COLORADO COURT OF APPEALS Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203	
Appeal from Larimer County District Court The Honorable Stephen J. Jouard Case No. 2023CV030319	
Defendant/Appellant: Fort Collins-Loveland Water District; **v.** **Plaintiff/Appellee:** Jacobs Investments, LLC d/b/a/Colorado Boring Company	**▲ COURT USE ONLY ▲**
Attorneys for *Amici Curiae*: Dianne M. Criswell, #48086 *Counsel for Special District Association of Colorado (SDA) and the Colorado Special District Property & Liability Risk Pool (CSD Pool)* Ann Terry, #25691, *Counsel for SDA* 225 East 16th Ave Suite 1000, Denver, CO 80203 Phone: (303) 863-1733 Email: dianne@sdaco.org; ann.terry@sdaco.org Tatiana G. Popacondria, #42261 1600 West 12th Avenue, Denver, CO 80204 Phone: (303) 628-6460 Email: Tatiana.Popacondria@denverwater.org *Counsel for the City and County of Denver, Acting by and through its Board of Water Commissioners (Denver Water)* Samuel J. Light, #22883 3665 Cherry Creek Drive North, Denver, CO 80209 Phone (303) 757-5475 Email: saml@cirsa.org *Counsel for Colorado Intergovernmental Risk Sharing Agency (CIRSA)* Robert D. Sheesley, #47150 Rachel Bender, #46228 1144 Sherman Street, Denver, CO 80203-2207 Phone: (303) 831-6411 Email: rsheesley@cml.org; rbender@cml.org *Counsel for Colorado Municipal League (CML)*	Case Number: 2023CA1477
BRIEF OF SDA, CSD POOL, DENVER WATER, CIRSA, AND CML AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT, FORT COLLINS-LOVELAND WATER DISTRICT	

CERTIFICATE OF COMPLIANCE

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 4,641 words (does not exceed 4,750 words).

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

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/ Dianne M. Criswell
Dianne M. Criswell, #48086
225 East 16th Ave Suite 1000
Denver, CO 80203
Phone: (303) 863-1733
Email: dianne@sdaco.org
Counsel for Amici Curiae, Special District Association of Colorado and the Colorado Special District Property & Liability Risk Pool

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The Special District Association of Colorado ("SDA"), the Colorado Special District Property & Liability Risk Pool ("CSD Pool"), the City and County of Denver, by and through its Board of Water Commissioners ("Denver Water"), the Colorado Intergovernmental Risk Sharing Agency ("CIRSA"), and the Colorado Municipal Leage ("CML"), by undersigned counsel and pursuant to C.A.R. 29, submit this brief as *amici curiae* in support of the Defendant/Appellant, Fort Collins-Loveland Water District ("District").

INTEREST OF *AMICI CURIAE*

SDA is a Colorado non-profit, voluntary association established in 1975 to provide communication, research, training, support, and advocacy for its member special districts. Special districts in Colorado date back to the early mining camps, where they were organized by residents to muster resources within the community in order to secure essential services. Since that time, special districts have played a vital role in providing public infrastructure and services throughout the state. The membership of the SDA consists of 2,611 special districts located throughout the State of Colorado. Including those members, the total number of special districts in the State of Colorado is 3,661.

The CSD Pool was formed in 1988 as a public entity risk-sharing pool, organized under Colorado law, and provides property, liability, and workers'

compensation coverage to its 2,197 members. Many special districts with public entity liability coverage through the CSD Pool operate and maintain infrastructure relating to the provision, treatment, or management of water, including water districts, sanitation districts, water and sanitation districts, conservancy districts, drainage districts, water conservation and irrigation districts, and groundwater management districts.

Denver Water is a public water utility established in 1918 to serve water to approximately 1.5 million people in Denver and the surrounding communities either directly or through a network of distribution contracts. Denver Water is a municipal corporation and a political subdivision of the State of Colorado, under the control of the Board appointed by the Mayor of Denver. Denver Water has the same powers as the City and County of Denver, but it is a separate legal entity and it is funded by water rates and new tap fees, not by taxes.

CIRSA is a Colorado public entity self-insurance pool providing property, liability, and workers' compensation coverages throughout the State of Colorado. Formed in 1982 by 18 municipalities, CIRSA now serves 284 member municipalities and affiliated legal entities. CIRSA is not an insurance company, but an entity created by intergovernmental agreement of its members as provided for by C.R.S. § 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. Whenever CIRSA members are sued in tort under the Colorado Governmental Immunity Act, CIRSA provides coverage and legal defense for such claims. Many of CIRSA's member municipalities operate utilities, including water and wastewater, and operate and maintain underground facilities.

