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Case No. 2020CA691</td></tr>
<tr><td>Appeal from District Court,
City and County of Denver
The Honorable Bruce Jones
Case No. 2019CV033759</td></tr>
<tr><td>Defendant-Appellant: The Regents of the University of Colorado

v.

Plaintiff-Appellee: Prairie Mountain Publishing Co. LLP d/b/a Daily Camera</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 7,076 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue a concise statement (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Michael Kotlarczyk

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Colorado Open Records Act ("CORA") requires state institutions to protect the confidentiality of a candidate for an executive position "who is not a finalist," but does not require institutions to name any minimum number of finalists. In reliance on that statute and its own policy adopted to reflect the statute, the University of Colorado (the "University" or "CU") selected one finalist in its 2018-19 presidential search—consistent with its past practice and the practice of other institutions of higher education—to go through the final, public stages of the selection process.

Did the district court err in concluding that the University must disclose materials for five other candidates, none of whom were selected as a finalist or went through the final stages of the selection process?

STATEMENT OF THE CASE

In July 2018, CU President Bruce Benson announced his retirement, effective July 2019. CF, pp 32-33. This announcement triggered a nearly 10-month search for the next president of CU, culminating in the appointment of Mark Kennedy as president.

A. The University's process for conducting a presidential search requires strict adherence to CORA and the Open Meetings Law.

The CU Board of Regents is created by the Colorado Constitution and is required by law to appoint the president of the University. *See* Colo. Const. art. IX, §§ 12, 13; § 23-20-106, C.R.S. (2019). To make this appointment, the Regents have adopted Regent Policy 3E to govern the search process. *See* § 23-20-112(1) (the Board may "enact laws for the government of the university").

Under Policy 3E, the Board of Regents must first create a search committee "to generate a strong pool of candidates" and identify "those candidates best qualified to meet the university's needs." CF, p 38. The search committee will then recommend to the Board those candidates it determines "are best qualified to fill the position." *Id.* at 40. In a presidential search, the search committee is responsible for "referring a minimum of five unranked candidates . . . for the Board of Regents to consider interviewing." *Id.* at 42.

The Board of Regents then "determine[s] which of the recommended candidates will be interviewed and in what order." *Id.* at

40. Following the interviews, the Board decides "which candidates will be designated as the finalist(s)." *Id.* at 42 (alteration in the original).

Policy 3E does not require the University to name multiple finalists. Instead, the Policy defines a finalist as

> [a] candidate who has agreed to be advanced for final consideration and potential appointment for the position of president . . . . A person who is named as a finalist shall be named in accordance with the requirements of [the Open Meetings Law,] Colo. Rev. Stat. 24-6-402(3.5) and records pertaining to that person shall be available for public inspection as allowed by [CORA,] Colo. Rev. Stat. 24-72-204[(3)(a)](XI)(A-B).

Id. at 37-38. The provision of the Open Meetings Law ("OML") cited in this definition requires any finalist to be publicly identified at least 14 days before being appointed to the position. *See* § 24-6-402(3.5). The cited provision from CORA, section (3)(a)(XI)(A), requires state institutions to deny requests seeking the records of any candidate who is not a finalist. *See* § 24-72-204(3)(a)(XI)(A).

Finally, Policy 3E requires that searches "be conducted in a timely and professional manner that respects the rights of candidates to confidentiality, to the extent permitted by law." CF, p 37. To that end, the Policy repeatedly emphasizes that the University's searches will be

conducted in a manner consistent with CORA and the OML. *See id.* at 37 ("Searches for the president . . . shall also be conducted in accordance with [the OML]"); *id.* at 37-38 (finalists "shall be named in accordance with the requirements of [the OML] and records pertaining to that person shall be available for public inspection as allowed by [CORA]"); *id.* at 39 (search committee "must operate in accordance with [the OML]"); *id.* at 40 ("Requirements for president and chancellor searches are set forth in [the OML] and [CORA]."). Because the identification of a finalist will subject his or her application materials to inspection under CORA, Policy 3E also provides that "[b]efore the Board of Regents identifies any candidate as a finalist, the chair and vice chair of the presidential search committee shall notify the candidate of the Board of Regents' intention and obtain the candidate's permission to advance him or her as a finalist." *Id.* at 42.

