YORK TIMES, & HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, at 8 (Aug. 2018), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/10/CMWF-NYT-HSPH-Seriously-Ill-Poll-Report.pdf>. For example, more than one in three seriously

ill adults use up all or most of their savings to deal with their health conditions, and medical bills represent all or nearly all of the total non-mortgage debt for approximately 20% of adults. *Id.* Furthermore, research has demonstrated that the experience of providing care for a family member with a serious medical condition can be emotionally and financially taxing, and add additional family stress. URBAN INSTITUTE REPORT, at 17.; *see also*, Katherine Ellison, *Caregivers of Elderly Loved Ones Face Heavy Emotional, Physical, Financial Toll*, THE WASHINGTON POST (Sept. 27, 2020), https://www.washingtonpost.com/health/caretaker-stress-depression-anxiety-increases/2020/09/25/abd281f6-e933-11ea-97e0-94d2e46e759b_story.html.

For example, a focus group with family caregivers receiving benefits from state paid leave programs suggests that the income provided through the programs relieves stress and results in improvements to physical and mental health for caregivers. Russell Tisinger et al., *Understanding Attitudes on Paid Family Leave: Discussions with Parents and Caregivers in California, New Jersey and Rhode Island*, WASHINGTON, DC: DEPT. OF LABOR (July 2016), https://www.dol.gov/asp/evaluation/completed-studies/Paid_Leave_AwarenessBenefitsBarriers.pdf. Access to paid leave for caregivers has also been shown to positively impact the health outcomes of care recipients, especially those who require acute care or hospitalization, and can

decrease nursing home placements. URBAN INSTITUTE REPORT at 17. The FAMLI Act will provide a critical safety net to keep Coloradans employed during a serious illness and ease associated financial burdens related to care for oneself or a loved one.

The FAMLI Act will also guarantee paid parental leave to bond with a new child, with significant benefits for both parents and children. The U.S. remains only one of two countries in the world, for which data is available, without any form of national paid maternity leave. International Labour Organization, *Maternity and Paternity at Work: Law and Practice Across the World*, at 16 (2014), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_242615.pdf. As reported by the Colorado Department of Public Health & Environment (CDPHE), for example, “[m]others who have access to maternity leave are less likely to experience pregnancy-related depression and related mental health issues.” Abby Johnson Holm, *The Health Benefits of Paid Family and Medical Leave: A Report for the Colorado Department of Labor and Employment’s Family and Medical Leave Implementation Task Force*, CO DEPT. OF PUB. HEALTH & ENVIRONMENT, at 11 (2020), <https://www.abetterbalance.org/resources/the-health-benefits-of-paid-family-and-medical-leave-a-report-for-the-colorado-department-of-labor-and-employments->

family-and-medical-leave-implementation-task-force/, (hereinafter “CDPHE REPORT”). California’s PFML law has also been shown to increase rates of paid leave among new fathers, increasing critical bonding time and helping co-parents to balance shared responsibilities and manage stress. Ann P. Bartel et al., “*Paid Family Leave, Fathers’ Leave-Taking, and Leave-Sharing in Dual-Earner Households*,” ASSOCIATION FOR PUBLIC POLICY ANALYSIS AND MANAGEMENT (2017), <https://www0.gsb.columbia.edu/faculty/abartel/papers/paid%20leave.pdf>. Furthermore, PFML addresses the financial strain of welcoming a new child, with one study showing women who return to work after PFML are less likely to receive public assistance and food stamps. Linda Houser, Ph.D. & Thomas P. Vartanian, Ph.D., *Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Business, and the Public*, RUTGERS CNTR. FOR WOMEN & WORK, at 2 (2012), <https://www.nationalpartnership.org/our-work/resources/economic-justice/other/pay-matters.pdf>. Paid parental leave not only has a positive impact on health outcomes for new parents, but also has significant health benefits for new children that may last significantly past early childhood. Shirlee Lichtman-Sadot & Neryvia Pillay Bell, *Child Health in Elementary School Following California’s Paid Family Leave Program*, JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 36(4) (2017): 790–827, <https://doi.org/10.1002/pam.22012>. Birthing parents who return to work within 12

weeks of giving birth are less likely to breastfeed and, when they do, breastfeed for less time than those who stay home longer; increased rates of breastfeeding improve health outcomes for both the breastfeeding parent and the child. Lawrence M. Berger et al., *Maternity Leave, Early Maternal Employment and Child Health and Development in the US*, 115 THE ECON. J.L no. F29, F39-F40 (2005).