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 106 home rule municipalities, 162 of the 165 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000. Many of CML's members operate utilities, including water and wastewater, and operate and maintain underground facilities.

The present case concerns whether the District may be held liable in tort for its alleged failure to accurately mark the type, location, size, and depth (if available) of its underground facilities resulting in damages to the

Plaintiff/Respondent, Jacobs Investments, LLC, d/b/a/ Colorado Boring Company ("CBC"). In its complaint, CBC argued that C.R.S. § 9-1.5-101, *et seq*. ("ERS") creates statutory duties, owed by owners/operators to excavators, which the District breached by failing to apply reasonable care when locating facilities under a theory of presumptive statutory liability, or in the alternative, that the District's actions were negligence per se or ordinary negligence. CBC Complaint at 4-7. CBC later expanded its theory of liability, claiming that a waiver of governmental immunity applied and that the court had subject matter jurisdiction to hear the case. CBC Response to Motion to Dismiss at 1-3, 8-14. The trial court denied the District's motion to dismiss, concluding that there were no material facts in dispute and agreeing with CBC that a waiver applied to the District's conduct in marking its water line to be part of the "operation and maintenance" of its line rather than ancillary to the purposes of the water facility. Order at 4. The Court's interpretation eliminates the protections afforded public entities under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.* ("CGIA") and exposes them to tort liability contrary to the language and intent of the ERS and CGIA.

Local governments have played a vital role in providing public infrastructure and services throughout the state, including in the treatment and delivery of clean drinking water. This brief addresses these issues in the context of the distribution

of drinking water and its treatment, but other types of underground public facilities may be impacted by this case. If this appeal by the District is unsuccessful, it would significantly broaden the CGIA waiver for the operation and maintenance of public water facilities, would signal a departure from long-standing court decisions on this waiver, and would result in excessive capital costs and unmanageable liability risks to local governments. Therefore, on behalf of their members, the *amici curiae* have a genuine interest in the outcome of these issues.

ARGUMENT

The District provides several distinct arguments in support of its appeal and this brief does not reiterate every aspect of those arguments. Rather, the *amici curiae* wish to reinforce the widespread and significant impact that the decision of this Court may have beyond the specific facts of this case.

A. Express Incorporation of the CGIA into the ERS

The civil penalties provision was added to the ERS in the 2000 legislative session by Senate Bill 184, establishing penalties for violations, assigning the costs of damages resulting from excavation damage to underground facilities depending on the circumstances, and requiring owner/operator indemnification of excavators in some circumstances. C.R.S. § 9-1.5-104.5. Subsection C.R.S. § 9-1.5-104.5(4) states that these requirements do not apply equally to public entities, providing that

"[n]othing in this article shall be construed to impose an indemnification obligation on any public entity or to alter the liability of public entities as provided in article 10 of title 24, C.R.S." This subsection was included when the entire statutory section was added in 2000 and clarifies that the other provisions of the section were not intended create public entity tort liability. Subsection C.R.S. § 9-1.5-104.5(4) has not been amended since it became law in 2000. The Colorado Supreme Court, even before the addition of C.R.S. § 9-1.5-104.5(4), recognized that the ERS did not create an implied waiver of governmental immunity. *State Department of Highways v. Mountain States Telephone & Telegraph Co*., 869 P.2d 1289, 1292 (Colo. 1994).

The trial court disagreed with the District's argument that C.R.S. § 9-1.5-104.5(4) precluded CBC's claims; however, the bases of the court's disagreement were not set forth in its order. Order at 4. The *amici curiae* incorporate by reference the District's arguments on this point. Defendant's Reply at 2-3.

For reasons explained below, expanding public entity liability through implied waivers or other theories are problematic and contradict the purposes of the CGIA. In error, the order did not apply a plain meaning interpretation to subsection C.R.S. § 9-1.5-104.5(4), although it is clear and unambiguous from the language of the subsection that public entities are not subject to tort liability under

the ERS. *Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1384-85 (Colo. 1997) (citations omitted) (noting that courts endeavor to effectuate the intent of the General Assembly by giving statutory terms their plain and ordinary meaning and interpreting statutory language to best effectuate the purposes of legislative scheme); *Ceja v. Lemire,* 154 P.3d 1064, 1066 (Colo. 2007) ("We need only turn to other rules of statutory construction if we find a statute to be ambiguous.").