B. The search process for all candidates for CU President followed Policy 3E.

The Board of Regents appointed a search committee on October 24, 2018 and engaged a national recruiting firm to assist in the search. CF, p 33. The search firm received more than 180 referrals or

applications for the position. *Id.* The firm then narrowed this field to 27 candidates for the search committee's consideration. *Id.*

On February 26, 2019, the search committee considered the 27 candidates, and unanimously voted to interview eleven. *Id.* On March 18 and 19, 2019, the search committee interviewed ten candidates, after one of the eleven withdrew. *Id.*

The search committee then identified six candidates for the Board of Regents to consider interviewing. *Id.* On April 3 and 4, 2019, the Board interviewed all six candidates, one time each. *Id.*

On April 10, 2019, the Board voted unanimously, 9-0, to "announce Mark R. Kennedy as a finalist for the presidency of the University of Colorado." *Id.* at 49. The Board adopted a resolution stating that the Board "welcomes comments on Mr. Kennedy's candidacy and shall not take any action to appoint or employ Mr. Kennedy for at least fourteen days from the date of this resolution." *Id.* Prior to naming him as a finalist, the Board sought and obtained Mr. Kennedy's permission to be publicly advanced as a finalist. *Id.* at 34.

The Board did not ask any other candidate to be advanced as a finalist and have their application materials subject to public disclosure. *Id.*

C. Only Mr. Kennedy went through the extensive final stages of the selection process, consisting of a rigorous and public vetting as a finalist.

To this point in the process, the burden on the candidates was minimal. Ten of the more than 180 candidates had filled out an application and been interviewed by the search committee, and six of those ten were interviewed again by the Board of Regents. But after being named a finalist, Mr. Kennedy went through an additional and rigorous public vetting over the following 22 days that differed both in kind and degree from the process that went before.

Mr. Kennedy appeared at open forums on each of the four CU campuses and the system administration offices. *Id.* at 65. CU also established a website for individuals to provide feedback on Mr. Kennedy's candidacy. *Id.* at 34. Participants provided feedback ranking Mr. Kennedy across seven categories: Intellectual & Professional; Leadership & Vision; Resource Development; Diversity; Administration & Management; Build & Sustain Relationships; and Personal Qualities.

Id. at 51. The University received nearly 3,000 responses from students, faculty, staff, alumni, and others across all four campuses, system administration, and among the broader community. *Id.* at 34, 50.

The Board of Regents convened again on May 2, 2019, more than three weeks after Mr. Kennedy was announced as a finalist. *Id.* at 34. The Board considered whether to appoint Mr. Kennedy as president of CU and did not consider whether to appoint any other candidate. *See id.* The public scrutiny on his candidacy during the prior three weeks was impactful. Unlike the prior unanimous vote to advance him as a finalist, Mr. Kennedy was appointed President of CU by a 5-4 vote. *Id.*

D. The Daily Camera initiated this litigation after CU declined to produce records for candidates who were not advanced as finalists.

On May 24, 2019, and again on July 9, a reporter for the Daily Camera served a CORA request on CU, seeking the names and application documents of both the candidates selected by the search committee and those interviewed by the Board of Regents. *Id.* at 34-35. The Board denied these requests as to all candidates other than Mr. Kennedy based on §§ 24-72-204(3)(a)(XI)(A) and 24-6-402(3.5). *Id.*

The Daily Camera then provided CU with a 14-day written notice of an intent to seek relief in district court, as required by § 24-72-204(5)(a). In it, the Daily Camera asserted "that there were 28 [sic] finalists" interviewed by the search committee, and "at a bare minimum, there were 6 finalists" interviewed by the Board. *Id.* at 74.

The Daily Camera filed suit after conferral failed to resolve the dispute. The Daily Camera dropped its argument that all 27 candidates vetted by the search committee were finalists, and instead only argued that the six interviewed by the Board were finalists. *Id.* at 137. After oral argument, the district court agreed, ordering CU to produce the materials for those six candidates. *Id.* at 395.

CU produced the materials of five candidates (including Mr. Kennedy), who had all since been publicly disclosed, but requested a stay pending appeal concerning the sixth candidate. *Id.* at 437. The district court denied the request, *id.* at 438, but this Court granted CU's motion to stay disclosure of the sixth candidate pending resolution of this appeal. *See* Order (May 28, 2020).

SUMMARY OF THE ARGUMENT

Mark Kennedy was the only candidate for CU President who was named as a finalist by CU, appeared at public forums at every campus, was subjected to intense public scrutiny and more than 2,800 comments, and was considered by the Board of Regents for appointment as President of CU at its May 2 meeting. Mr. Kennedy was therefore the only finalist under CORA, and CU correctly withheld the materials of all other candidates.

