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<tr><td>COLORADO SUPREME COURT
Ralph L. Carr Colorado Judicial Center
2 East 14th Avenue, 4th Floor
Denver, Colorado 80203
<hr>On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 2020CA0691
Denver District Court, Case No. 2019CV033759</td><td rowspan="2">▲COURT USE ONLY▲</td></tr>
<tr><td>PRAIRIE MOUNTAIN PUBLISHING CO., LLP, d/b/a DAILY CAMERA
Petitioner

v.

THE REGENTS OF THE UNIVERSITY OF COLORADO
Respondent</td></tr>
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<tr><td colspan="2" align="center">PETITION FOR WRIT OF CERTIORARI</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with all requirements of C.A.R. 53, which incorporates C.A.R. 25 and C.A.R. 28 by reference. Specifically, the undersigned certifies that:

The petition complies with the word limit set forth in C.A.R. 53:

☒ It contains 3,796 words (3,800 limit).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 53 and C.A.R. 32.

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Petitioner Prairie Mountain Publishing Company, LLP, d/b/a Daily Camera, ("Daily Camera"), through the undersigned counsel, respectfully submits the following Petition for Certiorari.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals erred in concluding that under the Colorado Open Records Act ("CORA") and Colorado Open Meetings Law ("the OML"), the University of Colorado Board of Regents ("Regents") could lawfully disclose a sole candidate as the "final *group* of applicants" or as the "*list* of *all* finalists" for the position of the University of Colorado President when six qualified candidates interviewed with the Regents and competed in the final round of competition.

Whether the Court of Appeals erred in reversing the district court's judgment that concluded that all six candidates who were interviewed by the Regents were "finalists" for purposes of CORA and the OML.

Whether it is possible to reconcile the Court of Appeals' holding that all public bodies in Colorado are free to determine who they shall identify as a "finalist" for any Chief Executive Officer position with the plain language and the animating principles of CORA and the OML.

OPINION FROM WHICH REVIEW IS SOUGHT

Review is sought from *Prairie Mountain Publishing Company, LLP, d/b/a Daily Camera v. Regents of the University of Colorado*, 2021 COA 26, a 2-1 published decision of the Colorado Court of Appeals issued on March 4, 2021.

JURISDICTION OF THE SUPREME COURT

Jurisdiction is based on §§ 13-2-127 & 13-4-108, C.R.S. and C.A.R. 49 and 52(b).

PENDING CASES

There are no cases pending before this Court addressing the same issues presented herein.

STATEMENT OF THE CASE AND FACTS

This is a case of first impression with tremendous statewide impact. As the number of groups who joined the amicus briefs filed in the Court of Appeals demonstrates, resolution of this issue will have far reaching consequences for the public, the press, applicants, and state and local governmental entities.[1] The Daily

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[1] HB 21-1051, introduced on February 16, 2021, seeks to amend the pertinent statutory scheme by permitting public bodies to disclose a sole finalist for executive officer positions. A copy of the current text of the bill may be found at: https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_1051_ren.pdf. If enacted, this legislation will prospectively change the law, and will therefore not moot this dispute. *See Union Pacific Railroad Co. v. Martin*, 209

Camera respectfully requests the Court to grant certiorari to resolve the issue of who is a "finalist" for Chief Executive Officer positions, and thereby whose identity must be disclosed to the public under CORA.

Applicable Statutory Framework

The OML requires all "public bodies" at the state and local levels of government to publicly identify the *list* of finalists for executive officer positions fourteen days prior to extending an offer of employment. Likewise, finalists' application materials are subject to disclosure under CORA. Conversely, the identity of the non-finalist candidates and their application materials remain confidential. The current statutory scheme therefore strikes a balance between public disclosure of leading candidates and confidentiality for those applicants who do not advance to the final round of competition.

CORA expressly declares that "[a]ll public records *shall be* open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law . . ." § 24-72-203(1)(a), C.R.S. (emphasis added). Among the public record exceptions is an exception for "[r]ecords submitted by or

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P.3d 185, 188 (Colo. 2009) (when the General Assembly amends a statute there is a presumption that it intends to prospectively change the law).

on behalf of an applicant or candidate for an executive position . . . who is not a finalist." § 24-72-204(3)(a)(XI)(A), C.R.S. CORA defines the term "finalist" as:

> an applicant or candidate for an executive position as the *chief executive officer* or 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.* (emphases added).