Studies also indicate that access to PFML decreases infant mortality rates, increases child immunizations, and improves mental health outcomes and cognitive developments in children. URBAN INSTITUTE REPORT, at p. 6-7; Agnitra Roy Choundhury & Solomon W. Polachek, *The Impact of Paid Family Leave on the Timing of Infant Vaccinations*, IZA DP no. 12483 (July 2019), <https://ftp.iza.org/dp12483.pdf>. Overall, families who have access to paid parental leave are healthier, more economically secure, and less likely to require taxpayer-funded public assistance.

Survivors of domestic abuse, sexual violence, and stalking will also gain essential new protections through the FAMLII Act. Twenty-one percent of employed adults are survivors of intimate partner violence. Corporate Alliance to End Partner Violence, *National Benchmark Telephone Survey on Domestic Violence in the Workplace* (2005), <http://www.ncdsv.org/images/caepvsurvey.workplace.pdf>. Without access to extended paid leave, the safety and well-being of workers experiencing domestic

violence is further jeopardized. *Fact Sheet: Paid Safe Time, A BETTER BALANCE* (Oct. 4, 2021), <https://www.abetterbalance.org/resources/paid-safe-time-factsheet/>. Survivors of domestic abuse, sexual violence, and stalking in Colorado will soon be able to take FAMLI leave to find and relocate to safe housing, access counseling and legal services, obtain a protection order, or deal with a myriad of other critical physical, emotional, and financial consequences of victimization. As a result, the FAMLI Act will serve to promote public safety, protect survivors, and make it more feasible for Coloradans experiencing such violence to seek help and protection.

Finally, the FAMLI Act will benefit military families. Colorado has the country's tenth largest population of active and reserve military members, with over 47,000 military personnel. URBAN INSTITUTE REPORT, at 20. The FAMLI Act addresses the unique challenges of military families, who endure deployments, frequent moves, and regular separations in support of the service member's duty to the state and country. *Id.* Workers can use leave under the FAMLI Act to make financial, legal, or caregiving arrangements in response to a family member's active-duty service. The FAMLI Act will fill this gap and ensure that Colorado's military families—who make great sacrifices to serve and protect our country—will receive essential supports during their times of need. *Military Families & The Need for Paid Leave, A BETTER BALANCE*, at 4-5 (Sept. 29, 2021),

<https://www.abetterbalance.org/resources/military-families-the-need-for-paid-leave/>.

iii. The FAMLI Act Addresses Key Social and Economic Disparities, Promotes Gender and Racial Equity in Colorado and Provides Significant Benefits to Society

The FAMLI Act will serve hardworking Coloradans of all demographics and socio-economic levels. However, the benefits of FAMLI coverage will dramatically improve health and economic outcomes for marginalized workers who are currently least likely to have access to paid or unpaid leave.

Research shows that the FAMLI Act can increase gender equity in the workplace. As reported by CDPHE, research shows that PFML can increase women's participation in the workforce, noting "there is a 12% gap in men's and women's labor force participation" in Colorado. CDPHE REPORT at 11. CDPHE further summarized research that "[n]ew mothers who take paid parental leave are more likely to stay in the workforce, and women with PFML are 54% more likely to receive wage increases later in their careers. Paid parental leave for fathers also makes it easier for women to re-enter the workforce and prosper in their careers."

Id. The FAMLI Act will provide a critical government service that will help to increase women's participation in the workplace and provide an essential safety net to family caregivers.

