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Certiorari to the Colorado Court of Appeals Case No. 2020CA205 Hon. Brown, Román, and Welling Arapahoe County District Court Case No. 2019CV32190 Hon. Elizabeth A. Weishaupl	
Petitioner: **MARSHALL P. BROWN**, in his official capacity as Director of Water of the City of Aurora, Colorado, **v.** **Respondent:** **WALKER COMMERCIAL, INC.**, a Colorado Corporation.	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER MARSHALL P. BROWN

CERTIFICATION

I hereby certify that this brief complies with 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 3,396 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/ Rachel Bender
Rachel Bender, #46228

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The Colorado Municipal League ("CML") respectfully submits the following *Amicus Curiae* Brief in Support of Petitioner Marshall P. Brown, in his official capacity as the Director of Water of the City of Aurora, Colorado.

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 membership consists of municipalities that routinely make decisions that can be judicially reviewed under the Colorado Rules of Civil Procedure. When municipal decisions in a wide variety of subject matter areas become "final," certain individuals can file a C.R.C.P. 106(a)(4) complaint in the district court where the municipality is located. Aggrieved and adversely affected individuals commonly use this avenue to challenge a final municipal decision. This Court's opinion will affect the entirety of CML's membership because all municipalities can and frequently do make the type of final decisions subject to review under C.R.C.P. 106(a)(4).

SUMMARY OF THE ARGUMENT

C.R.C.P. 106(a)(4) is the means for an aggrieved or adversely affected party to challenge final quasi-judicial decisions by a municipality. Municipalities frequently issue diverse types of final decisions in their day-to-day operations, which can trigger a C.R.C.P. 106(a)(4) complaint. Regardless of the substantive nature of the decision by a municipal body or employee, persons affected by the final decision can seek judicial review in the district court.

Due to the ever-present potential for a C.R.C.P. 106 claim to be filed during the specified time frame, municipalities rely on the explicit 28-day "shot clock" to know that a decision is truly final and that matters related to the decision can proceed without risk of disruption. This clear and well-established window of time provides a fair opportunity for aggrieved persons to challenge the municipal decision before the district court. However, municipalities across the state need clear and definite filing deadlines for C.R.C.P. 106(a)(4) complaints in order to continue effectively running their governments and best serve their communities.

If this Court permits the erosion of the current strict filing deadline, the result will consign municipal decision-making to a state of limbo. Uncertainty surrounding case filing deadlines causes ripple effects, such as the inability to move forward with a land use matter or employment action due to a lack of

certainty about whether the decision is truly final. CML asks this Court to confirm that any deadline for seeking judicial review by the district court is a rigid deadline without the possibility of any exceptions or delays.

If the Court nevertheless decides to permit the late filing of a C.R.C.P. 106(a)(4) action based on C.R.C.P. 6(b)'s excusable neglect provision, it should affirm a simple and easy-to-apply standard like the one relied on by the district court. Requiring a multi-part inquiry, like the standard set forth by the Court of Appeals for the first time, will impose a great burden not only on municipalities but on all parties to the case, as well as district courts. It is not necessary or prudent to impose this new burden in C.R.C.P. 106(a)(4) actions.

ARGUMENT

I. Expanding the strict deadline for filing C.R.C.P. 106(a)(4) complaints would negatively affect a wide range of municipal decisions.

C.R.C.P. 106(a)(4) is the exclusive pathway for an aggrieved party to seek judicial review of a municipality's final decision by the district court. Pursuant to C.R.C.P. 106(a)(4), the district court may review the decision to determine whether a "governmental body or officer" has "exceeded its jurisdiction or abused its discretion." Individuals subject to a municipality's final decision may use this remedy to challenge the decision before the district court whether or not a municipal code, rule, or other such document explicitly provides for this remedy.

Municipal decision-making occurs regularly in all municipalities across a wide range of subject matter areas. Categories of the hundreds, if not thousands, of municipal decisions subject to review under C.R.C.P. 106(a)(4) annually include, but are not limited to:

- Denying a particular use of a zone district, *see, e.g.*, *Danielson v. Zoning Bd. of Adjustment of Commerce City*, 807 P.2d 541 (Colo. 1990) (reviewing municipal zoning decision);
- Approving or denying an urban renewal plan, *see, e.g.*, *Bd. of Comm'rs of Cnty. of Boulder v. City of Broomfield*, 7 P.3d 1033, 1035 (Colo. App. 1999) (reviewing decision adopting urban renewal plan).
- Approving or denying a liquor license, *see, e.g.*, *Berger v. City of Boulder*, 195 P.3d 1138 (Colo. App. 2008) (reviewing municipal decision following liquor license use review);
- Approving or denying a marijuana license, *see Colo. Health Consultants v. City & Cnty. of Denver*, 429 P.3d 115 (Colo. App. 2018) (reviewing denial of renewal application for retail marijuana cultivation);
- Adoption of a municipal ordinance, *see U.S. West Commc'ns v. City of Longmont*, 924 P.2d 1071 (Colo. App. 1995) (reviewing validity of ordinance addressing undergrounding of facilities);

