

**SUPREME COURT
STATE OF COLORADO**

2 East 14th Avenue
Denver, CO 80203

DATE FILED: March 20, 2023 4:23 PM
FILING ID: B45F6297E28B3
CASE NUMBER: 2022SC119

On Writ of Certiorari to:

Colorado Court of Appeals, No. 2020CA1780
Opinion by Judge Tow
Richman and Grove, JJ., concurring

District Court, Fremont County, No. 2018CV30069
Judge Lynette M. Wenner

Petitioner:

THE STATE OF COLORADO

v.

Respondent:

ROGER HILL

▲ COURT USE ONLY ▲

*Attorneys for Amici Curiae Backcountry Hunters & Anglers,
American Whitewater, and Colorado River Outfitters
Association:*

Lori Potter, Atty. Reg. No. 12118
Samantha R. Caravello, Atty. Reg. No. 48793
KAPLAN KIRSCH & ROCKWELL, LLP
1675 Broadway, Suite 2300
Denver, Colorado 80202
Tel.: (303) 825-7000
Fax: (303) 825-7005
Email: lpotter@kaplankirsch.com
scaravello@kaplankirsch.com

Case No. 2022SC119

**BRIEF OF AMICI CURIAE BACKCOUNTRY HUNTERS & ANGLERS, AMERICAN
WHITEWATER, AND COLORADO RIVER OUTFITTERS ASSOCIATION
IN SUPPORT OF RESPONDENT ROGER HILL**

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.

Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,523 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 our 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/ Lori Potter

Lori Potter

*Counsel for Amici Curiae Backcountry
Hunters & Anglers, American Whitewater,
and Colorado River Outfitters Association*

TABLE OF CONTENTS

| | Page |
|---|-------------|
| CERTIFICATE OF COMPLIANCE..... | i |
| TABLE OF AUTHORITIES | iii |
| IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE | 1 |
| ARGUMENT | 4 |
| I. By Confirming Hill’s Right to Seek Declaratory Relief on Peaceful Access to the River, the Court of Appeals Set the Stage for Resolution of a Long-Simmering Issue. | 4 |
| A. The State’s Suggestion that the Status Quo Serves the Public Interest is Misleading. | 4 |
| 1. State Agency Agreements Do Not Substitute for Protection of a Citizen’s Navigability Right. | 6 |
| 2. The State’s Preference to Leave River Access to the Political Process Rings Hollow, Because the Political Process Has Produced Nothing..... | 7 |
| 3. The Political Process in Other Western States Addressing River Access Has Occurred in Response to Litigation, Not Instead of It..... | 8 |
| B. The Forecast of a Deluge of Litigation Is Greatly Exaggerated. | 11 |
| II. THE COURT OF APPEALS CORRECTLY DETERMINED HILL HAS A PARTICULARIZED GRIEVANCE..... | 12 |
| A. The Court of Appeals Correctly Interpreted and Applied Colorado Case Law Requiring a Particularized Injury to Establish Standing. | 12 |
| B. River Recreationists and Outfitters have Diverse and Specific Interests in Navigable River Use that Give Rise to Particularized Grievances when Impaired. | 15 |
| CONCLUSION | 17 |

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Ariz. Ctr. for Law in Pub. Interest v. Hassel</i> , 837 P.2d 158 (Ariz. Ct. App. 1991) | 9 |
| <i>Bendt v. City & Cnty. of Denver</i> , No. 00CV20 (Douglas Cnty. Dist. Ct. Jan. 18, 2002) | 11 |
| <i>City of Greenwood Vill. v. Petitioners for Proposed City of Centennial</i> , 3 P.3d 427 (Colo. 2007) | 13, 17 |
| <i>Colo. Med. Soc’y v. Hickenlooper</i> , 2015 CO 41 | 14 |
| <i>Conatser v. Johnson</i> , 194 P.3d 897 (Utah 2008) | 8 |
| <i>Defenders of Wildlife v. Hull</i> , 18 P.3d 722 (Ariz. Ct. App. 2001) | 6, 9 |
| <i>Friends of the Black Forest Reg’l Park, Inc. v. Bd. of Cnty. Comm’rs</i> , 80 P.3d 871 (Colo. App. 2003) | 15, 17 |
| <i>Galt v. State Dep’t of Fish, Wildlife</i> , 731 P.2d 912 (Mont. 1987)..... | 10 |
| <i>Hill v. Warsewa</i> , No. 20CA1780, 2022 Colo. App. LEXIS 156 (Colo. App. Jan. 27, 2022)..... | 4 |
| <i>Mont. Coal. for Stream Access, Inc. v. Curran</i> , 682 P.2d 163 (Mont. 1984)..... | 10 |
| <i>Mont. Coal. for Stream Access, Inc. v. Hildreth</i> , 684 P.2d 1088 (Mont. 1984) | 10 |
| <i>Reeves-Toney v. Sch. Dist. No. 1</i> , 2019 CO 40..... | 13, 14 |

