DATE FILED: January 23, 2023 8:00 PM
FILING ID: 22176BD034332
CASE NUMBER: 2022SC250

**SUPREME COURT OF COLORADO**
Ralph Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Appeal from the Colorado Court of Appeals, 2020CA1778
Opinion by Freyre, J., Navarro and Harris, JJ., concurring.
Jefferson County Dist. Ct. No. 2018CV31077
Honorable Christie A. Bachmeyer, Judge

**Petitioner: City and County of Denver**

**v.**

**Respondents: Board of County Commissioners of Adams County, City of Aurora, City of Brighton, and City of Thornton**

Robert Reeves Anderson, No. 48057
Brian M. Williams, No. 55343
Elizabeth M. Stonehill, No. 57845
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street
Denver, CO 80202-2848
Tel.: (303) 863-1000
Fax: (303) 863-2301
Email: reeves.anderson@arnoldporter.com
brian.williams@arnoldporter.com
elizabeth.stonehill@arnoldporter.com

*Attorneys for Amici Curiae*

▲ COURT USE ONLY ▲

Case Number: 2022SC250

# BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE COLORADO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER CITY AND COUNTY OF DENVER

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(a)(2) and (3), C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. The brief of *amici curiae* complies with the applicable word limit set forth in C.A.R. 29(d). Specifically, the brief contains 4,582 words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28(a)(2) and (3), C.A.R. 29 and C.A.R. 32.

*s/ R. Reeves Anderson*
Robert Reeves Anderson

*Counsel for Amici Curiae the Chamber of Commerce of the United States of America and the Colorado Chamber of Commerce*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **Page(s)**

**STATUTES**



**OTHER AUTHORITIES**

## IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The mission of the Colorado Chamber of Commerce is to champion a healthy business climate in Colorado. The four key objectives of that mission include: (1) maintaining and improving the cost of doing business; (2) advocating for a pro-business state government; (3) increasing the quantity of educated, skilled workers; and (4) strengthening Colorado's critical infrastructure (roads, water, telecommunications, and energy). The Colorado Chamber is the only business association that works to improve the business climate for all sizes of business from a statewide, multi-industry perspective. As a private, non-profit organization, the Colorado Chamber's work is funded solely by its members.

*Amici* have a substantial interest in the issue presented in this case. National and local businesses operating in Colorado enter into and are governed by thousands—perhaps hundreds of thousands—of contracts that will be affected by this Court's decision in this case. Left undisturbed, the Court of Appeals' accrual rule based on an "aware[ness] of damages," "certainty of harm," and "incentive to sue" threatens to upset settled contract-performance expectations for businesses. Businesses need certainty in their contractual relations, including certainty about how and when they may be exposed to suits arising from breaches of contract. *Amici* offer a wide-lens perspective on the detrimental effects of the rule adopted by the Court of Appeals—a rule that creates a perpetual risk that businesses may be forced to litigate decades-old claims when the relevant parties and evidence may no longer be available.

## SUMMARY OF THE ARGUMENT

The question presented in this case—whether a cause of action for breach of contract accrues only when "the extent of damages is fully ascertainable and there is an 'incentive to sue,'" Order granting certiorari at 2—may be one of first impression in this Court, but it is not novel.[1] Other state courts across the country have held

[1] The Court of Appeals held that a cause of action for breach of contract does not accrue until a plaintiff has "certainty of harm and incentive to sue." *Bd. of Cnty. Comm'rs of Adams Cnty. v. City & Cnty. of Denver*, 2022 COA 30 ("Opinion"),

almost uniformly that the statute of limitations for a breach-of-contract claim accrues at the time of non-performance (or when the non-performance is discovered), rather than when the damages are ascertainable. This majority consensus includes states that have adopted a discovery rule like Colorado's. Of the two outlier states that have embraced a contrary rule, one did so expressly by statute (Missouri), and the other relied on decades of settled precedent (Ohio). Neither of those rationales supports the Court of Appeals' decision in this case. Indeed, the 1950 student note that originally conceived of the "incentive to sue" rule never suggested that it apply to breach-of-contract claims like this one. Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1205–06 (1950).

Adoption of the "incentive to sue" rule would disrupt settled expectations for those doing business in Colorado, making this state a less attractive forum for commerce. The rule would also upend the General Assembly's intent to ensure stability and predictability through statutes of limitations, which protect individuals and businesses alike from being forced to litigate stale claims when memories have faded and evidence has been lost. The "incentive to sue" rule would afford litigants an indefinite period of time in which to bring claims, ignoring the legislature's

¶¶ 22–23. Under that formulation, "[c]ertainty of harm" refers to knowledge of damages flowing from the breach. *Id.* ¶¶ 21–23. This brief refers to that two-pronged standard as the "incentive to sue" rule.

judgment that, when it comes to certain lawsuits, it's better never than late. This new landscape will drive up transaction costs for businesses, and perhaps drive business away from Colorado.