- Rulemaking by municipal departments, *see Colo. Airport Parking, LLC v. Dep't of Aviation of City & Cnty. of Denver*, 320 P.3d 1217 (Colo. App. 2014) (reviewing municipal department's promulgated ground transportation rule); and
- Coming to a final decision in personnel disciplinary cases, *see, e.g.*, *Barnes v. City of Westminster*, 723 P.2d 164 (Colo. App. 1986) (reviewing personnel disciplinary matter).

A municipality's final action triggers the ability of an interested party to file a C.R.C.P. 106(a)(4) complaint regardless of whether the code, rules, or other pertinent document cites C.R.C.P. 106 as an avenue for relief. Nevertheless, a municipality may cross-reference C.R.C.P. 106(a)(4) or otherwise inform an individual on how to seek judicial review of a final municipal action.

For example, the City of Greeley's code section covering business taxes, licenses, and regulations, states that an order of an administrative hearing officer is subject to review by the district court if the aggrieved individual follows the procedure outlined in C.R.C.P. 106(a)(4). Greeley Municipal Code § 8-26(e). The City of Longmont code affirms that the hearing officer renders final decisions on water and utility wells, subject to a C.R.C.P. 106(a)(4) challenge. Longmont Municipal Code § 14.04.540. The Town of Monument, under the water discharge

permit section of its code, provides that an aggrieved or adversely affected party may seek review of a town order in the El Paso County District Court pursuant to C.R.C.P. 106(a)(4). Monument Municipal Code §13.12.180. The Town of Center declares that zoning applicants may challenge a final decision with the courts "in the nature of a certiorari under rule 106(a)(4)" and "[t]he town will be entitled to appeal any decision of the district court under said rule 106 proceedings." Center Municipal Code § 44-32. The Town of Alma, in its code provisions covering medical marijuana dispensaries, permits decisions made by the Board of Trustees to be reviewed by the district court under C.R.C.P. 106(a)(4), and states that "[t]he applicant's failure to timely appeal the decision is a waiver the applicant's right to contest the denial or conditional approval of the application." Alma Municipal Code § 6-3-140(e). Municipalities across the state have similar language spread throughout their code provisions.

These examples demonstrate the breadth and significant volume of municipal proceedings and decisions subject to C.R.C.P. 106(a)(4) review. As a result, the ruling in this case will apply well beyond the current case and impact many hundreds or even thousands of municipal decisions ranging from water use to taxation and land use to licensure.

Municipal decisions subject to review under C.R.C.P. 106(a)(4) are common, nearly everyday occurrences throughout Colorado. Neither the proceeding or decision, the ability to challenge such decisions, nor the time limit under C.R.C.P. 106(b) are hidden from interested parties. This process has always been accessible and currently results in hundreds of C.R.C.P. 106 cases across the state each year.[1] Eroding the current filing deadline for a C.R.C.P. 106(a)(4) action would likely cause an overwhelming increase in the number of claims. This would dramatically increase municipal costs and workload, clog courts with cases, and disrupt the plans of parties to municipal proceedings around the state. The case at issue, therefore, will significantly impact the day-to-day activities of municipalities statewide.

II. Strict application of the clear C.R.C.P. 106(b) deadline is essential to the efficient and productive operation of municipalities.

Currently, municipalities and other interested parties depend on the understanding that when a municipal governing body or official makes a final decision, the 28-day time frame for a party in interest to seek judicial review starts

[1] Based on a review of the Colorado Courts E-filing system, between 2015 and 2020, the number of cases categorized as C.R.C.P. 106 cases ranged from 253 to 335 per year. However, this presumes cases are properly categorized and does not take into consideration any cases that may be filed under a different primary case type due to multiple claims within a single complaint or those cases that include a C.R.C.P. 106 claim but are filed in federal court based on the other claims raised.

ticking. This time frame provides a fair opportunity for any party in interest to challenge the municipal decision before the district court. However, if the Court can authorize a late filing of a C.R.C.P. 106(a)(4) action or extend C.R.C.P. 106(b)'s deadline, as Respondent seeks to do in the present case, municipalities and others involved in those proceedings will be negatively impacted by the countless other requests that are likely to follow. Allowing the filing of a complaint seeking judicial review days, weeks, or months after the deadline will unfairly and impractically disrupt important actions flowing from a wide range of municipal decisions, from the commonplace to the momentous. Municipalities rely on the current strict deadline for certainty, to avoid confusion, and to run their operations smoothly. CML asks this Court to ensure that the deadline for filing a C.R.C.P. 106(a)(4) complaint remains a rigid deadline.

