CASE NO. 18-1051

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEO LECH, et al.,	)
	)
Plaintiffs – Appellants,	)
	)
v.	)
	)
CHIEF JOHN A JACKSON, et al.,	)
	)
Defendants – Appellees.	)

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Philip A. Brimmer
D.C. No. 1:16-CV-01956-PAC-MJW

AMICI CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION SUPPORTING DEFENDANT – APPELLEE, CITY OF GREENWOOD VILLAGE, AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER

DIANNE M. CRISWELL, #48086
Colorado Municipal League
1144 Sherman Street
Denver, CO 80203-2207
Phone: (303) 831-6411
Fax: (303) 860-8175
E-mail: dcriswell@cml.org
Attorney for Amici Curiae
Colorado Municipal League &
International Municipal League Association
June 18, 2018

CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League ("CML" or "the League") and the International Municipal Lawyers Association ("IMLA") have no parent corporations and no publicly traded stock. No publicly held corporation owns any part of either CML or IMLA.

STATEMENT OF CONTRIBUTION TO BRIEF

No party's counsel authored this Brief in whole or in part. No party, party's counsel, or person other than CML and IMLA, their members, or their counsel contributed money that was intended to fund preparing or submitting this Brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Colorado Municipal League ("CML" or "the League") and the International Municipal Lawyers Association ("IMLA"), by the undersigned counsel and pursuant to Fed. R. App. P. 29, submits this uncontested *Amici Curiae* Brief supporting Defendant – Appellee, City of Greenwood Village ("the City"), and affirmance of the District Court's Order dismissing Plaintiffs' – Appellants Mr. Leo Lech, et al. ("Appellants") federal claims.

CML was formed in 1923. The League is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 169 of the 171 statutory municipalities, and the lone territorial charter city, together constituting all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The International Municipal Lawyers Association is a nonprofit professional organization of more than 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local

governments. It does so in part through extensive *amicus* briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state appellate courts.

CML's participation as *amicus curiae* provides the Court with a statewide municipal perspective to emphasize how the outcome of this case will impact all cities and towns in Colorado. Municipalities serve the public interest by exercising police powers sanctioned by constitutional and statutory authority. One such manifestation of these powers includes the use of law enforcement. While public safety remains the paramount concern for law enforcement, especially in emergency situations, damage to private property during these times may unfortunately occur. These instances, however, do not qualify as the type of government interference or taking for which the United States or Colorado Constitutions require compensation. A ruling to the contrary hinders the fiscal ability of local governments to maintain safe communities.

IMLA's participation in this brief on behalf of local government attorneys also seeks to highlight the impact of this appeal on all municipalities within this circuit. Ensuring that local government attorneys can rely on long-standing takings case law forms the core of IMLA's interest in this appeal.

Any conclusion that private property damage reasonably caused by municipal law enforcement in an emergency situation constitutes a compensable taking under state and federal takings clauses eliminates the distinction between

police powers and eminent domain. Erasing this distinction nullifies important public safety considerations and undermines the training of law enforcement. It will also result in unmanageable liability for municipalities and exacerbate the fiscal and operational burdens public entities already face regarding facilities, streets, and other infrastructure. The Colorado legislature has already carefully balanced the public policy considerations in this case and this Court should not constitutionalize a case of property damage, which would undermine the legislature's decision. For these reasons and those recited in the City's brief, CML and IMLA urge the Court to reject the state and federal takings claims and due process claims and affirm the District Court's Order.

ARGUMENT

CML will not reiterate every argument the City makes in support of its response. Rather, CML and IMLA wish to emphasize the prevailing and substantial influence of the Court's decision over Colorado municipalities, beyond the specific facts of this case.

