COLORADO SUPREME COURT 2 EAST 14TH AVENUE DENVER, COLORADO 80203 Colorado Court of Appeals Case No. 2022CA0204 Judges Lipinsky, Fox, and Freyre presiding Archuleta County District Court Case No. 21CV30003 Honorable Jeffrey R. Wilson presiding	DATE FILED: January 2, 2024 3:20 PM FILING ID: 575E4988FD2B0 CASE NUMBER: 2023SC70 COURT USE ONLY
KRISTY ARCHULETA, in her official capacity as the Clerk and Recorder of Archuleta County, Petitioner v. **MATT ROANE,** Respondent	
Timothy R. Macdonald, No. 29180 Anna I. Kurtz, No. 51525 Laura Moraff, No. 59218 ACLU FOUNDATION OF COLORADO 303 E. 17th Avenue, Suite 350 Denver, CO 80203 P: (720) 402-3114 tmacdonald@aclu-co.org akurtz@aclu-co.org lmoraff@aclu-co.org *Attorneys for Amici Curiae ACLU of Colorado and Colorado Freedom of Information Coalition*	Case Number: 2023SC70

AMICI CURIAE BRIEF OF ACLU OF COLORADO AND COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF RESPONDENT MATT ROANE

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Curiae brief complies with all requirements of C.A.R. 28(a)(2), 28(a)(3), 29(c), and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4746 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/ Laura Moraff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members and supporters, is a state affiliate of the ACLU. The ACLU of Colorado is dedicated to the constitutional rights and civil liberties of all Coloradans, and vigorously supports the public's right to access government records and information as fundamental to our democracy. The organization frequently submits public records requests, and has a unique interest in ensuring that access to public records remains available to all persons, including those who seek to hold the government accountable through litigation.

Colorado Freedom of Information Coalition ("CFOIC") is a 501(c)(3) not-for-profit, educational, and nonpartisan alliance of news organizations, citizen groups and individuals dedicated to ensuring the transparency of state and local governments in Colorado by promoting open access to government records and meetings, and more generally, a free flow of information to We the People. Among CFOIC's member organizations are The ACLU of Colorado, Colorado Bar Association, Colorado Broadcasters

Association, Colorado Association of Libraries, Colorado Press Association, Common Cause, and The Independence Institute. CFOIC has a significant interest in the issues of this case. CFOIC (and all residents of Colorado) have a vested and continuing interest in the issues presented by this appeal.

INTRODUCTION

The court of appeals correctly held that a person in litigation against a government entity can obtain public records from that entity under the Colorado Open Records Act ("CORA"), whether or not the records are relevant to the litigation, just as any other person could. But by limiting its decision to its facts, the court left open the possibility that a court could restrict the availability of CORA as part of a trial management order in litigation against the government or as part of discovery limits. Leaving open these possibilities would undermine CORA, prompt additional wasteful litigation, and embolden cities, counties, and other public entities to improperly deny CORA requests when the requesting person or organization is litigating against it. The court of appeals opinion rightly recognizes that CORA includes no litigation exception, but wrongly invites governmental entities to effectively manufacture one by moving for restrictive CORA rulings as a matter of standard litigation practice.

Amici Curiae ACLU of Colorado and the Colorado Freedom of Information Coalition, and many other organizations and individuals, regularly use CORA to investigate government actions and policies, including on matters that end up in litigation. CORA is a critical tool in an open, democratic society for ensuring our public officials are accountable to the public. Amici urge this Court to hold that a party's ability to use CORA to access public records is independent from and not constrained by discovery in civil litigation. That is the only rule that respects the express terms of CORA and the critical democratic purposes it serves.

ARGUMENT

The fundamental question before the Court is whether a member of the public loses access to public records under CORA when she sues the government. Under the plain terms of CORA, the answer must be no.

The court of appeals rightly rejected each of the government's rationales for shirking its CORA obligations in this particular case. But the court declined to make clear that CORA requests were independent from litigation discovery because the plaintiff below had not engaged in discovery during the litigation. *Roane v. Archuleta*, 2022 COA 143, ¶ 39. This Court

should make clear that the ability to serve CORA requests on public entities is not constrained by a requester's status as a civil litigant.

I. CORA Contains No Exception Allowing a Public Entity to Withhold Public Records from Members of the Public Who Are Engaged in Litigation Against It.

