Colorado Court of Appeals 2 East 14th Avenue Denver, Colorado 80203	⮝ FOR COURT USE ⮝
Appeal from District Court, Denver County The Honorable A. Bruce Jones Case No. 2019CV33759	
Defendant-Appellant: THE REGENTS OF THE UNIVERSITY OF COLORADO & **Plaintiff-Appellee**: PRAIRIE MOUNTAIN PUBLISHING COMPANY, LLP.	Case No. 2020CA691
Thomas B. Kelley – #1971 KILLMER, LANE & NEWMAN, LLP 1543 Champa Street, Suite 400 Denver, Colorado 80202 Telephone: 303-571-1000 tkelley@kln-law.com Marc D. Flink – # 12793 BAKER & HOSTETLER LLP 1801 California Street., Suite 4400 Denver, Colorado 80202 Telephone: 303-861-0600 mflink@bakerlaw.com *Attorneys for Amici Curiae*	

BRIEF OF AMICI CURIAE THE COLORADO FREEDOM OF INFORMATION COALITION, THE JOSEPH L. BRECHNER CENTER FOR FREEDOM OF INFORMATION, ET AL.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of 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 3,848 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/*Marc D. Flink, 12793*
Counsel, Bar Number

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INTEREST OF *AMICI*

Amici Curiae represent both individual and institutional members of the press, as well as advocacy groups for freedom of information and freedom of the press, that all work toward ensuring the public is meaningfully informed about the activities of their government and submit this brief in support of PRAIRIE MOUNTAIN PUBLISHING COMPANY, LLP. (hereinafter "the Daily Camera"). As more fully set forth in the Unopposed Motion of The Colorado Freedom of Information Coalition and The Joseph L. Brechner Center for Freedom of Information, et al., for Leave to File a Brief as *Amici Curiae* which identifies each of the *amici*, *amici* and the citizens of Colorado, all have a vested and continuing interest in the issue on appeal before this Court. It violates both the letter and intent of CORA to sanction, as the Regents of the University of Colorado have done, their dodging CORA disclosure requirements simply by designating their nominee for the position as President of the University of Colorado as the "sole finalist" for the critical chief executive position of President of the University of Colorado. Amici write in support of the Daily Camera's position that the decision of the District Court below requiring the disclosure of the names of the six finalists from which the nominee was selected be affirmed.

This brief is conditionally filed with the Unopposed Motion of The Colorado Freedom of Information Coalition and The Joseph L. Brechner Center for Freedom of Information, et al., for Leave to File a Brief as *Amici Curiae* pursuant to C.A.R. 29. *Amici Curiae* respectfully request that this Court grant the motion and accept the filing of this brief.

I. INTRODUCTION

The presidency of a state university is one of the highest-paid and most powerful positions in all of state government. For this reason, Colorado law clearly entitles the public to play an oversight role through the Colorado Open Records Act's ("CORA") required disclosure of "finalists" for the position before a hire is made, as the court below properly concluded. See C.R.S. § 24-72-204(3)(a)(XI)(A). *Amici* write to emphasize that the ruling below is not just correct as a matter of basic statutory interpretation – as it undoubtedly is – but also as a matter of responsible public policy, consistent with the way that personnel decisions are made at state universities throughout the country.

Although there are many stakeholders affected by the decisions a university executive makes, few are consulted when that executive is selected through a closed process. A closed process can lead to outrage, as seen in the current case where stakeholders were allowed to voice their opinions on the progress of the

search only after it had concluded. Unable to defend its strained reading of the Colorado Open Records Act as a matter of statutory construction – a reading that seemingly permits more restrictive disclosure if there are more than three candidates that possess minimum qualifications for the position – Appellant has essentially asked the courts to rewrite the statute as a matter of public policy, in deference to the Regents' decision to hire the president of the University of Colorado entirely behind closed doors. As shown below, public-policy appeals fare no better than Appellants' failed attempt to rewrite the Open Records Act. In reality, public-policy considerations point overwhelmingly in favor of a transparent and inclusive search, and any sky-is-falling warnings to the contrary are unsupported by the historical record.