The deadline for filing a C.R.C.P. 106(a)(4) action is intended to function as a statute of limitations. *See Westlund v. Carter*, 565 P.2d 920, 921 (Colo. 1977) ("Since the requirements of C.R.C.P. 106(b) must be construed as a statute of limitations, the failure of the plaintiffs to perfect their petition for certiorari review within thirty days constituted a fatal defect which required that the complaint be dismissed.")[2]; *Auxier v. McDonald*, 363 P.3d 747, 751 (Colo. App. 2015)

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[2] At the time of the *Westlund* case, C.R.C.P. 6(b) set forth a 30-day deadline for

(reiterating that when “no statute provides a different limitations period, a claim seeking review under Rule 106(a)(4) that is filed more than twenty-eight days after the governmental body or officer’s final decision must be dismissed”). Unlike an appeal in a criminal case under C.A.R. 26(b), an interlocutory appeal in a civil case under C.A.R. 4.2(d), or a procedural matter in pending litigation, all of which involve deadlines for cases that already exists in the court system, the filing of a C.R.C.P. 106(a)(4) complaint initiates a case in the court system and, therefore, the filing deadline acts as a statute of limitations. Statute of limitations-type deadlines exist in part to make the judicial system fair and equitable. However, if this deadline is blurred and an interested party can sue months or years later, such a change will disrupt the fairness of the system and those who rely on it.

Uncertainty on the finality of decisions will impede the business of operating a municipality and the plans of those who depend on municipal operations. If, for example, an aggrieved person claims “excusable neglect” and files a late complaint challenging the approval of an urban renewal plan by the board of a municipality, the plan cannot move forward until the litigation is resolved. Depending on how late in the process this occurs, the municipality, property owners, and others may

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filing a C.R.C.P. 106(a)(4) complaint. In 2012, the rule was updated to provide for a 28-day filing deadline.

have already taken action in reliance on the decision they reasonably thought was final, only to be forced to stop midstream. An important project would lose momentum and those involved would lose money and resources expended on the decision. Allowing a challenge even days after the deadline has passed will result in great uncertainty and fear of disruption due to the possibility of a late C.R.C.P. 106(a)(4) complaint.

To illustrate with another example, if a person who was aware of a pending medical marijuana license application and issuance waits months to challenge the license approval, the licensee could be forced to wait for the C.R.C.P. 106(a)(4) claim to be resolved before constructing a business or may not even proceed to open if there is a chance their license will be invalidated. The municipality would lose sales tax revenue, employment opportunities for residents, or the development of another business and could risk losing the medical marijuana business altogether. While these consequences exist with any C.R.C.P. 106(a)(4) action, the risk of them occurring is confined to a known period based on the clear time frame set forth in C.R.C.P. 106(b). An exception to that time limit greatly increases the risk of any of those things happening as well as the magnitude of the impact.

Fairness, equity, and the interests of justice would not be well-served by expanding the current strict deadline, but tremendous damage would be done to

municipalities, other government entities, and all others who depend on the certainty the rule provides. Proceedings from which C.R.C.P. 106(a)(4) judicial review could follow are not conducted in secret and interested parties are not surprised by the municipal proceeding or decision because there is typically a heightened level of due process, including notice and opportunity to be heard, followed by issuance of a decision. In other cases of municipal decision-making, the proceeding may be publicized through published notice and conducted as part of an open meeting. Decisions themselves are often provided directly to parties in interest or made in a public setting. Upholding the current, well-established C.R.C.P. 106(a)(4) filing deadline continues to provide a fair opportunity for any party in interest to challenge the municipal decision while also serving the interests of government and those who rely on its services.

Finality and certainty in municipal decisions is crucial to the efficient operation of government and the wide range of services it provides to the public. Allowing exceptions to what has long been understood to be a hard deadline will cause a slowing of services, delays in development, disruption of business plans, and confusion in hiring as municipalities may be forced to wait for an uncertain extended period of time to act on a decision due to the possibility of a late C.R.C.P. 106(a)(4) complaint. This problem is compounded by the breadth of subject matter

and decisions municipalities make on a regular basis as discussed in the section above. Furthermore, it upends the current balance between a citizen's right to have his or her case heard against the municipality's need to conduct its business effectively and efficiently. *See, e.g.*, *Bd. of Cnty. Comm'rs of Douglas Cnty. v. Sundheim*, 926 P.2d 545, 550 (Colo. 1996) (stating C.R.C.P. 106 filing deadline balances citizen's right with need for efficient municipal planning); *Auxier*, 363 P.3d at 751 (quoting *Richter v. City of Greenwood Vill.*, 577 P.2d 776, 778 (Colo. App. 1978), in holding strict time limit for filing C.R.C.P. 106(a)(4) action expedites resolution to remove "municipal planning and individual properties from a cloud of uncertainty"). CML requests that this Court restore the proper balance.

