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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from Larimer County District Court Hon. Gregory M. Lammons Case No. 2021CV183	
Plaintiff/Appellee: MICHELE DIPIETRO, v. **Defendants/Appellants:** DELYNN COLDIRON, in her official capacity; MOSES GARCIA, in his official capacity; and the CITY OF LOVELAND, COLORADO.	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF APPELLANTS DELYNN COLDIRON, MOSES GARCIA, AND THE CITY OF LOVELAND

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 28(a)(2-3), C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

☑ It contains 4,312 words (does not exceed 4,750 words).

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

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

/s/ Robert D. Sheesley
Robert D. Sheesley, #47150

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The Colorado Municipal League ("CML") respectfully submits the following *Amicus Curiae* Brief in Support of Appellants Delynn Coldiron and Moses Garcia, in their official capacities, and the City of Loveland.

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 104 home rule municipalities, 167 of the 169 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

CML's member municipalities are entitled to rely on the attorney-client and deliberative process privileges to obtain legal advice and engage in candid, sensitive discussions to advance the public interest. CML's members routinely respond to record requests submitted pursuant to the Colorado Open Records Act, C.R.S. §§ 24-72-200.1 to –206. The statutory prohibition of the disclosure of privileged records has long been understood to protect privileged public records from disclosure to third parties who do not hold the privilege. This Court's opinion will impact the ability of the state and all political subdivisions to efficiently and effectively provide services for the public's benefit.

SUMMARY OF ARGUMENT

The attorney-client privilege and the deliberative process privilege are essential to a Colorado government's operation and the public interest. Even with a preference for open access to public records, the Colorado Open Records Act, C.R.S. §§ 24-72-200.1 to -206 ("CORA"), incorporates and respects these privileges. CORA, through C.R.S. § 24-72-204(3)(a) ("Subsection 3(a)"), prohibits the disclosure of 23 categories of records, including records subject to the attorney-client privilege (subsection IV) and the deliberative process privilege (subsection XIII). The trial court erred by ignoring CORA's ambiguity and misconstruing the limited exception that permits a "person in interest" to access privileged records covered by Subsection 3(a). CORA cannot reasonably be construed to grant access to privileged records by a person who is not the beneficiary of the applicable privilege. The trial court's construction of CORA destroys these privileges and would cause substantial harm to the public interest.

ARGUMENT

I. C.R.S. § 24-72-204(3)(a) is ambiguous and no reasonable construction can result in the release of privileged documents to a person who is not entitled to assert the privilege.

CORA requires that the records custodian deny access to records subject to a privilege, including common law privileges like the attorney-client privilege and the deliberative process privilege. C.R.S. § 24-72-204(3)(a)(IV), (XIII); *City of Colo. Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998) (citing *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987)). Although CORA has always allowed a "person in interest" (i.e., the "subject of a record," per C.R.S.§ 24-72-202(4), to inspect some records that otherwise cannot be disclosed, nothing in CORA's 54-year history suggests that a person is entitled to access a privileged record simply because they are discussed in the record. Privileges of non-disclosure exist to protect the interests of the beneficiary of that privilege, not persons discussed in a privileged document. *See Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982) (noting that "the attorney-client privilege exists for the personal benefit and protection of the client who holds the privilege"). The General Assembly never intended to incorporate common law privileges into CORA while simultaneously obliterating the privileges through an ambiguous exception.

The trial court erred by failing to recognize and resolve CORA's multiple pertinent ambiguities. *Cf. City of Westminster v. Dogan Constr. Co., Inc.*, 930 P.2d 585, 591 (Colo. 1997) (rejecting Court of Appeals' literal interpretation of the term "letters" that would have excluded a person's own handwritten notes). After its ambiguous inclusion in its introductory clause, Subsection 3(a) specifically discusses access by a "person in interest" in only a few of the 23 categories of records that it prohibits from disclosure. The absence of specific references in the remaining categories makes the statute unclear. Further, Subsection 3(a) permits access to a "person in interest…in accordance with" the subsection, suggesting that the exception requires further statutory permission to move past Subsection 3(a)'s general prohibition; otherwise, this phrase has no meaning at all.

