

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p> <hr/> <p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2017CA0859 Opinion by Webb, J., Terry and Rothenberg, JJ., concurring</p>	
<p>PETITIONER:</p> <p>THE CITY OF BOULDER, COLORADO,</p> <p>v.</p> <p>RESPONDENT:</p> <p>CODY TAYLOR</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for <i>Amicus Curiae</i>:</p> <p>Dianne M. Criswell, No. 48086 Colorado Municipal League 1144 Sherman Street Denver, CO 80203 Phone Number: (303) 831-6411 FAX Number: (303) 860-8175 E-mail: dcriswell@cml.org</p>	<p>Supreme Court Case No: 2018SC226</p>
<p>BRIEF OF <i>AMICUS CURIAE</i> COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER THE CITY OF BOULDER'S PETITION FOR WRIT OF CERTIORARI</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of 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:

This brief complies with the word limit set forth in C.A.R. 29(d) and C.A.R. 53(a): it contains 1,338 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29, C.A.R. 32, or C.A.R. 53.

By: s/Dianne M. Criswell
Dianne M. Criswell
*Attorney for the Colorado
Municipal League*

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
PETITIONER’S ISSUE PRESENTED FOR REVIEW.....	2
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	2
REASONS FOR GRANTING PETITIONER’S WRIT	
The Court of Appeals’ Ruling Greatly Expands Municipal Liability.....	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

<i>City & Cty. of Denver v. Gallegos</i> , 916 P.2d 509 (Colo. 1996).....	1,2,4
<i>Corsentino v. Cordova</i> , 4 P.3d 1082 (Colo. 2000).....	4
<i>deBoer v. Ute Water Conservancy Dist.</i> , 17 P.3d 187 (Colo. App. 2000).....	4,5
<i>Horrell v. City of Aurora</i> , 976 P.2d 315 (Colo. App. 1998).....	5
<i>Swieckowski v. City of Ft. Collins</i> , 934 P.2d 1380 (Colo. 1997).....	7
<i>Taylor v. City of Boulder, Colo.</i> No. 17CA0859 (Colo. App. Mar. 8, 2018).....	5

STATUTES

§ 24-10-106(1)(e),(f), C.R.S.....	4
-----------------------------------	---

RULES

C.A.R. 49(a).....	8
-------------------	---

OTHER AUTHORITIES

“Metering Best Practices: A Guide to Achieving Utility Resource Efficiency, Release 3.0” U.S. Dep’t of Energy (Mar. 2015).....	6
---	---

INTRODUCTION

There are hundreds of thousands of water meter pits connected to municipal water systems in Colorado. Many of these are located on private property and are not maintained by public entities. It was long the law in Colorado that cities and towns were not liable for injuries resulting from water meter pits on private property. As this Court explained in *City and County of Denver v. Gallegos*, 916 P.2d 509, 513 (Colo. 1996), because these water meter pits do not serve a broader public benefit, they are not “public water facilities” for which sovereign immunity has been waived in the Colorado Governmental Immunity Act (“CGIA”). With its ruling below distinguishing this precedent, the Court of Appeals imposed a concerning and unjustified expansion of governmental liability. If allowed to stand, the Court of Appeals’ decision will lead to costly liability on Colorado’s cities and towns for all water meter pits, even those located on private property and serving only a private benefit.

PETITIONER’S ISSUE PRESENTED FOR REVIEW

Whether this Court’s longstanding rule from *City and County of Denver v. Gallegos*, 916 P.2d 509 (Colo. 1996), that a public entity is immune from liability for injury resulting from a water meter pit located on private property, still applies following the 2003 amendment to the Colorado Governmental Immunity Act adding a definition of a “public water facility”?

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Colorado Municipal League was formed in 1923 and is a non-profit, voluntary association of Colorado municipalities. The League currently represents 270 of the 272 municipalities located throughout the State (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 169 of the 171 statutory municipalities, 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 League has a major interest in this case and can provide this Court with a valuable statewide municipal perspective. There are

hundreds of thousands of water meter pits connected to its members' water distribution systems, and the Court of Appeals' decision removes governmental immunity from liability for injuries resulting from water meter pits located on private property. Accordingly, the outcome of this appeal is of great importance to the League, as it may significantly broaden its members' liability and thereby create an indeterminate, but unquestionably large fiscal burden on Colorado's cities and towns.

REASONS FOR GRANTING PETITIONER'S WRIT

The Court of Appeals' Ruling Greatly Expands Municipal Liability.

Water meters measure the volume of water delivered to a property. As such, they are a necessary part of a municipal water distribution system. Throughout Colorado there are hundreds of thousands of water meters connected to cities and towns' water systems. Many of these meters are installed on private property, housed outside of the buildings they serve below ground in covered pits. While water meter pit covers are typically locked in place, universal keys are widely employed by private-sector plumbers, landscapers, and other professionals who need to access a water shut-off valve.