Public records belong to the public. The government officials who create such records work for us, the public. Therefore, CORA reflects Colorado's "public policy . . . that all public records shall be open for inspection by any person at reasonable times." C.R.S. § 24-72-201. As such, "there is a strong presumption in favor of disclosure," *Shook v. Pitkin Cnty. Bd. of Cnty. Commissioners*, 2015 COA 84, ¶ 6, and any exceptions to the presumption of openness must be specified in CORA itself or "otherwise provided by law," C.R.S. § 24-72-203(1)(a); *see also Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 877 (Colo. App. 1987) ("[A] public official has no authority to deny any person access to public records unless there is a specific statute permitting the withholding of the information requested."). Moreover, any "exceptions to disclosure are narrowly construed, and the record custodian bears the burden to prove that an exception applies." *Colorado Sun v. Brubaker*, 2023 COA 101, ¶ 12.

CORA enumerates its exceptions expressly. *See* C.R.S. § 24-72-204. And none of them states that a custodian may withhold records on the basis that the government entity has been sued by the records-requester. *Id.* On the contrary, as the court of appeals recognized, CORA expressly contemplates the availability of CORA requests as an alternative to discovery in pending litigation—its only restriction is to withhold fees and costs from a litigant who succeeds in CORA litigation over records it could have received through civil discovery instead. *Roane*, ¶ 32 (citing C.R.S. § 24-72-204(5)(b)).

Archuleta attempts to manufacture a litigation exception to CORA by reading one into the statutory exceptions for disclosures "prohibited by rules promulgated by the supreme court or by the order of any court," C.R.S. § 24-72-204(1)(c). But there is no such exception.

In *Martinelli*, this Court construed CORA's reference to "rules promulgated by the supreme court" as "a reference to the rules of civil procedure." *Martinelli v. Dist. Ct. in & for City & Cnty. of Denver*, 612 P.2d 1083, 1093 (Colo. 1983). The court of appeals correctly determined that there was no rule of civil procedure prohibiting Roane's request for documents under CORA. *Roane*, ¶¶ 61–63. This Court should affirm that holding, and

hold more clearly that the rules of civil procedure do not limit access to records under CORA. Instead, "CORA provides a statutory right to request public records, independent of the discovery procedures set forth in" court rules. *City of Fort Collins v. Open Int'l, LLC*, No. 21-CV-02063-CNS-MEH, 2022 WL 7582436, at *6 (D. Colo. Aug. 16, 2022) (unpublished opinion) (analyzing relationship between CORA and Federal Rules of Civil Procedure).

A. Neither the Rules of Civil Procedure nor Discretion Over Case Management Authorize Restricting Access Under CORA.

Petitioner incorrectly suggests that allowing a party in litigation to independently obtain records using CORA would "allow such party to circumvent the discovery limits in Rules 16, 16.1 and 26." Pet. Br. at 10. But by their plain text, these rules regulate discovery, not open records requests under CORA.

Rule 16.1 merely limits the number of "requests for production of documents" served in "Cases subject to Simplified Procedure." C.R.C.P. 16.1(k). Rule 16 limits *discovery* to that allowed by Rule 26(b). C.R.C.P. 16(b)(11). Rule 26(b) governs "the scope of *discovery*" and provides that "*discovery* shall be limited" in certain enumerated ways. C.R.C.P. 26(b) (emphasis added). Rule 26(d) provides that "[a]ny *discovery* conducted prior

to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2)." C.R.C.P. 26(d) (emphasis added). These rules do not in any way limit open record requests under CORA.

Amicus Curiae Colorado Counties, Inc. ("CCI"), however, argues, contrary to CORA, that district courts must have the ability to limit the availability of CORA as part of their discretion to craft case management orders. CCI Br. at 8. They point out that the Colorado Rules of Civil Procedure allow a court to issue a protective order imposing limits on discovery, and that a court might also grant a motion to stay discovery, forbidding plaintiffs from propounding discovery requests on defendants. *Id.* at 12. None of these limitations on litigation discovery, however, purports to restrict a plaintiff's ability to obtain public records through CORA.

CCI's reliance on Rule 1 is also misplaced. *See id.* at 5. Rule 1 explains that the Colorado Rules of Civil Procedure govern the procedures in *courts*. To be sure, the "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(a). But denying members of the public a statutory method of accessing public records can hardly promote "just" "speedy" and "inexpensive" resolutions of disputes.

Moreover, the C.R.C.P. cannot be construed—liberally or otherwise—to cover state statutes that govern public access to public documents and that are authorized entirely outside the litigation context.