## ARGUMENT

In Colorado, parties have three years to assert a claim for breach of contract. C.R.S. § 13-80-101(1)(a). That limitations period begins to accrue "on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence." *Id.* § 13-80-108(6). The key statutory term for determining the triggering date is the direct object—"breach"—which is commonly understood as a "violation or infraction of a law, obligation, or agreement." *Breach*, *Black's Law Dictionary* (11th ed. 2019); *see also Breach*, *Merriam-Webster*, http://merriam-webster.com/dictionary/breach (last visited Jan. 23, 2023) (an "infraction or violation of a law, obligation, tie, or standard"). In both the technical and lay definitions of "breach," the precipitating event is the "violation" of an "obligation," what contract law refers to as "non-performance." *See* 23 Williston on Contracts § 63:1 (4th ed.) ("As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract."); *see also Breach of Contract, Black's Law Dictionary* (11th ed. 2019) ("Violation of a contractual obligation by failing to

perform one's own promise, by repudiating it, or by interfering with another party's performance.").

In the decision below, the Court of Appeals determined that Adams County knew of Denver's alleged breach—its failure to use a noise-monitoring system to assess whether aircraft noise exceeded agreed-upon levels—by 1995. Opinion ¶ 21. Under the accrual statute's plain language, Adams County thus had until 1998 to file a claim for breach of contract. Adams County chose not to pursue a claim within that three-year window, purportedly because it did not perceive sufficient financial incentive to bring a lawsuit at that time. *Id.* ¶ 17. Adams County's conscious decision should have ended the parties' dispute in 1998 and precluded this suit, which was filed nearly two decades later.

Yet the Court of Appeals held that the statute of limitations accrued not, as the statute mandates, when Adams County discovered the "breach," but rather when Adams County realized its own "certainty of harm" and thus had a sufficient "incentive to sue." *Id.* ¶¶ 22–23. That novel interpretation of the accrual statute runs headlong into the statutory text and departs from settled understanding and precedent.

This *amicus* brief supplements those merits arguments by explaining how the decision below places Colorado out of step with nearly every other state to confront

this issue. As other states have recognized in rejecting the Court of Appeals' approach below, an incentive-to-sue rule undermines the objectives that statutes of limitations are enacted to accomplish: encouraging the prompt resolution of disputes and preventing the litigation of stale claims.

## I. Nearly Every State Has Rejected an "Incentive to Sue" Accrual Rule Based on Ascertainment of Damages

An accrual rule triggered by a plaintiff's "certainty of damages" and "incentive to sue" would put Colorado out of step with the rest of the country. In the only two states where the limitations period accrues upon ascertainment of damages, the relevant rule has either been enacted by statute or promulgated through a long and unbroken line of case law. Neither of these rationales supports the Court of Appeals' adoption of the minority approach for Colorado.

### A. At least 41 states follow the majority approach

A nationwide survey of state accrual rules reflects the outlier nature of the decision below. At least 41 states[2] have adopted the rule advocated by petitioner

[2] Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* Addendum. Seven other states—Iowa, Maine, New Jersey, New Mexico, North

here: that a breach-of-contract claim accrues when the breach occurs (or is discovered), regardless of whether damages are fully ascertainable at that time or whether the plaintiff has an incentive to sue. *See, e.g.*, *Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 749 n.6 (Okla. 2021) (collecting cases) ("The vast majority of courts weighing in on this fundamental question of law have held that a breach of contract claim accrues at the moment of breach rather than when the plaintiff is damaged by the breach."); *Amoco Oil Co. v. Liberty Auto & Elec. Co.*, 810 A.2d 259, 266 (Conn. 2002) ("[I]n an action for breach of contract the cause of action is complete at the time the breach of contract occurs . . . ." Absent fraudulent concealment, "ignorance of the fact that damage has been done does not prevent the running of the statute."); *Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. Dist. Ct. App. 2006) ("For a breach of contract action, it is well established that a statute of limitations runs from the time of the breach, although no damage occurs until later.").

This consensus holds true in states that, like Colorado, incorporate the discovery rule into their accrual standards. *See, e.g.*, *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135 (Ill. 1995) ("For contract actions . . . the

---

Dakota, Pennsylvania, and Rhode Island—also appear to follow the majority approach, though precedent is less clear in those jurisdictions. *See id.*

cause of action ordinarily accrues at the time of the breach of contract, not when a party sustains damages."). South Carolina, for example, applies a discovery rule nearly identical to Colorado's: "[A] breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence." *RWE NUKEM Corp. v. ENSR Corp.*, 644 S.E.2d 730, 733 (S.C. 2007). But "[t]his rule does not require that the party have actual notice of the full extent of damages or of the claim itself." *Poly-Med, Inc. v. Novus Scientific Pte. Ltd.*, 2018 WL 1932551, at *5 (D.S.C. Apr. 24, 2018); *see also Jones v. Hyatt Ins. Agency, Inc.*, 741 A.2d 1099, 1104 (Md. 1999) (under Maryland's discovery rule, "[i]n contract cases, . . . the period of limitations begins to run from the date of the breach").

Three states—Hawaii, California, and Tennessee—have explained that an "incentive to sue" in the context of a discovery rule means a suspicion of wrongdoing, not knowledge of damages: "Once the plaintiff has a suspicion of wrongdoing, *and therefore an incentive to sue*, she must decide whether to file suit or sit on her rights." *MODDHA Interactive, Inc. v. Philips Elecs. N. Am. Corp.*, 2015 WL 12746235, at *8–9 (D. Haw. May 14, 2015) (emphasis added) (quoting *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 928 (Cal. 1988)); *Bailey v. Shelby Cnty.*, 2013 WL 2149734, at *11 (Tenn. Ct. App. May 16, 2013) (same). Thus, in the states where

courts consider a litigant's incentive to sue, it is not, as the Court of Appeals believed, the *certainty of damages* that creates an incentive to sue, but rather a *suspicion of wrongdoing*. At that point, "[s]o long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *MODDHA Interactive, Inc.*, 2015 WL 12746235, at *8.