This conclusion is compelled by the plain language of the statute. CORA defines "finalist" to mean anyone "made public pursuant to" the OML, meaning two weeks before appointment. Put differently, the statute authorizes the Board of Regents to decide who is a finalist subject to the public vetting process. Based on the Board's vote, Mr. Kennedy was the only candidate made public and the only candidate who went through the rigorous public scrutiny of the final stages of the selection process. The district court failed to consider these facts, and simply asserted that candidates from an earlier stage in the process were also finalists. In doing so, the court mistakenly created a

minimum finalist requirement that is not found anywhere in the statute itself, and removed authority granted to the Board of Regents to decide who is a finalist for purposes of the public vetting portion of the process. This Court need go no further than the plain language of CORA to conclude the district court erred when it required the disclosure of candidates who were earlier eliminated from consideration from the presidential selection process.

Alternatively, the statute is at most ambiguous concerning a required number of finalists, and any ambiguity here should be construed in favor of the Board of Regents and its ability to exercise the authority granted to it by statute. The consequences of the district court's opinion will significantly impair future executive searches by state entities and remove discretion conferred on appointing authorities. By failing to protect the confidentiality of candidates who are not engaged in the final round of consideration, some qualified applicants might not apply at all.

The General Assembly sought to address this issue when it first created the CORA exemption for non-finalists in 1994, and then

expanded it in 2001. While the 1994 statute embraced the district court's interpretation that those interviewed by the Board of Regents would be finalists, the 2001 amendment removed the provision that all interviewees are finalists. The General Assembly also has never created a minimum finalist requirement for searches with numerous qualified candidates, leaving the discretion to the appointing authority to decide how to proceed. The legislative history makes clear that legislators were aware that entities could name a single finalist, like CU did here, but the General Assembly did not impose a minimum finalist requirement.

Finally, the goals of CORA and the OML are satisfied when the appointing authority announces at least one public finalist who is subject to the kind of scrutiny Mr. Kennedy received here. The sunshine laws seek to create the opportunity for the public to provide input before a candidate is appointed. That end was achieved in this case. To the extent that one might find it preferable to have multiple finalists all publicly disclosed, that policy judgment is the General Assembly's to make in the first instance. Absent its direction, the decision was for the

Board of Regents to make during its selection process and not for a court to second guess.

ARGUMENT

I. CORA prohibits CU from disclosing materials for the five candidates interviewed by the Board of Regents who did not go through the final steps of the selection process.

A. Standard of review and preservation.

Courts "review de novo questions of law concerning the correct construction and application of CORA." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). "Likewise, interpreting the OML presents a question of law that [courts] review de novo." *Colo. Off-Hwy. Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Rec.*, 2012 COA 146, ¶ 22.

The issue of whether CORA prohibits the requested disclosure is preserved for appeal. It was raised in the Daily Camera's complaint and argued by the parties in their briefing. CF, pp 3-10, 113-26, 332-56.

B. The plain language of CORA and the OML, as applied to CU's presidential search, demonstrates that Mr. Kennedy was the only finalist.

The primary goal of statutory interpretation is to "give effect to the General Assembly's intent." *Bd. of Cnty. Comm'rs of La Plata Cnty.*

v. Dep't of Pub. Health & Env't, 2020 COA 50, ¶ 14. To do so, courts "look first to the statute's language, giving words and phrases their plain and ordinary meanings." *Id.* This requires "reading applicable statutory provisions as a whole in order to accord consistent, harmonious, and sensible effect to all their parts." *People in Interest of W.P.*, 2013 CO 11, ¶ 11. "If the plain language is unambiguous and does not conflict with other statutory provisions, [courts] look no further." *Id.*

Applying these principles here, Mr. Kennedy was the only finalist in CU's presidential search. He alone went through "the final round of competition," CF, p 402, and he alone was publicly identified "no later than fourteen days prior to" the Board's final vote for appointing a president. § 24-6-402(3.5). Using the plain meaning of the word finalist, as defined by CORA, Mr. Kennedy was the only finalist. The district court erred by failing to properly consider the facts surrounding Mr. Kennedy's appointment and by failing to consider the statutory scheme as a whole. In short, the court arrogated to itself authority invested in the Board of Regents under the statute to determine who is a finalist.

1. <u>Mr. Kennedy is the only candidate who meets the definition of "finalist."</u>

CORA prohibits CU and other state entities from disclosing any "[r]ecords submitted by or on behalf of an applicant or candidate for an executive position . . . who is not a finalist." § 24-72-204(3)(a)(XI)(A). "Finalist" is defined as

> an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5), and if only three or fewer applicants or candidates for the chief executive officer position possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists.

Id.