If the legislature intended for CORA requests to be limited by civil discovery rules, it could have so limited them; but it did not. In enacting CORA, the legislature chose to allow litigants to file requests for open records. *See* C.R.S. § 24-72-204(5)(b) (providing that, if a person in litigation against a public entity obtains records under CORA that were discoverable under the Colorado rules of civil procedure, that person is not entitled to costs and attorney fees in their CORA matter). This Court must not override that choice. *See State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000) ("When construing a statute, courts must ascertain and give effect to the intent of the General Assembly . . . and must refrain from rendering judgments that are inconsistent with that intent." (internal citation omitted)).

B. Authority to Manage Discovery Is Not Authority to Limit All Information Gathering.

Nor is there any conflict between limitations on litigation discovery and access to open records under CORA. Archuleta's argument to the

contrary relies on the flawed premise that a CORA request somehow *is* a request for discovery.

But contrary to Archuleta's suggestion, "[t]he word 'discovery' is not a synonym for investigation." *American Bank*, 627 F.3d 261, 265 (7th Cir. 2010), *as amended* (Dec. 8, 2010). And "Rule 26 . . . is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so." *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944–45 (2d Cir. 1983). Rather, it is "a grant of power to impose conditions on *discovery* in order to prevent injury, harassment, or abuse of the court's processes." *Id.* at 945 (emphasis in original). Rule 26 does not govern requests under CORA because such requests for public records under a separate statutory scheme are not for *discovery*.

Treating a CORA request as a litigation discovery request makes as little sense as treating any other outside research as discovery. As this Court previously explained, a "court may not issue an order limiting a party in the use it may make of information not acquired under the discovery rules, even though had the same information been sought through discovery the opposing party would have been entitled to a protective order." *Jessee v.*

Farmers Ins. Exch., 147 P.3d 56, 60 (Colo. 2006) (quoting 4 James Wm. Moore et. al., Moore's Federal Practice ¶ 26.78, at 26–503 to 26–504 (2d ed.1987)); *see also Gulf States Steel of Alabama, Inc. v. Sec'y, Dep't of Lab.*, No. CIV.1:94-CV-2760-ODE, 1994 WL 794755, at *2 (N.D. Ga. Nov. 16, 1994) ("[I]t would be inappropriate to enter a protective order prohibiting [the plaintiff] from gathering information through a means which is independent from the discovery devices employed in this case," specifically the means of Georgia's Open Records Act (quoting *Carroll Anesthesia Assocs., PC. v. Quorum Health Resources, Inc.*, No. 1:93-cv-2185-ODE (N.D. Ga. July 6, 1994))).

The Seventh Circuit's decision in *American Bank v. City of Menasha* is instructive. 627 F.3d 261. There, American Bank sued the City of Menasha for violating federal securities laws. *Id.* at 263. Shortly after filing suit, American Bank submitted a public records request to the City under Wisconsin's analog to CORA, seeking records related to the subject of the lawsuit. *Id.* Instead of producing the requested records, the City sought—and the district court granted—a stay of discovery. *Id.*

As to the scope of the stay, the City argued that, while a newspaper would be free to request the records and publish them, the stay should "forbid American Bank to suggest to a newspaper that it request and publish

the records, or even hint at such a suggestion by telling a reporter that there might be some interesting stuff in the public records office about the City's misbegotten power-plant conversion project." *Id.* at 267. The Seventh Circuit (Judge Posner) recognized that a stay in this context was not only improper, but also raised First Amendment questions. *Id.*

Moreover, upholding the district court's stay would "create a precedent of unmanageable scope," as the court illustrated with the following hypotheticals:

> Suppose a newspaper reporter had requested and obtained records of the City's conversion fiasco but had not published anything. Could American Bank's lawyers ask him about what he had found in his search? Or would that be "discovery" too? What if the lawyers search Google under "City of Menasha securities litigation." Is that "discovery"—for if they do that, they will find articles that contain information about the litigation that they might find useful.

Id.

Wisconsin courts have highlighted similar flaws in barring open records requests because of pending litigation, recognizing that nothing "would preclude a person, not a party to the underlying litigation, from rightfully demanding the materials and then turning them over to the

litigants who otherwise would be denied them." *State ex rel. Lank v. Rzentkowski*, 141 Wis. 2d 846, 854 (Ct. App. 1987). Such a rule would reduce the open records law to "unenforceable stature and hold[] it out to ridicule rather than respect." *Id.*; *American Bank*, 627 F.3d at 267; *see also Nieto*, 993 P.2d at 501 ("[I]n construing a statute, [the Court] must seek to avoid an interpretation that leads to an absurd result."). For the same reasons, this Court should reject any rule falsely equating discovery requests with CORA requests.