States have articulated numerous rationales for rejecting a "certainty of damages" requirement for accrual in contract actions. "[U]nlike a tort claim, a breach of contract is a legal wrong independent of the existence of actual damages." *Morgan*, 488 P.3d at 750. In addition, based on the economic nature of contractual disputes, there is a real "concern that plaintiffs will delay bringing suit after a contract is breached in order to increase damages." *Hermitage Corp.*, 651 N.E.2d at 1135. By holding that a cause of action accrues at the moment of breach regardless of the certainty of damages, states provide an "objective, reliable, predictable and relatively definitive rule." *Med. Jet, S.A.*, 941 So. 2d at 578.

These rationales apply with equal force in Colorado. "Nominal damages are recoverable for a breach of contract even if no actual damages resulted or if the amount of actual damages has not been proved." *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 481 (Colo. App. 2003). Alternatively, a party can bring an action for specific performance. *Wheat Ridge Urb. Renewal Auth. v.*

*Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 740 (Colo. 2007); *see also, e.g.*, *Morgan*, 488 P.3d at 750 (holding that "[a]n action for breach of contract accrues when the contract is breached, not when damages result" because nominal damages are available immediately upon breach). Tethering accrual to the ascertainment of damages makes even less sense when Colorado courts have issued conflicting rulings on whether damages are even an element of a breach-of-contract claim. *Compare Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 818 (Colo. App. 2003) ("Proof of actual damages is not an essential element of a breach of contract claim."), *with City of Westminster*, 100 P.3d at 477 (damages are an element of a breach of contract claim). Given that disagreement, it is improbable that the General Assembly would have intended to tie accrual for breach of contract claims to the ascertainment of damages.

### B. The two states adopting the minority approach did so expressly by statute or based on longstanding precedent

As noted above, only two states have adopted a rule that the limitations period begins to run when damages are ascertainable: Missouri and Ohio. However, the rationales that motivated courts in those states to embrace the minority position do not apply in Colorado.

In Missouri, the state legislature expressly predicated accrual on the ascertainment of damages: a cause of action for breach of contract "shall not be

deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, *but when the damage resulting therefrom is sustained and capable of ascertainment*." Mo. Rev. Stat. § 516.100 (emphasis added). Unlike Colorado's accrual statute, which is silent on damages, Missouri's statute is explicit that the statute of limitations accrues only when damages are ascertainable, not at the time of breach. Missouri thus offers a statutory foil to Colorado: if the Colorado legislature intended for damages to be relevant to accrual in breach-of-contract actions, it could have enacted a law like Missouri's. Indeed, the Colorado General Assembly knows how to tie accrual to damages when it wants to. *See, e.g.*, C.R.S. § 13-80-108(8) (emphasis added) (unenumerated causes of actions "accrue when the *injury, loss, damage*, or conduct giving rise to the cause of action is discovered"). This Court, of course, is not free to include statutory requirements where the legislature has declined to do so. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. . . . To do so is not a construction of a statute, but, in effect, an enlargement by the court.").

The Court of Appeals' decision below affords Colorado litigants even more latitude to delay suit compared to Missouri's statute. Missouri adopted an objective standard, asking whether "some" damages have been sustained "so that claimants

know that they have a claim for some amount." *Nettles v. Am. Tel. & Tel. Co.*, 55 F.3d 1358, 1362–63 (8th Cir. 1995); *see also Dixon v. Shafton*, 649 S.W.2d 435, 438 (Mo. 1983) ("[T]he word 'ascertain' has always been read as referring to the fact of damage, rather than to the precise amount."). By contrast, the decision below appears to embrace a *subjective* standard under which a claim does not accrue until litigants have "certainty" of damages sufficient to establish an incentive to sue. For some litigants, a claim worth $1,000 may be sufficient incentive to sue; for others, the threshold may be $1,000,000 or more. By tying accrual to a party's accumulation of damages that it subjectively determines constitutes an "incentive to sue," the Court of Appeals' opinion invites delay and uncertainty.

As for Ohio, courts in that state have subscribed to the minority approach consistently through decisional law for decades. *See Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 536 N.E.2d 411, 414 (Ohio Ct. App. 1988); *Helen A. Thompson v. Ohio Dep't of Trans.*, 1996 WL 684138, at *3 (Ohio Ct. App. Nov. 26, 1996); *Bell v. Ohio State Bd. of Trustees*, 2007 WL 1640968, at *7 (Ohio Ct. App. June 7, 2007); *Castle King L.L.C. v. Atty Gen. of Ohio*, 2011 WL 1137299, at *2 (Ohio Ct. App. March 29, 2011). Colorado courts, by contrast, have consistently *rejected*—up until the decision below—the argument that accrual of a breach-of-contract action depends on damages. *See Middlekamp v. Bessemer Irr.*

*Ditch Co.*, 103 P. 280, 282 (Colo. 1909); *Goeddel v. Aircraft Fin., Inc.*, 382 P.2d 812, 815 (Colo. 1963); *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 147 n.8 (Colo. 2007); *D.R. Horton, Inc.-Denver v. Travelers Indem. Co. of Am.*, 860 F. Supp. 2d 1246, 1254 (D. Colo. 2012).

