SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203 BY THE COURT OF APPEALS Freyre, Taubman, and Plank, JJ. Case Number: 2016COA140 Appeal from the District Court, City and County of Denver Judge Elizabeth A. Starrs Case No. 2014CV33332 **Petitioner:** CITY AND COUNTY OF DENVER, COLORADO v. **Respondent:** SEAN DENNIS, AS CONSERVATOR AND ON BEHALF OF DOREEN HEYBOER	**▲ COURT USE ONLY ▲** Case Number: 2016SC000851
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AMICUS BRIEF IN SUPPORT OF CITY AND COUNTY OF DENVER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that this brief complies with C.A.R. 29(d) because it contains 3,681 words.

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The Colorado Intergovernmental Risk Sharing Agency ("CIRSA"), the Colorado Municipal League ("CML" or the "League"), and the State of Colorado (the "State") appear by their undersigned attorneys and, pursuant to C.A.R. 29, submit this brief in support of the City and County of Denver.

INTEREST OF THE *AMICI CURIAE*

CIRSA is a public entity self-insurance pool providing property, liability, and workers' compensation coverages throughout the State of Colorado. Formed in 1982 by 18 municipalities, it now serves nearly 300 member municipalities and affiliated legal entities. CIRSA is not an insurance company, but an entity created by intergovernmental agreement of its neighbors as provided for by COLO.REV.STAT. § 24-10-115.5. In addition to various coverages and associated risk management services, CIRSA provides its members sample publications, training, and consultation services. Member cities and towns govern CIRSA and support it through financial contributions. The contributions pay for covered claims against the members and their officers and employees. The contributions are also used to buy certain excess insurance or reinsurance coverage.

CML was formed in 1923. The League in a non-profit, voluntary association of 269 of the 272 municipalities located through the State of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 168 of the 171 statutory municipalities and the lone

territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The State and its departments, employees, agencies, and political subdivisions provide essential public services and functions and rely on the Colorado Governmental Immunity Act ("CGIA"), COLO.REV.STAT. § 24-10-101, *et seq.*, to prevent the disruption in these services and functions and to prevent increases in the cost of providing them. The State has created a risk management fund that is required to defend and indemnify the state, state officials, and state employees "pursuant to the 'Colorado Governmental Immunity Act.'" COLO.REV.STAT. § 24-30-1510(3)(a). The State, through the Colorado Department of Transportation ("CDOT"), maintains over nine thousand miles of roadway in Colorado.

Participation by *amici* is intended to provide the Court with a statewide perspective because the outcome of this case will likely have an impact on all cities and towns in Colorado, as well as the State itself. Though the instant case involves only the City and County of Denver, the State, along with all municipalities therein, including CIRSA and CML members, are responsible for the maintenance and repair of roadways within their respective jurisdictions, and are often involved in similar litigation to the one at bar.

The Court of Appeals' expansive interpretation of the meaning of "unreasonable risk" in determining whether a municipality has waived governmental immunity under the CGIA affects these entities directly and substantially. Specifically, the Court of Appeals' opinion inappropriately defines "unreasonable risk" for purposes of determining whether the condition of a public roadway is dangerous and thereby constitutes a waiver of immunity for governmental entities. The Court of Appeals' expansive definition is contrary to the plain language of the statute and is the opposite of what the General Assembly intended in establishing a waiver of governmental immunity for a "dangerous condition of a public highway, road, or street." COLO.REV.STAT. § 24-10-106(1)(d)(I). This interpretation of the CGIA will cause CIRSA and CML members, and the State, to expend resources to constantly monitor the conditions of roadways and repair or replace each and every condition of a roadway that does not conform to "the same general state of repair or efficiency as it was originally constructed." *Dennis v. City and County of Denver*, 2016COA140, ¶ 36. In other words, all roadways in Colorado must be kept in "as new" condition or immunity is waived. The diversion of resources to monitor, repair and replace roadways will have an immediate and negative impact the ability of the *amicus* entities to effectively budget for and fund other valuable and necessary public projects.