This provision does not impose any requirement that an institution name a minimum number of finalists, unless three or fewer candidates "possess the minimum qualifications." *Id.* Here, it is undisputed that more than three candidates "possess[ed] the minimum qualifications" for CU president. *See* TR 2/12/20, p 21:12-21. Accordingly, only a candidate who was "a member of the final group of

applicants or candidates made public pursuant to section 24-6-402(3.5)" of the OML was a "finalist" in CU's presidential search.

Subsection (3.5) of the OML also imposes no requirement as to the number of finalists named. Instead, subsection (3.5) provides:

> The state or local public body shall make public the list of all finalists under consideration for the position of chief executive officer no later than fourteen days prior to appointing or employing one of the finalists to fill the position. No offer of appointment or employment shall be made prior to this public notice. Records submitted by or on behalf of a finalist for such position shall be subject to the provisions of section 24-72-204(3)(a)(XI). As used in this subsection (3.5), "finalist" shall have the same meaning as in section 24-72-204(3)(a)(XI).

§ 24-6-402(3.5).

Mr. Kennedy is the only individual who was "made public pursuant to section 24-6-402(3.5)," and so is the only finalist for purposes of CORA. § 24-72-204(3)(a)(XI). Mr. Kennedy was publicly disclosed as a finalist more than 14 days before the Board voted on his appointment as president, as required by § 24-6-402(3.5). None of the other candidates were. Mr. Kennedy consented to being publicly named as a finalist. No other candidate did. Mr. Kennedy appeared at all four campuses and the system offices, and nearly 3,000 people provided

feedback on his candidacy. No other candidate went through that process either. And no candidate other than Mr. Kennedy was considered for appointment as CU President by the Board of Regents at its May 2 meeting. In short, Mr. Kennedy is the only candidate who went through the final stages of the process and was subject to the rigorous public vetting contemplated by the OML.

The plain meaning of the words used in CORA, applied to these facts, thus makes clear that Mr. Kennedy was the only individual disclosed and subjected to public scrutiny under the OML, and thus the only "finalist" whose records could be produced under CORA.

2. The district court disregarded the final steps in the process leading to the appointment of Mr. Kennedy as CU President.

The district court largely ignored this factual record. The district court summarized the final 22 days before the Board voted on Mr. Kennedy's candidacy as follows: "After being announced as the sole finalist, Mr. Kennedy was subjected to a public vetting phase where he appeared on all four campuses. An online portal was developed for the public to comment on Mr. Kennedy's nomination." CF, p 396. This

summary minimizes the rigorous process that Mr. Kennedy, and Mr. Kennedy alone, navigated and what the Board of Regents considered before voting to appoint him as president.

Before the Board voted on Mr. Kennedy's appointment on May 2, the Board had solicited substantial public feedback concerning Mr. Kennedy's suitability for his role as president. To inform its decision, the Board could consider his performance at five public forums, one at each campus in the CU system as well as the system offices. *Id.* at 65. The Board also had the benefit of the nearly 3,000 responses it received to its online portal. The responses from persons affiliated with the University included 890 students, 613 faculty, 537 staff, and an additional 424 alumni. *Id.* at 50. The University compiled feedback on Mr. Kennedy in the categories of intellectualism and professionalism, leadership and vision, resource development, diversity, administration and management, the ability to build and sustain relationships, and personal qualities. *Id.* at 51.

The Board thus had the benefit of all this information concerning Mr. Kennedy's candidacy when it considered whether to appoint him as

CU President on May 2. This public scrutiny was nearly fatal to his candidacy—while the Board voted unanimously to name Mr. Kennedy as a finalist, *id.* at 49, after considering the substantial feedback, four of the nine Board members switched their vote and voted against appointing Mr. Kennedy as president, *id.* at 65.

The district court failed to give effect to this factual record. The court defined "finalist" to mean "someone who competes in the final round of competition." *Id.* at 402. But, without explanation, the court asserted that the interviews with the Board of Regents constituted "the final round of competition." *Id.* This bare conclusion disregards the thousands of individuals who provided input at public forums and through the online portal, scrutiny to which no other candidate was subjected, and ignores the substantial impact that process had on the Board's vote. As argued to the district court, this meaningful public vetting prior to the Board's vote on appointment of the CU President constituted the final round of the selection process, not the earlier interviews that resulted in the unanimous determination to advance Mr. Kennedy as a finalist. *See* TR 2/12/20, p 35:10-21.

Determining who is a finalist in a given search requires an examination of the facts of that case. The district court erred by failing to appropriately consider the relevant facts here and apply CORA and the OML to those facts. Based on the undisputed facts here, Mr. Kennedy was the only candidate who went through the rigorous public vetting contemplated by the OML, and so was the only finalist whose materials CU could disclose under CORA.