Rocky Mountain Animal Def. v. Colo. Div. of Wildlife,
100 P.3d 508 (Colo. App. 2004) 15, 17

State ex rel Winkleman v. Ariz. Navigable Stream Adjudication Comm’n,
229 P.3d 242 (Ariz. Ct. App. 2010)9

Town of Erie v. Town of Frederick,
251 P.3d 500 (Colo. App. 2010)13

Utah Stream Access Coal. v. VR Acquisitions, LLC,
439 P.3d 593 (Utah 2019)8, 9

Litigation Documents

Deposition of Y. Lutwak, *Gateview Ranch v. Cannibal Outdoors*,
No. 01CV53 (Gunn. Cnty. Dist. Ct.).....5

Other Authorities

About, American Whitewater,
<https://www.americanwhitewater.org/content/Wiki/aw:about>2

CO Rivers Key to Economy, Business for Water Stewardship,
<https://businessforwater.org/co-rivers-key-to-economy>3

Colorado BHA, *Colorado BHA Q1 2023 Update* (Feb. 1, 2023),
https://www.backcountryhunters.org/colorado_bha_q1_2023_update1, 2

Colorado BHA, *Our Mission and Values*,
https://www.backcountryhunters.org/mission_and_values.....1

Colorado BHA, *Public Waters Access*,
<https://www.backcountryhunters.org/accessourwaters>2

Colorado Parks and Wildlife Commission, *Wild and Gold Medal Trout Management* (June 2019),
https://cpw.state.co.us/Documents/Commission/2019/June/Item.15a-POLICY_Wild_Gold_Medal-Katie_Lanter-DNR.pdf.....7

Governor’s River Access Dispute Resolution Task Force Final Report
(Dec. 13, 2010)5, 7

| | |
|--|----|
| Jason Robertson, <i>(CO) River Access in Colorado Under Siege!</i> , American Whitewater (Aug. 23, 2001) | 5 |
| Jerd Smith, <i>Fighting for the Right</i> , Headwaters, Fall 2010 | 5 |
| Lori Potter et al., <i>Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill</i> , 5 Univ. Denver Water L. Rev. 457 (2002) | 12 |
| <i>The Colorado River Outfitters Association</i> , Colorado River Outfitters Association, https://www.croa.org | 3 |
| Tim Kelley, <i>Despite AW's Successes... access to Colorado's rivers is still filled with Fear and Loathing</i> , American Whitewater, July/Aug. 2002 | 6 |

IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

Backcountry Hunters & Anglers (“BHA”), American Whitewater, and Colorado River Outfitters Association (“CROA,” and collectively, “River Recreation Amici”) are organizations whose members are actively engaged in recreational and commercial pursuits in Colorado’s outdoors, particularly on Colorado’s rivers and streams. River Recreation Amici and their members have an interest in protecting river access for Coloradans and visitors alike, and accordingly have a strong interest in this case and a unique and valuable perspective to offer to this Court.

BHA, a nonprofit organization, seeks to ensure North America’s outdoor heritage of hunting and fishing in a natural setting, through education and work on behalf of wild public lands, waters, and wildlife. *Our Mission and Values*, BHA (last visited Mar. 15, 2023).¹ BHA’s Colorado Chapter has 1,600 members and two staff. Although BHA is formed around hunting and fishing, its members also engage in hiking, backpacking, trail running, mountain biking, and off-roading. Colorado BHA, *Colorado BHA Q1 2023 Update*, BHA (Feb. 1, 2023).² BHA

¹ https://www.backcountryhunters.org/mission_and_values.