In this case, Appellants' argue they are due just compensation under the United States and Colorado Constitutions for damage to their property based on law enforcement action in apprehending an armed and dangerous suspect who had barricaded himself in their home for hours and shot at the officers on multiple occasions. The fundamental flaw in the Appellants' argument is that it conflates

property damage with a government taking. All takings may be characterized as damage to private property (direct damages, diminution of value, or appropriation); however, not all damage to private property by a public entity qualifies as a taking under either constitution. Merging every type of damage to property by a governmental entity, especially damage done by law enforcement during emergencies, into a constitutional takings theory leads to an absurd result because it creates an ever expanding basis for claims well beyond the constitutional authority on which just compensation is based.

A. Government Interferences for which Compensation Must Be Given Do Not Include Law Enforcement Actions

1. Law Enforcement Actions Do Not Qualify as either Physical or Regulatory Takings

Specific types of government interference with private property require compensation, including physical presence and regulatory action, neither of which applies here. The Appellants' argument that the scope of governmental actions that constitute a "taking" includes damage from law enforcement erroneously rests on outlier cases that fail to reflect the long-standing legal and policy purposes for maintaining a coherent takings scheme. Notably,

> the Takings Clause *does not undertake to socialize all losses*, only those which result from a taking of property. Thus, a takings clause is not a source of compensation for every action or inaction by a governmental entity that causes damage to property; instead, it provides compensation only for the taking or damaging of property that occurs as the result of an entity's exercise of its right of eminent domain.

7B Am. Jur. 2d. *Legal Forms* §97:15 (2018) (emphasis added).

Courts begin the analysis of a takings claim with the first type of government interference in personal property that requires compensation: physical possession by the government. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."); 7B Am. Jur. 2d. *Legal Forms* §97:15 (2018) ("When the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner under the Takings Clause.") (emphasis added)).

Compensation may also be due to property owners when government regulation incidentally diminishes the value of private property. *Lingle*, 544 U.S. at 537. The question in a regulatory taking claim is whether the regulatory interference is so extensive as to warrant compensation, which differs from law enforcement action during emergencies. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 63 (Colo. 2001); *see e.g.*, *City of Boulder v. Kahn's, Inc.*, 543 P.2d 711 (Colo. 1975) (holding that a pedestrian mall did not create unreasonable restrictions upon pedestrian access to establishments, therefore, it should not be construed as a taking). In *Customer Co. v. City of Sacramento*, the

California Supreme Court discussed the limited type and breadth of government interference for which takings compensation is due, observing:

> The California Constitution of 1879 added the phrase "or damaged" to the just compensation provision, but this change was not intended to expand the scope of the constitutional compensation provision beyond the ambit of eminent domain and public improvements. It appears, instead, that the words "or damaged" were added to clarify that the government was obligated to pay just compensation for property damaged in connection with the construction of public improvements, even if the government had not physically invaded the damaged property.

895 P.2d 900, 906 (Cal. 1995) (citations omitted).

Municipal law enforcement action categorically differs from either category because these actions lack the affirmative nature of the power of eminent domain or a regulatory taking.[1] This is not a standard case of eminent domain; this is a case involving police action in emergencies. Colorado courts have refused to adopt a takings theory in cases involving law enforcement claims. *See Young v. Larimer Cty. Sheriff's Office*, 356 P.3d 939 (Colo. App. 2014) (state's police power encompassed the government's ability to seize and retain property to be used as evidence); *City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 766 (Colo. 1992) ("[T]he seizure of the vehicle was not a taking of private property for public purposes" but rather pursuant to "a lawful exercise of Denver's police

[1] Sandra B. Zellmer, *Takings, Torts and Background Principles*, 52 Wake Forest L. Rev. 193, 216 (2017) (discussing the affirmative and/or invasive nature of a taking, versus a tort, that helps discern whether government actions are tantamount to an appropriation for a public purpose).

power."). *See also* Dist. Ct. Order 17-18, Jan. 18, 2018 (discussing state and federal cases, before and after *Customer Co.* was decided, which have similarly concluded that property damage caused by law enforcement officials in the performance of their duties does not give rise to a claim for just compensation). Including law enforcement actions in emergencies within takings claims expands the law beyond established precedent, causing an unsettling shift in expected municipal practices.