In adopting the "incentive to sue" rule, the Court of Appeals ignored the approach followed in almost every state, *i.e.*, that the statute of limitations accrues at the time or discovery of breach, regardless of whether damages are ascertainable. Unlike the few states that tie accrual to ascertainable damages, Colorado is not bound to this approach by statute or decades of decisional law. This Court should reverse the Court of Appeals to align Colorado with nearly every other state that has considered this issue.

## II. An "Incentive to Sue" Rule Needlessly Undermines the Salutary Benefits of Statutes of Limitations

The Court of Appeals' decision below undercuts policy benefits that motivate legislatures and courts alike to embrace statutes of limitations, most notably the timely resolution of legal disputes. A damages-based incentive-to-sue rule allows claims to be brought "after some indefinite period of time"—potentially decades—thereby "destroy[ing] the effectiveness of the statute of limitations." *Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992). This unpredictable standard inevitably will increase the cost of doing business in Colorado. To the extent the decision below was

motivated by equitable factors, Colorado law already provides courts with flexibility to address unfair applications of the statute of limitations.

### A. An "incentive to sue" rule disincentivizes the timely litigation of disputes, creates uncertainty, and increases transaction costs

This Court has described as "intuitively obvious" the "rationale for allowing only a limited and specified time period to discover breaches and damages" when "regular and diligent inspection" would uncover the alleged breach. *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 814 (Colo. 2008). Limitations statutes "penaliz[e] unreasonable delay," thereby encouraging litigants to timely pursue their claims. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996). They promote "desirable security and stability," protecting parties from a continual threat of litigation. *Id.* And they prevent "the litigation of stale claims," which "promotes justice" and the efficient resolution of judicial disputes. *Morrison v. Goff*, 91 P.3d 1050, 1056 (Colo. 2004).

A damages-based "incentive to sue" rule undermines these salutary benefits in several respects. First, an incentive-to-sue rule *rewards* rather than punishes delay. If the statute of limitations does not begin to accrue until the plaintiff knows of the certainty of harm and has a sufficient incentive to sue, that inquiry will extend by an unknown duration the time within which a litigant can pursue a legal claim, allowing potential plaintiffs to take a wait-and-see approach to their rights.

That approach encourages gamesmanship in which parties delay enforcement of their contract rights until an opportune moment. Consider an investment contract entered into in 2010 that bars the broker from pursuing speculative investments, including any collectibles. The beneficiary learns in a year-end statement in 2011 that the broker invested a small portion of the portfolio in sports trading cards—a clear breach of the parties' contract. The beneficiary confronts the broker, but because the investment generated a substantial return, the beneficiary declines to sue to enforce the contract and acquiesces to the investment.[3] Over the next several years, the broker invests progressively higher percentages of the portfolio in trading cards and continues to obtain steady returns. In 2022, the market for trading cards crashes and erases half of the portfolio's value, prompting the investor to sue for breach of contract based on the broker's collectibles investment. Even though the beneficiary had known for more than a decade that the broker had breached the contract by investing in trading cards, an incentive-to-sue rule based on certainty of damages would excuse the beneficiary's years-long delay in enforcing the contract until the beneficiary decided it was worth it to sue.

[3] *See* Jeff Tracy, *The sports trading card boom*, Axios (September 2, 2020), https://www.axios.com/2020/09/02/sports-trading-card-value-boom-stock-market.

Statutes of limitations are enacted to prevent precisely that gamesmanship. In Colorado, once a party discovers a breach, it has *three years* to decide whether it wants to pursue a lawsuit. That affords an aggrieved party ample time to investigate the breach and consider what the short- and long-term damages may be, and to weigh those benefits against the risks and burdens of litigation. To the extent uncertainty remains, the parties can enter a tolling agreement or try to resolve the dispute out of court. But the General Assembly has decided that there are consequences when a party opts to do nothing, only to try to assert its contract rights years later after the parties believed the matter to be resolved.

These concerns surfaced in the 1950 student note that spawned the incentive-to-sue rule, Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950). *See Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver*, 907 P.2d 648, 654 (Colo. App. 1995) (citing *Developments*). The special rule was proposed to address instances of "continuing or repeated wrongs" when it might be unclear whether the limitations period should accrue from the first wrongful act or some later period. *See Developments*, at 1205; Opinion ¶¶ 17–18 (emphasis added) (explaining that Aurora knew of Denver's alleged breach in 1995 and that "*no recurring duties are associated with this claim*."). Notably, the 1950 law review article concedes that a breach of contract would trigger the running of

the limitations period: "If the defendant's conduct in itself invades the plaintiff's rights, so that suit could be maintained regardless of damage—*as with a breach of contract* and most intentional torts—the statute commences upon completion of the conduct." *Developments*, at 1200–01 (emphasis added). The decision below thus extended the "incentive to sue" rule to circumstances it was never intended to address.

