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On Certiorari from Colorado Court of Appeals, Case No. 2023COA118 Judges Furman, Román and Fox District Court, Arapahoe County Case No. 22CV30927 Judge Elizabeth Beebe Volz	
Petitioner/Cross-Respondent: THE SENTINEL COLORADO v. **Respondent/Cross-Petitioner:** KADEE RODRIGUEZ, City Clerk, in her official capacity as Records Custodian for City of Aurora.	**▲COURT USE ONLY▲**
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BRIEF OF *AMICI CURIAE* THE COLORADO MUNICIPAL LEAGUE AND THE SPECIAL DISTRICT ASSOCIATION IN SUPPORT OF RESPONDENT KADEE RODRIGUEZ

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 28(a)(2-3), 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 2,869 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/ Robert D. Sheesley
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The Colorado Municipal League ("CML") and the Special District Association of Colorado ("SDA") respectfully submit this *Amicus Curiae* Brief in Support of Respondent Kadee Rodriguez in her official capacity as the City Clerk of the City of Aurora.

IDENTITY OF *AMICI CURIAE* AND THEIR INTEREST IN THE CASE

CML, formed in 1923, is a nonprofit, voluntary association of 271 of the 273 cities and towns located throughout Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 107 home rule municipalities, 163 of the 165 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

The SDA is a Colorado nonprofit, 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 to secure essential services. Since that time, special districts have played a vital role in providing public infrastructure and services throughout the state. The SDA's membership consists of 2,714 of 3,755 special districts located throughout Colorado.

CML and the SDA will provide the Court with a statewide perspective as to local government operations and the importance and inherent challenges of the attorney-client privilege of a local government. The Court of Appeals' decision creates substantial doubt for thousands of local governing bodies regarding their ability to effectively communicate with attorneys while furthering transparency and communicating with constituents. This brief will assist the Court by exploring the benefits and nature of the privilege in a local government organization, how accidental and unauthorized disclosures of privilege information could occur, and the nature of public meeting agendas. This brief will also seek to identify the harms to the public interest that would result from upholding the Court of Appeals' decision in this matter.

SUMMARY OF ARGUMENT

CML and the SDA urge the Court to ensure that thousands of Colorado local governments can enjoy the full benefit of the attorney-client relationship and the attorney-client privilege without risking waiver through inadvertent or unauthorized disclosure. Most local governments are governed by an elected governing body supported by staff that administer the government's functions. Outside of judicial discovery proceedings, the unintentional or unauthorized disclosure of a privileged attorney-client communication by a constituent of the local government organization

should not be construed as a waiver of the attorney-client privilege. Even if such a waiver occurs, only a partial, narrow waiver of the specific material at issue should be found. A contrary decision would decrease transparency, increase the consequences of misconduct and accidents, and devalue the attorney-client relationship and the public's interest in a local government receiving effective legal advice.

ARGUMENT

The waiver of a government's attorney-client privilege, at least outside of context of judicial discovery proceedings, should require an intentional action by a person or entity authorized to waive the privilege for the government. Waivers of a local government's attorney-client privilege should not result from unauthorized or inadvertent action by its officials or staff. To prevent harm to the public interest from inadvertent and unauthorized disclosures of privileged communications, an intentional waiver standard must apply.

I. The attorney-client privilege serves the public interest in local governments receiving effective legal advice.

Government entities are entitled to confidentiality in their communications with attorneys. *See Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. 2019) (citing *All. Constr. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 865-70 (Colo. 2002) and *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)).

The privilege allows a government to receive legal advice, comply with the law, and communicate through multiple constituents who are responsible for the client's operation. *See Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987) (applying rationale from *Upjohn Co. v. United States*, 449 U.S. 383 (1981) to protect certain communications between a state university's counsel and employees). A government client and attorney must be able to rely with certainty on the protection, otherwise, the privilege "is little better than no privilege at all." *See Upjohn*, 449 U.S. at 393.

The attorney-client privilege serves to encourage a person or organization to obtain legal assistance or advice in a timely manner. *See Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court for Denver*, 718 P.2d 1044, 1047 (Colo. 1986). "[W]ithout the protection the privilege provides to such confidential communications, 'clients may be reluctant or unwilling to seek legal advice or to confide fully in their attorney.'" *Id*. (quoting *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001)). The open exchange of information between attorney and client facilitates a full understanding of the facts and, in turn, an attorney's effective representation of their client. This confidential exchange of information is so imperative that this Court has recognized that "the right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client

are ordinarily protected from later disclosure without client consent." *Wesp*, 33 P.3d at 196.

A municipality or special district, as an organization, generally should be considered the "owner" of the attorney-client privilege. *See Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982) ("the attorney-client privilege exists for the personal benefit and protection of the person who holds the privilege"); *see also Ross*, 423 F.3d at 605 (noting that "generally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual officers, is the client"). As an organizational client, a local government acts and operates through its officers (e.g., elected bodies or mayors in some governments), employees, and other constituents. *See* Colo. R.P.C. 1.13, Comment 1. Each of these people, however, acts within the limits of authority set by law.