While the OML does not separately define the term "finalist," 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 ***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 a 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), C.R.S. (emphases added).

Facts and Procedural History

This litigation arose as the result of the recent Regents' presidential search process. Following President Bruce Benson's announced retirement, the Regents commenced a nationwide search for his successor as the "Chief Executive Officer" of the state's 4-campus system. Over 180 individuals applied, notwithstanding the presumption that the names and application materials of all "finalists" would be publicly disclosed. The search firm hired by the Regents determined that at least 27 of the applicants met the minimum qualifications. From these 27 candidates, the search committee interviewed 10 candidates. The search committee then advanced 6 candidates for consideration by the Regents. In the final round of competition, the Regents interviewed these 6 candidates. Each candidate had one interview with the Regents. On April 10, 2019, the Regents voted to name Mark Kennedy as the "sole finalist." CF, pp 32-34.

The announcement of Mr. Kennedy as the "sole finalist" was met with considerable criticism from faculty, staff, students, and the public. Mr. Kennedy appeared on all four campuses. The Regents voted 5-4 to appoint Mr. Kennedy as the University of Colorado's next President 23 days after his announcement as the "sole finalist." CF, pp 34, 50-60.

In late May 2019, the Daily Camera submitted a CORA request for the names and application materials of the 27 applicants advanced by the search firm and the names and application materials of the 6 candidates who had been interviewed by the Regents. The Regents denied these requests and produced only Mr. Kennedy's application materials. Following conferral amongst the parties and counsel, the Regents declined to change their position. CF, pp 34-35.

The Daily Camera commenced this litigation in Denver District Court, seeking a show cause order and a ruling that the Regents improperly withheld the names and application materials of the six candidates interviewed by the Regents. Following the filing of stipulated facts and exhibits, extensive briefing and oral argument, the Denver District Court ruled that the six candidates interviewed by the Regents were finalists, and accordingly ordered the Regents to disclose the names and application materials of all six finalists. CF, pp 395-409. As the identities of four of the remaining five finalists had previously been leaked to *The Colorado Independent* online newspaper, the Regents produced the application materials relating to those four finalists but sought a stay as to release of the name and application materials of the only remaining undisclosed finalist. Following the

district court's denial of the stay request, the Court of Appeals granted a stay in a 2-1 decision.

The Regents then appealed the district court's ruling. On March 4, 2021, the Court of Appeals reversed in a 2-1 published decision. Despite concluding that CORA's definition of "finalist" was confusing and circular, and that the district court did a yeoman's job attempting to make sense of the statutes, the majority concluded that the plain language of the statutes unambiguously permitted the Regents to identify only a sole finalist. *Regents,* 2021 COA 26 ¶¶ 7, 16, & 31-32. The majority opinion failed to reconcile its interpretation of one phrase, wrenched from an interdependent statutory scheme, with the other phrases, which explicitly require the disclosure of names and application materials of everyone "who is *a member of the final* ***group*** *of* applicants or candidates" (CORA) and of "***the list*** *of all finalists* under consideration" (OML) fourteen days prior to offering the position to "***one of*** the finalists." According to the majority, whether this interpretation of our state's Sunshine Laws was good policy or government was not for the Court to decide. *Regents*, ¶ 29. By its own terms, the majority opinion refused to consider whether its construction of the statutory text effected the General Assembly's purpose in enacting those laws or contravened it.

In dissent, Judge Jones concluded that the statutes unambiguously contemplate that, unless there is only one applicant, there will always be more than one "finalist." *Id.* at ¶ 61. Judge Jones noted that the majority's interpretation runs afoul of several basic principles of statutory construction. *Id.* at ¶¶ 53-59. Further, the majority's interpretation contravened both this Court's precedents holding that exceptions to CORA's (and OML's) general rule of disclosure and access must be narrowly construed and the policy of transparency underlying both of those statutes. *Id.* at ¶¶ 60-61. The dissent would therefore have affirmed the district court's decision.

REASONS FOR GRANTING THE PETITION

There are no less than three special and important reasons for granting this petition under C.A.R. 49. The issues raised were preserved in the lower court. A *de novo* standard of review applies because the case presents a question of statutory interpretation.