II. ARGUMENT AND CITATION TO AUTHORITY

Amici will not repetitively recite the facts set forth amply in the decision below and in the parties' briefs. In short, the issue in this case involves the University of Colorado Board of Regents' decision to withhold the names of all candidates interviewed for the presidency of the University of Colorado-Boulder except for one: Mark Kennedy, the ultimate choice. This decision contravenes Colorado law, which provides that the public is entitled to, at a bare minimum, the

names of the three candidates deemed qualified for an executive governmental position.[1]

A. Colorado law plainly requires disclosure of records necessary for the public to exercise oversight over presidential hiring

The Colorado Open Records Act ("CORA"), C.R.S. § 24-72-201 *et seq.*, is broadly construed to maximize public access to information. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153-54 (Colo. App. 1998). A public agency, such as the University of Colorado, has no authority to withhold access to public records unless a specific statute permits it, *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288, 520 P.2d 104 (Colo. 1974), and no such exemption exists here.

As the court below correctly held, Colorado law plainly entitles the public to see the names of "finalists" for public university presidencies. In enacting a CORA exemption for the application materials for a candidate who is "not a finalist," C.R.S. § 24-72-204(3)(a)(XI)(A), the legislature consciously struck a sensible balance that protects the identities of people who have no realistic possibility of

[1] C.R.S. § 24-72-204(3)(a)(XI)(A). According to the Stipulated Facts and Supplemental Stipulated Facts submitted to the trial court, Kennedy was one of 27 candidates deemed qualified for the position of President, one of 10 candidates granted an initial interview with the search committee, and one of six finalists granted an interview with the full Board of Regents before he was selected as the nominee.

becoming president, and whose names are therefore of no great import to the public, while making sure that the public can see that the hiring process operates in a fair and above-board manner. As set forth in the ruling below, and as more fully developed in Plaintiff-Appellee's Answer Brief, the term "finalists" as used in CORA includes the six candidates who were selected to be interviewed by the Regents before they settled on Mr. Kennedy as their nominee.[2]

To allow the Regents to engage in manipulative word-play and end-run the statute by defining the term "finalist" as synonymous with "nominee" would deal a crippling blow to the Open Records Act. If hidebound agencies are permitted to invent novel and unintended definitions of commonly used words to avoid statutory disclosure obligations, the legislature's choice of terms will cease being of any legal significance and will become merely advisory.

Because the statutory entitlement to disclosure could scarcely be clearer, Appellants can win only by persuading the court to usurp the legislature and

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[2] Had the Colorado General Assembly intended "finalists" be the equivalent of a "nominee," it knew how to do so. *See, e.g.,* C.R.S. § 22-2-105.5 ("The vacating board member shall not participate in the open meeting to vote on the selection of a nominee to fill the vacancy. … Selection of a nominee shall occur by a majority vote of the state board members present and voting at the meeting called for such purpose.").

judicially rewrite the statute. For the reasons that follow, the court should decline the invitation.

B. The public has a profound interest in knowing how state university presidents are hired

The president of the University of Colorado-Boulder has responsibility for a $1.86 billion operating budget, a workforce of 37,000, and the welfare of 35,500 students. The presidency is, quite simply, one of the most powerful state government jobs in Colorado, analogous to the mayor of a city of 72,500 people, with responsibility not just for education but for housing, law enforcement, health care, and the full range of municipal services. Colorado law amply recognizes the public interest in university governance by making Regents positions publicly elected in contested races (contrary to the more commonplace method of gubernatorial appointment). This structure is explicitly built around Colorado law's recognition that state universities must be held accountable to the public.

If presidential searches are conducted in the total secrecy for which Appellants argue in this case, the public will have no way of knowing whether a diverse range of candidates received consideration, or whether the process was engineered to produce a preordained result. Research shows that secretive searches primarily accrue to the benefit of insider candidates with ties to the

decisionmakers.[3] In addition to evaluating the performance of their elected Regents, Coloradans need access to information about searches so they can evaluate the performance of high-priced executive search firms who receive six-figure compensation from taxpayer dollars.[4] None of this is possible if the public is denied information about presidential finalists.

