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Colorado Court of Appeals Case No. 2023CA1537 Denver County District Court Case No. 2020CV33286	▲**COURT USE ONLY**▲
Petitioner/Cross-Respondent: PUBLIC SERVICE OF COLORADO d/b/a XCEL ENERGY, v. **Respondent/Cross-Petitioner:** ESTATE OF CAROL ROSS, by and through its personal representatives DEREK ROSS and TANYA WEINDLER as heirs to Carol Ross.	Case No. 2025SC231
Attorneys for Amici Curiae: The Colorado Civil Justice League, The National Federation of Independent Business Small Business Legal Center, Inc., Colorado Defense Lawyers Association Name: Evan Stephenson (#37183) Phoebe Schneider (#59337) Spencer Fane LLP Address: 1700 Lincoln Street, Suite 2000 Denver, CO 80203 Telephone: 303.839.3800 Facsimile: 303.839.3838 Email: estephenson@spencerfane.com pschneider@spencerfane.com	

BRIEF OF *AMICI CURIAE* THE COLORADO CIVIL JUSTICE LEAGUE, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., COLORADO DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,392 words (and does not exceed the length limit for amicus briefs from C.A.R. 29(d), which here is 4,750 words) and complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules.

s/ *Evan B. Stephenson*

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INTERESTS OF AMICI CURIAE

The Colorado Civil Justice League ("CCJL") is a voluntary non-profit organization dedicated to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy, and legislative initiative. It is a diverse coalition of large and small businesses, trade associations, individual citizens, and private attorneys. Founded in the year 2000, CCJL has been actively involved in legislative reform of Colorado's civil liability system and has submitted amicus curiae briefs to this Court on several occasions.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in

Washington, D.C., and all 50 state capitals, the interests of its members.

Colorado Defense Lawyers Association ("CDLA") is a statewide nonprofit organization comprised of over 800 defense attorneys. Founded in 1973, CDLA supports and serves the interests of lawyers involved on the defense side of civil litigation. The organization's members generally represent businesses and insurance companies, as well as individuals and entities being defended under a policy of insurance or indemnity. They provide superior and balanced service to their clients by enhancing the skills, effectiveness, and professionalism of the Colorado civil defense bar and addressing significant issues in the civil justice system.

The issue presented in this case will affect the CCJL, NFIB Legal Center, CDLA, and their respective members. Amici Curiae believe their local and national perspectives will aid the Court in its analysis of the important issues before it.

ISSUE PRESENTED

Whether, as a matter of first impression, the "felonious killing" exception to the Wrongful Death Act's cap on noneconomic damages,

C.R.S. § 13-21-203(1)(a) (2024), by its plain language applies only to individuals and not corporations.

SUMMARY OF THE ARGUMENT

The Court should reverse the court of appeals' ruling in *Estate of Ross v. Public Service Company of Colorado*, 2025 COA 31, 569 P.3d 882, expanding to corporations the "felonious killing" exception to the noneconomic damages cap in the Wrongful Death Act ("WDA"), which on its face applies only to "individuals," meaning natural persons. Amici agree with the exegesis of the statutory scheme provided in Petitioner's opening brief.

This brief addresses the public policy question of "why." Specifically, why would a legislature create a "felonious killing" exception for natural persons but not corporations? The answer: doing so maximizes the deterrent impact of tort law on the natural persons who kill others by their own conduct. It is both a rational and sensible policy decision to aim the deterrent effect of uncapped noneconomic damages solely at natural persons whose hands do the killing, to deter as many such killings as possible from occurring. By targeting the most proximate direct human cause of these deaths, the Legislature's policy

choice seeks to minimize, through tort deterrence, the number of people who die in such killings, preserving as many human lives as possible. The Legislature's policy choice, viewed *ex ante* from the perspective of protecting innocent human life, makes eminent sense.

As with all public policy choices, the General Assembly's decision represents a trade-off. Limiting the felonious-killing exception to individuals (i.e., natural persons) who kill also limits the number of pockets or bank accounts plaintiff's attorneys may recover from after a killing has occurred. The Legislature's choice prioritizes the goal of *ex ante* prevention of killings above that of *ex post* compensation. Those are the two competing policy goals at stake in this appeal: (i) reducing the number of such killings, versus (ii) maximizing the pool of money available after they do.