Finally, the meaning of "person in interest" or "subject of a record" is ambiguous with respect to records in the government's possession that are subject to a privilege held by the government. A person who is discussed in or even the cause of the record's creation is not necessarily the "subject" of the record. *Cf. Mayor of Balt. v. Md. Comm. Against Gun Ban*, 617 A.2d 1040, 1047 (Md. 1993) (interpreting similar "person in interest" definition in Maryland records law to include only the police officer subject to an internal police investigation); *Briscoe v. Mayor of Balt.*, 640 A.2d 226, 231 (Md. Ct. Spec. App. 1994) (finding person

whose complaint instigated excessive force investigation was not a "person interest" for investigation records under Maryland records law). The trial court should have acknowledged that the "subject" of a privileged record would be the holder of the privilege or the person whose private information is involved.

The trial court also should have recognized the need to construe CORA under the principle that courts must avoid a statutory construction that leads to an absurd result. *See Arapahoe Cnty. Dep't of Human Servs. v. Velarde*, 507 P.3d 518, 521 (Colo. 2022) (citing *Dep't of Revenue v. Agilent Techs., Inc.*, 441 P.3d 1012, 1016 (2019)); *Cisneros v. Elder*, 506 P.3d 828, 831 (Colo. 2022). The trial court failed to consider the nature of the privileges involved and to give appropriate weight to the impact of its interpretation. The resulting interpretation creates such an unintended "absurd result" that would cause substantial harm to the public interest and must be avoided.

CORA's prohibitions on the disclosure of records, including privileged records, and the right of a "person in interest" to access to limited categories of records, originated in the report of the Committee on Open Public Records appointed by the General Assembly in 1967. *See Dogan Constr. Co.*, 930 P.2d at 591 (relying on report for guidance in interpreting CORA). The committee's recommended legislation prohibited the disclosure of certain records "unless

otherwise provided by law, provided that any records available to the person in interest under this subsection shall also be available for inspection by others if such person in interest has given his consent . . . .” Colorado Legislative Council, Report to the Colorado General Assembly of 1967, Research Publication No. 126 at xxii. The report explained the committee’s recommended legislation, including prohibitions on the disclosure of five categories of records the committee described as “privileged, confidential, personal or private nature information”: medical, psychological, and scholastic achievement data; personnel files; letters of reference; trade secrets, privileged information, and confidential information; and library and museum material. *Id.* at xvii, xxii-xxiii. Of these categories, the committee discussed access by the “person in interest” to medical, psychological, and scholastic data, and personnel files. *Id*. The committee specifically declined to authorize disclosure of letters of reference to “person in interest” (an issue addressed by the General Assembly in 1969) and did not reference such a disclosure with respect to privileged information. *Id.* at xvii.

The General Assembly adopted a version of Subsection 3(a) that began, “The custodian shall deny the right of inspection of the following records, unless otherwise provided by law, provided that any of the following records shall be available to the person in interest under this subsection . . . .” Colo. Sess. Laws

1968, ch. 66, § 4(3)(a) at 203. In 1969, the General Assembly replaced "provided" with "except" and inserted the phrase "other than letters of reference concerning employment, licensing, or issuance of permits" into Subsection 3(a)'s introductory clause, rather than in the category for letters of reference. 1969 Colo. Sess. Laws 1969, ch. 265, § 4(3)(a) at 925. The final phrase "under this subsection" changed to "pursuant to this subsection" in 2018, and then to "in accordance with this subsection" in 2021. Colo. Sess. Laws 2021, ch. 279, § 24-72-204(3)(a)(XXIII) at 1614; Colo. Sess. Laws 2018, ch. 281, § 24-72-204(3)(a) at 1760.

Over 54 years, the list of records that a custodian cannot disclose has grown from 5 to 23 categories in an inconsistent manner that highlights CORA's ambiguity. For example, in 1999, when the General Assembly partially codified the deliberative process privilege, the General Assembly also prohibited the disclosure of veterinary medical records of privately owned animals and records of sexual harassment investigations through Subsection 3(a). Colo. Sess. Laws, ch. 73, § 24-72-204(3)(a)(X), (XIII) at 207-08; Colo. Sess. Laws 1999, ch. 127, § 24-72-204(3)(a)(XIV) at 370-71. In the same session and, in one case, the same act, the General Assembly did not include any concept of a "person in interest" with respect to the deliberative process privilege, but, for both sexual harassment and veterinary records, specifically addressed access by a "person in interest" by

defining persons who could be considered a "person in interest." *Compare* C.R.S. §§ 24-72-204(3)(a)(XII), (XIV) *with* C.R.S. § 24-72-204(3)(a)(XIII).

