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Colorado Court of Appeals, Case No. 22CA0204 Lipinsky, Fox, and Freyre, JJ. Archuleta County District Court, Case No. 21CV30003, Hon. Jeffrey R. Wilson	
Petitioner: KRISTY ARCHULETA, in her official capacity as the Clerk and Recorder of Archuleta County, **v.** **Respondent**: MATT ROANE	**▲COURT USE ONLY▲**
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BRIEF OF AMICUS CURIAE COLORADO COUNTIES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Dated: February 1, 2023

CERTIFCATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28, C.A.R. 29, C.A.R. 32, and C.A.R. 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and C.A.R. 29(d).

Choose one:

_X___ It does not exceed 15 pages.

_X__ Undersigned counsel certifies that this Brief complies with all the requirements as to typeface, font and line spacing, pursuant to C.A.R. 29 and C.A.R. 32.

I acknowledge that this 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/ Andrew D. Ringel .
Signature of attorney or party

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ISSUES PRESENTED

Colorado Counties, Inc. ("CCI") adopts the Issues Presented contained in Petition for Writ of Certiorari from Kristy Archuleta, in her official capacity as the Clerk and Recorder of Archuleta County ("Clerk and Recorder") ("the Petition").

STATEMENT OF THE CASE

CCI adopts the Statement of the Case contained in the Petition.

INTEREST OF AMICUS CURIAE

CCI is a Colorado non-profit corporation founded by the State's county commissioners in 1907 to further county government cooperation and efficiency. CCI members include 62 of the 64 county governments in Colorado. Using discussion and cooperative action, CCI works to solve the many financial, legal, administrative, and legislative problems confronting county governments throughout Colorado. As part of this mission, CCI regularly participates as *amici curiae* in cases before the courts of Colorado in cases raising important legal issues for Colorado's counties.

REASONS AMICUS CURIAE BRIEF IS DESIRABLE

CCI has appeared as *amici curiae* for decades before this Court and the courts of Colorado to express the concerns and perspectives of counties when the federal and state courts in Colorado confront significant questions that could result in

unintended consequences to public officials and public employees. This represents one such case.

The published decision of the Court of Appeals concerning the intersection between the Colorado Rules of Civil Procedure governing discovery and the Colorado Open Records Act ("CORA"), C.R.S. §§ 24-72-200.1 *et seq.*, presents significant issues applicable to the county commissioners in all of Colorado's 64 counties and in fact all public entities in Colorado. *See* ***Roane v. Archuleta,*** 2022 COA 143 ("Opinion"). CCI seeks to participate to provide this Court with a statewide county government perspective on the significant issues raised in the Court of Appeals' decision and the Petition. CCI is well-positioned to describe the impact of the Court of Appeals' flawed interpretation and application of the Colorado Rules of Civil Procedure and CORA in this case on all of Colorado's counties.

SUMMARY OF ARGUMENT

The Court of Appeals' Opinion fails to appropriately address the relationship between the Colorado Rules of Civil Procedure governing discovery and CORA in cases where a litigant seeks to utilize CORA instead of discovery as provided by the Rules. As public entities, counties in Colorado are subject to CORA requests and also are parties to litigation. The Court of Appeals' Opinion suggests CORA and discovery are separate processes. In so doing, the Opinion ignores the important

underlying purpose of the Rules of Civil Procedure—namely, the just, speedy and inexpensive determination of litigation. Modern discovery rules including those adopted by this Court in Colorado impose a proportionality requirement on discovery, allowing limits to discovery based on the nature of the particular dispute. The Court of Appeals' failure to consider these purposes of the discovery rules and the inherent authority of District Courts under the Rules of Civil Procedure to tailor discovery in every case when considering how CORA and civil discovery should work together in a complementary fashion was erroneous. The importance of clarity concerning the relationship between CORA and civil discovery to all public entities in Colorado justifies this Court reviewing the Court of Appeals' decision.