2. Courts Must Maintain the Distinction between Police Power and the Power of Eminent Domain

Amici support the conclusion of the District Court that the distinction between an exercise of police power and the power of eminent domain must be maintained. Dist. Ct. Order at 20. In *Desert Truck Sales*, the Colorado Supreme Court articulated the conceptual division:

> Police power should *not* be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed.

837 P.2d at 766 (citing *Lamm v. Volpe*, 499 F.2d 1202 (10th Cir. 1971)) (emphasis added).

The distinction must be maintained because the analysis, when municipalities are acting pursuant to their police powers, differs significantly from the acquisition of private property pursuant to eminent domain. "Eminent domain

takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public." *Conger v. Pierce Cty.*, 116 Wash. 27, 36 (Wash. 1921); *see also Customer Co.*, 895 P.2d at 913 **(**"[T]he efforts of the law enforcement officers to apprehend a felony suspect cannot be likened to an exercise of the power of eminent domain.").

Maintaining clarity between police and eminent domain powers in a takings claim prevents the unravelling of necessary logic in the analysis. Under an eminent domain action, the government may have a categorical, constitutional obligation to provide just compensation. 7B Am. Jur. 2d. *Legal Forms* § 97:15 (2018); *see also City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759. In contrast, pursuant to the reasonable and proper application of its police powers, the government may damage, destroy, restrict, and impair private property without compensation to the owners.[2] Damage to property from law enforcement actions without a right to compensation remains a possible legal outcome.[3] Municipalities

[2] "[T]he U.S. Supreme Court has described the noncompensable nature of emergency public safety acts as an inherent limitation in title to private property, 'absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others.'" William Dillard, *The Powers that Be*, 26 S.C. Law 18, 22 (2014) (citations omitted).

[3] "'The clause prohibiting the taking of private property without compensation is not intended as a limitation of those police powers which are necessary to the tranquility of every well-ordered community. . . . It has always

may sometimes bear liability for law enforcement actions which damage private property; however, the proper basis for such compensation is not under either the United States Constitution or Colorado Constitution. *See* Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 et seq.

To distinguish between eminent domain and police power, the Court should apply the long-standing 'emergency exception' in the Tenth Circuit, discussed by the District Court. Dist. Ct. Order at 22-23.[4] The District Court observed that, to the extent the demarcation between police powers and the power of eminent domain were blurred, this case is not close to the line. *Id.* at 21. The District Court then noted the emergency situation in this case and discussed the application of the "emergency exception" to the just compensation requirement. *Id.*

Maintaining the distinction between law enforcement action and governmental interference qualifying as a taking requiring just compensation prevents the mingling of entirely different species of governmental actions.

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been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and although no compensation is made.'" *U. S. Disposal Sys. Inc. v. City of Northglenn*, 193 Colo. 277 (Colo. 1977) (citing *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905)).

[4] "'[I]n its legitimate exercise the police power often works not only damage to property but destruction of property. . . . Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be, then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is *damnum absque injuria* [damage without injury].'" *Customer Co.*, 895 P.2d at 909-10 (internal citations omitted).

"Public use" in a takings context promotes the long-range policy goals of a community. In contrast, the "public benefit" in a law enforcement context has an immediate nature, such as the broad public benefit resulting from expeditious resolution of emergencies. Converting "public benefits" resulting from a law enforcement action to the "public use" of private property becomes a very difficult utilization to measure. That inestimable "public use" of private property in a law enforcement action starkly contrasts with the assignment of compensation for government interference through eminent domain or regulatory action that diminishes the economic value of property. In the law enforcement context, greater damage to private property may occur if the police fail to act at all or the public safety could be at risk.[5] Further, establishing a "but for" causation test for law enforcement remains impossible because future possibilities in emergencies are not foreseeable. Courts and local governments cannot easily measure, nor socialize, property damage from law enforcement or emergency responses. This distinction between eminent domain and police power must therefore remain.