The CGIA generally provides that public entities “shall be immune from liability in all claims for injury which lie in tort.” § 24-10-106(1). This governmental immunity is waived for injury resulting from a public entity’s “operation and maintenance of any *public* water facility.” *Id.*, -106(1)(f) (emphasis added); *see also id.*, -106(1)(e) (waiving immunity for injury resulting from “[a] dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility”).

In 1996, this Court held that water meter pits located on private property do not give rise to municipal liability. *Gallegos*, 916 P.2d at 511–12, *disapproved of on other grounds*, *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000). Because an individual “water meter pit only benefits the property on which it is located,” it is “not operated for the benefit of the public” and does not constitute a “public water facility” over which sovereign immunity has been waived. *Gallegos*, 916 P.2d at 511–12.

Although several divisions of the Court of Appeals followed *Gallegos* in published decisions, *deBoer v. Ute Water Conservancy Dist.*, 17 P.3d 187, 188–89 (Colo. App. 2000); *Horrell v. City of Aurora*, 976 P.2d 315, 315–316 (Colo. App. 1998), the Court of Appeals below rejected this precedent and held a water meter pit is a public water facility, regardless of where it is located or what purpose it serves. *Taylor v. City of Boulder, Colo.*, No. 17CA0859, slip op. at 4–7 (Colo. App. Mar. 8, 2018).

The holding of the Court of Appeals, if allowed to stand, would result in considerably broader liability for Colorado’s cities and towns. Instead of being responsible for just the comparatively few water meter pits on their own property, municipalities would face exposure for injuries resulting from all water meter pits—particularly, the many thousands located on private property. Such a result will likely be quite costly. The number of claims for damages is sure to increase, and cities and towns will be forced to fund the costs of greater liability with more taxes, budget cuts, and/or higher water fees. Municipalities deliver the basic health, welfare, and safety functions that make life possible in

communities by providing utilities, building and maintaining streets and other infrastructure, policing, responding to emergencies, and adjudicating disputes. Insurance or settlement costs for government tort liability reduce the resources that would otherwise be available for infrastructure or government services.

Managing exposure in other ways may prove impractical. Physically reading a water meter once required a municipal employee to remove and refit a water meter pit cover. Remote meter reading technology, referred to as “automated meter reading” or “AMR,” has allowed many municipalities, especially those with more than 2,000 people, to efficiently redirect limited resources. A few employees now can drive around the water service area and read meters via an electronic device without getting out of their vehicles. AMR is being adopted as a best practice for water utilities management to achieve savings of water by users **and** resources in the management of the utility.¹ Clearly, to regularly inspect water meter pit covers would

¹ *Metering Best Practices: A Guide to Achieving Utility Resource Efficiency, Release 3.0*, U.S. DEPT OF ENERGY (Mar, 2015), available at <https://www.energy.gov/sites/prod/files/2015/04/f21/mbpg2015.pdf>.

require a sizeable personnel increase that would add substantially to cities and towns' ongoing expenses and may reduce the water savings from adopting best practice approaches, such as AMR.

In addition to its costs, the Court of Appeals' expansion of governmental liability is unwarranted. One of the fundamental policies underlying the CGIA is to "hold[] governmental entities responsible for *their* actions." *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1387 (Colo. 1997) (emphasis added). Water meter pits are often located on private property, and it follows that most are not maintained by a public entity. Remote reading technology means that municipal staff no longer have any regular occasion to physically remove and refit a water meter pit cover. Private-sector plumbers, landscapers, and other professionals who need to access a water shut-off valve are much more likely to access a water meter pit. While most covers are locked in place, universal keys are readily available, and cities and towns have no practical way to ensure that third-parties properly secure covers. It makes no sense to hold a municipality responsible for a water meter pit

that is located on private property and can be accessed so freely by private parties.

CONCLUSION

Special and important reasons warrant the exercise of this Court's sound judicial discretion. *See* C.A.R. 49(a). The Court of Appeals failed to follow controlling precedent and imposed a costly and unjustified expansion of governmental liability for hundreds of thousands of water meter pits, many of which are located on private property and serve only a private benefit. The League therefore respectfully requests that this Court grant Petitioner the City of Boulder's Petition for a Writ of Certiorari.

Submitted this 17th day of May, 2018.

COLORADO MUNICIPAL LEAGUE

By: *s/Dianne M. Criswell*

*Attorney for Amicus Curiae, the
Colorado Municipal League*

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2018, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER THE CITY OF BOULDER'S PETITION FOR WRIT OF CERTIORARI** was served electronically via Colorado Courts E-Filing on the following:

Michael P. Fossenier
Law Office of Michael Fossenier, LLC
4155 Jewell Avenue, Suite 808
Denver, CO 80222
(720)328-2248
mike@fozlaw.com

Ronald L. Wilcox
Wilcox Law Firm, LLC
383 Corona Street, Suite 401
Denver, CO 80218
(303)594-6720
ron@wilcox.legal

Jonathan P. Fero
Semple, Farrington & Everall, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
(303) 595-0941
jfero@semplelaw.com

Thomas A. Carr,
Boulder City Attorney
P.O. Box 791
Boulder, CO 80306
(303) 441-3020
carrt@bouldercolorado.gov

s/ Dianne M. Criswell