There is no avoiding a trade-off between the two goals. The two goals cannot both be optimized here. This is so because allowing plaintiffs to recover against corporations for the same deaths will reduce or obviate the exception's deterrent effect upon human killers. In effect, it will insulate human killers from paying uncapped damages personally or from facing the consequences of being subject to an

uncapped judgment they cannot pay. Plaintiffs' attorneys can much more easily collect from the assets and insurance policies of corporations than from those of individuals. The court of appeals' rule will thus shift the focus away from the actual human killer to corporations, blunting the deterrent effect.

The General Assembly exercised its role and prerogative as a policymaking body to adopt laws that effectively prioritize deterrence of felonious homicide over compensation for it. The court of appeals overturned that policy decision. Because "the public policy of the state is a matter for the determination of the Legislature and not for the courts," *St. Luke's Hosp. v. Indus. Com. of Colo.*, 349 P.2d 995, 997–98 (1960), this Court should reverse and restore the Legislature's choice.

ARGUMENT

I. EXPANDING THE FELONIOUS-KILLING EXCEPTION TO CORPORATIONS WOULD REDUCE OR ELIMINATE ITS IMPACT ON NATURAL PERSONS WHO ACTUALLY COMMIT FELONIOUS HOMICIDES

The General Assembly's incorporation of the probate code's definition of "felonious killing" into the WDA demonstrates that the felonious-killing exception targets natural persons who commit felony

homicides—not corporations whose liability may in practice simply be passed on to the public and externalized on society. The Legislature's decision to limit the exception to natural persons who commit homicide represents a sensible policy choice to maximize deterrence and prevention of such killings in the first instance. This Court should restore that choice by reversing the judgment below.

A. Colorado Legislatively Adopted Noneconomic Damages Caps in Response to the Insurance Crisis of 1986

Every statute "must be construed in light of [its] legislative intent and purpose." *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364 (Colo. 1994) (construing a statute imposing a cap on noneconomic damages). To properly understand the Legislature's decision not to apply the felonious-killing exception to corporations, it is necessary to review the history and purpose of legislative noneconomic damages caps in this State.

In 1986, the General Assembly enacted a series of damage caps and other "tort reform" laws in response to the phenomenon that Yale Law School professor George L. Priest dubbed the insurance "crisis of early 1986." George L. Priest, *The Current Insurance Crisis and Modern*

Tort Law, 96 Yale L.J. 1521, 1527 (1987). The insurance crisis was severe. In 1986, the U.S. Department of Justice released a study of the crisis noting that insurance had become "simply" unavailable in some areas.[1] Where insurance was available, "premium increases of several hundred percent over the last year or two have become commonplace."[2]

The Justice Department blamed the crisis in part on the "explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as pain and suffering or punitive damages."[3] The Justice Department's study recommended a series of legal reforms, including laws to "[l]imit non-economic damages (such as pain and suffering, mental anguish, or punitive damages) to a fair and reasonable maximum dollar amount."[4]

Colorado heeded such advice. The "General Assembly passed tort reform legislation in 1986 in response to concerns about dramatic

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[1] *See Tort Policy Working Group, U.S. Dep't of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 5 (1986).

[2] *Id.* (emphasis in original).

[3] *Id.* at 6.

[4] *Id.* at 8.

increases in the cost of insurance and the difficulties people and businesses experienced obtaining insurance." *Niemet*, 866 P.2d at 1364. The "primary goal of the legislature" in enacting the noneconomic damages caps "was to increase the affordability and availability of insurance by making the risk of insured entities more predictable." *Id.*

B. The Legislature Addresses Concerns About the Adequacy of Noneconomic Damages Compensation by Increasing Caps or by Creating Secondary Caps, Not by Uncapping Damages

Increasing the affordability and availability of insurance, however, was not the General Assembly's sole goal. The Legislature "was also concerned about unduly restricting the recoveries of deserving, injured people." *Id.* at 1365. As to Colorado's ordinary statutory cap on noneconomic tort damages, C.R.S. § 13-21-102.5(3)(a), the Legislature created a "relief valve" intended to increase the compensation received by those "seriously or desperately" injured. *Niemet*, 866 P.2d at 1364 (Senate Floor Debate on S.B. 67 Before the Full Senate, 55th Gen. Assembly, 2d Reg. Sess., 2d Reading (Audio Tape 86–14, Feb. 25, 1986)). As this Court observed in *Niemet* regarding the legislative cap on regular noneconomic tort damages: "The intent

was to cap the amount of noneconomic damages paid by individual defendants, in order to increase predictability for insurance companies, while at the same time not restricting the recovery of noneconomic damages by seriously injured persons more than was necessary to accomplish the goal of insurance predictability." *Id.* at 1365–66.