Second, the incentive-to-sue rule facilitates the litigation of stale claims. Businesses may be forced to defend against claims that "have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *W. Colorado Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 29 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)). This case exemplifies that risk, as witnesses with knowledge regarding the parties' contractual negotiations in the 1990s passed away before Adams County filed this lawsuit. Brief of Appellant, *Bd. of Cnty. Comm'rs of Adams Cnty. v. City & Cnty. of Denver*, 2022 COA 30, 2021 WL 7500856, at *23.

Third, an incentive-to-sue rule creates uncertainty for businesses forced to perpetually languish under a risk of future suit, perhaps decades after performance decisions were made. This unpredictability will drive up transaction costs by forcing parties to devise, negotiate, and draft language to contract around the possibility of

a protracted limitations period. For instance, businesses may be forced to include definitive contractual limitations periods to supersede the unpredictable "incentive to sue" rule. Without such a contract provision, parties could be held hostage by opportunistic plaintiffs who sit on their rights for years or even decades.

These hardships will be differentially felt by businesses with nationwide operations, who may be forced to adopt Colorado-specific contract language or risk carrying liability reserves on their books for decades. Some businesses may even be disincentivized to do business in Colorado for fear of being forced to defend against unexpected lawsuits long after Colorado operations have stopped.

### B. An "incentive to sue" rule could spread beyond contract disputes

The adverse consequences of the Court of Appeals' decision are not doctrinally limited to claims for breach of contract. Litigants seeking an end-run around the statute of limitations will seize on the incentive-to-sue standard in other contexts, too.

The governing statute—C.R.S. § 13-80-108—applies to several other causes of actions. For fraud claims, accrual occurs "on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered." C.R.S. § 13-80-108(3). Likewise, claims for wrongful possession "accrue at the time the wrongful possession is discovered or should have been

discovered by the exercise of reasonable diligence." *Id.* § 13-80-108(7). Given the similarity of language among the various provisions—swapping out only the direct object of "breach" for "misrepresentation" or "wrongful possession"—plaintiffs will certainly seek to apply the rule to these other claims, again risking unfair surprise for businesses. *See also id.* § 6-1-115 (Consumer Protection Act claims accrue "after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.").

### C. Equitable tolling already protects parties from rigid application of statutes of limitations

The "incentive to sue" rule appears to be a solution in search of a problem: a way to mitigate the potential inequity inherent in all limitations periods. *See Fed. Elec. Comm'n v. Cruz*, 142 S. Ct. 1638, 1652 (2022) (discouraging such "prophylaxis upon prophylaxis"). But Colorado law already includes an equitable release-valve for truly exceptional situations. In addition to the legislature's adoption of a generous discovery rule, the doctrine of equitable tolling mitigates the risks inherent in a limitations period.

Colorado has long recognized that in certain narrow circumstances, "equity provides a basis for tolling a statute of limitations." *Garrett v. Arrowhead Imp. Ass'n*, 826 P.2d 850, 853 (Colo. 1992); *see also Morrison*, 91 P.3d at 1053. Tolling may be warranted when litigants fail to timely file their claims due to the defendant's

"wrongful conduct" or other "extraordinary circumstances." *Brown v. Walker Com., Inc.*, 2022 CO 57, ¶ 35 n.5. Together, Colorado's accrual statute and equitable tolling "provide courts with tools to prevent statutes of limitations from expiring and barring claims." *Morrison*, 91 P.3d at 1053.

Unlike the doctrine of equitable tolling, which this Court has applied sparingly, *see, e.g.*, *Brodeur*, 169 P.3d at 150, and characterized as "disfavored," *Brown*, 2022 CO 57, ¶ 35, no such guardrails limit a party's ability to argue that it lacked sufficient financial incentive to sue based on the accumulation of damages. As more parties seek safe harbor within that minority rule, the benefits attendant to the statute of limitations will be further eroded.

## CONCLUSION

The Court should reverse the decision below.

Dated: January 23, 2023

Respectfully submitted,

ARNOLD & PORTER

*s/ R. Reeves Anderson*

Robert Reeves Anderson (Bar No. 48057)
Brian M. Williams (Bar No. 55343)
Elizabeth M. Stonehill (Bar No. 57845)
1144 Fifteenth Street
Denver, CO 80202-2848
Tel.: (303) 863-1000
Fax: (202) 863-2301
Reeves.Anderson@arnoldporter.com

## ADDENDUM

| Survey of the 50 States and the District of Columbia | |
|---|---|
| **States expressly adopting the rule advocated by Petitioner:**<br>41 jurisdictions expressly hold that a breach-of-contract claim accrues when the breach occurs (or is discovered), regardless of whether damages are fully ascertainable at that time or whether the plaintiff has an incentive to sue. | |
| **1. Alabama** | ***AC, Inc. v. Baker*, 622 So. 2d 331, 335 (Ala. 1993)** ("The statute of limitations on a contract action runs from the time a breach occurs rather than from the time actual damage is sustained."). |
| **2. Alaska** | ***Howarth v. First Nat. Bank of Anchorage*, 540 P.2d 486, 490–91 (Alaska 1975)** ("The statute of limitations begins to run in contract causes of action from the time the right of action accrues . . . . This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as a consequence of the breach."). |
| **3. Arizona** | ***Trepel v. Hodgins*, 2022 WL 1316198, at *3 (Az. Ct. App. May 3, 2022)** ("A breach of contract accrues when a party fails to perform as required."). |
| **4. Arkansas** | ***Zufari v. Architecture Plus*, 914 S.W.2d 756, 760–61 (Ark. 1996)** ("The test for determining when a breach of contract action accrues is the point when the plaintiff could have first maintained the action to a successful conclusion . . . . When performance of a duty under contract is contemplated, any non-performance of that duty is a breach" that entitles a plaintiff to bring an action.). |