B. Duty of Excavators to Exercise Reasonable Care

The ERS outlines the respective obligations of excavators and owners of underground facilities during any excavation. The purpose of the statute is "to prevent injury to persons and damage to property." C.R.S. § 9-1.5-101. Through the establishment of a statewide notification system, "excavators shall be able to obtain crucial information regarding the location of underground facilities prior to excavation and shall thereby be able to greatly reduce the likelihood of damage to any such underground facility or injury to any person working at an excavation site." *Id*. To that effect, the statutory scheme of the ERS requires that excavators "shall use nondestructive means of excavation to identify underground facilities and shall otherwise exercise reasonable care to protect any underground facility in or near the excavation area." C.R.S. § 9-1.5-103(4)(c)(I)(A). CBC's argument

that it did not bear responsibility under the statute and that there was "no need to pothole to locate" the District's line contradicts this statutory requirement to exercise reasonable care. Plaintiff's Response at 8. Reasonable care in this context means using nondestructive means of excavation, including methods such as potholing, hand-digging, and vacuum excavation.[1] Further, industry best practices require that when an excavator becomes aware that a facility has not been marked or inaccurately marked, it submit an Excavator Re-notification before proceeding with their excavation.[2] If an excavator "fails to exercise reasonable care in excavating" and "damages an underground facility during such excavation," it "shall be presumably liable for any cost or damage incurred" by the owner "in restoring, repairing, or replacing the damaged facility, together with reasonable costs and expenses of suit, including reasonable attorney fees; and any injury or damage to persons or property resulting from the damage to the

[1] *Excavator Handbook: Safe Digging Guide*, COLORADO 811 – UTILITY NOTIFICATION CENTER OF COLORADO (Nov. 2022) at 21, 54; https://www.colorado811.org/wp-content/uploads/2023/01/Excavator-Handbook-redesign-final.pdf. *See also Safety and Health Information Bulletin – Avoiding Underground Utilities during Horizontal Directional Drilling Operations*, UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Mar. 2018); https://www.osha.gov/sites/default/files/publications/shib031318.pdf (discussing the necessary practices of verification of underground line locates by potholing in the context of worker safety).

[2] *Excavator Handbook: Safe Digging Guide* at 21, 54.

underground facility." C.R.S. § 9-1.5-104.5(2)(d)(I), (II). In taking no action to confirm locates, CBC was in violation of its own statutory duties under the ERS and is now attempting to shift its own burden and reasonable care onto utility owners, which is contrary to the intent and purpose of the ERS.

C. Governmental Immunity Bars Tort Claims

The determination of governmental immunity from an action in tort, or which could lie in tort, is a question of subject matter jurisdiction to be decided pursuant to statute and addressed by the trial court on a motion to dismiss. *Fogg v. Macaluso*, 892 P.2d 271, 276-77 (Colo. 1995). Construing the statutory bar, C.R.S. § 24-10-108, the Colorado Supreme Court stated that "[w]hen the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008). And, further, that the CGIA "broadly encompasses all claims against a public entity arising from the breach of a general duty of care, as distinguished from contractual relations or a distinctly non-tortious statutorily-imposed duty." *Colo. Dep't of Transp. V. Brown Grp. Retail, Inc.*, 182 P.3d 687, 691 (Colo. 2008) (discussing amendments to the CGIA made to reemphasize and restate the original

public policy purpose of the CGIA, which is that governmental immunity applies to claims against public entities which lie or could lie in tort). The CGIA applies to all claims which are or could be pled in tort against a public entity and bars those claims unless a specific CGIA waiver applies.

The CGIA establishes governmental immunity from tort liability with limited exceptions, which are narrowly construed and do not include failure to comply with ERS requirements. ERS did not create a waiver of governmental immunity. Again, the ERS specifically states that "[n]othing in this article shall be construed to impose an indemnification obligation on any public entity or to alter the liability of public entity as provided in [CGIA]." C.R.S. § 9-1.5-104.5(4). An allowance for tort liability in the ERS against public entities, including any implication that a failure to comply with the ERS constitutes a waiver of governmental immunity under the CGIA, would fundamentally change the structure of tort law as it applies to public entities in Colorado. Such a conclusion directly contradicts the legislative intent of the CGIA, as well as the case law interpreting its provisions; therefore, the trial court erred in its order denying the District's motion to dismiss and judicially creating an implied waiver.