To address concerns regarding adequate compensation for seriously injured plaintiffs, the Legislature created a secondary, higher, doubled noneconomic damages cap in regular tort cases (not wrongful death cases). C.R.S. § 13-21-102.5(3)(a). As shown by this history, the Legislature knows how to alleviate concerns about inadequate compensation plaintiffs caused by noneconomic damages caps. Its solution is to adjust the caps or create a secondary cap that is higher and is governed by statutory factors. It is not to uncap the damages.

The Legislature has recently confirmed and again followed its historical approach to concerns about the adequacy of compensation. Instead of uncapping damages in certain species of cases, the General Assembly once again raised the caps. *See* H.B. 24-1472, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024); Seth Klamann, *Colorado Gov. Jared Polis signs law raising damages cap for medical malpractice*

claims, Journal-Advocate, June 3, 2024. Adjusting the caps—not uncapping damages—has always been the Legislature's policy choice to address adequacy of noneconomic damages compensation. And it remains the Legislature's policy choice to this day.

The General Assembly's longstanding approach to the compensation objective of tort law and damages caps comports with Colorado's longstanding policy regarding noneconomic damages, as explained in the Colorado Revised Statutes:

> The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

C.R.S. § 13-21-102.5(1); *see also James v. Coors Brewing Co.*, 73 F. Supp. 2d 1250, 1252 (D. Colo. 1999) ("In finding that such awards are unduly burdensome, Colorado's General Assembly implied that enactment of the tort reform statutes would serve to protect individual defendants from excessive damage verdicts while maintaining sufficient awards for injured plaintiffs.").

C. The Felonious-Killing Exception to the WDA Advances the Deterrent Purpose of Tort Law, as Opposed to Its Compensatory Purpose

Compensation, however, is not the only purpose of tort law. "Torts are designed to encourage socially beneficial conduct and deter wrongful conduct." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 897–98 (Colo. 2002). The Restatement (Second) of Torts section 901(c) states that the "rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable." Restatement (Second) of Torts § 901(c); *Hoery v. United States*, 64 P.3d 214, 223 (Colo. 2003) (citing section 901(c)). These purposes are, among other things, "to punish wrongdoers and deter wrongful conduct." Restatement (Second) of Torts § 901(c).

For a number of reasons, the evidence reflects that the felonious-killing exception seeks to deter natural persons who kill, rather than being focused primarily on compensation. First, as explained above, the Legislature has always addressed the adequacy of compensation through the amount of the caps, rather than uncapping damages for classes of cases.

Second, the General Assembly adopted the felonious-killing exception in response to a domestic violence case in which the cap protected a father who brutally murdered his children's mother. (Respondent's Addendum Filed in the Court of Appeals, Case No. 2023CA001537 at 33–34 (Filed May 30, 2024), Filing ID D7BCA52768E23.) The legislative history focuses significantly on domestic violence cases and the need to prevent domestic violence. For instance, a speaker from the Denver District Attorney's office stated the felonious-killing exception would "in fact have some preventative effect that we can stop cycles of violence by using resources and helping people recover." (*Id.* at 40.) Another speaker in support of the felonious-killing exception specifically distinguished between corporate liability and domestic violence cases, stating that he did not "anticipate" more cases implicating the exception "happening in the corporate world. I do anticipate it happening in the domestic violence world." (*Id.* at 41.) Prevention of domestic violence was a focus of the exception.

Third, still another supporter of the bill explained its importance in helping prevent fatal hate crimes such as stabbings that neo-Nazis had perpetrated in Texas. (*Id.*) That supporter expected the exception to

create "better protection" against certain hate crimes. (*Id.*) Judging from the context, the call for "protection" sought to prevent such murders from evil actors (such as neo-Nazis) from occurring in the first place, not to collect from a greater pool of corporate money after the murders had occurred. (*See id.*) The overall tenor of the commentary in support of the bill centered on the impact of uncapped noneconomic damages on the natural persons who kill others.