C. CORA's Reference to "the order of any court" Contemplates Only Those Orders Referenced in the Act Itself.

Just as the Rules of Civil Procedure grant courts no general case management authority to limit a litigant's statutory right to access public records outside of court, neither does CORA itself. While the statute authorizes courts to prevent disclosure of open records, it does so in circumstances clearly specified by the statute, *not* as a matter of courts' general discretion in litigation involving public entities.

CORA specifies the circumstances under which a court order prevents disclosure of public records. *See People in Int. of A.A.T.*, 759 P.2d 853, 854 (Colo. App. 1988) ("The Act provides specific procedures for the filing of

actions in the district court to resolve disputes concerning the accessibility of records.").

Those whose CORA requests are denied "may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record." C.R.S. § 24-72-204(5)(a). Additionally, a records custodian may "apply to the district court for an order permitting him or her to restrict disclosure" of records protected under the "'deliberative process' privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government." C.R.S. § 24-72-204(3)(a)(XIII). A court would then "determine, based on the circumstances in the particular case, whether the public interest in honest and frank discussion within government is outweighed by the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." *Land Owners United, LLC v. Waters*, 293 P.3d 86, 96 (Colo. App. 2011), *as modified on denial of reh'g* (Sept. 29, 2011) (citing C.R.S. § 24–72–204(3)(a)(XIII)). Similarly, a records custodian who believes disclosure of a record "would do substantial injury to the public interest . . . may apply to the district court of the district in which such

record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited." C.R.S. § 24-72-204(6)(a). Under this provision, a records custodian could, for example, apply for a court order to prevent disclosure of a particular autopsy report on the grounds that it would be contrary to the public interest to release the report because the death occurred under suspicious circumstances and the investigation was still in early stages. *Denver Pub. Co. v. Dreyfus*, 520 P.2d 104, 107 (Colo. 1974). These are the provisions that contemplate an "order of any court" that could restrict or prohibit a specific disclosure of public records pursuant to CORA based on a court's consideration of the facts at hand and the competing interests involved.

None of these provisions contemplates court orders that prohibit the disclosure of public records otherwise available under CORA solely because the requester is a civil litigant. Because "the claim of entitlement to access to public records under [CORA] presents issues distinct from the issue of the discoverability of possible evidence for use in litigation," there is "no reason to attempt to saddle the litigation court with the determination of issues that

are different from the issues otherwise pending before it." *People in Int. of A.A.T.*, 759 P.2d at 855.

II. Treating Open Records Requests and Litigation Discovery As Separate Processes Respects Their Independent Purposes.

CORA and discovery are distinct tools that serve distinct purposes. Treating open records requests as litigation discovery requests contradicts the statute, ignores these important differences, and undermines the democratic purposes CORA serves.

That is why courts "uniformly refuse[] to define requests for access to federal or state public records under public records laws . . . as discovery demands, even when . . . the request is made for the purpose of obtaining information to aid in a litigation and is worded much like a discovery demand." *American Bank v. City of Menasha*, 627 F.3d at 265; *see, e.g.*, *Tighe v. City of Honolulu*, 55 Haw. 420, 424 (1974); *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 236 (Iowa 2019) (Appel, J., concurring specially) ("The public records act is generally distinct from our discovery rules.").

While discovery is directed toward "the elimination of surprise at trial, the discovery of relevant evidence, the simplification of issues, and the promotion of expeditious settlement of cases," *Hawkins v. Dist. Ct. In & For*

Fourth Jud. Dist., 638 P.2d 1372, 1375 (Colo. 1982), CORA is "directed toward 'regulation of the entirely different situation of the general exploration of public records by any citizen during general business hours.'" *Martinelli*, 199 Colo. at 177 (quoting *Tighe*, 55 Haw. at 424).

Discovery provides a structure for the exchange of private information in an inherently adversarial setting. Parties engaged in discovery are often incentivized to get as much private information from the other side as possible. *C.f.* Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. Legal Stud. 29, 32 (1995) (referring to parties' "strong incentive to take advantage of their right to discovery when informational asymmetries are impeding settlement"). In this context, the relevancy of a particular discovery request is paramount. And whether relevant information is discoverable depends on "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." C.R.C.P. 26(b)(1).