First, the Court of Appeals' ruling is contrary to this Court's precedents and settled canons of statutory construction. As the dissent noted, the majority opinion (i) contravenes the principle that a statute must be interpreted as a whole to give it sensible effect; (ii) leads to an absurd result, and (iii) fails to read the relevant

provisions as a whole and in context to advance the underlying purposes. *Regents*, ¶¶ 53-59.

Second, the Court of Appeals' decision is contrary to this Court's holdings that exceptions to CORA's general rule of disclosure must be narrowly construed to favor disclosure to the public, the ultimate beneficiary of the remedial statute. Indeed, the Court of Appeals acknowledged that its interpretation of both CORA and the OML are subject to abuse by public bodies, who (under the majority's decision) are free to always disclose only a single "finalist" for a Chief Executive Officer position, which is inimical to principles of open government. *Id.* at ¶ 29. In declining to assess the policy implications of its decision and to advance the overriding purpose of the Sunshine Laws, the majority opinion conflicts with multiple decisions issued by this Court.

Third, this is a case of first impression, as neither the Court of Appeals nor this Court has previously interpreted the finalists' provisions in § 24-72-204(3)(a)(XI)(A), C.R.S. and § 24-6-402(3.5), C.R.S. Left undisturbed, the published opinion below will have far-reaching adverse impact on the public's ability to monitor the selection processes used by public bodies across the state to fill Chief Executive Officer positions including University Presidents, School

District Superintendents, Chiefs of Police, Managers of Public Safety, County Administrators, City Managers, and all city and county department heads. Precisely because of such far-reaching and significant public impact, this Court has repeatedly granted review of Court of Appeals' decisions interpreting our state's Sunshine Laws. *See, e.g., Uberoi v. Univ. of Colo.,* 686 P.2d 785 (Colo. 1984); *Associated Students v. Regents*, 543 P.2d 59 (Colo. 1975).[2] It should do so again here.

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[2] *See also Doe v. Colo. Dep't of Pub. Health & Env't*, 451 P.3d 851 (Colo. 2019); *Reno v. Marks*, 349 P.3d 248 (Colo. 2015); *Benefield v. Colo. Republican Party,* 329 P.3d 262 (Colo. 2014); *Denver Post Corp. v. Ritter,* 255 P.3d 1083 (Colo. 2011); *Marble v. Darien,* 181 P.3d 1148 (Colo. 2008): *Hanover Sch. Dist. v. Barbour,* 171 P.3d 223 (Colo. 2007); *Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005); *Denver Pub. Co. v. Cty. Comm. of Arapahoe,* 121 P.3d 190 (Colo. 2005); *Bd. of Cty. Comm. v. Costilla Cty. Cons. Dist.,*88 P.3d 1188 (Colo. 2004); *Wick Comm. Co. v. Montrose Cty. Bd. Comm'rs*, 81 P.3d 360 (Colo. 2003); *Pierce v. St. Vrain Valley Sch. Dist.,* 981 P.2d 600 (Colo. 1999); *City of Colo. Spr. v. White*, 967 P.2d 1042 (Colo. 1998); *City of Westminster v. Dogan Const.,* 930 P.2d 585 (Colo. 1997); *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991); *Sargent v. Western Serv.,* 751 P.2d 56 (Colo. 1988); *Cole v. State*, 673 P.2d 345 (Colo. 1983); *James v. Bd. of Comm'rs,* 611 P.2d 976 (Colo. 1980); *Benson v. McCormick,* 195 Colo. 381 (Colo. 1978); *Denver Pub. Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974); *Bagby v. Sch. Dist. No. 1,* 186 Colo. 428 (1974).

I. The Court of Appeals' Interpretation is Inconsistent with Both This Court's Statutory Construction Jurisprudence and Settled Canons of Statutory Construction.