D. Enforcing the Felonious-Killing Exception as Written Focuses the Deterrent Signal of Tort Law on the Natural Persons Who Kill

This Court and the Restatement (Second) of Torts both endorse the notion that tort law deters civil wrongs. *Bueno*, 54 P.3d at 897–98; Restatement (Second) of Torts § 901(c). Some scholars claim to have demonstrated the deterrent effect of tort law empirically. *See* J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & Econ. 427, 453 (2001). Some researchers further contend that uncapping noneconomic damages increases the deterrent effect of tort law. *See* Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform*, 84 J. Health Econ., July 2022, at 1. Maximizing tort-law deterrence with uncapped

noneconomic damages, however, comes at a steep cost that the Legislature has rejected in most instances, for the reasons identified above.

The General Assembly, however, decided that it was a good policy decision to uncap noneconomic damages entirely and unleash unchecked tort-law deterrence on the small class of anti-social natural persons who kill others. C.R.S. § 13-21-203(1)(a). Enforcing the felonious-killing exception against such individuals can be expected to maximize tort law's deterrent effect on the most proximate cause of felonious homicides—the human beings who directly commit them with their own hands. Maximizing the legal impact of such conduct on those individuals increases the chance of deterring them from committing homicidal acts in the first place, promoting the preservation of innocent human lives.

E. Expanding the Felonious-Killing Exception to Corporations Reduces or Eliminates Its Impact on the Natural Persons Who Actually Kill

From the standpoint of maximizing tort-law deterrence of natural persons who actually kill, the Legislature's decision to limit the felonious-killing exception to individuals is prudent. But expanding the

exception to corporations would reduce or eliminate its impact on natural persons who kill.

This is so because opening up corporations to this type of liability will change the litigation-strategy incentives of plaintiffs and their attorneys. Once corporations are liable for uncapped damages under the felonious-killing exception (especially if that occurs under theories of vicarious liability), plaintiffs' attorneys' incentives will be to shift as much of the uncapped damages as possible to corporations, whose insurance and assets typically exceed those of individuals, and against whom collection activity is easier. The incentive to pursue the human felonious killer personally, or to pursue him or her with the same vigor, will be dramatically reduced. Indeed, there would be no need even to join the actual human being who killed. Under Petitioner's view of the exception, plaintiffs could sue the nearest corporation and not even name the natural person who directly committed the killing.

Together, all of these factors necessarily reduce the personal impact of the felonious-killing exception on those who commit such killings. They therefore necessarily reduce the deterrent impact of tort law on those natural persons and, a reasonable Legislature could

conclude, may increase the number of such felonious homicides in society. The Legislature had every right, and every reason, to craft the WDA to promote the policy of reducing the number of felonious killings by increasing the deterrence of natural persons who most directly commit them. The court of appeals reversibly erred by substituting its own judgment in place of the statute as written.

II. EXPANDING THE FELONIOUS-KILLING EXCEPTION TO CORPORATIONS WILL FORCE THE INNOCENT PUBLIC TO SUBSIDIZE INDIVIDUAL KILLERS IN THE FORM OF HIGHER COSTS

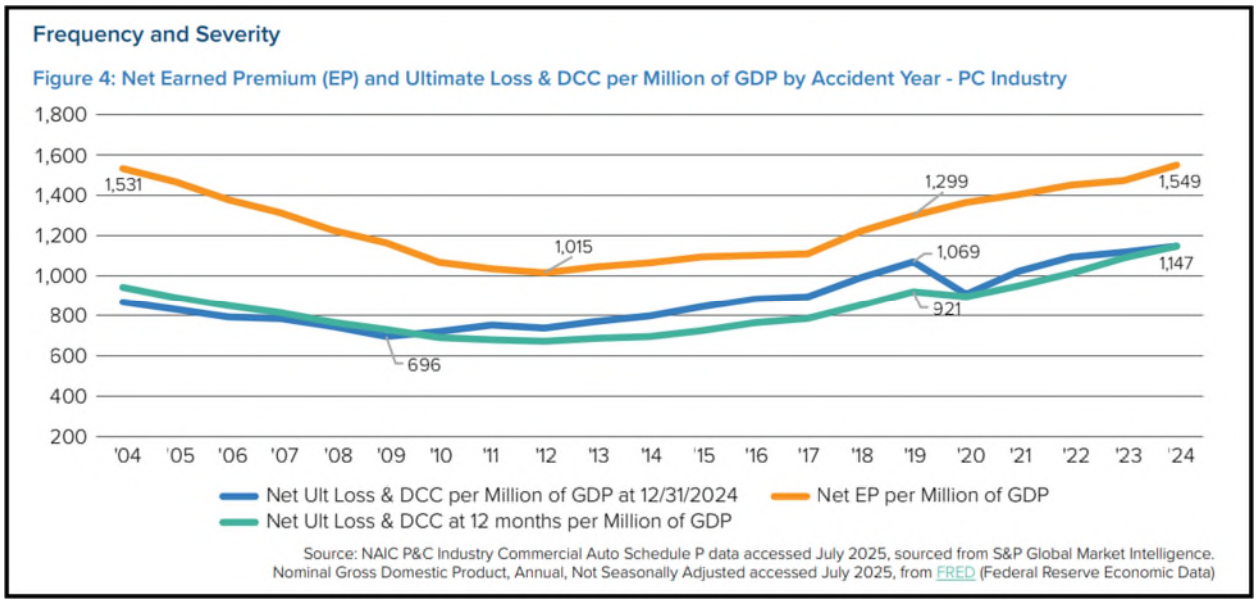
The shift of focus away from the natural person who committed the felonious killing to the nearest corporation will have further profound consequences that run afoul of the WDA. Not only will the human beings who committed such felonies face less personal accountability and deterrence, but also the public will ultimately be forced to cross-subsidize them as businesses pass along uncapped damages to public in the form of higher prices.