The General Assembly (and, by extension, courts interpreting its legislation) understood it was necessary to weigh that inequity against the prospect that greater liability for the government "could disrupt or make prohibitively expensive the provision of such essential public services and functions." COLO.REV.STAT. § 24-10-102. The taxpayers will ultimately bear the fiscal burdens of unlimited liability. *Id*. The Court of Appeals' interpretation thus runs contrary to the plain language of the statute and one of the primary purposes of the CGIA, namely: "to protect the taxpayers against excessive fiscal burdens." *Id*.

I. ARGUMENT

This brief will focus on how the Court of Appeals' interpretation of the phrase "unreasonable risk," as it relates to whether there exists a "dangerous condition" on a public roadway under COLO.REV.STAT. § 24-10-106(1)(d)(I), conflicts with the plain language of the statute, the legislative intent underlying the creation of the CGIA, and this Court's precedent as it relates to this statutory provision.

Colorado's General Assembly enacted the CGIA to protect taxpayers from excessive and unpredictable fiscal burdens associated with the efficient functioning of public entities. This Court has thus recognized that such entities only waive their governmental immunity for injuries resulting from a "dangerous condition" of a public roadway where a plaintiff demonstrates that the dangerous condition in

question presents "an unreasonable risk to the health and safety of the public." COLO.REV.STAT. §§ 24-10-106(1)(d)(I), 24-10-103(1.3).

The Court of Appeals' opinion sweeps far too broadly by holding that a risk is "unreasonable" when a roadway has changed in any way from its original state. By eliminating the requirement that a plaintiff prove that the condition complained of poses an unreasonable risk, the opinion is contrary to the statute's plain language. It also runs afoul of the purpose of the CGIA by unacceptably expanding the potential for a public entity's liability for a plaintiff's injury. For these reasons, *amici* respectfully request that this Court reverse the Court of Appeals and remand this matter for further findings consistent with a determination that in order to prove a waiver of immunity for the "dangerous condition of a highway," plaintiffs must present evidence showing that the condition of the roadway actually posed an unreasonable risk of harm, not simply that the roadway was not in its "as constructed" condition.

A. The Court of Appeals' decision is contrary to the General Assembly's long-standing policy of protecting taxpayers against excessive and unpredictable fiscal burdens.

If immunity is waived for injuries allegedly caused by any change in the condition of a roadway from its original state, public entities must either expend resources to ensure that all roadways within its boundaries are constantly

monitored and repaired (or replaced)[1] to their condition as initially constructed,[2] or suffer the loss of governmental immunity. For a city the size of Denver, this task would be herculean in terms of cost and manpower. For the State of Colorado, which oversees more than nine thousand miles of mainline roads,[3] the obligation will be even more difficult and expensive. CDOT estimates that it would cost approximately seven billion dollars over a five-year period to achieve "as constructed" conditions on its mainline roadways. Maintaining CDOT's mainline roadways at that level would cost one billion dollars yearly. Restoring Colorado bridges to an "as constructed" condition would cost an additional seven billion dollars plus $360 million yearly for maintenance.[4] To put these figures in context, CDOT's total budget for fiscal year 2017 is $1.4 billion.

[1] It is not clear that a repair, no matter how well done, would be sufficient to satisfy the Court of Appeals' requirement that the roadway must at all times be kept in the same state of being or repair as when it was originally constructed, as even the best repairs to a roadway are likely to differ slightly from the original roadway in terms of quality, color, shape, type of materials (e.g., hot asphalt versus cold mix asphalt), height of repair, or in other ways. Accordingly, the only way to ensure that a changed roadway is in its original state may be to replace it, resulting in exponentially higher costs to the government entity.

[2] This standard—that roads must be maintained as originally constructed—presents not only an unmanageable task, but an unintelligible standard to determine whether repairs are necessary. Logically, a road is altered from its original condition after a single car drives across it, or a single hairline crack appears.