| | |
|---|---|
| **5. California** | ***Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F. Supp. 2d 1127, 1134 (N.D. Cal. 2006)** ("A cause of action for breach of contract accrues at the time of the breach of contract, and the statute of limitations begins to run at that time regardless of whether any damage is apparent or whether the injured party is aware of his right to sue.") (applying California law). |
| **6. Connecticut** | ***Tolbert v. Connecticut Gen. Life Ins. Co*, 778 A.2d 1, 5 (Conn. 2001)** (In an action for breach of contract, it "is well established that *ignorance of the fact that damage has been done does not prevent the running of the statute*, except where there is something tantamount to a fraudulent concealment of a cause of action."). |
| **7. Delaware** | ***Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 77 (Del. 2013)** ("A cause of action accrues . . . at the time of the wrongful act, even if the plaintiff is ignorant of that cause of action . . . . For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach. Breach is defined as a failure, without legal excuse, to perform any promise which forms the whole or part of a contract."). |
| **8. District of Columbia** | ***Hensel Phelps Constr. Co. v. Cooper Carry, Inc.*, 210 F. Supp. 3d 192, 197 (D.D.C. 2016)** ("Indeed, District of Columbia law is clear: accrual for contract cases occurs when the contract is first breached . . . . Once the breach is committed, the statute of limitations begins to run even if the breaching party still had additional contract duties to perform, even if the full scope [of] the consequences from the breach are not yet apparent, and even if there is still an opportunity to remedy the consequences of the breach to minimize or eliminate damages."). |

| | |
|---|---|
| **9. Florida** | ***Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. Dist. Ct. App. 2006)** ("For a breach of contract action, it is well established that the statute of limitations runs from the time of the breach, although no damage occurs until later."). |
| **10. Georgia** | ***Space Leasing Assocs. v. Atl. Bldg. Sys. Inc.*, 241 S.E.2d 438, 441 (Ga. App. 1977)** ("Under Georgia law, the statute of limitations runs from the time the contract is broken, and not at the time the actual damages results or is ascertained."). |
| **11. Hawaii** | ***Scott v. Pilipo*, 23 Haw. 349, 355 (1916)** ("A right of action accrues whenever such a breach of duty or contract has occurred . . . . That the statute begins to run from the time a right of action accrues, without regard to when actual damages results, is well settled."). |
| **12. Idaho** | ***Mason v. Tucker & Assocs.*, 871 P.2d 846, 853 (Id. Ct. App. 1994)** ("A cause of action for breach of contract accrues upon the breach even though no damage may occur until later."). |
| **13. Illinois** | ***Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135 (Ill. 1995)** ("For contract actions . . . the cause of action accrues at the time of the breach of contract, not when a party sustains damages."). |
| **14. Indiana** | ***Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 56 N.E.3d 38, 44 (Ind. Ct. App. 2016)** ("A cause of action for breach of contract accrues and the limitations period commences at the time of the breach, rather than at the time that actual damages are sustained as a consequence of the breach."). |

| | |
|---|---|
| **15. Kansas** | ***Pizel v. Zuspann*, 795 P.2d 42, 54 (Kan. 1990), *opinion modified on denial of reh'g*, 803 P.2d 205 (Kan. 1990)** ("A cause of action for breach of contract accrues when a contract is breached by the failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury it causes."). |
| **16. Kentucky** | ***Wood v. State Farm Fire & Cas. Co.*, 2020 WL 1898401, at *3 (Ky. Ct. App. Apr. 17, 2020)** ("[T]his Court reaffirmed that an action for breach of contract accrues when the contract is breached, not when damages are suffered."). |
| **17. Louisiana** | ***Div. of Admin., Office of Cmty. Dev.-Disaster Recovery Unit v. Leger*, 333 So.3d 486, 489–93 (La. Ct. App. 2021)** (holding that the prescriptive period for a breach-of-contract claim ran from the initial moment of non-compliance—when the agreement was signed—because the prescriptive period begins to accrue "when the contract is breached"). |
| **18. Maryland** | ***Jones v. Hyatt Ins. Agency, Inc.*, 741 A.2d 1099, 1103–04 (Md. 1999)** ("In contract cases, the general rule is that the period of limitations begins to run from the date of breach, for it is then that the cause of action accrues and becomes enforceable . . . . For every breach of a contract, there is a right of recovery of at least nominal damages."). |

