COLORADO SUPREME COURT Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2020CA0691 Denver District Court Case No. 2019CV33759	▲ FOR COURT USE ▲
PRAIRIE MOUNTAIN PUBLISHING COMPANY, LLP, d/b/a DAILY CAMERA Petitioner v. THE REGENTS OF THE UNIVERSITY OF COLORADO Respondent	Case No. 2021SC260
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BRIEF OF *AMICI CURIAE* THE COLORADO FREEDOM OF INFORMATION COALITION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

C.A.R. 29 governing briefs of *amicus curiae* does not set forth any word or page limitations for briefs in support of a petition for certiorari review. The timing and length of an *amicus curiae* brief in support of a petition for certiorari is set forth in C.A.R. 53(g). I hereby certify that this Brief of *Amici Curiae* in Support of Petition for Writ of Certiorari complies with the requirement of Rule 53(g) that an *amicus* brief must contain no more than 3,150 words. This *amicus* brief contains 3,095 words. In addition, I certify that this brief complies with the content and form requirements of C.A.R. 29 and 32.

I acknowledge that my 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/*Marc D. Flink, 12793*
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INTEREST OF *AMICI*

The parties to this *amicus curiae* brief are identified in the Unopposed Motion of [*Amici*] for Leave to File a Brief as Amici Curiae ("Unopposed Motion")**.**

Amici have a significant interest in this case. *Amici* represent both individual and institutional members of the press, as well as advocacy groups for freedom of information and freedom of the press, that work toward ensuring the public is meaningfully informed about the activities of their government. *Amici* submit this brief in support of Prairie Mountain Publishing Company, LLP's (hereinafter "Daily Camera") Petition For Writ of Certiorari to review *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 (hereinafter "*Regents*").

As more fully set forth in the Unopposed Motion*, amici* and the citizens of Colorado all have a vested and continuing interest in the issues presented to this Court. *Amici* write in support of the Daily Camera's position that the Court of Appeals' *Regents* decision is in error and should be reversed and that the well-reasoned decision of the District Court below requiring the disclosure of the names of the six finalists from which the nominee was selected was correct and should have been affirmed. The Court of Appeals' decision reversing the decision of the District

Court allows the Board of Regents of the University of Colorado ("Regents"), and as precedent will allow all other governmental entities appointing a chief executive officer, to take it upon themselves to define and limit their Colorado Open Records Act, C.R.S. § 24-72-201 *et seq*. ("CORA") disclosure requirements simply by designating a nominee for the position as chief executive officer of the governmental entity as the "sole finalist." The Court of Appeals decision violates both the letter and intent of the Colorado Open Records Act and should be vacated and reversed.[1]

I. INTRODUCTION

This matter presents issues that are of significant public interest and concern to the people of Colorado and the journalists who work to keep the public informed of appointments of chief executive officers entrusted to lead public bodies. The Court of Appeals' 2-1 reversal of the District Court's well-reasoned decision that the Regents violated CORA when they decided only to disclose the candidate selected for President of the University of Colorado as the "final group of applicants" or as the "list of all finalists" when a group of five other qualified final

[1]According to the Stipulated Facts and Supplemental Stipulated Facts submitted to the trial court, Mark Kennedy, the candidate appointed as President of the University of Colorado-Boulder was one of 27 candidates deemed qualified for the position of President, one of 10 candidates granted an initial interview with the search committee, and one of six finalists granted an interview with the full Board of Regents before he was selected as the nominee.

candidates were interviewed by the Regents, provides free rein to all public bodies to act on the flawed rationale of the Court of Appeals and conceal from public scrutiny the process by which chief executive officers are selected. This is a dangerous precedent that deprives the public of any meaningful oversight and input into the selection process of a public body's chief executive officer.

In addition to the adverse affect on public oversight, as addressed in the Daily Camera's Petition, the Court of Appeals' decision is contrary to this Court's precedent and settled canons of statutory construction. *See* Petition §I. The Court of Appeals' decision also is contrary to this Court's holdings that the exceptions to CORA's general rule of disclosure must be narrowly construed to favor disclosure to the public. *See* Petition §II.