How public university presidents do their jobs – and whether they are competent and well-prepared to do so – is, manifestly, a matter of the highest public interest and concern. At Michigan State, President Lou Anna Simon was forced to resign in disgrace for her role in the cover-up of serial sexual molestation by former gymnastics doctor Larry Nassar.[5] The chancellor of the University of Wisconsin-Oshkosh squandered millions of dollars by – without proper

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[3] *See* Frank D. LoMonte, *The Cost of Closed Searches*, ACADEME (Spring 2019), https://www.aaup.org/article/costs-closed-searches#.Xzp8ChNKjeo (reporting results of study showing that more than half of Georgia's public four-year colleges' sitting presidents, hired in closed-door searches, were in-house candidates, as opposed to neighboring states with open finalists lists, where outsider candidates stood a better chance of competing).

[4] A 2016 national study found that the average fee for a headhunting firm to hire a president or provost at a four-year university was $101,607. Rick Seltzer, *Search Firm Contracts Aren't What Some Think, Researchers Find*, INSIDE HIGHER ED (Jun. 16, 2017), https://www.insidehighered.com/quicktakes/2016/06/17/search-firm-contracts-arent-what-some-think-researchers-find.

[5] Matthew Haag & Marc Tracy, *Michigan State President Lou Anna Simon Resigns Amid Nassar Fallout*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/sports/olympics/michigan-state-president-resigns-lou-anna-simon.html.

authorization – pledging taxpayer money to back up risky investments that failed, leading him to plead guilty to felony charges.[6] A poorly chosen president can endanger the university's finances and the safety of its students. To say, as Appellants insist, that the hiring decision is none of the public's business simply ignores reality.

Public universities, in Colorado and across the country, happily acknowledge that they are government agencies when governmental status is of strategic benefit – for instance, when it entitles them to state immunity from liability suits. *See Hartman v. Regents of Univ. of Colo.*, 22 P.3d 524, 527 (Colo. App. 2000) (accepting CU-Boulder's position that it "serves a state function as an arm of the state" for purposes of sovereign immunity). Governmental status is not a cap that may be doffed and donned only when it suits the wearer; if universities are "public" when being public is beneficial, they must accept the scrutiny that goes along with it.

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[6] Kelly Meyerhofer, *Former UW-Oshkosh officials fined in plea deal in financial scandal involving building projects*, WISCONSIN STATE JOURNAL (Jan. 16, 2020), https://madison.com/wsj/news/local/education/university/former-uw-oshkosh-officials-fined-in-plea-deal-in-financial-scandal-involving-building-projects/article_53ba7c36-6c3d-59c8-b5bd-beb6ea153821.html.

C. Courts have regularly found a public interest in knowing the identities of presidential finalists

Courts across the country have interpreted their state public-records statutes, as the court below did, to enable the public to keep watch over the way state university presidents are selected. In an instructive case, *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348 (Ariz. 1991) (en banc), the Supreme Court of Arizona ruled that the university had to release the names of the 17 candidates who had been interviewed for the president's job. The court reasoned that: "Candidates who actively seek a job run the risk of their desire becoming public knowledge. Because they are candidates, they must expect that the public will, and should, know they are being considered. The public's legitimate interest in knowing which candidates are being considered for the job therefore outweighs the countervailing interests of confidentiality, privacy [and] the best interests of the state." *Id.* at 352 (internal quotes omitted).

A Louisiana appeals court ruled similarly in 2014, deciding that Louisiana State University ("LSU") trustees were obligated to release names of the candidates for the president's position who participated in the final round of interviews. *Capital City Press, L.L.C. v. La. St. Univ. Sys. Bd. of Sup'rs*, 168 So.3d 727 (La. App. 2014). The court found that the state legislature intended for the public to know the names of the candidates who interviewed with the board of

trustees: "By traveling to and participating in the interview process, these persons clearly were expressing a desire to be considered for the position," thus differentiating them from mere prospects whose names might have been idly floated. *Id.* at 742.