[3] "Mainline" roadways do not include frontage roads, ramps, or other ancillary roads maintained by CDOT.

[4] CDOT collects, stores, and analyzes historic and current costs of labor and material for highway construction. Using this data, CDOT arrived at these

Even for municipalities of smaller sizes or population, the Court of Appeals' interpretation will require an increase in, or at least a diversion of, resources to keep up with these expanded responsibilities, and the burden of that change will fall on the municipalities' relatively smaller populations of citizens. Assuming, *arguendo*, that a public entity could expend the necessary resources to attempt to monitor and repair or replace all changed roadway conditions, it would still have to prioritize which conditions required more attention, as it simply could not make "as new" all conditions simultaneously.

For any level of government, one of the most serious policy choices for elected officials is setting budget priorities and weighing those priorities against available resources. In Colorado, prioritizing expenditures for government services can be especially challenging in the context of our constitutional restrictions on spending and requiring voter approval for increased taxes. *See* COLO.CONST., art. X, § 20(3)–(4). If the Court of Appeals' interpretation of the waiver for the dangerous condition of a public roadway is upheld, expenditures in this area would become the highest priority for any government in Colorado, undermining the legislative processes that are open to public input and which balance citizens' needs for government services. Re-prioritizing government spending in this manner can have unintended consequences, including: the impossibility of creating

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estimates by running models on the costs of repairing or re-building, and maintaining, highways and bridges to an "as constructed" condition.

responsible, long-term fiscal plans; the availability of capital and operating budget capacity for other purposes; the inability to respond to emergencies; and the impairment of obligations that are secured through public revenues (such as bonds).

The Court of Appeals' opinion assumes that all changed roadway conditions are inherently dangerous, and it does not account for the severity of the deterioration of the roadway, the length of time such condition had existed, or its location. Thus, even working at its fullest capacity, a public entity may nonetheless be liable for injuries resulting from even the slightest change to the condition of a roadway.

It is impractical to believe that any public entity could muster the resources to comply with this interpretation of COLO.REV.STAT. § 24-10-106(1)(d)(I). These entities must budget and plan for the maintenance of roadways just as they must for any other public expense. If the waiver of immunity—and subsequent expansion of potential liability—for any change to the condition of a roadway is permitted to stand, the State and Colorado municipalities will be forced to divert resources for other public programs and services for the sole purpose of monitoring and repairing or replacing its roads.

To avoid having these other programs and services suffer, *amici*, their members, and the State likely would be required to increase taxes on citizens to

ensure their provision. This result is contrary to the intent of the General Assembly in enacting the CGIA, as set forth in COLO.REV.STAT. § 24-10-102; "The general assembly . . . recognizes that the taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens." COLO.REV.STAT. § 24-10-102.

The expansive reading contained in the decision of the Court of Appeals contravenes this explicit policy determination. If the Court of Appeals' ruling in this case is allowed to stand, CIRSA and CML members, along with the State of Colorado, will be required to assume the financial burdens of unpredictable and massive liability to the detriment other vital public functions or their taxpaying citizens. In addition to imposing such burdens in violation of the policy goals of the CGIA, the Court of Appeals' opinion simply cannot stand in the face of the express statutory language, the intent of the General Assembly in enacting the CGIA, and this Court's previous decisions concerning the definition of "unreasonable risk."

B. The Court of Appeals' interpretation of "unreasonable risk" is contrary to the language of the GGIA and conflicts with the legislative intent and this Court's decisions interpreting the CGIA.

The Court of Appeals held that, in the context of public roadways, a condition presents an "unreasonable risk" where the municipality "fail[s] to keep a

road in the same general state of repair or efficiency as it was initially constructed … because it *could* 'increase the risk of injury above that deemed to be acceptable during the design stage.'" *Dennis*, 2016COA140, ¶ 36 (emphasis added) (quoting *Medina v. State*, 35 P.3d 443, 448–49 (Colo. 2001). The practical effect of this holding is a waiver of governmental immunity for any condition of a roadway that ages, changes, or is altered even slightly from its original construction or state of being. The court's holding must be reversed.