ARGUMENT

I. COLORADO COUNTIES ARE SUBJECT TO BOTH REQUESTS UNDER THE COLORADO OPEN RECORDS ACT AND LITIGATION

The Colorado Open Records Act ("CORA"), C.R.S. §§ 24-72-200.1 *et seq.*, applies to all "political subdivisions" of the State which includes every county. C.R.S. § 24-72-202(5) and (6). CORA allows anyone to request public records from every county in Colorado pursuant to the terms of the Act. C.R.S. § 24-72-203(1)(a). Counties regularly are subject to CORA requests. *See generally* ***Reno v. Marks,*** 349 P.3d 248 (Colo. 2015) (CORA proceedings against Clerk and Recorder of Chaffee County); ***Denver Publ. Co. v. Bd. of Cnty. Comm'rs of Arapahoe Cnty.,*** 121 P.3d

190 (Colo. 2005) (CORA proceedings against Board of County Commissioners); ***Wick Commc'ns. Co. v. Montrose Cnty. Bd. of Cnty. Comm'rs,*** 81 P.3d 360 (Colo. 2003) (CORA proceedings against Board of County Commissioners and County Manager).

Counties are also subject to being sued. *See* C.R.S. § 30-11-101(1)(a) (empowering counties to sue and be sued); C.R.S. § 30-35-103(5) (empowering home rule counties to sue and be sued). And counties are regularly subject to litigation. *See, e.g.*, C.R.S. § 24-10-102 (describing purposes of Colorado Governmental Immunity Act as including: "It is further recognized that the state, its political subdivisions, and the public employees of such public entities, by virtue of the services and functions provided, the powers exercised, and the consequence of unlimited liability to the government process, should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided by this article."). The Opinion does not reference any of these statutes and does not account for any of these principles.

II. THE RELATIONSHIP BETWEEN THE COLORADO RULES OF CIVIL PROCEDURE GOVERNING DISCOVERY AND THE COLORADO OPEN RECORDS ACT PRESENTS ISSUES REQUIRING RESOLUTION BY THIS COURT

Fundamentally, the Opinion ignores the need to define the relationship between the Colorado Rules of Civil Procedure governing discovery and CORA for litigation involving public entities in Colorado. This Court should accept certiorari to define the relationship between civil discovery and CORA. The District Courts require guidance from this Court on how to manage CORA and discovery in an appropriate fashion.

Initially, a variety of provisions of the Colorado Rules of Civil Procedure emphasize how consideration of issues such as cost and practicality should factor heavily in interpreting and applying the Rules. For example, C.R.C.P. 1, in pertinent part provides: "These rules shall be liberally construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. The 2015 comment to the Rules emphasized this mandate of Rule 1, as follows:

> The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost

> and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

C.R.C.P. 1, 2015 Comm., ¶ 1. C.R.C.P. 26 governing discovery now incorporates the concept of proportionality expressly, recognizing the need for the District Court to tailor discovery to the issues of a particular case. *See generally* C.R.C.P. 26(b)(1); C.R.C.P. 26, 2015 Comments, ¶ 15 ("C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. . . . These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules 'shall be liberally construed, administered, and employed by the court and the parties to secure a just, speedy and inexpensive determination of every action.' C.R.C.P. 1.").

The Rules of Civil Procedure govern the procedures for proceedings in civil trial courts in Colorado. "The Rules provide a complete and orderly procedure for the trial and determination of civil actions." ***Colorado State Bd. of Examiners of Architects v. Marshall,*** 315 P.2d 198, 199 (Colo. 1957). "The civil rules, and our

cases interpreting them, reflect an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs." ***DCP Midstream, LP v. Anadarko Petroleum Corp.,*** 303 P.3d 1187, 1190 (Colo. 2013). "Hence, we hold that, to resolve a dispute regarding the proper scope of discovery in a particular case, the trial court should, at a minimum, consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F). When tailoring discovery, the factors relevant to a trial court's decision will vary depending on the circumstances of the case, and trial courts always possess discretion to consider any or all the factors listed—or any other pertinent factors—as the needs of the case require." ***Id.*** at 1191; *see also* ***In re Marriage of Gromick,*** 387 P.3d 58, 63-64 (Colo. 2017) (applying principles from ***DCP Midstream*** to dissolution of marriage proceeding under C.R.C.P. 16.2).

The Court of Appeals' decision failed to consider or address these animating principles governing civil discovery under the Rules and inappropriately curtails the discretion of District Courts to manage their dockets. While the Court of Appeals is correct CORA and civil discovery serve different purposes, it is much too facile to simply assert the Rules of Civil Procedure have no bearing on the propriety of a litigant using CORA to replace, supplement, or obtain the equivalent of civil discovery from a public entity the litigant is suing. This Court has not hesitated to

disapprove of decisions of the Court of Appeals which curtailed the discretion of District Courts to manage dockets, cases, or trials. *E.g.*, ***Gibbons v. People,*** 328 P.3d 95, 97 (Colo. 2014) ("We agree with the ***Gibbons*** division that ***Raglin***'s mistrial advisement requirement is inconsistent with our precedent, but we disapprove of its per se prohibition. We hold that a trial court is not required to provide a mistrial advisement when giving a modified-***Allen*** instruction. The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury.").