Contrary to the Regents' insistence in this case that transparency will compromise their autonomy, the Supreme Court of Minnesota rejected the notion that enforcement of open-records obligations constitutes an intrusion into university management decisions: "[Open government laws] affect the presidential search process only in its interface with the outside world, that is, the extent to which this public institution, which is funded substantially by public tax dollars, must make the final part of that process accessible to the public." *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 286 (Minn. 2004). The court noted that the widespread practice of disclosing the names of finalists and inviting them to the campus to be vetted in a public process "does rebut any generalization that presidential searches cannot effectively be performed under such requirements." *Id.* at 287.

Courts in Georgia and Texas, applying their states' open-government statutes, have reached similar conclusions. In *Bd. of Regents of the Univ. Sys. of Ga. v. The Atlanta Journal*, 378 S.E.2d 305, 308 (Ga. 1987), the Georgia Supreme

Court found that state law entitled the public to the names of candidates for the presidency of the University of Georgia, finding that the state's argument amounted to "a corporate preference for privacy" rather than protection of any legitimate expectation of privacy of the individual contenders. Similarly, in *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. 1983), the court found that the public's entitlement to the names of candidates for the presidency of Texas A&M University could not be overcome by asserting the privacy of the applicants, because being considered for a high-ranking government job was not a private matter. "We do not regard the candidates' names to be facts of a highly embarrassing or intimate nature, which, if publicized, would be highly objectionable to a reasonable person," the court held. "[M]any persons might well be honored that they were considered for the presidency of one of the state's large universities." *Id.* at 551. In both the Texas and Georgia cases, the courts directed university officials to the legislature, not the courts, if they wanted a special carve-out from the obligations of public records and meetings. That avenue exists for the Regents here as well.

A lone outlier case in Michigan, *Federated Publications, Inc. v. Board of Trustees of Mich. State Univ.*, 594 N.W.2d 491 (Mich. 1999), is readily distinguishable. The decisive factor there – absent in this case – is that Michigan

has a unique governance structure under which the state university system is treated in the state constitution as an autonomous branch of government, so that trustees have considerable leeway to disregard state statutes. *See id.* at 497 ("[T]he Legislature may not interfere with the management and control of universities. … The constitution grants the governing boards authority over the absolute management of the University, and the exclusive control of all funds received for its use.") (internal quotes and citation omitted). In Colorado, the General Assembly through the enactment over the years of express provisions of CORA that make CORA's statutory requirements applicable to the Regents, has divested the Regents of the autonomy they seek to retain to determine who are and who are not "finalists" subject to disclosure. *Cf. Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 2012 CO 17, 271 P.3d 496 (Colo. 2012).

To sum up, courts have regularly found that the public is entitled to access to the records of presidential finalists, both because that is a faithful construction of state open-government law and because there are compelling public-policy imperatives that point toward the need for inclusiveness and transparency.

D. Claims that secrecy is necessary to make a successful hire are overblown and unsupported by evidence

To the extent that the Regents seek to nullify state law by arguing that secrecy is necessary to produce a successful presidential hire, the evidence for that

claim is slender. In fact, research demonstrates that there is no night-and-day difference between the backgrounds of people hired as presidents in searches where finalists are disclosed versus those hired in secrecy.[7] While the recent history of searches across the country indicates that universities are modestly more likely to hire away sitting presidents if they conduct a closed search, they are modestly *less* likely to hire away sitting provosts and vice presidents – and a closed search is more likely to yield a president with no substantial higher-ed experience who comes from the business world.[8] The same study also demonstrates that, counter to the claim that candidates will shy away from competing in public because of the risk of lost professional reputation, no such loss is documentable: The most common career path for someone who is publicly rejected as a presidential finalist is to attain a different presidency[9] – which is exactly the case at hand here. Contrary to the insistence that the best-qualified candidates will not apply for presidential searches in which their names are disclosed, Kennedy himself recently applied for a presidency at the University of Central Florida