Open records requests are fundamentally different. First, CORA governs access only to *public* information. The information does not belong to the government; it belongs to us, the public. Record custodians hold public records *in trust* for all citizens of Colorado. Colo. Att'y Gen. Op. No. 01-1, 2001 WL 862582, at *4 (July 5, 2001). Thus all citizens of Colorado must have access to public records as provided for in the statute; treating open records like the government's private information is antithetical to CORA.

Second, for this reason, unlike in discovery, "[t]he particular purpose for which one seeks the public record is not relevant in determining whether disclosure is required" under CORA. *City of Colorado Springs v. White*, 967 P.2d 1042, 1056 (Colo. 1998); *Martinelli*, 199 Colo. at 176 ("The open records laws regulate, as a general matter, the inspection and copying of governmental records by 'any person,' without limitation as to the reason or reasons for which the inspection is undertaken." (internal citations omitted)).[1]

[1] The same is true for CORA's federal counterpart, the Freedom of Information Act ("FOIA"). *See Am. C.L. Union v. U.S. Dep't of Just.*, 655 F.3d 1, 15 n. 26 (D.C. Cir. 2011) ("[I]t is well settled that the identity of the requesting party and the purposes for which the request for information is made have no bearing on whether such information must be disclosed under FOIA." (internal citations and quotation marks omitted)); *In re Sealed Case*,

Third, applying the incentive structure of adversarial litigation to open records requests subverts CORA's democratic purposes. CORA was enacted with the recognition that "excessive government secrecy, especially when imposed arbitrarily by elected or administrative officials, can endanger the freedom of speech concept embodied in the [F]irst [A]mendment and may threaten democracy generally." Colo. Legis. Council, *Open Public Records for Colorado,* Res. Publ'n. No. 126, at xi ¶ 1 (1967). "Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so that government officials can be held accountable." *Doe v. City of Mansfield*, No. 22-3052, 2023 WL 1822208, at *4 (6th Cir. Feb. 8, 2023) (quoting *State ex rel. Fair Hous. Opportunities of Nw. Ohio v. Ohio Fair Plan*, 184 N.E.3d 952, 964 (Ohio 2022)). Access to information about the agencies charged with protecting our rights, safety, education, health, and environment, is essential to Coloradans developing informed opinions about the functioning of our

---

121 F.3d 729, 737 n. 5 (D.C. Cir. 1997) ("[T]he particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure."); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 n. 14 (D.C. Cir. 1977) ("A court's decision in a discovery case may rest in part on an assessment of the particularized need of the party seeking discovery, but in a FOIA suit, the court does not consider the needs of the requestor.").

government, the politicians we elect to represent us, and the steps we should take to organize and advocate for a better future. CORA *must* be available broadly in order to fulfill its purpose of "provid[ing] open government through disclosure of public records." *Wick Commc'ns Co. v. Montrose Cnty. Bd. of Cnty. Comm.*, 81 P.3d 360, 364 (Colo. 2003).

Finally, treating an open records request as a discovery request would have the perverse and absurd effect of conditioning access to public records on refraining from litigation against the government. A member of the public's ability to scrutinize public records should not be restricted at the very point at which he has reason to believe those records plausibly evidence some cognizable government wrong. The ACLU of Colorado and other organizations and individuals often utilize CORA requests to investigate allegations of wrongdoing or malfeasance; those investigations promote good governance, transparency, and accountability. At times, they lead to litigation, including while other CORA requests are pending. Handing another tool to public entities to refrain from disclosing public records under CORA, just at the moment when someone seeks to hold them accountable in litigation, would run counter to both the statute and the principles of democratic accountability.

III. A Clear Rule Is Necessary to Prevent Judicial Creation of a Litigation Exception to CORA That Does Not Exist.

Because the plaintiff here had not made use of his allotted discovery requests in litigation, the court of appeals stopped short of rejecting Archuleta's conflation of open records with discovery. *Roane*, ¶ 62. By resolving this case based on the fact that Roane had not propounded any discovery requests below, the court of appeals left open the possibility that discovery limits in the rules or a court order *could* restrict a litigant's access to CORA. While there might sometimes be wisdom in declining to resolve a question of statutory interpretation that will repeat time and again, this is not one of those cases.