The overriding goal of statutory construction is to effectuate the legislature's intent. *Dep't of Revenue v. Agilent Technologies, Inc.*, 2019 CO 41, ¶ 16. This Court has instructed courts to examine the entire statutory scheme to give consistent, harmonious, and sensible effect to all of the statute's parts, applying words and phrases in accordance with their plain and ordinary meaning. *Id.*; *Hassler v. Account Brokers of Larimer County, Inc.*, 2012 CO 24, ¶ 15. Words and phrases must be read in context, and may not be assessed in isolation. *Jefferson County Board of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). Furthermore, "in the absence of some express indication to the contrary, a term or provision that is part of a greater statutory scheme should be interpreted, to the extent possible, harmoniously with the other provisions and purpose of that scheme." *City & County of Denver v. Expedia,* Inc., 2017 CO 32, ¶ 18 (citations omitted); *see also Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043 & n.6 (Colo. 1991) (tax ordinance must be construed *in pari materia* with entire statutory scheme to effectuate the legislative intent). Statutory construction that renders any words or phrases superfluous or that would lead to illogical or absurd results is to be avoided. *Agilent Technologies,* ¶

16; *Schaden v. DIA Brewing Co., LLC*, 2021 CO 4M, ¶ 32. In particular, the General Assembly's manifest intent must prevail over a literal meaning of the statute if the literal meaning would lead to an absurd result. *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011).

The majority opinion contravenes these settled principles of statutory construction, as announced by this Court over decades of jurisprudence. First, it characterizes § 24-72-204(3)(a)(XI)(A)'s definition of the term "finalist" as "confusing and perhaps circular." *Regents,* ¶ 16. Yet the majority holds the statute's text plainly and unambiguously supports the interpretation advanced by the Regents – that a finalist is whoever the Regents say is a finalist – even if that interpretation makes little sense. *Id.* at ¶¶ 16, 18 & 30.

Second, the majority's opinion is at odds with the principle that statutes are to be interpreted as a whole to give a sensible effect to all phrases. By its own acknowledgment, the majority's interpretation is subject to abuse and is inimical to principles of good government. *Id.* at ¶ 29.

Third, and most critically, the myopic reliance on the admittedly circular statutory definition renders meaningless other words and phrases in the two inter-related statutes: the terms "member," "group," "list," and "one of," in addition to

multiple uses of the plural form "finalists." Rather than giving each of these words and phrases their plain and ordinary meaning, the majority's opinion adopts the Regents' tortured interpretation of these terms, noting that there can be a single member LLC or a list of one. However, as Judge Jones' dissent points out, the term "group" *always* refers to more than one, *Id.* at ¶ 56, n.8 & 9, and a "list" with only one entry is non-sensical. And as noted above, the majority opinion does not attempt to reconcile its interpretation with the statutory phrases "who is *a member of the final group of applicants or candidates*" (CORA) and "the *list of all finalists* under consideration" and "one of the finalists" (OML).

Fourth, the majority's interpretation leads to an absurd result. Section 24-72-204(3)(a)(XI)(A), C.R.S. provides that if three or fewer candidates meet the minimum qualifications, all the candidates are deemed "finalists." Yet under the majority's opinion, a public body may choose to disclose a sole finalist whenever there are *more than* three qualified applicants. While conceding that "this result makes little sense," the Court of Appeals nevertheless concluded it does not reach the high bar of absurdity. *Regents,* ¶ 30 (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2156-57 (2016)). The Daily Camera respectfully submits that this interpretation, which provides an appointing entity

unfettered authority to determine who is a finalist, except in cases where only three or fewer candidates meet the minimum qualifications, surmounts the absurdity bar.

In its opinion below, the district court characterized the Regents' interpretation of the statutory language as "linguistic gymnastics." CF, p 401. When read as a harmonious whole, and in context, the statutory text of both §§ 24-72-204(3)(a)(XI)(A) and 24-6-402(3.5), C.R.S. evince the legislature's intent that the identity of multiple finalists be disclosed, provided there is more than one qualified applicant. The "list," identifying every "member" of the "group" of applicants who remain under consideration, must be publicly disclosed at least fourteen days prior to the public body's extending an offer of employment to the candidate chosen from that "group" on the "list" for the position. In determining that the plain and unambiguous language of these provisions permitted the Regents to disclose a sole finalist, notwithstanding that they had interviewed six candidates in the final round of competition, the majority opinion conflicts with several firmly established canons of statutory construction announced by this Court.

II. The Court of Appeals' Decision is Contrary to this Court's Precedents Interpreting CORA and the OML

The Court of Appeals' decision is contrary to this Court's holdings that Colorado's Sunshine Laws must be interpreted broadly in favor of public

transparency. This Court has held that to effectuate CORA's remedial purposes, all exceptions from the presumption of disclosure must be narrowly construed. *City of Westminster v. Dogan Construction Co.*, 930 P.2d 585, 589 (Colo. 1997). Similarly, this Court has held that the OML "should be interpreted most favorably to protect the ultimate beneficiary, the public." *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983). The OML is to be interpreted broadly "to further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that *meaningful participation in the decision-making process* may be achieved." *Board of County Commissioners v. Costilla County Conservancy District*, 88 P.3d 1188, 1193 (emphasis added) (citing *Cole*, 673 P.2d at 347).