Ultimately, the public is the beneficiary of a governmental organization receiving the full benefit of the attorney-client relationship, including the application of the attorney-client privilege. By consulting with an attorney, the people that make decisions for the local government are more likely to respect the constitutional rights of individuals, ensure compliance with legal requirements, reduce or avoid financial liability to public finances, and consider creative legal solutions to complex

problems. The attorney-client privilege that applies to those conversation should not be set aside indiscriminately and should remain intact despite accidental disclosures or unauthorized revelations.

As expressed by the United States Sixth Circuit Court of Appeals: "Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The privilege helps insure that conversations between municipal officials and attorneys will be honest and complete. In so doing, it encourages and facilitates the fulfillment of those obligations." *Ross*, 423 F.3d at 602; *see also In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (recognizing that the government "access to candid legal advice directly and significantly serves the public interest") (internal citation omitted). This rationale for the privilege "applies with special force in the government context." *See In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005).

Despite this significant benefit, a local government organization is at significant risk of inadvertent or unauthorized disclosure of privileged communications. Privileged information cannot be restricted easily as membership in governing bodies frequently changes and multiple staff members may need access to information. Local governments also are required to conduct aspects of their business in public (under laws that recognize and protect the attorney-client

privilege). In many cases, there are few effective methods to prevent rogue disclosures. Accidental disclosures can be caused by time pressures imposed by statutory requirements, a lack of resources to conduct thorough reviews of documents in meeting materials or public records request responses, or careless speech by an individual official.

The Court's decision in this case will impact how thousands of local governments can consult with their attorneys in the pursuit of public business and fully benefit from the attorney-client relationship. If the Court of Appeals' decision is upheld, local governing bodies may be reluctant to confer with counsel before acting, which disadvantages the public in terms of transparency and sound decision-making. Legal services could be strictly rationed to avoid inadvertent disclosures, thereby preventing lower-level employees from receiving the benefit of legal advice. The loss of privilege could severely harm a local government's efforts to perform public functions, including negotiating real estate transactions, litigating disputes, or enforcing laws. In this context, CML and the SDA encourage the Court to adopt a protective view of the attorney-client privilege as it relates to local governments.

II. The attorney-client privilege of a local government entity should only be considered waived by an intentional, authorized act when the disclosure is in the course of operations.

This case presents an opportunity to confirm a protective view of the attorney-client privilege held by a local government. Such a view prevents harm to the public from the accidental or unauthorized disclosures of privileged communications. Lacking an adequate framework in which to review the disclosure in this case, the Court of Appeals simply concluded that the inclusion of a letter in an agenda packet was a waiver by the city council without considering whether the waiver was express or implied, how the letter was included, and whether the inclusions was accidental or made without authority of the city council. CML and SDA suggest that the public interest is best served by taking a more protective approach to the waiver of a local government's privileged communications during the course of its operations.

This Court, while recognizing the doctrine of waiver and several categories of waiver, has not recognized a standard approach to evaluating whether an inadvertent disclosure constitutes waiver or one that applies specifically to waivers by local governments, especially outside of the discovery context. *See Wesp*, 33 P.3d at 197; *see also In re Marriage of Amich and Adiutori*, 192 P.3d 422, 424 (Colo. App. 2007) (adopting an "ad hoc" approach to evaluating accidental disclosures of privileged information during judicial discovery proceedings); Michael H. Berger, Ann T.

Lebeck, *Inadvertent Disclosure of Confidential or Privileged Information*, 40 Colo. Law. 65, 67 (January 2011).

Waiver can be express or implied, presumably where the action was both intentional and done by someone with authority to waive the attorney-client privilege for the entity. *See Wesp*, 33 P.3d at 198 (citing *Denver Post Corp. v. Univ. of Colo.*,739 P.2d 874, 881 (Colo.App.1987) (finding an implied waiver of the privilege by the disclosure of a document to a district attorney by a governmental entity)). An implied waiver results from disclosure to a third party or placing the communications at issue. *See People v. Trujillo*, 144 P.3d 539, 543 (Colo. 2006). Disclosure alone does not suffice; implied waiver requires "evidence showing that the privilege holder, 'by words or conduct, has impliedly forsaken his claim of confidentiality with respect to the communication in question.'" *Wesp*, 33 P.3d at 198 (internal citations omitted); *see also In re Estate of Rabin*, 474 P.3d 1211, 1220 (Colo. 2020) (holding that the appointment of a personal representative was an implied waiver as to communications necessary for estate administration "in light of the role of the personal representative under Colorado law").