D. Exceptions to Governmental Immunity Are Interpreted Narrowly

Courts have applied the plain meaning analysis to waivers of governmental immunity, narrowly construing exceptions to immunity to avoid imposing liability for torts that the Colorado General Assembly did not intend. *See Richland Development Co., L.L.C. v. East Cherry Creek Valley*, 934 P.2d 841, 843 (Colo. App. 1996). There is ample case law illustrating that courts have construed the scope CGIA waivers narrowly, maintaining the plain meaning of the statutory language, and declining to expand the scope of the waiver to create implied exceptions. *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34, 37-38 (Colo. App. 1995) (refusing to apply a broad definition of "operation" to the public building waiver of governmental immunity when a slip and fall injury occurred in the parking lot of a correctional facility); *Jenks v. Sullivan*, 826 P.2d 825, 827 (Colo. 1992) (disagreeing with the injured party's assertion that the plain meaning of "or the use thereof" included security in a courthouse and stating instead that the legislature did not intend such an expansive reading of the dangerous condition of a public building waiver) (overruled on other grounds); *Jilot v. State*, 944 P.2d 566, 570 (Colo. App. 1996) (concluding that the dangerous condition of public building waiver may not be combined with other waivers to create an implied waiver).

CBC argued that the court has subject matter jurisdiction under the CGIA waiver, C.R.S. § 24-10-106(1)(f), because locating and marking underground infrastructure, as required by the ERS, falls under "operation" and "maintenance" of a "public water facility". C.R.S. §§ 24–10–103(2.5), (3)(a), (5.7). Plaintiff's Response at 8-14. The District has already well-articulated that the operation and maintenance of a public water facility waiver does not apply. For purposes of brevity, the *amici curiae* believe that *AIG Property Casualty Company v. Edwards Excavating, Inc.,* 2016 WL 11696309 (D. Colo. June 13, 2016) is helpful and persuasive in its analysis. Further, the *amici curiae* agree that locating and marking underground facilities is ancillary to the purpose of the District's water facilities. The purpose of the District's facilities is to supply water to its users and locating and marking lines does not constitute "operation and maintenance" of a public water facility as these terms are defined by the CGIA. *See Richland Development Co., L.L.C.,* 934 P.2d at 843 (holding that operation of a water facility did not include the provision of accurate information about taps and that responding to such inquiries was, at most, ancillary, to the purpose of supplying water for customers). Finally, governmental immunity may only be waived under C.R.S. § 24-10-106(1)(f) where "the public entity both operates *and* maintains the public water facility," and the CBC did not show that the District "operated *and*

maintained" its facilities by locating them. *City & Cnty. Of Denver By & Through Bd. Of Water Comm'rs v. Gallegos*, 916 P.2d 509, 512 (Colo. 1996) (emphasis added); C.R.S. § 24-10-103(3)(a) (defining "operation"); C.R.S. § 24-10-103(2.5) (defining "maintenance").

The waiver of governmental immunity provided in C.R.S. § 24-10-106(1)(f) does not apply and it was error to deny the District's motion to dismiss, because CBC's claims are barred by sovereign immunity.

E. The Purpose of Public Water Systems is to Provide Clean Drinking Water

Public water systems, such as the District, provide clean drinking water to most of the people living and working in Colorado – and 90 percent of Americans.[3] That is their purpose, and it is not a simple purpose to meet.

Public water systems are heavily regulated under state and federal laws because clean drinking water is essential for public health. In Colorado, the Colorado Primary Drinking Water Regulations apply to public water systems, like the District, with the stated purpose of "assur[ing] the safety of public drinking water supplies and to enable [enforcement] of the standards established by the

[3] *Information about Public Water Systems*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/dwreginfo/information-about-public-water-systems.

federal Safe Drinking Water Act…" Section 11.1(2) (Purpose), 5 CCR 1002-11. These are extremely complicated and technical regulations. And, the applicable laws and rules change frequently, based on periodic reviews,[4] public health crises,[5] or new scientific data.[6]

The underground infrastructure of a public water system is complicated. Water pipes and other underground facilities used by public water systems may include lines that a public entity owns or operates as a successor through abandonment, acquisition, annexation, transfer, or consolidation. Underground facilities may be old and/or transferred with little information on which a current public water system may rely. Further, the infrastructure for public water systems is expensive to build, with costs driven by the necessary consideration of public health, welfare, and safety.[7] In addition to state and federal grant and loan

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[4] *Six-Year Review of Drinking Water Standards*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/dwsixyearreview/drinking-water-distribution-systems.