At the very least, this Court should accept certiorari to remind the District Courts of their authority in crafting case management orders under C.R.C.P. 16 to address how CORA requests will be treated in litigation involving public entities. *Compare* ***Citizen Ctr. v. Gessler,*** 2012 U.S. Dist. LEXIS 98066 (D. Colo. July 16, 2012) (utilizing Fed. R. Civ. P. 16 Scheduling Order to restrict use of CORA requests to circumvent discovery limitations as follows: "Plaintiff Citizen Center shall refrain during discovery in this case from submitting Colorado Open Records Act ("CORA") requests to any of the Defendants for inspection and copying of public records that are related to this case and otherwise obtainable using discovery in order to prevent Plaintiff from using CORA as a means to exceed the discovery limits

included in this Order."). District Courts in Colorado have the same ability to manage discovery pursuant to Rule 16 to address CORA requests in the context of a Case Management Order. *See, e.g.*, ***Antero Res. Corp. v. Strudley,*** 347 P.3d 149 (Colo. 2015) (discussing purposes of C.R.C.P. 16 as "to accomplish early purposeful and reasonably economical management of cases by the parties with court supervision," as well as "to insure only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial."; quoting C.R.C.P. 16, Comm. Cmt., Operation). Allowing the Opinion to stand would permit civil litigants suing public entities to use CORA requests in routine circumvention of case management orders containing limits on C.R.C.P. 34 requests for production of documents which the District Court in its discretion saw fit to impose.

Unless a District Court is allowed to address CORA requests in some fashion, the District Court cannot comply with the Rule's purpose and mandate. Moreover, because Rule 16 does not apply to all actions, for those actions where discovery is not permitted or limited, allowing CORA to supplant the civil discovery rules is particularly problematic. *See* C.R.C.P. 16(a) ("This Rule shall not apply to domestic relations, juvenile, mental health, probate, water court proceedings . . . , forcible entry and detainer, C.R.C.P. 106 and 120, and other similar expedited proceedings, unless otherwise ordered by the court or stipulated by the parties.").

Further, in cases involving public entities and public employees subject to the Colorado Governmental Immunity Act ("CGIA"), C.R.S. §§ 24-10-101 *et seq.*, only limited discovery necessary to resolve a CGIA sovereign immunity issue is permitted pursuant to C.R.S. § 24-10-108 and C.R.S. § 24-10-118(2.5). *See* ***Colo. Special Dists. Prop. & Liab. v. Lyons,*** 277 P.3d 874, 884 (Colo. App. 2012) (describing limited discovery available under the CGIA). Under the Opinion, despite any order so limiting discovery, CORA requests would presumably remain allowed against the public entity or public employee who raised the CGIA defense in direct contravention of such order. Similarly, C.R.C.P. 26(c) allows parties and non-parties to obtain protective orders to prevent discovery. The Opinion does not address how a CORA request would be impacted by the existence of a protective order precluding or limiting discovery. Further, the Opinion offers no guidance concerning how an entitlement to immunity and a concomitant stay of discovery in the litigation would impact a subsequent CORA request from the same litigant. *See* ***Moody v. Ungerer,*** 885 P.2d 200, 202 (Colo. 1994) (discussing qualified immunity from 42 U.S.C. § 1983 claim).

In sum, this Court should accept certiorari to address the relationship between CORA and the civil discovery rules so these type of considerations and issues can

be presented to and decided by this Court. The Opinion's failure to recognize the profound implications of its decision in these respects warrants review by this Court.

CONCLUSION

In conclusion, for all the foregoing reasons, Colorado Counties, Inc. respectfully requests this Court grant the Petition for Writ of Certiorari filed by Petitioner Kristy Archuleta, in her official capacity as the Clerk and Recorder of Archuleta County, and enter all other and further relief as this Court deems just and appropriate.

Dated this 1st day of February, 2023.

Respectfully submitted,

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on this 1st day of February, 2023, I served the foregoing **BRIEF OF AMICUS CURIAE COLORADO COUNTIES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** on the Clerk of this Court, and served a copy of the foregoing via the Colorado Courts E-Filing System, on the following:

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