Historically, for a plaintiff to overcome immunity for injuries she sustained on a public roadway, she must put forth evidence that there existed "a dangerous condition of a public . . . road . . . which physically interfere[d] with the movement of traffic." COLO.REV.STAT. § 24-10-106(1)(d)(I). To prove a "dangerous condition" exists, a plaintiff must demonstrate (1) "a physical condition" of the roadway; (2) "that constitutes an unreasonable risk to the health or safety of the public;" (3) "which is known to exist or which in the exercise of reasonable care should have been known to exist;" and (4) "which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility." COLO.REV.STAT. § 24-10-103(1.3). Where a plaintiff sues over an allegedly deficient condition of a public roadway, whether a "dangerous condition" exists on a roadway usually will turn on whether that condition constitutes an "unreasonable risk."

The Court of Appeals' decision departed from that long-established historic analysis, grounded in the language of the CGIA. In arriving at its conclusion that a risk is unreasonable when a road is not in the "same general state of repair or efficiency as it was initially constructed," the Court of Appeals ostensibly relied on the language of COLO.REV.STAT. § 24-10-103(1.3), (2.5), and *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1385 (Colo. 1997). In *Swieckowski*, this Court held that "the government's duty to 'maintain' was intended by the legislature to mean a duty to restore a facility to the same condition as originally constructed." 934 P.3d at 1385. But referring to both statutory language and the statute's legislative history, the Court held that a public entity's maintenance duty arose "where the roadway has changed from its original condition *and this change poses a danger*." *Id*. (emphasis added). In this case, however, the Court of Appeals ignored that key phrase from *Swieckowski*. The decision below requires public entities to act once a roadway has changed from its condition as initially constructed, *regardless of whether the changed condition actually poses a danger*.

Under well-established rules of statutory construction, every word and every provision is to be given effect—none should be ignored. *Clark v. Fellin*, 251 P.2d 940, 943 (Colo. 1952) ("the whole statute must be read together and considered as a whole and its intent gathered from all of its provisions.") (citation omitted). Yet here, the Court of Appeals' opinion *eliminates entirely* the requirement that a

plaintiff prove the fourth element of the test for a "dangerous condition." The City and County of Denver conceded in the *Trinity* hearing elements (1) and (3) of the test, and the Court of Appeals did not determine element (4). *Dennis*, 2016COA140, ¶¶ 7, 37, 40. However, the Court determined that making road repairs is the duty of governmental entities, and *any* change to the roadway which is not repaired or replaced immediately is deemed to be a violation of the entities' duty. The decision improperly bypasses the separate requirement that a plaintiff prove that the entity's "act or omission in constructing or maintaining" the roadway was "negligent," COLO.REV.STAT. § 24-10-103(1.3), since the mere fact that the roadway is changed would satisfy both the "unreasonable risk" and "negligence" components. Because the Court of Appeals' interpretation ignores a statutory element necessary to support a waiver of immunity, the decision must be reversed.

The CGIA is intended to waive governmental immunity and extend liability to municipalities for their "failure to *maintain* [public] facilities in a condition *safe for public use*." *Stephen v. City and County of Denver*, 659 P.2d 666, 668 (Colo. 1983) (emphasis added). This Court in *Stephen* clearly distinguished between a failure to maintain the facility and a condition that was dangerous. *Id.* However, it notably did not state that the failure to maintain a particular condition in its original state necessarily led to the conclusion that such condition was dangerous. *Id.* By

contrast, the Court of Appeals' decision in this case holds that a condition is unsafe for public use if it is changed in any way from its original state. The holding is contrary to the language and intent of the statute, and renders meaningless the distinction between "dangerous condition" and "maintenance" as set forth by statute and as clarified in *Stephen.*

The terms "dangerous condition" and "maintenance" are separately defined under the CGIA, and the definition of neither term includes the other. *See* COLO.REV.STAT. §§ 24-10-103(1.3), (2.5). This is perhaps the best evidence that the legislature could not have intended to waive immunity for a dangerous condition premised on nothing more than a failure to maintain a condition as it was originally constructed. Ultimately, nothing within the CGIA or this Court's precedent supports the Court of Appeals' interpretation in this case.