III. This Court should reject the unduly burdensome and problematic excusable neglect standard created by the Court of Appeals.

A jurisdictional defect occurs when a plaintiff fails to bring a claim by the deadline, which should not be upended by permitting an extension of time due to excusable neglect. *See, e.g.*, *Gold Star Sausage Co. v. Kempf*, 653 P.2d 397, 400 (Colo. 1982) ("Failure to bring a C.R.C.P. 106(a)(4) proceeding within the . . . time limit is a jurisdictional defect."). If this Court determines that enlargements of time for excusable neglect pursuant to C.R.C.P. 6(b) apply to C.R.C.P. 106(a)(4) actions, CML supports the rejection of the unduly burdensome excusable neglect standard created by the Court of Appeals.

The district court in this case relied on C.R.C.P. 6(b)'s long-standing excusable neglect standard established in *Farmers Insurance Group v. District Court of Second Judicial District*, 507 P.2d 865, 867 (Colo. 1973), which is easily determined by any court without requiring significant action by the parties. That standard simply looks to whether there were unforeseen circumstances, such as a personal tragedy or destruction of files, that would cause a reasonably careful person to overlook a required deadline. *Id*. The Court of Appeals, in contrast, created a standard to parallel C.R.C.P. 60(b)'s excusable neglect standard, that requires courts to consider (1) whether the neglect was excusable, (2) whether the moving party has alleged a meritorious claim, and (3) whether the extension would be consistent with considerations of equity. This standard amplifies the undue burden created by allowing an enlargement of C.R.C.P. 106(b)'s time limit.

Currently, in reliance on the strict jurisdictional deadline for filing a C.R.C.P. 106(a)(4) action, courts can quickly dispose of untimely cases by resolving a motion to dismiss that considers legal issues and undisputed or limited facts. Even if this Court were to erode the filing deadline by permitting consideration of excusable neglect under C.R.C.P. 6(b), reliance on the straightforward standard utilized by the district court will still allow for a quick and

easy determination of the issue. This will not be true if this Court adopts the new standard created by the Court of Appeals.

The Court of Appeals' problematic new standard will result in unfair burdens for municipalities around the state and the courts that must resolve such disputes. District courts will be forced to consider the merits of the underlying case which, in a C.R.C.P. 106(a)(4) action, is heavily dependent upon the evidence in the record before the defendant municipal body or officer. However, C.R.C.P. 106(a)(4)(III) provides that the "date for filing the record shall be after the date upon which an answer to the complaint must be filed." Requiring the filing of the record before the answer, at the time when the court is considering a motion to dismiss, will necessitate the preparation of the record in cases when its submittal would otherwise never be required.

In many C.R.C.P. 106(a)(4) actions, the record is extensive and there is a significant cost in terms of time and resources for municipalities to compile the record for the district court – a cost municipalities do not currently have to sustain when cases should be dismissed due to an obvious lack of jurisdiction. This burden would be even greater for small municipalities that have more limited staff and resources. Forcing municipalities to utilize taxpayer monies for this purpose is

unnecessary and unwarranted in light of the easier to administer standard used by the district court.

The possibility of an evidentiary hearing to evaluate excusable neglect imposes the same, and possibly more, burdens on municipalities. Even if the production of the record is not mandated, the municipality will be forced to compile most, if not all, of the record to defend its decision during the evidentiary hearing if the merits of the case is an element of the excusable neglect analysis. The municipality will have to employ or use an in-house attorney and present at least one witness. The costs of attorneys and staff time as well as the loss of productivity will fall disproportionately on municipalities, even though it is the opposing party who seeks to avoid the strict jurisdictional deadline by claiming excusable neglect. Utilizing the district court's simple standard properly places the burden back upon the party who seeks to file a late C.R.C.P. 106(a)(4) action based on excusable neglect and reduces the burden to municipalities.

CONCLUSION

For the reasons set forth herein, CML urges this Court to uphold the strict 28-day jurisdictional deadline provided in C.R.C.P. 106(b), for seeking judicial review of a final quasi-judicial decision by the district court pursuant to C.R.C.P. 106(a)(4). If, however, the Court decides to permit late filings based on a showing

of excusable neglect under C.R.C.P. 6(b), CML requests that this Court reject the burdensome standard created by the Court of Appeals and affirm the district court's straightforward excusable neglect standard.

Dated this 7th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2022, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER MARSHALL P. BROWN** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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