3. Municipal Governments Rely on Takings Claims Precedent

Municipal governments require certainty both for long-range planning, including the affirmative actions of condemnation, and to address daily law

[5] Similarly, property damage might occur regardless of what avenue law enforcement pursue. In this case, the home could have been significantly damaged had a shootout occurred within the home between officers and the armed suspect.

enforcement and emergency response in their communities. Blurring the concept of a compensable taking to cover any type of damage contradicts takings case law on which municipal governments rely. Expanding the scope of a compensable taking based on general statements of fairness fails to provide a persuasive basis for contradicting long-standing case law.

Municipalities would be unduly burdened if the Court agrees with Appellants' attempt to expand the scope of takings claims. Appellants' reliance on *Steele v. City of Houston* and *Wegner v. Milwaukee Mut. Ins. Co.* is misplaced.[6] As the Supreme Court of California explained, "[t]he opinion in *Steele* is poorly reasoned and internally inconsistent. The opinion in *Wegner* relies primarily upon the faulty reasoning in *Steele*. Neither decision gives serious consideration to the body of authority governing actions for inverse condemnation." *Customer Co.*, 895 P.2d at 914. Further, *Wegner* and *Steele* do not represent a consensus. *Id.* ("[N]early every other court to consider this question has held that constitutional just-compensation principles do not apply to damages caused by law enforcement officers in the course of performing their duties.") (citations omitted).

Municipal governments greatly affect the lives and properties of residents through the exercise of law enforcement authority, regulatory police powers, and eminent domain. Maintaining the proper scope of compensable government taking

[6] Appellants' Br. 7-8 (citing *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W. 2d 38, 42 (Min. 1991); *Steele v. City of Houston*, 603 S.W. 2d 786-89 (Tex. 1980)).

allows municipal governments to perform these core functions effectively and efficiently.

B. Extending a Takings Claim to Damages from Law Enforcement Actions Will Broadly Impact Operations and Finances

1. Police Power is a Fundamental Function of Municipal Government that Must Not be Hindered

The power to maintain the health, welfare, and safety of the public is a legitimate and long-standing power of municipal governments. *Anaya v. Crossroads Managed Care Sys. Inc.*, 195 F.3d 584, 590-91 (1999) (citing *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 479, 503 (1987)). Colorado municipalities have specific statutory municipal power to pass ordinances and to employ peace officers to enforce laws. Colo. Rev. Stat. § 31-15-401(1)(a) (2016). Similarly, under the Colorado Constitution, home rule cities and towns govern all functions of local affairs, including reasonable exercise of police powers. Colo. Const. art. XX § 6; *City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001). Pursuant to this authority, 138 Colorado municipalities maintain established police departments, all of which will be impacted by an adverse decision in this case.[7]

[7] *See* Criminal Justice Law International, Colorado Law Enforcement Agencies, http://criminaljusticelaw.org/enforcement/u-s-police-agencies-list/colorado/.

Municipal governments seek to protect the health, welfare, and safety of their communities. *See e.g., Town of Dillon v. Yacht Club Condo. Home Owners Ass'n*, 325 P.3d 1032, 1038 (Colo. 2014). Law enforcement agencies support this core function of municipalities by, in part, responding to emergencies and have broad power to do so. *Id.* Residents in municipalities expect this response from public authorities as it grants peace of mind knowing aid will quickly arrive in dangerous situations. Law enforcement should not hesitate during emergencies—thereby, delaying the protection of the public—to consider property rights and to ponder whether the City can financially afford to address the emergency. Delayed decision-making, or foregoing taking action due to the financial risk, may have devastating, even deadly, consequences. The law must support a municipality's ability to protect its citizens, not hinder it.