In fact, this Court has previously even declined to read the word "maintain" to create a waiver of immunity simply by virtue of the municipality's ownership of a roadway on which a dangerous condition existed. *Swieckowski*, 934 P.2d at 1384 (holding that the City's failure to install guards, barriers, or signs that a widened portion of the roadway ended abruptly into a ditch was part of the design of the roadway, rather than a failure to maintain, since the legislature did not intend to expose entities to liability simply for "keeping a public roadway in existence"). Rather, a waiver of immunity would only be appropriate based on the

municipality's failure to repair a roadway "where the roadway has changed from its original condition *and this change poses a danger*." *Id.* at 1385 (emphasis added).

Just four years after *Swieckowski*, this Court held that the duty of a governmental entity "to return the road to the same general state of being, repair or efficiency as initially constructed" did not exist at all times, but was only required if the condition could be proven to "increase the risk of injury above that deemed to be acceptable during the design stage." *Medina*, 35 P.3d at 457. This Court therefore has consistently held that a plaintiff must prove not only that the public entity failed to maintain a condition of a roadway in the same state as initially constructed, but also that condition must itself was "dangerous," that is, it "increase[d] the risk of injury" above that risk incurred by the design of the condition itself.

Through each of the above decisions, this Court repeatedly gave meaning to each provision in the statute. Yet, the Court of Appeals' opinion disregards these decisions by truncating the elements underlying the determination of what constitutes a dangerous condition, thereby ignoring or eliminating specific, controlling statutory language. The opinion removes the requirement that a dangerous condition "increase the risk of injury" to a driver or passenger above that amount of risk present in the very design of the roadway. In its place, it creates

a waiver of governmental immunity for the municipality's failure to address *any* change whatsoever to the condition of the roadway, regardless of whether it increases that risk, which will in turn expand the potential for a municipality's liability for a potential injury. Although waivers of immunity are to be construed broadly, courts cannot ignore express limitations contained in statutory waivers of immunity to create liability unintended by the legislature.[5]

II. CONCLUSION

Given the foregoing, *amici* respectfully request that this Court reverse the Court of Appeals' holding that a public roadway is "dangerous" for the purposes of the CGIA where the condition of a roadway is minimally changed or deteriorated, and remand the case for further findings consistent with a determination that that in order to prove a waiver of immunity for the "dangerous condition of a . . . highway, road, or street" plaintiffs must present evidence showing that the condition of the roadway posed an unreasonable risk of harm. COLO.REV.STAT. § 24-10-106(1)(d)(I). The imposition of a waiver of governmental immunity and the potential for unlimited liability for any change in the condition of a roadway—no matter how insignificant—that causes injury is contrary to the plain language of

[5] Among those unintended consequences is how courts in Colorado should apply the newly-truncated definition of "dangerous condition" to each of the other waivers of immunity found in COLO.REV.STAT. §24-10-106(1), and specifically whether those courts must determine if the activities of the agency or employee in question are "inherently dangerous" before deciding whether or not a plaintiff is required to prove that a changed condition poses an unreasonable risk to the public.

the CGIA, contrary to the General Assembly's long-standing policy of protecting taxpayers against excessive and unpredictable fiscal burdens, and contrary to this Court's prior decisions. The Court of Appeals' interpretation of "unreasonable risk" in deciding what constitutes a "dangerous condition" of a roadway impacts the ability of the State and municipalities across the state to effectively budget for and fund other valuable and necessary public projects.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the this 18th day of July, 2017, I electronically filed the foregoing **AMICUS BRIEF IN SUPPORT OF CITY AND COUNTY OF DENVER** via Colorado Courts E-Filing which will send a true and correct copy to the following:

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