3. The district court's interpretation of "finalist" is inconsistent with the statute when read as a whole.

When interpreting statutory language, courts must read "applicable statutory provisions as a whole in order to accord consistent, harmonious, and sensible effect to all their parts." *W.P.*, 2013 CO 11, ¶ 11. Here, the district court's interpretation is inconsistent with CORA and the OML when those statutes are read as a whole, in four ways.

First, the district court erred by adding a minimum finalist requirement that does not exist in the statute. "Where the legislature could have restricted the application of a statute, but chose not to, [courts] do not read additional restrictions into the statute." *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 804 (Colo. 2000). The General

Assembly did not require a minimum number of finalists in either CORA or the OML. The General Assembly also did not prohibit an entity from naming a single finalist; instead, it left with the appointing authority (here, the Board of Regents) the judgment as to how many finalists to advance. The Court "must respect the legislature's choice of language, and [should] not add words to the statute." *Oakwood Holdings, LLC v. Mortg. Invs. Enters. LLC*, 2018 CO 12, ¶ 12.

The district court reasoned that some minimum finalist requirement must apply because the statute imposes a minimum finalist requirement when a search identifies fewer than three qualified candidates. *See* § 24-72-204(3)(a)(XI)(A) ("if only three or fewer applicants or candidates . . . possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists"); *see also* CF, p 402. But this is exactly backwards.

"Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others." *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001). Here, the General Assembly applied a minimum finalist requirement ***only*** to those searches that

revealed three or fewer qualified candidates. Under the *expressio unius* canon, the Court should imply from this that the General Assembly intended to exclude all other executive searches—like CU's presidential search—from the three-candidate minimum. The Court should thus "read the General Assembly's inclusion of a single, specific, narrow exception to mean that the General Assembly intended that there be no other exceptions to the rule" that no minimum number of finalists is required. *Cain v. People*, 2014 CO 49, ¶ 13.[1]

Interpreting the statute to require an unspecified minimum number of finalists is not only non-textual, but also unworkable. Under the district court's interpretation, government entities are left to wonder how many finalists they must identify. Two? Three? Four? Executive searches differ from entity to entity and the identification of a finalist for purposes of CORA and the OML cannot be reduced to a

[1] Nor does the district court's construction of the statute fix the supposed problem it purports to address. The district court left open the possibility that a state entity could name only two finalists when more than three candidates who meet the qualifications for the position. But this would still be fewer than the three-candidate minimum for a small-field search with only three qualified candidates.

formulaic process. And this unspecified minimum, whatever it is, would require an entity to name as finalists candidates that are not being considered for appointment.

Here, only Mr. Kennedy was identified by the Board of Regents as appropriate for consideration as President on April 10, and he was the only candidate considered by the Board for appointment at its May 2 meeting. The state sunshine laws do not require an entity to advance any number of candidates not being considered for the position simply to meet a minimum finalist requirement that the laws themselves do not specify. It is, in short, the decision of the Board to determine how many finalists are appropriate, and the statute does not provide the court with any basis to second-guess that judgment. Indeed, there are no judicially manageable standards in the statute upon which to base such second guessing.

Second, the district court erred by failing to give effect to § 2-4-102 when construing the word "finalists" in the OML. The court held that the use of the word "finalists" indicated a legislative intent to preclude entities from naming a single finalist. CF, pp 400-01. But when

interpreting Colorado statutes, "[t]he singular includes the plural, and the plural includes the singular." § 2-4-102. This rule of interpretation is statutory law and not, as the district court held, merely a "general principle of interpretation" that courts "need not rely on." CF, p 401. (quotations omitted). Rather, § 2-4-102 "*requires* that [courts] read singular nouns to include their plural form and plural nouns to include their singular form." *People v. Crawford*, 230 P.3d 1232, 1235 (Colo. App. 2009) (emphasis added). The district court thus erred in concluding that the legislature intended to require more than one finalist when it used the word "finalists" because Colorado law requires the words be used interchangeably.

Third, the district court incorrectly considered single, isolated words or phrases in CORA and the OML—"member," "group," "list," and "one of"—as a statement of legislative intent. CF, p 400. "But, to properly understand a statute, [courts] cannot read various words or phrases in isolation but must read them in context, and in a manner that gives effect to the entire statute." *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 10 (quotations omitted). The legislature here chose words

that permit the naming of multiple finalists. But the legislature did not require the naming of multiple finalists in broad executive searches such as this and left that judgment to the appointing authority.[2] *See Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 772 (Colo. 2005) ("Had the General Assembly intended to limit [the scope of a statute], it would have said so."). These words should not be examined in isolation and apart from the statutory definition of "finalist" to determine who constitutes a "finalist" for purposes of CORA.