The FAMLI Act will also address current racial inequalities in access to paid leave. Compared to white workers, workers of color are more likely to be unable to take leave when they need it, due most often to inability to afford unpaid time off or fear of losing a job; Latinx workers are 66% more likely to be unable to take leave, while the figure is 83% more likely for Black workers and 100% more likely for Native American, Pacific Islander and multiracial workers. *Paid Family and Medical Leave: A Racial Justice Issue – and Opportunity*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES (Aug. 2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>. Disparities in access to paid leave and other economic supports make it more difficult for families of color to absorb the financial shock of a serious family or medical need. *Id.* Racial discrimination in the workplace has also exacerbated historical structural inequality in wealth building over generations, which is further compounded by a lack of access to PFML. *Id.* For example, as of July 2020, several months before voters approved the Colorado FAMLI Act, 77% of white individuals reported that they would be able to cover a \$400 emergency expense using cash or its equivalent, compared to only 55% of Hispanic individuals and 48% of Black individuals. *Update on the Economic Well-Being of U.S. Households: July 2020 Results*, BD. OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Table 4 at 14 (Sept. 2020),

<https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-update-202009.pdf>. The FAMLI Act will provide an important financial safety net to people of color throughout Colorado when qualifying needs arise.

iv. Once Fully Implemented, The FAMLI Act Will Also Provide Important Benefits to Employers of All Sizes and the Self-Employed

Research shows that PFML laws, like the FAMLI Act, benefit employers. Access to paid leave ensures that workers can stay on the job or quickly return to work following an unexpected health or family event. These programs also increase morale and loyalty, which in turn reduces costly turnover. Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, CNTR. FOR AM. PROGRESS (Nov.16, 2012), <https://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>; Benjamin Bennett et al., *Paid Leave Pays Off: The Effects of Paid Family Leave on Firm Performance*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 27788 (2021), https://www.nber.org/system/files/working_papers/w27788/w27788.pdf. As employers compete for talent in Colorado, access to PFML can attract new workers and allow caregivers to remain in—or reenter—the labor pool. The FAMLI Act will also help to level the playing field for small businesses by creating a baseline right to PFML across Colorado and ensuring employers can

affordably offer this popular benefit. *Paid Leave Policies on Main Street*, SMALL BUSINESS FOR AMERICA (2021), <https://www.smallbusinessforamericasfuture.org/small-business-for-america-s-future-releases-paid-leave-survey-results>. For these reasons, the FAMLI Act is supported by many business owners from across the State.

The FAMLI Act also allows self-employed individuals to elect coverage. FAMLI Act, C.R.S. §8-13.3-514. When considering self-employment or starting one's own business, many Coloradans may hesitate to take the economic risk without access to paid leave. These barriers are particularly high for new or prospective parents, people with chronic illnesses or disabilities, or those who provide care to loved ones. In addition, "gig" workers who are bona fide independent contractors often lack access to crucial benefits like PFML. The FAMLI Act will provide tremendous peace of mind to self-employed individuals, whether entrepreneurs or workers who are independent contractors, by offering affordable, elective PFML insurance for life's critical moments.

v. The FAMLI Act is Backed by Extensive Research and is Based on Proven and Time-Tested Models

The FAMLI Act is not a novel program, but rather mirrors programs throughout the country. Colorado established the tenth PFML insurance program in the country, joining eight other states and Washington D.C. *Comparative Chart of*

Paid Family and Medical Leave Laws in the United States, A BETTER BALANCE (March 24, 2022), <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/>. These PFML programs are sustainable and solvent: “[a]ccording to the National Academy of Social Insurance, using a dedicated payroll contribution approach to funding makes it highly sustainable from a fiscal standpoint ... The three longest-running state-level [PFML] . . . programs have been solvent for multiple years, with fairly stable contribution rates from one year to the next.”

Colorado Paid Family and Medical Leave: Program Design and Implementation, UNIVERSITY OF MINNESOTA, at 44 (Sept. 2019),

<https://www.abetterbalance.org/resources/iwpr-and-university-of-minnesota-report-colorado-paid-family-and-medical-leave-program-design-implementation/>.

Colorado’s FAMLI Act builds on the successful models established by other states with similar programs, none of which have been struck down by judicial action.