| | |
|---|---|
| **19. Massachusetts** | ***Nortek, Inc. v. Liberty Mut. Ins. Co.*, 843 N.E.2d 706, 710–11 (Mass. App. Ct. 2006)** ("A cause of action for breach of contract accrues at the time of breach . . . even though a specific amount of damages is unascertainable at the time of the breach or even if damages may not be sustained until a later time."). |
| **20. Michigan** | **Mich. Comp. Laws § 600.5827** ("[T]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."). |
| **21. Minnesota** | ***Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989)** ("A cause of action accrues when the right to institute and maintain a lawsuit arises . . . and it has long been settled that a cause of action for breach of contract accrues on the breach of the terms of the contract.").<br><br>***Estate of Riedel by Mirick v. Life Care Ret. Communities, Inc.*, 505 N.W.2d 78, 81 (Minn. Ct. App. 1993)** ("Specifically, a breach of contract action accrues at the time of the breach, even though actual damages occur later."). |
| **22. Mississippi** | ***Johnson v. Crisler*, 125 So. 724, 725 (Miss. 1930)** ("In the case of a breach of contract, the cause of action accrues at the time of breach, regardless of the time when damages from the breach occurred; this is the general rule.").<br><br>***Rives v. Ishee*, 335 So. 3d 1098, 1102 (Miss. Ct. App. 2022)** (recognizing that Mississippi has held that a cause of action accrues at the time of breach, regardless of damages, "for almost a century now"). |

| | |
|---|---|
| **23. Montana** | ***Kitchen Krafters, Inc. v. Eastside Bank of Montana*, 789 P.2d 567, 571 (Mont. 1990), *overruled on other grounds by Busta v. Columbus Hosp. Corp.*, 916 P.2d 112 (Mont. 1996)** ("A breach of contract is a legal wrong independent of actual damage. A failure to show actual damages and the resulting interference that none were sustained does not defeat the cause of action."). |
| **24. Nebraska** | ***Weyh v. Gottsch*, 929 N.W.2d 40, 52 (Neb. 2019)** ("A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known."). |
| **25. Nevada** | ***Soper v. Means*, 903 P.2d 222, 225 (Nev. 1995)** (The statute of limitations began to run when the plaintiff knew of the defendant's non-performance, evidenced by the defendant refusing to install electricity and closing a corporate account for the land at-issue. The statute of limitations began to run at this point because the plaintiff "knew or should have known of facts constituting a breach."). |
| **26. New Hampshire** | ***Roberts v. Richard & Sons, Inc.*, 304 A.2d 364, 366 (N.H. 1973)** ("An action for breach of contract unlike a tort action accrues when the breach occurs whether any damage then occurred or not."). |
| **27. New York** | ***Ely-Cruikshank Co. v. Bank of Montreal*, 615 N.E.2d 985, 987 (N.Y. 1993)** ("In New York, a breach of contract cause of action accrues at the time of the breach . . . . The statute runs from the time of the breach though no damage occurs until later."). |

| | |
|---|---|
| **28. North Carolina** | ***Penley v. Penley*, 332 S.E.2d 51, 62 (N.C. 1985)** (The statute of limitations began to accrue when the defendant "broke her promise or took action inconsistent with the promise she made to [the] defendant" because "a cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises."). |
| **29. Oklahoma** | ***Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 753 (Okla. 2021)** ("A breach of contract action accrues when the contract is breached, not when damages result."). |
| **30. Oregon** | ***Romero v. Amburn*, 2022 WL 17984026, at *2–6 (Or. App. Dec. 29, 2022)** ("For more than 50 years, it has been established that a breach of contract action accrues at the time of breach . . . . As soon as a party to a contract breaks any promise he has made, he is liable to an action."). |
| **31. South Carolina** | ***Poly-Med, Inc. v. Novus Scientific Pte. Ltd.*, 2018 WL 1932551, at *5 (D.S.C. Apr. 24, 2018)** ("[The discovery rule] does not require that the party have actual notice of the full extent of damages or of the claim itself; simply a party must act promptly to investigate the existence of a claim when facts and circumstances indicate that one might exist."). |
| **32. South Dakota** | ***In Re Estate of Cullum*, 871 N.W.2d 655, 659–60 (S.D. 2015)** (The statute of limitations began to run when the defendant broke his promise and therefore put the plaintiff "on notice that a breach occurred."). |
| **33. Tennessee** | ***Wilkins v. Third Nat'l Bank in Nashville*, 884 S.W.2d 758, 761 (Tenn. Ct. App. 1994)** (The statute of limitations began to run "when the bank breached the contract" and not "from the time [plaintiffs] were damaged by the breach."). |

| | |
|---|---|
| **34. Texas** | ***Archer v. Tregellas*, 566 S.W.3d 281, 288 (Tex. 2018)** ("[A] cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. Under this rule, a cause of action for breach of contract accrues at the moment the contract is breached."). |
| **35. Utah** | ***Clarke v. Living Scriptures, Inc.*, 114 P.3d 602, 604 (Ut. Ct. App. 2005)** ("[T]he statute of limitations began to run at the time the purposed breach of contract occurred: when [defendant] refused to perform under the contract and not when its damages were ascertained."). |
| **36. Vermont** | ***Alexander v. Gerald E. Morrissey, Inc.*, 399 A.2d 503, 505–06 (Vt. 1979)** (The statute of limitations began to run when "any contractual duty . . . was breached" because "the rule in this jurisdiction is that a cause of action for breach of contract accrues when the breach occurs and not when it is discovered."). |
| **37. Virginia** | **Va. Code. Ann. § 8.01-230** ("In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue . . . when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered."). |
| **38. Washington** | ***Taylor v. Puget Sound Power & Light Co.*, 392 P.2d 802, 804 (Wash. 1964)** ("Running of the statute of limitations against the breach of contract . . . is not postponed by the fact that the actual or substantial damage did not occur until a later date."). |