As another example of Subsection 3(a)'s ambiguity, in 2019, the General Assembly created the Office of Legislative Workplace Relations to investigate complaints of workplace harassment in the General Assembly and legislative staff agencies. Colo. Sess. Laws 2019, ch. 24 at 2377. Despite explicitly excluding the office's records from the definition of "public records," the General Assembly chose to explicitly prohibit the disclosure of these non-public records under Subsection 3(a). C.R.S. § 2-3-511(3); C.R.S. § 24-6-204(3)(a)(X.5). The complete prohibition on disclosure in C.R.S. § 2-3-511(3) does not include an exception allowing access by a "person in interest" and the corresponding prohibition in Subsection 3(a) does not refer to a "person in interest." However, another prohibition under Subsection 3(a) specifically permits access to sexual harassment complaint records involving any other governmental entity by a "person in interest" who may be either the complainant or the subject of the complaint. *See* C.R.S. § 24-72-204(3)(a)(X) If the General Assembly intended all categories of records in Subsection 3(a) to be accessible by a person in interest, it would have uniformly addressed such access in each category.

The most recent amendment to Subsection 3(a), in 2021, suggests that a "person in interest" is not privy to all records that are protected from disclosure even if the person could be viewed as a subject of the record. Colo. Sess. Laws 2021, ch. 279 at 1606-15 ("H.B. 21-1181"). H.B. 21-1181 created the Voluntary Soil Health Program Act, C.R.S. §§ 35-73-101 to -108, which prohibits the disclosure of records created or maintained in connection with the state's soil health program if the records could identify specific landowners or parcels of land; there is no exception allowing access by the owner of such land. C.R.S. § 35-73-107. In addition to modifying the introductory clause, H.B. 21-1181 also amended Subsection 3(a) to include a new subsection XXIII that mirrors the prohibition in the Voluntary Soil Health Program Act, without any specific reference to access by a "person in interest." C.R.S. § 24-72-204(3)(a)(XXIII). The General Assembly would not have enacted an absolute prohibition on the disclosure of records in C.R.S. § 35-73-10, and then immediately created an inconsistent exception simply by locating the same prohibition in Subsection 3(a).

The trial court incorrectly disregarded these conspicuous disparities and inconsistencies. As discussed below, the trial court's orders create an absurd result that should be reversed. The very nature of the attorney-client and deliberative process privileges indicates that the only "person in interest" or "subject" of a

record protected by a government privilege is the government as the beneficiary of the privilege. The primary subject of a privileged record is the government; any other person discussed in the document is tangential to the government as the subject matter of the document. Further, the public interest would be substantially harmed by permitting persons outside the scope of a privilege to have unfettered access to privileged material.

II. Destroying the attorney-client and deliberative process privileges through an unreasonable interpretation of C.R.S. § 24-72-204(3)(a) would substantially harm the public interest and hinder the operation of government.

In the instant case, the trial court determined that both privileges applied, but erred in finding that Subsection 3(a) unambiguously created exceptions to those privileges that allowed a third party to access privileged records. This result is manifestly absurd and unreasonable and contravenes the General Assembly's intent in incorporating these common law privileges in CORA. CML respectfully submits that this Court should uphold the attorney-client and deliberative process privileges in the absence of any recognized judicial or definitive statutory exception. If the trial court's rulings are upheld, Colorado governments and the public interests they serve would suffer severe consequences.

A. The attorney-client privilege protects the orderly administration of justice and serves the public interest.

CORA incorporates the common law attorney-client privilege in Subsection 3(a), along with the privilege for attorney work product. *See City of Colo. Springs v. White*, 967 P.2d 1042 (Colo. 1998) (recognizing the incorporation of the common law privileges in CORA); *see also Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. App. 1987). The attorney-client privilege is a common law privilege codified at C.R.S. § 13-90-107(1)(b) that serves to protect communications between an attorney and their client pertaining to legal advice. *All. Constr. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 864 (Colo. 2002).

Governments are entitled to confidentiality in their communications with attorneys just like any other person in Colorado. *See Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. 2019) (citing *All. Constr. Sols.*, 54 P.3d at 865-70 and *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)). The privilege allows a government to receive legal advice, ensure compliance with the law, and communicate through multiple constituent persons who operate the organizational client. *See Denver Post*, 739 P.2d at 880 (applying rationale from *Upjohn Co. v. United States*, 449 U.S. 383 (1981) to protect certain communications between state university counsel and state university employees). A government client and attorney must be able to rely with certainty on the

protection; otherwise, the privilege "is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

The attorney-client privilege serves to encourage a person or organization to obtain legal assistance or advice in a timely manner. *See Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court for Denver*, 718 P.2d 1044, 1047 (Colo. 1986). "[W]ithout the protection the privilege provides to such confidential communications, 'clients may be reluctant or unwilling to seek legal advice or to confide fully in their attorney.'" *Id.* (quoting *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001)). The open exchange of information between attorney and client facilitates a full understanding of the facts and, in turn, an attorney's effective representation of their client. This confidential exchange of information is so imperative that the Colorado Supreme Court recognized that "the right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client are ordinarily protected from later disclosure without client consent." *Wesp*, 33 P.3d at 196.