Finally, the district court's interpretation of CORA intrudes upon the Board's inherent and statutory authority to select finalists for CU President. CORA and the OML are governmental transparency laws, and, in the absence of express language to the contrary, should not be interpreted as creating substantive requirements dictating how

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[2] Both in ordinary parlance and Colorado law, "member," "group," and "list" can all refer to single components. "Single-member LLCs are permitted by statute . . . ." *Sedgwick Props. Dev. Corp. v. Hinds*, 2019 COA 102, ¶ 17. A grocery list can contain a single item, and a witness list a single witness. And the federal constitution permits an "equal protection claim [to] be asserted with respect to a group or a class of one." *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1196 (10th Cir. 2019) (quotations omitted).

institutions should run their presidential searches. That is particularly true with respect to CU's Board of Regents, who possess not only inherent authority to exercise discretion in the University's hiring process, but also constitutional and statutory authority over such matters. *See* Colo. Const. art. VIII, § 5(2) (granting the Board authority to exercise "general supervision" of CU); § 23-20-111 (same); § 23-20-112(1) ("The board of regents shall enact laws for the government of the university . . . ."); § 23-20-106 ("The regents of the university shall elect a president of the university . . . .").

Here, requiring the disclosure of the five additional candidates would intrude on this authority, and force CU to disclose individuals who were not being considered for appointment as CU President. Such a result is inconsistent with the statutory definition of "finalist" and intrudes upon the Board's discretion to select the president of CU. Therefore, the Board's decision to name only Mr. Kennedy as a finalist was consistent with its authority over the presidential hiring process and the statutory scheme of CORA as a whole.

C. If the statute is ambiguous, other tools of statutory construction make clear that Mr. Kennedy was the only finalist.

For the reasons given above, the statutory text is unambiguous and permitted CU to disclose only Mr. Kennedy's materials in response to the Daily Camera's request. Alternatively, if the Court finds that the General Assembly's use of words like "group" and "list" creates an ambiguity in the statute, the Court should still find that CORA did not require CU to name others as finalists.

"A statute is ambiguous if multiple reasonable interpretations are possible." *Bd. of Cnty. Comm'rs of La Plata Cnty.*, 2020 COA 50, ¶ 14. To resolve ambiguity, courts "look to factors beyond plain language, such as legislative history, the consequences of a given construction, and the goal of the statutory scheme." *W.P.*, 2013 CO 11, ¶ 11. Here, these factors conclusively weigh in favor of CU's construction of CORA.

1. <u>The district court's construction of the statute will seriously impair the ability of institutions of higher education to obtain quality candidates.</u>

The district court failed to consider the consequences of its construction of the statute. By denying CU the ability to protect the

confidentiality of individuals not considered for appointment as CU President, the district court's interpretation will make it harder for CU, and other state institutions, to obtain quality candidates in future presidential searches.

Permitting CU to ensure the confidentiality of candidates who will not be considered for appointment as CU President ensures the strongest possible pool of candidates. Common sense, legislative history, and the actual experience of this case all demonstrate that protecting candidate confidentiality unless they enter the final phase of consideration is critical to encourage the best possible candidates.

It is not difficult to understand why candidates for CU President, who, like Mr. Kennedy, may have already held a job as a university president or other public role, would not want their interest in the position known unless they are very seriously being considered for the appointment. Those who are at the candidate's current place of employment may resent learning that the candidate is looking for another job. And if the candidate is unsuccessful, the candidate may be embarrassed about not making it to the final round of consideration.

The General Assembly was particularly concerned about this deterrent effect when it adopted section (3)(a)(XI)(A) in CORA, stating that failing to protect candidate confidentiality "deters qualified people from applying." CF, p 163 (*Governmental Entities Executive Positions: Hearing on H.B. 1234 Before the H. Comm. on State Affairs*, 59th Gen. Assemb., 2d Reg. Sess. (Colo. Feb. 15, 1994) (Statement of Rep. Jeannie Reeser, Sponsor, H.B. 1234). But the district court's order recreates this deterrent effect that CORA was meant to eliminate.

Nor is this merely a theoretical concern. After this litigation was filed, a reporter received the names of thirty individuals considered for CU President, and published a story identifying most of them. CF, p 321. But even there, the reporter agreed not to publish the names of three individuals who had informed the Board that public disclosure of their identities could jeopardize their current jobs. *Id.* at 322.