[5] *EPA, Leaders of Flint and Detroit, Michigan Discuss Lead in Drinking Water*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (June 28, 2021), https://www.epa.gov/newsreleases/epa-leaders-flint-and-detroit-michigan-discuss-lead-drinking-water.

[6] *Per- and Polyfluoroalkyl Substances (PFAS)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (last visited Dec. 10, 2023), https://www.epa.gov/pfas.

[7] *State of Colorado Design Criteria for Potable Water Systems – Safe Drinking Water Program Implementation Policy DW005*, COLORADO

programs that generally speak to the extraordinary expense of building or replacing underground water facilities, there are special programs to help water systems comply with new drinking water standards and regulations, including replacing lead lines.[8] Underground facilities for public water systems are complex; and these facilities share increasingly congested rights-of-way with other underground lines, pipes, and cables.[9]

F. Governmental Immunity Exceptions Carefully Weigh Remedies for Injury against the Public Interest in Risk Management

1. Legislative Intent

The legislative intent section of the CGIA set forth in C.R.S. § 24-10-102 speaks of the need to balance the costs to the public from expanded tort liability against the public interest in preserving governmental funds for public infrastructure and essential public services. The Court's role in interpreting and effectuating the legislative intent of the CGIA is in recognition of the Legislature's

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DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT (effective July 1, 2022; scheduled review date July 1, 2026), https://drive.google.com/file/d/1lOVDmKp2qQLr8V-s5Km5LesZTr1Pg8_J/view.

[8] *Water quality grants and loans*, COLORADO DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT, https://cdphe.colorado.gov/glu; *Programs – Revolving Funds and Loans*, COLORADO WATER RESOURCES AND POWER DEVELOPMENT AUTHORITY https://www.cwrpda.com/programs.

[9] *Research Report: Managing Utility Congestion Within Rights-of-Way*, MINNESOTA DEPARTMENT OF TRANSPORTATION (Dec. 2019); https://mdl.mndot.gov/items/2019RIC20G.

role in establishing public policy. "[W]e are constrained by limiting principles of judicial review to interpret statutory language consistently with the intent of the General Assembly and with the plain meaning of the words chosen by this body when it enacts a statute. We may not substitute our view of public policy for that of the General Assembly." *Swieckowski*, 934 P.2d at 1387. In the context of the CGIA, the legislative intent is to establish by statute governmental immunity for public entities while providing limited waivers for injury from governmental negligence. Which limited waivers should exist is a matter of public policy for the General Assembly to weigh and decide.

In the *Evans* trilogy, the Colorado Supreme Court determined that the General Assembly should decide questions of government liability and risk. The purpose of those cases was not to invalidate the notion of governmental immunity, but rather establish it in the proper forum. *Evans v. Board of County Comm'rs*, 482 P.2d 968 (Colo. 1971); *Flournoy v. School Dist.*, 482 P.2d 966 (Colo. 1971); *Proffitt v. State*, 482 P.2d 965 (Colo. 1971). This was in recognition that the General Assembly, and not the courts, should determine when governmental entities should enjoy immunity from suit. *See Open Door Ministries v. Lipschuetz*, 2016 CO 37M, ¶ 13, 373 P.3d 575 (Colo. 2016).

The General Assembly enacted the CGIA to balance an individual's interest in recovering damages for an injury against the need to protect the public interest from excessive fiscal burdens. The historical default of common law sovereign immunity remains: in principle, a claim in tort cannot lie against the government. Although now, waivers of this immunity provide relief for injury in limited circumstances that result from government negligence. These waivers encourage responsible action and maintenance by governmental entities. *See Swieckowski*, 934 P.2d at 1387. This balancing of interests is shown in the CGIA Declaration of Policy, C.R.S. § 24-10-102, which expressly recognizes that unlimited liability could 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, under the CGIA, governmental entities are liable in tort for their actions, and those of their agents, only to such an extent and subject to such conditions as provided by the CGIA. *See Jilot* , 944 P.2d at 569 ("[S]overeign immunity protects public entities against the risk that unforeseen tort judgments will deplete public funds, resulting in the termination or curtailment of important government functions, by limiting waiver to specific categories of claims. Thus, waivers to sovereign immunity should themselves be strictly construed.")

2. Fiscal and Risk Management

Governmental immunity against torts is an important tool in the larger effort to manage liability risk and to provide effective and efficient government services. Expanding the scope of the waiver under C.R.S. § 24-10-106(1)(f) beyond its clear and plain meaning risks the creation of tort liability that is impossible for public entities in Colorado to manage. There would be great social and financial cost to the citizens of Colorado from such an expansion.