Although the attorney-client privilege is not absolute and is subject to certain exceptions not at issue in this case, the Colorado Supreme Court has refused to create an exception that "would swallow the protections of the privilege and undermine its purpose." *See id.* at 201. Rejecting a "manifest injustice standard,"

the Court declined to create an unpredictable standard without legislative approval. *Id.* Despite the General Assembly's goal of allowing broad access to public records, the essential purpose and long history of the attorney-client privilege suggests that the General Assembly would not create such a broad exception to the privilege using the ambiguous language of Subsection 3(a).

B. The deliberative process privilege serves the public interest by enhancing the government's decision-making process.

The General Assembly expressly included the deliberative process privilege in Subsection 3(a) in 1999 after the Colorado Supreme Court recognized the common law deliberative process privilege in *City of Colorado Springs v. White*, 967 P.2d 1042, 1050 (Colo. 1998). C.R.S. § 24-72-204(3)(a)(XIII). Subsection 3(a) partially codifies, but does not entirely supplant, the common law privilege. *Land Owners United, LLC v. Waters*, 293 P.3d 86, 95 (Colo. App. 2011).

Unique to the government setting, the deliberative process privilege is meant "to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future." *White*, 967 P.2d at 1046, 1051. The privilege serves the public interest in sound decision-making by ensuring that subordinates will offer decision makers with "uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism," that partially formulated policies are not

prematurely disclosed, and that the public are not misled by the disclosure of rationales or concepts that are not adopted by the decision maker. *Id.* at 1051 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Unlike the attorney-client privilege, the common law deliberative process privilege contains an inherent exception based on the competing interests of the government and the person seeking access. The privilege can be overcome if the person seeking disclosure shows that their "interests in disclosure of the materials is greater than the government's interest in their confidentiality." *Id.* at 1054 (listing relevant non-exclusive factors). Subsection 3(a) incorporates a similar balancing test, requiring a court to determine whether "disclosure of the records would cause substantial injury to the public interest" by weighing "based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." C.R.S. § 24-72-204(3)(a)(XIII). If the balance weighs in favor of the government, the materials would be protected from disclosure under CORA. *Id.* Neither the Colorado Supreme Court nor the General Assembly, in codifying the privilege, referenced disclosure to a "person in interest."

The trial court acknowledged that certain records in the instant case were protected by the deliberative process privilege and their disclosure would stifle frank and honest discussions within the government. Appellant's Appendix at p. 003. Engaging in the balancing test required by Subsection 3(a), the trial court found that the public disclosure of the records to the "public writ large" would cause substantial injury to the public interest, but still held that the Appellee, in her private interest, could access the records with no limitations on the use or dissemination of the records. *Id.* Subsection 3(a), however, required the court to evaluate the harm caused by any disclosure of a record, not disclosure to the "public writ large." C.R.S. § 24-72-204(3)(a)(XIII). Once the Appellee receives the records, the privilege is destroyed because the Appellee can disclose the records to anyone she sees fit.

C. The trial court's interpretation of CORA reaches an absurd and unjust result.

The trial court's ruling creates the absurd result in which a government cannot use writings to communicate with its attorneys or deliberate on predecisional matters without risking disclosure of privileged formation if the communication discusses a third party. If affirmed, the trial court's ruling will have far-reaching detrimental effects on nearly all aspects of government operations.

First, relying on oral communications (which are not public records) to receive and provide legal advice or to deliberate is unreasonable and inefficient, especially in the context of a government organization that relies on multiple constituents to perform its work. With increasing reliance on e-mail and remote work, governments are more likely to communicate in writing, both internally and with attorneys, to facilitate efficiency and thorough discussions. If only oral communications are protected, both the client and attorney would have to be available to speak at the same time and neither can write, record, or even leave a voicemail discussing the client's concerns or the attorney's advice. This process would have to be repeated for every constituent of the organization involved and for every new question or development. Without a writing, the government would have no historical records on which to rely should either the attorney or constituent employee leave.