Only a protective, lenient standard that requires a knowing and authorized waiver serves the public interest and comports with the nature of the attorney-client privilege. The privilege can only be waived by the client. *See Losavio v. Dist. Court*,

533 P.2d 32, 35 (Colo. 1975) (internal citations omitted). "The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose." Restatement (Third) of the Law Governing Lawyers § 73, Comment j (2000); *see also Affiniti Colorado*, 462 P.3d at 614 (noting that authority to waive a "corporation's attorney-client privilege rests with its current management"). The constituents through which a local government operates, whether elected officials or staff, are given broad access to privileged information in the course of their official duties but are not endowed with authority to act individually to waive the privilege on behalf of the local government. Neither individual members of the governing body nor a staff member should be found to ever waive the privilege inadvertently or without authority. A local government should not be penalized for the negligent acts of employees or intentional acts that violate confidentiality requirements.

A lenient approach would not undermine the social interests of transparency. Unlike some states, Colorado's sunshine laws respect the attorney-client privilege and recognize the benefits that come from a government confidentially communicating with its legal counsel. The Open Meetings Law (OML) specifically provides an opportunity to hold an executive session for this purpose. The OML also recognizes that an agenda must include some description of the detail of the matter

discussed in executive session, without compromising the purpose of the session, even when it comes to attorney conferences. C.R.S. § 24-6-402(4); *see also Guy v. Whitsitt*, 469 P.3d 546, 553 (Colo. App. 2020) (construing the OML to require some description of the subject matter of attorney conferences in executive session without waiving the attorney-client privilege). The Open Records Act (ORA) prohibits the disclosure of privileged public records and includes the common law attorney-client privilege. *See* C.R.S. § 24-72-204(3)(a)(IV); *see also City of Colo. Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998) (recognizing the inclusion of the common law privilege); *DiPietro v. Coldiron*, 523 P.3d 1019, 1025 (Colo. App. 2022) (recognizing that concept that the privilege may give way to social policies is not absolute and the ORA specifically created exceptions to this concept).

As it relates to this case, the inclusion of a document in a public meeting packet, without more, should not be construed to operate as a waiver of the attorney-client privilege. The Court of Appeals determined that a waiver occurred because "the City Council included in the March 28 public letter from special counsel . . . ." reciting the direction given by the client in an executive session. There was no evidence or finding about why the letter was included or whether any person with authority to waive the privilege made the decision to include the letter. This

conclusion is contrary to this Court's direction in *Wesp* that the privilege holder must forsake confidentiality by words or conduct. *See* 33 P.3d at 198.

Aurora's meeting packet would have been prepared by staff members, like most agendas throughout the state. While local processes may exist for creating an agenda item, local government meeting agendas and supporting materials are compiled from many sources and are not likely to be reviewed by a governing body or even an attorney before publication. Similarly, agenda items and supporting materials do not represent a municipality's position or view on a particular item until approval of the item by the body. Persons with responsibility and authority to compile and publish an agenda and its supporting materials (like a city or town clerk) are not likely to have authority with respect to the government entity's attorney-client privilege. Finding a waiver through an act of the clerk or a single official that prepares an agenda would deprive the city council of the privilege it controls on behalf of the organization.

Other examples of accidental or unauthorized disclosures are not difficult to identify. A member of a governing body could lose a privileged memorandum from a city attorney or, worse, provide the document to a third party. Without approval from the rest of the council, an elected official could preface an explanation of their individual vote on a matter by stating (whether or not accurate), "Our attorney

believes this action is legal" or "According to our attorney, we are violating the law." *See, e.g., Interfaith Hous. Del., Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1402 (D. Del. 1994) (holding that individual council member did not waive council's attorney-client privilege by making a statement explaining attorney's reasoning). A city planner might consult with their town attorney regarding a land development permit through e-mail and then forward the attorney's candid response, without authorization, to the applicant. A clerk may not recognize that a document includes attorney-client communications when making the document available pursuant to the ORA. None of these situations should result in a waiver of the privilege.

The result of the Court of Appeals' decision is manifestly unjust and against the public's interest. Local governments provide agendas and supporting documentation to promote transparency and inform the public. Supporting a waiver of the attorney-client privilege in this case undermines transparency and would discourage local governments from providing detail in their agenda packets or creating a robust record, absent detailed review of agendas.

CONCLUSION

In recognition of the critical importance of the attorney-client privilege to the work of local governments on behalf of the public, CML and the SDA urge the Court to hold that the subsequent disclosure of a privileged communication in an agenda

packet did not waive the attorney-client privilege held by the city council. Instead, this Court should endorse a lenient view of unauthorized or inadvertent disclosure that will protect local governments and ensure that they continue to request and receive the full benefit of the attorney-client relationship.

Dated November 21, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2024, I filed the foregoing **BRIEF OF *AMICUS CURIAE* THE COLORADO MUNICIPAL LEAGUE AND THE SPECIAL DISTRICT ASSOCIATION IN SUPPORT OF RESPONDENT KADEE RODRIGUEZ** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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