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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▲**
Andrew D. Ringel, #24762 Hall & Evans, L.L.C. 1001 17th Street, Suite 300 Denver, Colorado 80202 Phone: (303) 628-3300 Fax: (303) 628-3368 ringela@hallevans.com Attorneys for Amicus Curiae Colorado Counties, Inc.	Case Number: 2023SC70

BRIEF IN SUPPORT OF PETITIONER FROM AMICUS CURIAE COLORADO COUNTIES, INC.

Dated: November 27, 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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ISSUE GRANTED

Colorado Counties, Inc. ("CCI") adopts the Issue Granted contained in the Opening Brief from Kristy Archuleta, in her official capacity as the Clerk and Recorder of Archuleta County ("Clerk and Recorder") ("Opening Brief").

STATEMENT OF THE CASE

CCI adopts the Statement of the Case contained in the Opening Brief.

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 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,*** 526 P.3d 220 (Colo. App. 2022) ("Opinion"). CCI seeks to participate to provide this Court with a statewide county government perspective on the significant issues raised by the Opinion. CCI is well-positioned to describe the impact of the Opinion's flawed interpretation and application of the Colorado Rules of Civil Procedure and CORA in this case on all of Colorado's counties.

CORA 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 of Arapahoe County); ***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 of Montrose County).

Counties may also be 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."). Based on these realities, CCI is well-positioned to provide this Court with a county perspective on the intersection of CORA and litigation.

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. Colorado's counties are subject to both CORA and litigation. Despite the

Opinion's suggestion, CORA and discovery are not separate processes to be treated as unrelated silos. Modern discovery practice under the Rules of Civil Procedure imposes a proportionality requirement, allowing limits to discovery based on the nature of the dispute and expressly includes consideration of costs, scope and amount at issue. The Rules empower District Courts to engage in case management specific to each case. This Court needs to permit the District Courts to consider the intersection between CORA and civil discovery as part of their existing specific case management analysis in cases involving public entities. The Opinion's ignoring the potential importance of CORA requests as adjuncts to litigation cannot remain the law in Colorado. If it does, all of Colorado's counties, and all of Colorado's public entities will unnecessarily suffer.

ARGUMENT

I. THIS COURT MUST DEFINE THE RELATIONSHIP BETWEEN THE COLORADO RULES OF CIVIL PROCEDURE GOVERNING DISCOVERY AND THE COLORADO OPEN RECORDS ACT

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 must define the relationship between civil discovery and CORA in its decision in this matter.

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 District Courts 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 Opinion fails to consider or address these animating principles governing civil discovery and inappropriately curtails the discretion of District Courts to manage cases. While the Opinion 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 simultaneously 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.").

This Court must 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.").[1] District Courts in Colorado have the same ability to manage discovery pursuant to Rule 16 which should include the ability 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,"

[1] *See also* ***Hutter v. Fox,*** 2019 U.S. Dist. LEXIS 198052, at *14 (W.D. Wis. Nov. 15, 2019) (differentiating between open records act request and discovery request and denying motion to compel response to open records request in litigation); ***Independence Inst. v. Gessler,*** 2013 U.S. Dist. LEXIS 81833, at *2 (D. Colo. June 11, 2013) (discussing withdrawal of CORA request for billing records in favor of a discovery request under the Federal Rules of Civil Procedure).

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); ***American Water Dev., Inc. v. City of Alamosa,*** 874 P.2d 352, 375 n. 38 (Colo. 1994) ("Rule 16 . . . permitting pretrial procedures, can achieve its purpose of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation. The trial judge must be permitted wide latitude in guiding a case through its preparatory stages." (quoting 3 James Wm. Moore et. al., Moore's Federal Practice P. 16.19 (2d ed. 1993)). 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.[2]

Unless District Courts are 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

[2] Similar issues may also arise related to records requested pursuant to the Colorado Criminal Justice Records Act ("CCJRA"), C.R.S. § 24-72-303, when a party to the litigation is a custodian of records within the meaning of the CCJRA. For counties, this occurs when CCJRA records are requested from the Sheriff.

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.").