Amici can attest to the broad importance of CORA to individuals, journalists, public interest advocacy organizations, and the larger public. And as the brief of CCI clearly demonstrates, the government considers compliance with CORA a burden. If the court of appeals' opinion is simply affirmed without the clarity Amici request, the surest outcome will be that every time a public entity is sued, it will move to restrict the plaintiff's access to CORA as a matter of standard practice. Indeed, this is largely already the case. *See, e.g.*, *Carranza et al. v. Reams*, No. 20-cv-00977-PAB, DE 48 (D. Colo.

Apr. 27, 2020) (in COVID conditions class action against Weld County Sheriff, denying Defendant's request for protective order precluding plaintiffs from issuing any future CORA/CCJRA requests relating to COVID-19 for the duration of the litigation); *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074-WYD-STV, DE 46 (D. Colo. Oct. 19, 2018) (seeking an order barring Masterpiece Cakeshop bakery owner Jack Phillips from requesting open records from Colorado Civil Rights Division, the Colorado Civil Rights Commission, and the Governor related to his charge of discrimination). Without clear guidance from this Court, at best, the result will be a patchwork of orders that inconsistently interfere with the public's right of access to open records under CORA. Such discovery rulings will be difficult to challenge on appeal, as they will be subject to abuse of discretion review with no real standard to judge them against. At worst, the result will be the judicial creation of a litigation exception to CORA that, as the court of appeals recognized, does not exist in the statute.

For all the reasons discussed above, either result would be contrary to CORA's text and undermine its democratic purposes. This Court should therefore join the many others that have recognized that civil litigants retain

the right to use public records laws in the same manner as any other person. *See, e.g. Mid-Atl. Recycling Techs., Inc. v. City of Vineland*, 222 F.R.D. 81, 85 (D.N.J. 2004) ("[D]ocuments that are 'governmental records' and subject to public access under OPRA are no less subject to public access because the requester filed a lawsuit against the governmental entity."); *Noland v. City of Albuquerque*, No. CIV-08-0056 JB LFG, 2009 WL 5217998, at *3 (D.N.M. Oct. 27, 2009) ("County Defendants state no sound reason supported by any relevant legal authority why [Plaintiff] cannot make requests for public information while his lawsuit is pending."); *Cnty. of Los Angeles v. Superior Ct. (Axelrad)*, 82 Cal. App. 4th 819, 826 (2000) ("[A] plaintiff who has filed suit against a public agency may, either directly or indirectly through a representative, file a [California Public Records Act] request for the purpose of obtaining documents for use in the plaintiff's civil action."); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 168 (3d Cir. 1993) ("Just as [intervener] could, consistent with the stay order, continue to research the factual underpinning for his claim in libraries or other institutions where publicly available information is stored, so he may also inspect and copy those court records which any member of the public has a right to view."); *see also Roane*, 2022 COA 143, ¶ 52 (citing additional cases). By affirming the

distinction between litigation discovery and CORA, this Court can ensure that the rules governing each "are not in conflict; they are in harmony." *Morrison v. City & Cnty. of Denver*, 80 F.R.D. 289, 291 (D. Colo. 1978).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed, and this Court should make clear that a party's ability to use CORA to access public records is independent from and not constrained by discovery in civil litigation. The only qualification CORA imposes on a requester's ability to obtain public records that were also available through discovery is the statutory restriction on recovering fees and costs. Amici urge this Court to hold that a person's ability to obtain records under CORA is not contingent on refraining from litigation against the public entity in possession of the records.

Respectfully submitted this 2nd day of January, 2024.

/s/ *Laura Moraff*

Timothy R. Macdonald, No. 29180
Anna I. Kurtz, No. 51525
Laura Moraff, No. 59218
AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF COLORADO
303 E. 17th Avenue, Suite 350
Denver, CO 80203
Telephone: (720) 402-3114
Email: tmacdonald@aclu-co.org
akurtz@aclu-co.org
lmoraff@aclu-co.org

Attorneys for Amici Curiae ACLU of Colorado and Colorado Freedom of Information Coalition

CERTIFICATE OF SERVICE

I hereby certify that, on January 2, 2024, a true and correct copy of the foregoing **AMICI CURIAE BRIEF OF ACLU OF COLORADO AND COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF RESPONDENT MATT ROANE** was served via the Colorado Courts E-Filing system upon:

Matt Roane, Esq.
mhroane@gmail.com

Todd A. Weaver, Esq.
tweaver@archuletacounty.org

Andrew D. Ringel, Esq.
ringela@hallevans.com

/s/ Mahima Chaudhary