² https://www.backcountryhunters.org/colorado_bha_q1_2023_update.

believes that “[f]or anglers, waterfowlers and other sportsmen, access to streams and waterways is the most important factor in our participation in – and the perpetuation of – our storied outdoor traditions.” *Public Waters Access*, BHA (last visited Mar. 15, 2023).³ BHA works to improve access for diverse populations that historically have faced challenges to recreating on Colorado’s streams. BHA seeks to conserve natural resources so that all pursuits can be enjoyed responsibly for many generations. Colorado BHA, *Colorado BHA Q1 2023 Update*.

American Whitewater is a national nonprofit river conservation organization founded in 1954 with approximately 7,000 members and 85 local-based affiliate clubs, representing whitewater enthusiasts across the nation. *About*, American Whitewater (last visited Mar. 15, 2023).⁴ In Colorado, American Whitewater has ten clubs, 900 members, and three staff, who enjoy the hundreds of miles of Colorado’s whitewater rivers and streams. American Whitewater is the primary advocate for the preservation and protection of whitewater rivers throughout the United States. To support its mission, American Whitewater seeks to ensure rights

³ <https://www.backcountryhunters.org/accessourwaters>.

⁴ <https://www.americanwhitewater.org/content/Wiki/aw:about>.

of public access to rivers and streams for recreational use by human-powered watercraft.

CROA is a trade association representing approximately 45 licensed professional river rafting outfitters who specialize in providing outstanding outdoor adventures for families and individuals of all tastes and capabilities. The organization's mission is to promote rafting in Colorado and provide a reasoned voice on legislative, regulatory, and other developments that affect the commercial rafting industry, the health of local rivers, and Colorado's tourism economy as a whole. *The Colorado River Outfitters Association*, Colorado River Outfitters Association (last visited Mar. 3, 2023).⁵ River-based recreation creates nearly \$19 billion in economic output in Colorado annually. *CO Rivers Key to Economy*, Business for Water Stewardship (last visited Mar. 15, 2023).⁶

⁵ <https://www.croa.org>.

⁶ <https://businessforwater.org/co-rivers-key-to-economy>.

ARGUMENT

I. BY CONFIRMING HILL’S RIGHT TO SEEK DECLARATORY RELIEF ON PEACEFUL ACCESS TO THE RIVER, THE COURT OF APPEALS SET THE STAGE FOR RESOLUTION OF A LONG-SIMMERING ISSUE.

A. The State’s Suggestion that the Status Quo Serves the Public Interest is Misleading.

The late federal district judge Richard Matsch was fond of describing the trials he presided over as “alternative dispute resolution,” by which he meant the alternative to the duels and showdowns that once resolved disputes in the Wild West. The court of appeals took a page from Judge Matsch’s playbook by upholding Hill’s standing to use a declaratory judgment action to “clarify his rights in order to be free from threats of physical violence.” *Hill v. Warsewa*, No. 20CA1780, 2022 Colo. App. LEXIS 156, ¶ 24 (Colo. App. Jan. 27, 2022) (“Opinion”). Nevertheless, the State claims that a court is not the appropriate forum for river access disputes, desiring instead to resolve (or perhaps avoid resolving) such disputes through the political process. Opening Br. 26-33. In the State’s view, the status quo is working.

River Recreation Amici would point the Court to their own experiences with the status quo, experiences that are much closer to the Wild West form of dispute resolution than to the civil and orderly proceedings one might expect in modern-

day Colorado. River Recreation Amici have encountered physical danger in the form of barbed wire, cables, and other obstructions strung across rivers where boaters or anglers will strike them; being showered by rocks from a bridge above; grates hanging into the river; and gunfire.⁷ The law enforcement response to these violent incidents consists chiefly of sheriffs issuing trespass citations to river users,⁸ not mediation of issues or elimination of danger.

⁷ Such experiences are well-documented. *See, e.g.*, Governor’s River Access Dispute Resolution Task Force Final Report 3 (Dec. 13, 2010) (hereinafter “Task Force Report”), <http://hermes.cde.state.co.us/drupal/islandora/object/co:12408/datastream/OBJ/view> (“The Task Force was made aware of situations where landowners created deliberate obstructions[,] . . . hanging barbed wire and fishhooks below a bridge, felling trees across river channels, and constructing impassable fences”); Jerd Smith, *Fighting for the Right*, Headwaters, Fall 2010, <https://issuu.com/cfwe/docs/hw24final> (collecting examples); Jason Robertson, *(CO) River Access in Colorado Under Siege!*, American Whitewater (Aug. 23, 2001), https://www.americanwhitewater.org/content/Article/view/article_id/195/display/full/ (noting that riparian landowners built “death trap” consisting of a metal grate hanging from a bridge over a popular boating stretch of the South Platte River); Deposition of Y. Lutwak at 50-54, *Gateview Ranch v. Cannibal Outdoors*, No. 01CV53 (Gunn. Cnty. Dist. Ct.) (landowner acknowledged that his cable fences crossed low over a stretch of the Lake Fork of the Gunnison River run by a CROA member outfitter).