For example, consider a C.R.C.P. 106.5 action involving an inmate's challenge to a Code of Penal Discipline ("COPD") conviction. In all such cases, the Executive Director of the Colorado Department of Corrections ("CDOC") is a required party. *See* C.R.C.P. 106.5(b). Discovery is not permitted in such an action and review is limited to the certified record before the District Court. ***Colorado Springs v. District Court of Cnty. of El Paso,*** 519 P.2d 325, 327 (Colo. 1974); ***Cline v. Boulder,*** 532 P.2d 770, 772 (Colo. App. 1975). Because the CDOC Executive Director is subject to CORA and CCJRA requests, unless the District Court has the authority under the Rules of Civil Procedure generally, and specifically under Rule 16 and Rule 26, to address an inmate's effort to obtain extra-record discovery by using CORA and CCJRA requests, the purposes of C.R.C.P. 106.5 cannot be met. Instead of a streamlined review of the COPD conviction based on the certified record, extrinsic issues will undoubtedly be litigated (or at least attempted), obviating the process contemplated by the Rule.

Based on such considerations, District Courts should be allowed to issue appropriate orders in litigation to address how CORA requests will be treated in connection with civil discovery. The overarching principle should be a litigant should not be able to use CORA to avoid the discovery rules. *Compare* ***Word of Faith Outreach Center Church, Inc. v. Morales,*** 143 F.R.D. 109, 117 (W.D. Tex. 1992) ("The Attorney General has not only used the Open Records Act to avoid discovery rules, he has abused those discovery rules and undermined this Court's attempt to encourage lawyers to behave as responsible adults and conserve judicial resources by resolving their own discovery disputes."). This Court should empower District Courts to address CORA in the context of their duty to manage discovery in an effective manner pursuant to the tools provided by the Rules of Civil Procedure.

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. Additionally, 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); ***Strom v. Weiser,*** 2021 U.S. Dist. LEXIS 228314, at *6-7 (D. Colo. Feb. 18, 2021) (discussing stay of discovery under the CGIA pursuant to C.R.S. § 24-10-108 and 118(2.5) until issue of sovereign immunity is resolved). This Court needs to provide appropriate guidance in these areas for the District Courts.

Absent guidance from this Court, the District Courts are left without the tools to manage potential circumvention of a stay under the CGIA or another provision of law. For example, faced with such a situation, a federal court granted a motion for a protective order precluding an open records act request be made against a party defendant when a stay of discovery was in place in the litigation. ***Smith v. City of Wellsville,*** 2020 U.S. Dist. LEXIS 20116, at *3-4 (D. Kan. Feb. 6, 2020). The Opinion ignores the authority the District Court possesses under C.R.C.P. 16,

C.R.C.P. 26, and generally under the Rules of Civil Procedure, to manage the cases before it to ensure no litigant is inappropriately circumventing the orders of the District Court concerning discovery with a CORA request to a public entity litigant.

In sum, the modern Rules of Civil Procedure are designed to empower District Courts to actively manage cases and to tailor discovery, pretrial proceedings, and case management to the specific circumstances of each case. The Rules should allow District Courts to consider the intersection of civil discovery and CORA requests. This Court needs to provide clear guidance and appropriate parameters reminding the District Courts of their robust case management authority in this regard, authority unrecognized and unconsidered by the Court of Appeals in its Opinion. Absent the District Courts being able to address the propriety of CORA requests made in the context of litigation, public entities in Colorado will be left having to respond to CORA requests while litigating against the same or an aligned party. Such a result is fundamentally inconsistent with the Rules of Civil Procedure, principles of judicial economy and fairness.

CONCLUSION

In conclusion, for all the foregoing reasons, Colorado Counties, Inc. respectfully requests this Court reverse the Court of Appeals' decision, and for all other and further relief as this Court deems just and appropriate.

Dated this 27th day of November, 2023.

Respectfully submitted,

/s/ Andrew D. Ringel .
Andrew D. Ringel, #24762
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, Colorado 80202
Phone: (303) 628-3300
Fax: (303) 628-3368
Email: ringela@hallevans.com

ATTORNEYS FOR AMICUS CURIAE COLORADO COUNTIES, INC.

CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on this 27th day of November, 2023, I served the foregoing **BRIEF IN SUPPORT OF PETITIONER FROM AMICUS CURIAE COLORADO COUNTIES, INC.** on the Clerk of this Court, and served a copy of the foregoing via the Colorado Courts E-Filing System, on the following:

Matt Roane, Esq.
mhroane@gmail.com

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

/s/ Nicole Marion
Nicole Marion
Hall & Evans, L.L.C.