In holding that § 24-72-204(3)(a)(XI)(A), C.R.S. provides each appointing entity unfettered discretion to determine what the term "finalist" means, the majority opinion conflicts with this Court's precedents cited above. Further, the majority opinion departs from "the overriding goal" of statutory construction, to effectuate the basic purpose of the statutory scheme. Indeed, the majority opinion concedes "[m]any will argue, more than plausibly, that [our interpretation] is inimical to principles of open government." *Regents,* ¶ 29. In sum, the majority opinion renders meaningless the multiple statutory terms manifesting the legislature's clear intent

that multiple finalists are to be publicly disclosed. The majority opinion also construed the exemption from disclosure broadly, in contravention of this Court's holdings.

III. This is a Case of First Impression with Far-Reaching Statewide Impact.

The current statutory language is the product of four bills passed from 1994 to 2001. Over time, several public bodies across the state have gravitated toward the practice of disclosing only a single "finalist" for key leadership positions, under the assumption that the disclosure of multiple finalists diminishes the caliber of applicants.[3] As set forth in the amicus brief filed by the Colorado Freedom of Information Coalition and the Joseph L. Brechner Center below, there is little to no empirical evidence supporting this speculative assumption. (Amicus Brief, pp. 12-13, n.7).

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[3] *See* Court of Appeals' amicus brief filed by Higher Education Institutions, pp. 4-5; Regent Policy 3E (CF pp 37-44) (announcing University of Colorado policy permitting a sole or multiple finalists); *see also* https://www.cherrycreekschools.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=85&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=38803&PageID=1 .

The Regents' challenged actions denied the public not only its statutory right to compare and evaluate "the group" of finalists who were under consideration fourteen days before appointment (thereby monitoring the Regents' selection process) but also, even more critically, its opportunity to provide input and feedback to the Regents before their final hiring decision was made. As the sole finalist disclosure of Mr. Kennedy demonstrates, this opaque process significantly diminished public confidence in government institutions. CF, pp 50-60. In contrast, transparency in the selection process enhances public confidence in hiring decisions and inures to the benefit of diverse, qualified candidates.

Through its open records act requests and this litigation, the Daily Camera sought to remove the shroud of secrecy draped over public bodies' evaluation and selection of "finalists" – the final group of individuals who were considered – to fill the position as the Chief Executive Officer of a governmental unit, including the four-campus University of Colorado. Left undisturbed, the published opinion below will have a huge adverse impact on the transparency of hiring processes for University Presidents, School Superintendents, Police Chiefs, City Managers, County Administrators, and other Chief Executive Officer positions statewide.

As noted above, as of today's date, HB 21-1051 has passed the House on third reading and is awaiting hearing in the Senate State, Veterans, and Military Affairs Committee. Even if this bill were to be enacted into law, resolution of this petition will have significant statewide impact. First, HB 21-1051 is prospective in operation. Second, the identity and application materials of the sixth candidate interviewed by the Regents have not been publicly disclosed. Third, there is at least one other case currently pending in the state's district courts requiring resolution of this issue.[4] Fourth, several recent announcements of a "sole finalist" for high profile positions will remain subject to secrecy and the attendant public skepticism of the wisdom of those selections.

CONCLUSION

For the foregoing reasons, the Daily Camera respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 15th day of April, 2021.

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[4] In *Knapp v. Board of Education, Academy District 20*, El Paso County District Court Case No. 19CV32570, the District Court previously entered summary judgment in Ms. Knapp's favor, concluding that the Board violated CORA and the OML when it failed to disclose the identity of the other finalists, in addition to the sole candidate disclosed, for the Board Superintendent position. As a result of the Court of Appeals' decision below, the Board has filed a C.R.C.P. 59 motion for reconsideration.

/s/Robert R. Gunning
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the **PETITION FOR WRIT OF CERTIORARI** this 15th day of April, 2021, upon all parties herein via the Colorado Courts E-filing System to the Court and the following:

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