⁸ *See, e.g.*, Robertson, *supra* (sheriff ticketed or removed boaters on South Platte and Florida Rivers); Tim Kelley, *Despite AW’s Successes... access to Colorado’s rivers is still filled with Fear and Loathing*, American Whitewater, July/Aug. 2002,

Against this backdrop, the State propounds various rationales for maintaining the status quo for determining river access – *i.e.*, no method for determination at all.⁹

1. State Agency Agreements Do Not Substitute for Protection of a Citizen’s Navigability Right.

The State suggests that its collaborative management efforts are an acceptable substitute for protecting the rights of citizens to access navigable stretches of rivers. Opening Br. 29-30. River Recreation Amici recognize that standing to assert a right of navigability is the only question now before this Court. Assuming, however, that Hill can make out a case for navigability after his standing to do so is affirmed, the difference between a personal right of access and the State’s alternative is dramatic. The State’s unspecified access agreements would have expiration dates, conditions, and qualifications that Hill and other anglers are bound by, but not party to. The “Gold Medal” trout fishing designation

at 22, <https://www.americanwhitewater.org/content/Journal/get-journal-pdf/issue/4/year/2002/.raw> (noting six years of ticketing boaters on South Platte River).

⁹ By contrast, the courts in some western states have held that as a fiduciary matter, a state must determine navigability before it can disclaim an interest in the bed of a river, *Defenders of Wildlife v. Hull*, 18 P.3d 722, 729 (Ariz. Ct. App. 2001), a safeguard that River Recreation Amici support.

that the State touts, *id.* at 29, is a metric describing a water body that, at a given time, contains 60 pounds of trout per acre – not a description of a right of access. Colorado Parks and Wildlife Commission, *Wild and Gold Medal Trout Management 2* (June 2019).¹⁰ All of these temporary, conditional understandings are a wholly different species than a navigability access right. None of them applies to Hill’s fishing hole on the Arkansas. Not least, they apply to anglers, but not to users like private boaters and commercial boating companies, for whom access to navigable rivers is obviously critical.

2. The State’s Preference to Leave River Access to the Political Process Rings Hollow, Because the Political Process Has Produced Nothing.

The State asks the Court to consign this issue to commissions or the legislature. Opening Br. 30-33. The State mentions one river access bill, H.B. 1188, that went nowhere in 2010, and a Governor’s Task Force that convened briefly in the wake of that bill. Opening Br. 31. It is telling that the Task Force could not even agree that there is, or should be, such a thing as a right of river access. *See* Task Force Report at 2 (“Nothing in this Final Report should be

¹⁰ https://cpw.state.co.us/Documents/Commission/2019/June/Item.15a-POLICY_Wild_Gold_Medal-Katie_Lanter-DNR.pdf.

understood to endorse any stakeholder’s side of the ‘right to float’ dispute.”).

Amici American Whitewater and CROA each had representatives who sat in vain on the Task Force. Were a court to affirm navigability, the political process might then be activated to define the scope and conditions of the associated access, as has happened in other western states. *See infra* Section I.A.3. But the status quo is silence and inaction, which are no support at all for the State’s plea to deny Hill standing and leave it to politicians.

3. The Political Process in Other Western States Addressing River Access Has Occurred in Response to Litigation, Not Instead of It.

The State contends that the example of nearby western states is one of leaving river access to the political processes there. Opening Br. 33-40. Ironically, when one examines the river access saga of those states closely, the opposite is true: river access claimants brought litigation to confirm their access rights, which only then moved those states to legislate. These examples support Hill’s position, not the State’s.

In Utah, the legislature enacted the Public Waters Access Act (“PWAA”) in 2010 “in response to” the Utah Supreme Court’s decision in *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008). *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 598 (Utah 2019). “Through the terms of the PWAA, the legislature

sought to restore ‘the accommodation existing between recreational users and private property owners’ as it existed ‘before the decision in *Conatser*.’” *Id.* The State admits the legislature enacted the PWAA in response to *Conatser*, Opening Br. 36-38, but misses the overarching point that litigation plays a key role in moving river access issues forward.