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[7] Turner Street, *Is secrecy necessary for a successful university presidential search? Here's what the numbers say*, MEDIUM.COM (Aug. 6, 2020), https://medium.com/@UFbrechnercenter/is-secrecy-necessary-for-a-successful-university-presidential-search-heres-what-the-numbers-say-b429f954145c.
[8] *Id.*
[9] *Id.*

knowing that his name would be disclosed, and – as evidenced by his selection at UC-Boulder – plainly suffered no lasting career damage by having his UCF candidacy publicly debated.[10]

The secrecy with which the Regents made the choice ended up provoking substantial backlash, including "antagonistic" receptions at four campus visits after Kennedy's hire became a *fait acccompli*.[11] The Boulder Campus Staff Council passed a resolution expressing dissatisfaction with Kennedy as the nominee, citing concerns about diversity and donor relations during his time at the helm of the University of North Dakota.[12] A graduate student at CU-Denver encapsulated the feelings of the opposition, saying, "I don't want him to be the CU president. But it also seems a little concretely clear that it doesn't matter what I or students or

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[10] Andrew Haffner, *Mark Kennedy not chosen as Central Florida president*, GRAND FORKS HERALD (Mar. 9, 2018), https://www.grandforksherald.com/news/4415499-mark-kennedy-not-chosen-central-florida-president. In point of fact, CU-Boulder is rated as a more prestigious institution than UCF, according to *U.S. News and World Report*.
[11] Jenny Brundin, *After A Week Of Meetings And Town Halls, Mark Kennedy Still Hasn't Won Over Some CU Students And Faculty*, COLORADO PUBLIC Radio (Apr. 26, 2019), https://www.cpr.org/2019/04/26/after-a-week-of-meetings-and-town-halls-mark-kennedy-still-hasnt-won-over-some-cu-students-and-faculty/.
[12] A copy of the Apr. 19, 2019, resolution is available at https://www.colorado.edu/staffcouncil/2019/04/19/resolution-concern-mr-mark-kennedys-nomination-president-university-colorado..

faculty or staff think either because the regents have already made up their minds."[13]

From a group of six finalists, a public body put forth a candidate for public position, asked the people for their thoughts, the people roundly rejected the candidate and asked for another, and the public body went on to appoint its candidate anyway. The Regents' action in the face of such opposition raises legitimate public interest and concern over the qualifications of the other five finalists – an interest and concern that the CORA "finalist" provisions were enacted to address.

E. The Need For Transparency And Public Input And Oversight Extends To All Governmental Executive Positions.

The Amici supporting the Defendant-Appellant provide anecdotal evidence of how other state and local entities in Colorado have circumvented the requirements of CORA by naming sole "finalists." However, there can be no doubt that this court lending its imprimatur to such process will undermine the transparency and public participation in the selection of persons for state and local executive positions intended by the legislative enactments in CORA. Qualified

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[13] *Diversity, Inclusion Dominate CU President Finalist's Campus Tour*, KUNC.ORG (Apr. 26, 2019), https://www.kunc.org/education/2019-04-26/diversity-inclusion-dominate-cu-president-finalists-campus-tour.

candidates wishing to serve the public good in roles of police chiefs, fire chiefs, town managers, and other critical state and local executive positions abound.[14] Just recently, the city of Aurora, which has been under a nationwide scrutiny after the August 2019 death of a 23-year-old African-American man in police custody, hired its first female police chief after a nationwide search that attracted applicants from much larger police departments including Baltimore and Dallas, four of