This situation is not unique to CU. As the amicus brief submitted by the Colorado School of Mines, Colorado State University, Colorado State University-Pueblo, Colorado Mesa University, the University of Northern Colorado, and Western Colorado University demonstrates,

many of the state's leading academic institutions are deeply concerned that their ability to attract the best candidates will be hindered by the broad disclosure regime created by the district court opinion.

The consequences of the district court's interpretation on future presidential searches are thus real and serious. Because these results are not required by the language of the statute, CORA should be construed to avoid these consequences, which would divest the Board of its statutory authority to make this delicate judgment. *See* § 23-20-106.

2. CORA's legislative history demonstrates increasing concern for protecting the confidentiality of candidates.

The legislative history of section (3)(a)(XI)(A) also supports granting institutions autonomy to determine who should be advanced as a finalist. Every legislative enactment in this area has further protected the confidentiality of candidates. And, despite revising this statute twice in the last 26 years, the General Assembly has never adopted a requirement for a minimum number of finalists.

Section (3)(a)(XI)(A) was adopted in 1994. 1994 Colo. Sess. Laws 936 (included in the record at CF, p 139). Prior to that time, all candidates' materials were subject to disclosure under CORA. As one

member of the House State Affairs Committee noted, the effect of such a disclosure regime was stark:

> It deters qualified people from applying, especially in-state candidates, promotes applicants and candidates to withdraw from the system, and it infringes applicants' and candidates' privacy interests by imperiling their jobs and kind of gives them the statement they're second rate because they didn't make it all the way.

CF, p 163 (Statement of Rep. Jeannie Reeser, Sponsor, H.B. 1234). To address these concerns, the General Assembly passed H.B. 94-1234.

H.B. 94-1234 provided some protection to candidates for executive positions that did not previously exist, but provided far less protection than exists under current law. First, H.B. 94-1234 required state institutions to keep the records of non-finalists in executive searches confidential, but only if the candidates specifically requested confidentiality. *Id.* at 140. Second, it defined "finalist" more broadly than current law, as it included all candidates "chosen for an interview" and all candidates still under consideration 21 days before the position was filled. *Id.* Finally, H.B. 94-1234 deemed all candidates finalists if there were six or fewer "competing" for a position. *Id.* Thus, while H.B.

94-1234 granted state institutions some ability to protect candidate confidentiality, it required far greater disclosure than currently exists.

The current language of section (3)(a)(XI)(A) was adopted in 2001, which substantially narrowed the disclosure required by H.B. 94-1234. 2001 Colo. Sess. Laws 1069 (included in the record as H.B. 01-1359 at CF, p 147). The 2001 amendment removed the requirement that candidates request confidentiality; removed the definition of "finalist" that covered all candidates who were interviewed; shortened the required amount of time prior to appointment that finalists must be considered (14 days rather than 21 days); and cut in half the requirement that all candidates in a small-field search are considered finalists (from searches with "six or fewer applicants" to "three or fewer applicants" meeting the minimum qualifications). CF, p 153.

One of the sponsors of the bill, Representative Mitchell, made clear in testimony to the House Committee on Information and Technology, that only those still being considered 14 days before the appointment are finalists: "Anyone still being considered 14 days from the final appointment will be a finalist, and they will be made public.

But anyone not being considered at that point need not be disclosed." *Expansion of Open Records Act: Hearing on H.B. 1359 Before the H. Comm. on Info. and Tech.*, 63rd Gen. Assemb., 1st Reg. Sess. (Colo. Mar. 28, 2001) at 11:38-13:40 (Statement of Rep. Shawn Mitchell, Member, H. Comm. on Info. and Tech.). The sponsor of the 2001 amendment thus made clear that section (3)(a)(XI)(A) meant what it said: that those individuals made public at least 14 days before the appointment are finalists who must be disclosed, and those not made public need not be disclosed.

The district court failed to give effect to the 2001 amendment. The court "conclude[d] that the Board of Regents violated CORA by withholding the names and application materials of the other five individuals interviewed by the Board of Regents." CF, p 397. But the 2001 amendment to CORA expressly removed the provision that all candidates who were interviewed are deemed finalists. To further underscore the point, in 2009, the General Assembly considered and rejected a bill which would have re-imposed the requirement that all

candidates interviewed by a university's governing board are "finalists" whose names should be made public. CF, p 362.