2. Compensation for Property Damage from Law Enforcement Actions May Be Catastrophic

Unlike contractual and tort liabilities, which may be fiscally managed through contract provisions, training, participation in risk pools and insurance, there is no way to budget for and manage unforeseeable compensation that could arise from law enforcement action in response to emergencies. A municipality can plan for property acquisition or regulatory takings through normal budget and planning procedures. The exercise of eminent domain authority for public projects or development within a municipality typically follows a planning scheme

slowly developed over time – sometimes decades. In stark contrast, budgeting and planning for the cost of property damage arising from emergency response would require impossible foresight of the scale, nature, and number of emergencies.

Training and development of standard procedures, especially for inherently risky or dangerous circumstances, remain the most effective ways to manage risk in a law enforcement context. The City's Emergency Response & Crisis Negotiations Teams Operations Manual ("Operations Manual") exemplifies such efforts. Adopting the Appellants' argument will dramatically hinder municipal efforts to implement best practices and provide adequate training because agencies will need to allocate greater funds for liabilities which may be incurred in the *absence* of any negligence. This shift in a municipality's economic resources, which are already limited, will unduly burden local efforts to maintain the safety of the community.

3. The Colorado Governmental Immunity Act Provides Guidance for this Case

Courts and legislatures have used an alternative remedy available in similar cases: a claim for damages in tort. Tort claims against the government are constrained by the statutory waivers to governmental immunity which are grounded in thoroughly vetted public policy that balances the interests of private citizens with the public as a whole. When such claims lie in tort, a claimant must also prove negligence by the government or another recognized tort basis – again,

requirements based upon well-established principles of fault and public policy. Ignoring these public policy considerations and eliminating the claimant's burden of proof to show negligence, and instead allowing recovery under a constitutional takings theory, would fundamentally undermine the fiscal and public policy considerations underlying Colorado's governmental immunity statute.

The Colorado Governmental Immunity Act ("CGIA") allows the state and its political subdivisions to manage risk and provide effective and efficient government services. Colo. Rev. Stat. § 24-10-102. When drafting the CGIA, the Colorado General Assembly balanced the rights and needs of injured persons against the need to protect the public at large from excessive fiscal burdens that could impair important public services. Waivers of immunity under CGIA provide relief in multiple categories and circumstances where the injury results from government negligence or a failure to perform its duties. These waivers encourage responsible behavior by governmental entities without hindering public servants from discharging their duties in emergency situations. *See Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1387 (Colo. 1997). The CGIA's "Declaration of policy," Colo. Rev. Stat. § 24-10-102, expressly recognizes that unlimited liability would disrupt essential public services, that taxpayers would ultimately bear the fiscal burden of unlimited liability, and that unlimited liability would discourage public employees from providing such services. Therefore, governmental entities

are liable for their actions, and those of their agents, only to the extent and conditions provided by the CGIA. *See Jilot v. State*, 944 P.2d 566, 569 (Colo. App. 1996) ("[S]overeign immunity protects public entities against the risk that unforeseen tort judgments will deplete public funds. . . . Thus, waivers to sovereign immunity should themselves be strictly construed.").

Municipal governments deliver essential services required of society that the private sector[8] is usually unable, unwilling, or disinclined to undertake. These services include providing safe drinking water to residents, treating sewage, building and maintaining roads and bridges, enforcing laws enacted for the protection of the public, apprehending violators of those laws, fighting fires, providing emergency medical services, and otherwise responding in an organized fashion to whatever local emergencies may arise. The costs of claims against municipalities reduce the resources that would otherwise be available to provide these services and functions. Limiting municipal liability is essential to the preservation of adequate resources for direct government services. Imposing additional fiscal responsibility to pay for damages to property resulting from law enforcement action under an expanded takings theory and beyond the limited circumstances for which governmental immunity is waived will further burden taxpayers and discourage responsible municipal behavior.

[8] Nor are these services furnished regularly or effectively by the state or federal governments.