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[14] *See, e.g.*, Mike Bunge, *Finalists named for new Albert Lea city manager*, KIMT.COM (Aug. 25, 2020), https://www.kimt.com/content/news/Finalists-named-for-new-Albert-Lea-City-Manager-572217461.html (identifying five finalists for the position of city manager in Albert Lea, all of whom have experience as city managers or city administrators and four of whom hold advanced degrees); Kelsey Thompson, *Meet the 4 finalists for Hutto's next city manager*, COMMUNITY IMPACT NEWS (Aug. 6, 2020), https://communityimpact.com/austin/round-rock-pflugerville-hutto/government/2020/08/06/meet-the-4-finalists-for-huttos-next-city-manager/ (reporting that 68 people applied for the Hutto city manager's position, for which four finalists were publicly announced); Suzanne Cheavens, *District announces three superintendent finalists*, TELLURIDE DAILY PLANET (Feb. 13, 2020), https://www.telluridenews.com/news/article_70ad6aba-4eb9-11ea-b150-3b228fabb01f.html (reporting that three Telluride school superintendent finalists would be holding an open-door meet-and-greet with interested community members); Trevor Reid, *Public invited to meet 6 finalists for Front Range Fire chief*, GREELEY TRIBUNE (May 2, 2019), https://www.greeleytribune.com/2019/05/02/public-invited-to-meet-6-finalists-for-front-range-fire-chief/ (reporting that 36 people applied for fire chief of Greeley, six of whom were named finalists and brought to town to meet the public, three of whom were present or former chiefs of other departments). Notably, in every one of these situations and dozens more like them across the state, the governing bodies referred to the final round of interviewees, accurately, as "finalists."

whom were declared finalists and interviewed in publicly viewable sessions.[15] The public was able to see that a diverse and well-qualified slate of candidates received careful consideration, rather than being left to "trust the system" at a time of enormous distrust and skepticism of all government operations, especially policing. It would be unthinkable in the year 2020 to take the position that the public is entitled to no voice in the hiring of a police chief. While some candidates undoubtedly would like to be secretly considered for a position they may not achieve, an affirmation of the ruling below will make it clear that the General Assembly weighed those considerations and determined that the public has an interest in providing input into the candidate that will be the nominee for the position selected from the list of finalists being considered.

III. CONCLUSION

Every consideration in this case points in favor of the trial court's correct decision: Colorado law unmistakably entitles the public to the documents that

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[15] Elise Schmelzer, *Longtime Aurora police officer will be first woman to lead the departmen*t, DENVER POST (Jun. 9, 2020), https://www.denverpost.com/2019/12/30/aurora-interim-police-chief-vanessa-wilson/; *see also* Janet Oravetz, *Aurora Police chief finalists face questions from community during virtual town hall*, 9NEWS.COM (Jun. 23, 2020), https://www.9news.com/article/news/local/local-politics/aurora-police-chief-finalists-town-hall/73-9592ea22-8d6f-44e0-b1b7-8b7acf1f8f37 (reporting on public interview session for four finalists, including senior officers from Baltimore and Dallas police departments).

Appellees are seeking, judicial decisions interpreting laws similar to Colorado's are broadly in agreement that disclosure is required, and public policy imperatives weigh lopsidedly in favor of transparency and accountability – perhaps never more so than now, when universities are literally making life-or-death decisions about the safety of tens of thousands of young people. For all of the aforementioned reasons, the decision below should be affirmed and access to the requested records granted.

DATED: September 8, 2020

Respectfully submitted,

/s/Thomas B. Kelley
Thomas B. Kelley – #1971
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: 303-571-1000
tkelley@kln-law.com

/s/ Marc D. Flink
Marc D. Flink – # 12793
BAKER & HOSTETLER LLP
1801 California Street., Suite 4400
Denver, Colorado 80202
Telephone: 303-861-0600
mflink@bakerlaw.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, a true and correct copy of the foregoing was served via Colorado Courts E-Filing and served upon all counsel of record listed below:

Robert R. Gunning, #26550
Eric Maxfield, #29485
Maxfield Gunning, LLP
1738 Pearl Street, Suite 300
Boulder, Colorado 80302

Michael Kotlarczyk
Assistant Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Mike.kotlarczyk@coag.gov

Skippere Spear
Senior Assistant Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Skip.Spear@coag.gov

Erica Weston
Special Assistant Attorney General
Office of University Counsel
1800 Grant Street, Suite 700
Denver, CO 80203
Erica.weston@cu.edu

/s/ Deborah Gonday
Deborah Gonday