It is well known that businesses pass on the costs of the legal system to the public in the form of higher prices for products and services. *See* Charles J. Goetz, *Law and Economics* 400 (1984) (noting

that, according to economic modeling, "a cost initially levied on producers turns out, after the passage of some time for adjustment, to be 'shifted' entirely to consumers. The tracing out of this process in an attempt to discover the ultimate consequences of a market change is called incidence analysis. Traditionally, economists have used incidence analysis primarily to investigate the burdens imposed by various forms of taxes. The same analytic principles are, however, applicable to other kinds of costs and benefits, notably including those created by the legal system."); Deborah J. La Fetra, *Freedom, Responsibility, and Risk*, 36 Ind. L. Rev. 645 (2003) (". . . consumers must also realize that businesses have passed the costs of outlandish tort verdicts onto them in the form of higher prices. Even worse, many vitally important businesses have simply chosen not to operate in the United States out of fear of litigation.").

The phenomenon of businesses passing the costs of uncapped damages to the public can be illustrated with time-series data for liability insurance charting the amount spent on such insurance against the amount paid for claims. Below is one example of such data from the

commercial auto space that is typical of all major liability insurance spaces:



Jim Lynch & William Nibbelin, *Increasing Inflation on Liability Insurance – Impact as of Year-End 2024* at 6 (Ins. Info. Inst. 2025).[5]

As shown above, commercial auto liability insurance industry data indicate that premiums and losses paid move together, as corporations charge more to cover increased costs, passing them back to the public. In the words of the authors of the report quoted above: "Until 2009 commercial auto ultimate losses were falling relative to GDP. Since

[5] https://www.iii.org/sites/default/files/docs/pdf/triple-i_cas_increasing_inflation_year-end-2024_wp_10302025.pdf

then, the line has been characterized by relentless increases in losses, which since 2012 have been passed along to customers." (*Id.*) In simpler terms, when these costs go down, corporations can lower their prices (all other variables held constant); but when they rise, so do prices, as corporations pass back the increases to consumers.

Expanding the felonious-killing exception to businesses will inevitably result in innocent members of the public paying higher prices for insurance and other goods and services as businesses pass back to them the cost of uncapped noneconomic damages created by natural persons who kill. The net effect will be that felonious killers will be permitted to externalize the costs of their killings on society, reducing their own accountability at the expense of the innocent Colorado public. The Court should recoil from such an outcome, particularly where, as here, the plain language of the felonious-killing exception forbids it.

CONCLUSION

The Court should reverse the ruling of the court of appeals and hold that the felonious-killing exception does not apply to corporations.

Dated: March 5, 2026

Respectfully submitted,

s/Evan B. Stephenson
Evan B. Stephenson (#37183)
Spencer Fane LLP

s/Phoebe K. Schneider
Phoebe Schneider (#59337)
Spencer Fane LLP

Attorneys for Amici Curiae the Colorado Civil Justice League, The National Federation of Independent Business Small Business Legal Center, Inc., and Colorado Defense Lawyers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via CCE this 5th day of March, 2026, on all counsel of record.

s/ Elise D. Norris