| | |
|---|---|
| **39. West Virginia** | ***McKenzie v. Cherry River Coal & Coke Co.*, 466 S.E.2d 810, 817 (W. Va. 1995)** ("We have consistently held that the statute of limitations begins to run when the breach of the contract occurs or when the act breaching the contract becomes known. The statute of limitations does not begin to run when a party to the contract declares a forfeiture."). |
| **40. Wisconsin** | ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.*, 497 N.W.2d 115, 116 (Wisc. 1993)** ("We hold that . . . a contract cause of action accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known that the breach occurred . . . [and regardless of whether] the limitations period expired before [plaintiff] discovered its injury."). |
| **41. Wyoming** | ***Richardson Assocs. v. Lincoln-Devore, Inc.*, 806 P.2d 790, 802 (Wyo. 1991)** ("The principle applied to contractual actions is that the statute of limitations commences to run when the right or cause of action accrues . . . . This is usually the time of a breach of a contractual agreement rather than the time that actual damages are sustained as a consequence of the breach."). |
| **<u>States likely applying the rule advocated by Petitioner:</u>**<br>7 states hold that a breach-of-contract claim accrues when the breach occurs, and the reasoning from these cases suggests that these states do not require ascertainment of damages or an incentive to sue. | |
| **1. Iowa** | ***Sellers v. Interstate Power & Light Co.*, 2013 WL 5761066, at *2 (Iowa Ct. App. Oct. 23, 2013)** ("The general rule is that a cause of action accrues when the aggrieved party has a right to institute and maintain a suit. In the case of a contract dispute, that right accrues and the limitations period beings running upon breach of the contract."). |

| | |
|---|---|
| **2. Maine** | ***Chiapetta v. Clark Assocs.*, 521 A.2d 697, 699 (Me. 1987)** ("The accrual of a cause of action occurs at the time the plaintiff sustains a judicially cognizable injury . . . . Usually a cause of action sounding in contract accrues when the contract was breached."). |
| **3. New Jersey** | ***Berkley Risk Solutions, LLC v. Indus. Re-Int'l, Inc.*, 2017 WL 4159170, at *8 (N.J. Ct. App. Sept. 20, 2017)** ("A breach of contract claim accrues at the moment when the breach occurs."). |
| **4. New Mexico** | ***Welty v. W. Bank of Las Cruces*, 740 P.2d 120, 122 (N.M. 1987)** ("In a breach of contract action, the statute of limitations begins to run from the time of the breach."). |
| **5. North Dakota** | ***Holverson v. Lundberg*, 879 N.W.2d 718, 724 (N.D. 2016)** ("The statute of limitations generally beings to run from the commission of the wrongful act giving rise to the cause of action; however, that rule is subject to a discovery rule . . . . [W]e have interpreted the discovery rule to mean that notice of facts putting a person of ordinary intelligence on inquiry" is sufficient to trigger the statute of limitations.). |
| **6. Pennsylvania** | ***Sadtler v. Jackson-Cross Co.*, 587 A.2d 727, 731 (Pa. 1991)** ("Generally, an action founded on a contract accrues when the contract is breached."). |
| **7. Rhode Island** | ***Blue Ribbon Beef Co. v. Napolitano*, 696 A.2d 1225, 1229 (R.I. 1997)** (distinguishing between accrual for statute-of-limitations purposes, which occurred at the moment of the breach, and accrual for prejudgment-interest purposes, which requires damages). |

| **States requiring ascertainment of damages, <u>but without an "incentive to sue" condition:</u>** | |
|---|---|
| 2 states require ascertainment of damages for a breach-of-contract claim to accrue, but neither jurisdiction requires fully ascertainable damages or an incentive to sue. | |
| **1. Missouri** | **Mo. Rev. Stat. § 516.100** ("[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment . . . ."). <br><br> ***Dixon v. Shafton*, 649 S.W.2d 435, 438 (Mo. 1983)** ("The word 'ascertain' has always been read as referring to the fact of damage, rather than to the precise amount."). |
| **2. Ohio** | ***Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 536 N.E.2d 411, 414 (Ohio Ct. App. 1988)** ("Ordinarily, a cause of action does not accrue until actual damage occurs; when one's conduct becomes presently injurious, the statute of limitations begins to run."). |

## CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE COLORADO CHAMBER OF COMMERCE by e-service, this 23rd day of January 2023, addressed to the following:

Mark R. Davis
Jachimiak Peterson Kummer, LLC
860 Tabor Street, Suite 200
Lakewood, CO 80401
Counsel for Respondents Board of County Commissioners of Adams County, City of Aurora, City of Brighton, and City of Thornton

Frederick R. Yarger
Meghan Frei Berglind
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Counsel of Petitioner City and County of Denver

W. Eric Pilsk
Samantha R. Caravello
Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, CO 80202
Counsel of Petitioner City and County of Denver

*s/ Tanya Huffaker*
Tanya Huffaker