The need for PFML is well established by existing research, and the program approved by Colorado voters has been extensively studied and debated. In 2019, Colorado established a PFML implementation task force to issue recommendations on 16 potential PFML policy questions. Family and Medical Leave Implementation Act, C.R.S. §8-13.3-301, *et seq.* The Task Force, which consisted of 13 voting members representing a range of perspectives, met for 43 hours, received nearly 1,000 public comments, commissioned an independent actuarial

study, and solicited reports from three experts and two State Departments. The Task Force reached broad consensus on 14 of the 16 policy parameters for a PFML program, and these recommendations and expert reports guided formation of Proposition 118. *Family and Medical Leave Implementation: FAML I Taskforce Final Report as directed by SB 19-188* (Jan. 8, 2020), <https://www.abetterbalance.org/wp-content/uploads/2022/03/Final-FAML I-Task-Force-Recommendations-1-6-2019-1.pdf>. The Task Force’s outside experts concluded that this policy will provide much-needed support for working families and their loved ones, and also will contribute to robust economic growth for Colorado.

B. An Alternative Interpretation of Section 20(8)(a) Could Lead to Unintended Consequences, Including the Crippling of Other Government Services

Even if this Court disagrees with the Respondent’s argument that Section 20(8)(a) does not apply to the FAML I Act, it should follow precedent and avoid an interpretation of Section 20(8)(a) that would cripple the FAML I Act and other current and future government services. In addition to hindering the FAML I Division’s ability to provide voter-approved PFML services, Petitioner’s TABOR interpretation would cripple the government’s ability to provide other government services. For example, the FAML I Act is structured in a way that mirrors many aspects of Colorado’s Unemployment Insurance (“UI”) law, including numerous

cross-cites in the FAMLII Act to the UI law’s eligibility standards and definitions, and a similar requirement that covered employers pay premiums based on employee wages. Although the UI program predates TABOR, Colorado has approved changes to UI in the years since TABOR’s passage. As a result, if this Court were to follow Petitioner’s strained interpretation of Section 20(8)(a), the decision would also threaten Colorado’s UI program.

This Court has clearly distinguished between “taxes” and “fees” under TABOR and reinforced the distinction in a line of cases. In *Colorado Union of Taxpayers v. City of Aspen*, for example, this Court noted that such a determination turns “implicitly on whether (1) the charge was imposed as part of a regulatory scheme enacted pursuant to the government's police powers and (2) the charge bore a reasonable relationship to the direct or indirect costs to the government of providing the service or regulating the activity.” 418 P. 3d 506, 512-513 (Colo. 2018). This Court further stated “[i]n cases in which the answer to these questions was yes, we determined that the charges were not taxes. Where the primary purpose of the charge was to raise revenue for the general expenses of government, we concluded that the challenged assessments were taxes.” *Id.*

Colorado’s FAMLII Act premiums are clearly a fee under this Court’s test; the law establishes a regulatory program to provide PFML, which will improve the health, safety, and well-being of Coloradans and benefit both employers and

employees. The program’s premiums are fees to directly support this program, rather than raising revenue for the general expenses of government. Petitioner’s argument seeks to use the “surcharge” language in Section 20(8)(a) to create a new loophole to restrict the State’s ability to create fees, based on wages or income, directly related to the provision of government services. A finding for the Petitioner could have dire consequences for Colorado’s ability to provide critical services through a fee-for-service model—both now and in the future.

CONCLUSION

The voter-approved FAMLI Act will benefit the public health, safety, economic stability, and workplace equity of millions of Coloradans and will provide an essential government service to meet the critical need for PFML. The policy is based on extensive research, as well as the experience of similar programs in other states. Although Petitioner seeks to create a new loophole to challenge government enterprises funded through fees, the plain language of Section 20(8)(a) of TABOR does not apply to non-tax laws or enterprise program fees that do not raise revenue for general government purposes. Even if this Court were to agree with Petitioner’s strained interpretation of Section 20(8)(a), precedent requires the Court to uphold the FAMLI Act and avoid an interpretation that would cripple Colorado’s ability to provide current and future services.

Respectfully submitted this 4th day of April, 2022.

A BETTER BALANCE

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CERTIFICATE OF SERVICE

I certify that on April 4, 2022, I served this **BRIEF OF AMICI CURIAE LABOR AND POLICY ORGANIZATIONS AND BALLOT PETITION FILERS IN SUPPORT OF RESPONDENT** on all parties to this case, as identified below, using the Colorado Courts E-filing System.

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