Likewise, in Arizona, legislation in 1987 on navigability for title followed litigation whereby the State asserted title to riverbed lands. *See Ariz. Ctr. for Law in Pub. Interest v. Hassel*, 837 P.2d 158, 161 (Ariz. Ct. App. 1991) (recounting the process whereby legislation responded to earlier litigation); *see also State ex rel Winkleman v. Ariz. Navigable Stream Adjudication Comm’n*, 229 P.3d 242, 246 (Ariz. Ct. App. 2010) (same).

In holding sections of the 1987 legislation unconstitutional, the Arizona Court of Appeals explained that the bill responded to assertion of title to riverbeds. *Ariz. Ctr.*, 837 P.2d at 161. As a result of the Court’s decision, the legislature in 1994 acted a second time to address the issue. *Winkleman*, 229 P.3d at 247; *Defenders of Wildlife v. Hull*, 18 P.3d 722, 727 (Ariz. Ct. App. 2001). While the State here extols the current process for determining the navigability of rivers in Arizona (a process which, the State notes, includes a right of judicial review), it

ignores the fact that litigation drove Arizona to develop that process. *See* Opening Br. 34-35.

In Montana, the legislature enacted the Montana Stream Access Law in 1985. This legislation on recreational use of streams occurred “in response to” two Montana Supreme Court decisions assuring citizen access to rivers in Montana. *Galt v. State Dep’t of Fish, Wildlife*, 731 P.2d 912, 913 (Mont. 1987) (citing *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984), and *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984)). The State notes that “the contours” of stream access rights “were being worked out in the courts” in Montana, Opening Br. 35-36, yet would deny Coloradans the ability to similarly vindicate stream access rights in court.

If the State wants to follow the lead of other western states on navigability issues, as it urges in its brief, *id.* at 33-42, it would do best to accept the holding that Hill has standing to adjudicate navigability in the trial court. The contours of navigability could then be fleshed out in the courts, the legislature, or both – as has happened in Utah, Arizona and Montana.

B. The Forecast of a Deluge of Litigation Is Greatly Exaggerated.

The State would have the Court believe that granting standing to Hill would cause a flood of litigation. *See* Opening Br. 8, 32-33. There are flaws in this contention.

One need only look to the scant number of reported cases in which a non-governmental entity asserted the right of access via navigability in other jurisdictions that countenance the claim, such as Utah, New Mexico and Montana. The State can't point to any deluge (nor even a trickle) in Colorado after the court of appeals decided that Hill – and presumably, any other person similarly situated – has standing to do so. The point is that such lawsuits are costly, challenging and time-consuming for a plaintiff to mount. Having the standing to bring an access claim incentivizes river users to reach agreements with landowners in or out of court – and vice versa.¹¹

The State contradicts its own argument when it contends that “no law or court has ever declared any Colorado river navigable,” Opening Br. 28, because it

¹¹ *See, e.g., Bendt v. City & Cnty. of Denver*, No. 00CV20 (Douglas Cnty. Dist. Ct. Jan. 18, 2002) (order approving stipulation by American Whitewater and landowner on South Platte River conveying perpetual easement to float through property, negotiated after American Whitewater intervened in landowner's quiet title action).

cannot cite any cases in which a court has been asked to do so. In fact, the district court for Gunnison County declared a stretch of the Gunnison River navigable in 1961.¹² One case in 62 years hardly a deluge makes.

II. THE COURT OF APPEALS CORRECTLY DETERMINED HILL HAS A PARTICULARIZED GRIEVANCE

A. The Court of Appeals Correctly Interpreted and Applied Colorado Case Law Requiring a Particularized Injury to Establish Standing.

The court of appeals correctly determined that Hill's claim is sufficiently particularized to confer standing because Hill alleges concrete injuries that have occurred and that he seeks to avoid in the future. Opinion, ¶ 27. The State attempts to rebut this determination by identifying two other individuals who have suffered similar injuries, and by noting that any member of the public *could* suffer similar injuries were they to take the same actions as Hill. Opening Br. 24-25. The State's

¹² Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 Univ. Denver Water L. Rev. 457, 474 n.103 (2002) (citing *Arnett v. Trouthaven Inc.*, No. 5702 (Gunnison Cnty. Dist. Ct. Sept. 13, 1961)) (navigability determination supported by historical use by boats and rafts). As the article notes, a granular count of navigability decisions and their precise basis is difficult because courts use inconsistent definitions for navigability. *Id.* at 460-61.

argument misconstrues Colorado standing case law regarding particularized versus generalized grievances.