The limitation of governmental liability is absolutely necessary to maintain resources for Colorado's local governments for essential government services and infrastructure. If the outcome of this appeal resulted in a waiver of governmental immunity or statutory tort liability for failure to locate, the fiscal impact would exceed any amount of tax or fee revenue that local government owners or operators of public water systems in Colorado could levy because providing perfectly accurate locates is impossible without excavating entire systems. Non-conductive materials, such as PVC, cannot be located using traditional locate methods – and the requirement to install electronically locatable underground infrastructure only

applies to new underground facilities installed on or after August 8, 2018, per C.R.S. § 9-1.5-104(10).[10]

The costs of insurance and the costs of settlements and judgments for government tort liability reduce the resources that would otherwise be available for infrastructure or government services. Public entity general liability policies insure public entities against claims for injury or loss, including coverage for tort claims for which no governmental immunity applies. If CGIA waivers were broadened to allow tort liability for a public entity's failure to accurately locate underground water facilities, local governments could face liability for claims that are so significant as to be potentially uninsurable. To get a sense of the potential liability exposure, the number of locate requests (known as "tickets") which Colorado 811[11] reported in its most recently published annual report was over a million.[12] That report does not distinguish how many of the 1,098,433 tickets in 2022 were for

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[10] *Best Practice – Electronically Locatable*, UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION, DIVISION OF OIL AND PUBLIC SAFETY, COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, https://ops.colorado.gov/sites/ops/files/BestPracticeElectronicallyLocatable.pdf.

[11] Colorado 811 the statutorily authorized notification association to which all utility owners and operators must join and with which all underground utilities must be registered. C.R.S. §§ 9-1.5-102(4), 9-1.5-105.

[12] *2022 Annual Report*, COLORADO 811 – UTILITY NOTIFICATION CENTER OF COLORADO, https://www.colorado811.org/wp-content/uploads/2023/09/CO811_2022_Annual_Report_Final2_hr.pdf.

local government owned or operated underground facilities – but those locate requests to local governments likely represent a significant portion of that total. Given the potential frequency and severity of failure to locate claims, it is possible that such risks may not be insurable or if insured, under coverages that have some combination of high costs, low limits, or high deductibles.

Regardless of whether an insurance policy excludes coverage for a claim, a government liable for a tort under the CGIA waivers must still make payment somehow. In fact, the CGIA compels governments to make payment within the fiscal year of the settlement or judgment from any or all following: available funds from self-insurance reserves; unappropriated unrestricted funds; and funds appropriated for judgments, but not encumbered. C.R.S. §§ 24-10-113(1), (2). If the governmental entity is unable to pay a judgment due to a lack of funds in the fiscal year in which it is final, the entity must levy a tax to pay the judgment. C.R.S. § 24-10-113(3). These are strong statutory requirements to compel entities, like municipalities, to make full and expeditious payment. Were the CGIA waivers to be expanded, local governments would need the opportunity to plan for the fiscal impacts of increased insurance, claims and remediation costs so that taxpayers would not have to pay a special levy as a last resort. It is this

deliberative and public process for which the policy making role of the General Assembly exists.

CONCLUSION

The outcome of this appeal may significantly broaden statutory waivers of governmental immunity under the Colorado Governmental Immunity Act and, thereby, create an indeterminate, but unquestionably large and unmanageable fiscal burden on local governments with underground public water facilities. For the reasons set forth here and in the District's Notice of Appeal, the *amici curiae* request that this Court reverse the trial court judgment and remand this matter with directions.

Respectfully submitted this 15th day of December, 2023.

/s/ Dianne M. Criswell
Dianne M. Criswell, #48086
Counsel for Amici Curiae, SDA and the CSD Pool

/s/ Ann Terry
Ann Terry, #25691
Counsel for Amicus Curiae, SDA

/s/ Tatiana G. Popacondria
Tatiana G. Popacondria, #42261
Counsel for Amicus Curiae, Denver Water

/s/ Samuel J. Light, #22883
Samuel J. Light, #22883
Counsel for Amicus Curiae, CIRSA

/s/ Robert D. Sheesley, #47150
Robert D. Sheesley, #47150
Counsel for Amicus Curiae, CML

/s/ Rachel Bender, #46228
Rachel Bender, #46228
Counsel for Amicus Curiae, CML