The "legislature's removal of particular language serves as a statement of legislative intent that it did not wish to include such language." *Daniel v. City of Colo. Springs*, 2014 CO 34, ¶ 20. The district court's conclusion that all those interviewed by the Board of Regents were finalists ignored "the well-established presumption that when the legislature amends a law, it intends to change that law." *Id.*

Finally, the legislative history also underscores the district court's error in interpreting section (3)(a)(XI)(A) to include a required minimum number of finalists. Neither the 1994 nor the 2001 legislation imposed such a requirement, other than when a search garnered fewer than six total (in 1994) or three qualified (in 2001) candidates.

Further, the legislative history concerning a 1997 amendment to section 3.5 of the OML shows that legislators do not believe there is any required minimum number of candidates in the statute.

> SENATOR PASCOE: Senator Alexander, one of my concerns is that there might just be one finalist announced. Is there somewhere in the law, existing in the law, a requirement that you name a certain number of finalists?

> MR. CHAIRMAN: Senator Alexander.
> SENATOR ALEXANDER: Not that I'm aware of.
> . . .
> SENATOR PASCOE: It could be one person that's announced and then one person who is appointed 14 days later?
> MR. CHAIRMAN: Senator Alexander.
> SENATOR ALEXANDER: It could be one applicant, I suppose, that goes through the whole process too, you know.

CF, pp 296-97 (*Local Public Body CEO Hiring Procedures: 2d Reading of S.B. 059 Before the Senate*, 61st Gen. Assemb., 1st Reg. Sess. (Colo. Jan. 31, 1997)); *see also id.* at 293 (SENATOR WATTENBERG: "what determines that you're a finalist?" SENATOR ALEXANDER: "the specific number of people being considered is not addressed in the bill."). Despite acknowledging that an institution could name a single finalist, no amendments have ever been made to the OML or CORA to require a minimum number of finalists for a broad search like CU's presidential search.

3. CORA's and the OML's goals of allowing public input before appointing a chief executive were more than met here.

CORA and the OML are designed to balance the privacy interests of candidates and the ability to generate a strong applicant pool, on the one hand, against the public's qualified right to access certain candidate

records, on the other hand. *See, e.g.*, CF, p 163 (Statement of Rep. Jeannie Reeser, Sponsor, H.B. 1234). Specifically, they create a period of time during which the public can comment on anyone the state entity may appoint as its leader, by requiring all finalists to be disclosed "no later than fourteen days prior to appointing or employing one of the finalists to fill the position." § 24-6-402(3.5).

Here, CU made Mr. Kennedy's identity and application materials public 22 days before the Board voted on whether to appoint him as president. During that time, CU went far beyond what was required of it under CORA and the OML by hosting open forums at its campuses and offices. CU also set up a website to actively solicit feedback on Mr. Kennedy, which is also not required by CORA or the OML. The Daily Camera believes that other candidates should have been made public as well, but the Board was no longer considering those other candidates for the position and was legally prohibited from considering them at its May 2 meeting based on the OML's requirement of two weeks' disclosure. Thus, in this case, CU went above and beyond what was required of it by the sunshine laws.

The district court largely ignored these actions taken by CU, and instead concluded that section (3)(a)(XI)(A) should be construed narrowly because the goal of the sunshine laws is to promote transparency. CF, pp 406-07. However, the Colorado Supreme Court has cautioned against this sort of reductive interpretation of CORA.

> Although CORA's general purpose is to provide broad access to public records, the legislature has affirmatively limited this general purpose by creating exceptions to the statutory disclosure requirements. . . . Thus, CORA reflects the legislature's intent to protect both the public's broad right to access public records and the government's more limited right to withhold certain records.

Benefield v. Colo. Republican Party, 2014 CO 57, ¶ 25. By protecting records of individuals not being considered for appointment to the position, section (3)(a)(XI)(A) embodies the same respect for individuals' privacy as are found in other provisions of CORA. For example, under CORA, a public entity may deny public inspection of records containing personal information where disclosure would be contrary to the public interest, such as data pertaining to an examination for employment or private email addresses. § 24-72-204(2)(a)(II), (VII). CORA also prohibits a public entity from disclosing other records containing

personal information, such as personnel files, letters of reference, and marriage applications. § 24-72-204(3)(a)(II)(A), (III), (XIX).

Protecting the confidentiality of the non-finalists interviewed by the Board while facilitating robust public debate over Mr. Kennedy was thus consistent with CORA's overall goals and structure.

CONCLUSION

CU publicly identified and produced the records of the only finalist who was considered by the Board of Regents for appointment as president of CU. The order of the district court should be reversed.

Respectfully submitted this 18th day of August, 2020.

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CERTIFICATE OF SERVICE

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