The State cites multiple cases for the general principle that a plaintiff must show a particularized injury in order to establish standing. *Id.* at 21-23. But the cases cited involved standing questions different from the one presented here. *See City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437-40 (Colo. 2007) (considering whether a political subdivision had standing to challenge a state statute and whether it could assert claims of third parties not involved in lawsuit); *Town of Erie v. Town of Frederick*, 251 P.3d 500, 504 (Colo. App. 2010) (holding municipality had standing to contest land annexations “to the extent that it is actually aggrieved,” but not to raise issues on behalf of third parties); *Reeves-Toney v. Sch. Dist. No. 1*, 2019 CO 40, ¶ 28 (concluding teacher “failed to establish a clear nexus between her status as a taxpayer and the constitutional violation she alleges”). These cases do not support the State’s argument that a plaintiff such as Hill, who has been concretely injured and threatened in the attempted exercise of a claimed right, somehow lacks standing to seek redress for that injury.

The State attempts to transform the particularized *injury* requirement into a requirement that a plaintiff “ha[ve] a legally protected *interest* not shared with the

public.” Opening Br. 22 n.1 (emphasis added); *see also id.* at 24, 25-26. This is an unsupported misstatement of the standard. The only case the State cites for this point, *id.* at 22 n.1, addressed the injury requirement for taxpayer standing – which Hill does not allege – and did not require an interest not shared with others. *See Reeves-Toney*, ¶ 30.

Further, the State cites no authority for its suggestion that an injured plaintiff lacks standing to sue if others have suffered the same injury or hypothetically could suffer the same injury by following in the plaintiff’s shoes. *See* Opening Br. 24-25. As noted above, River Recreation Amici’s members have experienced intentional physical obstructions and violence while accessing Colorado’s rivers and streams. *See supra* pp. 4-5. Would those members be denied standing in a lawsuit related to such violence and access because other river users might experience the same aggressive tactics?

The requirement that a plaintiff have a particularized grievance does not mean the grievance must be an idiosyncratic one. Such a rule would effectively prohibit individuals with common interests and common grievances from joining together to file a lawsuit and would prevent associations of similarly situated individuals from engaging in litigation. That is clearly not the law in this State. *See, e.g., Colo. Med. Soc’y v. Hickenlooper*, 2015 CO 41, ¶ 14 (determining

petitioner associations representing impacted medical professionals had standing to challenge Governor’s decision without questioning uniqueness of injury); *Rocky Mountain Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004) (concluding nonprofit corporation alleging “interest[] in preserving wildlife” and injury due to wildlife poisoning had standing without concern that any member of public could assert same interest and injury); *Friends of the Black Forest Reg’l Park, Inc. v. Bd. of Cnty. Comm’rs*, 80 P.3d 871, 877 (Colo. App. 2003) (concluding nonprofit corporation had standing to challenge road that would “adversely affect the aesthetics of the park” without evaluating number of individuals affected).

The court of appeals correctly concluded that Hill alleges a particularized injury based on physical harm and threats of harm and prosecution he has experienced, Opinion, ¶ 27, and that conclusion should be upheld.

B. River Recreationists and Outfitters have Diverse and Specific Interests in Navigable River Use that Give Rise to Particularized Grievances when Impaired.

Even absent the physical harm and threats experienced by Hill, river recreationists and outfitters such as Hill and River Recreation Amici have diverse and specialized interests in river access that, if impaired, provide a particularized injury sufficient to satisfy prudential standing requirements.

As indicated in the Identity and Statement of Interest of Amici Curiae, *supra*, River Recreation Amici represent a wide array of interests in recreating on river segments, many of which involve different river characteristics and conditions such that there is no homogeneous interest in river segments shared by all River Recreation Amici, let alone all members of the general public. For example, anglers may touch the riverbed and, in some places, the riverbanks, or they may float through a property without touching down, or a combination of the two. A boater may primarily float through a river segment without touching the bed or bank, but may in fast current or treacherous conditions need to scout a rapid or portage it. Commercial boaters make a living, create jobs, and enable residents and tourists to enjoy rivers in a way those passengers couldn't do on their own. Such uses also vary by season, by volume of water, and by watercraft. These specific but varied interests, when impaired, necessarily give rise to specific injuries. An angler prohibited from wading on the riverbed in a prime fishing area may be injured by that prohibition, while a whitewater rafting guide who rows her boat through the stretch without touching would not be injured by that prohibition at all.