Second, the trial court's ruling would have the effect of limiting a government's access to legal advice and the competence of any legal advice obtained. Consulting an attorney in a manner that protects the privilege would be a time-consuming, burdensome, and likely ineffective activity. Attorneys would be inhibited in fulfilling their professional responsibilities to their government clients. The result would be an increased risk of costly litigation, injury to the public and

public employees, damages awards funded by taxpayers, non-compliance with the law, and a loss of public trust.

Third, the public interest would be substantially harmed both by the unfair advantage given to a third party "person in interest" and by the inhibition on candid deliberations if a third party discussed in a privileged writing is permitted to access the writing discussing that person. The third party's personal interests are directly antagonistic to the public interest served by preserving the privileges. The third party's private interest would be inappropriately elevated above the public interest because the third party would receive unfair insights into government employees' candid thoughts, evaluations of potential legal weaknesses or threats to the government, or learn of the government's negotiating limits. The government's ability to make sound decisions and to comply with the law would be undermined if staff members avoid frank discussions or consultations with an attorney.

Consider the following common scenarios in which the government relies on written communications, all of which would be placed at risk if the trial court's rulings are affirmed:

- When a municipality receives an application for a business license or a land development approval, municipal staff from multiple disciplines (e.g., planning, building officials, law enforcement, engineering) evaluate

and offer comments on the application. Any written communications revealing disagreement among the staff or identifying issues that the third party could use to its advantage over the government might be disclosable. If staff members hesitate to use written communications to discuss their concerns, the process would be delayed, the quality of the government's evaluation for the public's benefit is undermined, the rights of other interested parties in a proceeding are impacted, and there is no written reference for any future discussion. Staff members might avoid consulting with an attorney or might receive ineffective counsel, potentially risking compliance issues and the invalidation of the government's decision. If the application is subject to an administrative hearing, the government attorney's materials and strategy for the hearing could be obtained by the applicant to create an uneven playing field.

- A government purchasing property on which to build a recreation center engages in difficult negotiations with the property owner to obtain the best value for the taxpayers' dollars. Writings reflecting deliberations among municipal staff and recommendations to decision makers may reflect the municipality's negotiating range and limitations on its options. If a property owner can obtain those writings, the government could lose

any advantage and leverage in negotiations, thereby compromising the expenditure of taxpayer dollars.

- After an accident on municipal property involving injury to a third party, the municipal attorney prepares a memorandum at the city or town manager's request detailing the municipality's potential liability and risk and outlining settlement options. Even if the memorandum is not admissible as evidence, the injured party would be permitted to preview the municipality's litigation strategy and evaluation of weaknesses and therefore gain an unfair advantage in settlement negotiations and future litigation. If the municipality is afraid to request this information from its attorney, it might lose options for an early, cost-effective resolution.

In each of these circumstances, and many more, the harms of disclosure to a third party "person in interest" are precisely those harms that the privileges are designed to prevent.

Fourth, if CORA mandates the disclosure of the government's privileged information to a third party, it is possible that the government's right to assert the privilege against any other person is waived. *See Wesp*, 33 P.3d at 198 (discussing the implied waiver of the privilege by disclosure of materials to a third party). Even if the disclosure does not legally waive the privilege, the privileged record

has been made public with no restrictions on the future use or disclosure of the communication by the "person in interest." This actual or de facto loss of the privilege results in a substantial harm to a government and the public it serves.

The General Assembly never intended to create these exceptions and cause such drastic harm to the public interest. A construction of Subsection 3(a) that protects privileged documents, except when the privilege would be applied to a potential adversary, is absurd and unreasonable. Reading a broad exception to the attorney-client and deliberative process privileges into Subsection 3(a) would compromise a municipality's ability to be fiscally responsible, to protect itself from unnecessary liability, to plan and innovate, and to be a good steward of municipal resources. There are only two reasonable constructions of Subsection 3(a): (1) CORA does not permit blanket access to all categories of records described in Subsection 3(a) by a "person in interest;" or (2) for a privileged record, only the beneficiary of the privilege is the "person in interest."

CONCLUSION

CORA intends to maintain the attorney-client privilege, the deliberative process privilege, and other common law privileges unless a clear statutory exception applies. The trial court erred by refusing to recognize CORA's ambiguity and relying on a superficial construction of Subsection 3(a) that reaches

an absurd result that would destroy the privileges in a manner not intended by the General Assembly. CML urges this Court to hold that documents protected by either the deliberative process privilege or the attorney client privilege are not subject to disclosure to a person discussed in the record under CORA.

Dated this June 16, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this June 16, 2022, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF APPELLANTS DELYNN COLDIRON, MOSES GARCIA, AND THE CITY OF LOVELAND** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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