C. Extending Compensation for Property Damage from the Exercise of Police Power by Law Enforcement Will Have a Deleterious Effect on Public Safety

> "[L]aw enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action. . . . [T]o bring an [inverse condemnation claim]. . . might well deter law enforcement offers from acting swiftly and effectively to protect public safety in emergency situations."

Customer Co., 895 P.2d at 910-11. Law enforcement officers must carefully balance public safety, officer safety, and individual rights. Applying a takings theory to recovering damages in this context will upset this equilibrium and will lessen public and officer safety. The fiscal realities of being categorically liable for damage to private property from law enforcement actions will cause officer hesitation and contradict other best practices, which could result in danger to the public or loss of life.[9]

Preserving public safety in a law enforcement context requires the adoption of standard operating procedures. Maintaining public safety in exigent

[9] "'We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is mentioned, that the *Lord Mayor* of *London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, *for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.*'" *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 155 n.7, 73 S. Ct. 200, 203 (1952) *quoting Respublica v. Sparhawk*, 1 U.S. 357, 363 (1788) (emphasis added).

circumstances is the hallmark of law enforcement training – and a difficult outcome to achieve, considering the unforeseeable dangers and individual stressors on public safety officers. Typical law enforcement training in any circumstance demonstrates the difficulties in being "prepared for anything." For example, the Peace Officer Standards and Training Board (POST Board) within the Colorado Department of Law produces a manual to overview laws, procedures, and training that includes 165 pages of descriptions of training programs. *See* Office of the Attorney General, Colorado Peace Officer Standards and Training (2015), https://coloradopost.gov/about-post/post-rules-and-manual. Municipal law enforcement officers must acquire a working knowledge of a large body of law and practice through the initial and ongoing training they receive. Beyond that, officers must learn to overcome the biological and neurological human responses to stress. Applying constitutional takings liability to these instances will contribute to second-guessing in emergency situations that put public or officer safety at significant risk. This will place an officer in an untenable position in an emergency: follow procedures to protect the public welfare and officer safety or expose the governmental entity to a potentially disastrous fiscal impact.

CONCLUSION

Subjecting municipalities and local governments to an expanded scope of takings compensation for law enforcement actions violates established precedent. Expansions of the takings theory will hamper and delay law enforcement and emergency responses, deleteriously impacting public and officer safety. Further, categorical liability for private property damage will disrupt essential public services and require municipalities to plan for an unknowable and potentially unlimited amount of compensation. For the reasons stated above and in the City's Brief, CML and IMLA urge the Court to reject entreaties to broaden takings compensation to include these types of damages and to affirm the District Court's Order.

Respectfully submitted,

Counsel for Amici Curiae

/s/ Dianne M. Criswell

DIANNE M. CRISWELL, #48086 (Colo.)
Colorado Municipal League
1144 Sherman Street
Denver, CO 80203-2207
Phone: (303) 831-6411
Fax: (303) 860-8175
E-mail: dcriswell@cml.org
Attorney for Amici Curiae
Colorado Municipal League & International Municipal Lawyers Association

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/s/ Dianne M. Criswell
DIANNE M. CRISWELL, #48086 (Colo.)

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I hereby certify that with respect to the foregoing:

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/s/ Dianne M. Criswell
DIANNE M. CRISWELL, #48086 (Colo.)

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following and hand delivered seven (7) hard copies to the court within two (2) business days:

Rachal B. Maxam
Law Office of Rachel Maxam, PLLC
1512 Larimer St., Suite 600
Denver, CO 80202
Email: rachel@maxamlawfirm.com
Attorney for Appellants

J. Andrew Nathan
Ashley Hernandez-Schlagel
Nathan Dunn & Mayer P.C.
7900 E. Union Ave. Suite 600
Denver, CO 80237
Email: anathan@ndm-law.com
Attorneys for Appellee

/s/ Dianne M. Criswell
DIANNE M. CRISWELL, #48086 (Colo.)