Acknowledging that these river users have unique interests that may result in unique injuries is consistent with well-established law finding recreational and

aesthetic injuries sufficient grounds for standing. *See, e.g., Greenwood Village*, 3 P.3d at 437 (stating that “harm to intangible values can satisfy the injury-in-fact requirement” and including as an example “aesthetic and ecological interests”); *Friends of the Black Forest*, 80 P.3d at 877 (noting that both the U.S. Supreme Court and Colorado Supreme Court have “recognized aesthetic and ecological interests as sufficient for standing purposes”); *Rocky Mountain Animal Def.*, 100 P.3d at 513 (similar).

The State’s asserted rule here views interest and injury at the broadest possible level, claiming Hill cannot have standing if any other member of the public “could” have standing if in the same position as Hill. *See* Opening Br. 24, 25-26. This approach fails to recognize the diversity of passionate river users in Colorado and threatens to deprive those users of access to the courts when their interests are threatened. This Court should affirm the decision of the court of appeals to prevent such a result.

CONCLUSION

For the foregoing reasons, River Recreation Amici respectfully request this Court affirm the decision of the court of appeals.

Respectfully submitted March 20, 2023.

S/ Lori Potter

Lori Potter, No. 12118

Samantha R. Caravello, No. 48793

KAPLAN KIRSCH & ROCKWELL LLP

*Attorneys for Amici Curiae Backcountry
Hunters & Anglers, American Whitewater,
and Colorado River Outfitters Association*

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE BACKCOUNTRY HUNTERS & ANGLERS, AMERICAN WHITEWATER, AND COLORADO RIVER OUTFITTERS ASSOCIATION IN SUPPORT OF RESPONDENT ROGER HILL** was served as follows:

| Party | Type | Attorney |
|--|---------------|--|
| SERVED VIA COLORADO COURTS E-FILING | | |
| Roger Hill | Respondent | Alexander N. Hood (Hood Law Office PLLC) Mark S. Squillace |
| State of Colorado | Petitioner | Eric R. Olson (Colorado Attorney General) Scott Steinbrecher (Colorado Attorney General) Daniel E. Steuer (Colorado Attorney General) Grant T. Sullivan (Colorado Attorney General) Olivia D. Probetts (Colorado Attorney General) |
| Mark Warsewa Linda Joseph | Amicus Curiae | Kirk Bradford Holleyman (Kirk Holleyman PC) |
| Party Suppressed | Impartial | Kirk Bradford Holleyman (Kirk Holleyman PC) |
| Party Suppressed | Impartial | Kirk Bradford Holleyman (Kirk Holleyman PC) |
| Colorado Water Congress | Amicus Curiae | April D. Hendricks (Burns Figa and Will PC) Peter D. Jaacks (Burns Figa and Will PC) Stephen H. Leonhardt (Burns Figa and Will PC) |
| Colorado Farm Bureau | Amicus Curiae | David S. Hayes (Hayes Poznanovic Korver LLC) |
| Crystal Creek Homeowners Association | Amicus Curiae | David S. Hayes (Hayes Poznanovic Korver LLC) |

| | | |
|-------------------------------------|---------------|--|
| Jackson Shaw/Taylor River Ranch LLC | Amicus Curiae | David S. Hayes (Hayes Poznanovic Korver LLC) |
| Taylor Placer, Ltd. | Amicus Curiae | David S. Hayes (Hayes Poznanovic Korver LLC) |
| Wilder Association | Amicus Curiae | David S. Hayes (Hayes Poznanovic Korver LLC) |
| Pacific Legal Foundation | Amicus Curiae | Jeffrey W. McCoy (Pacific Legal Foundation) |
| SERVED VIA U.S. MAIL | | |
| Pacific Legal Foundation | Amicus Curiae | Deborah J. LaFetra Pacific Legal Foundation 555 Capitol Mall, Suite 1290 Sacramento, CA 95814 |

S/ Lori Potter

Lori Potter