Colorado law clearly entitles the public to play an oversight role through CORA's and the Colorado Open Meeting Law's ("COML") required disclosure of "finalists" for the chief executive officer position of public bodies before a hire is made, as the District Court and the dissent in the Court of Appeals properly concluded. *See* C.R.S. § 24-72-204(3)(a)(XI)(A). *Amici* write to emphasize that the Court of Appeals' 2-1 reversal of the District Court's decision is not just incorrect as a matter of basic statutory interpretation, but also undermines and is contrary to the public policy embodied in CORA and COML.

II. REASONS FOR GRANTING PETITIONER'S WRIT

Amici hereby adopts and will not repeat the factual background and arguments set forth in the Petitioner's Petition in the sections denominated Statement of the Issues Presented for Review, Statement of the Case and Facts, and Reasons for Granting the Petition. For the reasons set forth in the Petition and herein, *amici* respectfully urge this Court to grant the Petition, which presents an issue of first impression to this Court.

A. The Public Has A Profound Interest In Knowing How Chief Executive Officers, Including State University Presidents, Are Hired.

The president of the University of Colorado-Boulder has responsibility for a $1.86 billion operating budget, a workforce of 37,000, and the welfare of 35,500 students. The presidency is, quite simply, one of the most powerful state government jobs in Colorado, analogous to the mayor of a city of 72,500 people, with responsibility not just for education but also for housing, law enforcement, health care, and the full range of municipal services. Colorado law clearly recognizes the public interest in university governance by, among other things, making Regents positions publicly elected in contested races (contrary to the more commonplace method of gubernatorial appointment). This structure is explicitly built around Colorado law's recognition that state universities must be held accountable to the public.

If presidential searches are conducted in the secrecy sanctioned by the Court of Appeals' decision in this case, the public will have no way of knowing whether a diverse range of candidates received consideration, or whether the process was engineered to produce a preordained result. Research shows that secretive searches primarily accrue to the benefit of insider candidates with ties to the decisionmakers.[2] In addition to evaluating the performance of their elected Regents, Coloradans need access to information about searches so they can evaluate the performance of high-priced executive search firms who receive six-figure compensation from taxpayers.[3] None of this is possible if the public is denied information about presidential finalists.

How public university presidents do their jobs and whether they are competent and well-prepared to do so is, manifestly, a matter of the highest public interest and concern. At Michigan State, President Lou Anna Simon was forced to resign in disgrace for her role in the cover-up of serial sexual molestation by

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[2] *See* Frank D. LoMonte, *The Cost of Closed Searches*, ACADEME (Spring 2019), https://www.aaup.org/article/costs-closed-searches#.Xzp8ChNKjeo.

[3] A 2016 national study found that the average fee for a headhunting firm to hire a president or provost at a four-year university was $101,607. Rick Seltzer, *Search Firm Contracts Aren't What Some Think, Researchers Find*, INSIDE HIGHER ED (Jun. 16, 2017), https://www.insidehighered.com/quicktakes/2016/06/17/search-firm-contracts-arent-what-some-think-researchers-find.

former gymnastics doctor Larry Nassar.[4] The chancellor of the University of Wisconsin-Oshkosh squandered millions of dollars by pledging, without authorization, taxpayer money to back up risky investments that failed, leading him to plead guilty to felony charges.[5] A poorly chosen president can endanger the university's finances and the safety of its students.

Public universities, in Colorado and across the country, happily acknowledge that they are government agencies when governmental status is of strategic benefit for instance, when it entitles them to state immunity from liability suits. *See Hartman v. Regents of Univ. of Colo.*, 22 P.3d 524, 527 (Colo. App. 2000) (accepting CU-Boulder's position that it "serves a state function as an arm of the state" for purposes of sovereign immunity). Governmental status is not a cap that may be doffed and donned only when it suits the wearer; if universities are "public" when being public is beneficial, they must accept the scrutiny that goes along with it.

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[4] Matthew Haag & Marc Tracy, *Michigan State President Lou Anna Simon Resigns Amid Nassar Fallout*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/sports/olympics/michigan-state-president-resigns-lou-anna-simon.html.

[5] Kelly Meyerhofer, *Former UW-Oshkosh officials fined in plea deal in financial scandal involving building projects*, WISCONSIN STATE JOURNAL (Jan. 16, 2020), https://madison.com/wsj/news/local/education/university/former-uw-oshkosh-officials-fined-in-plea-deal-in-financial-scandal-involving-building-projects/article_53ba7c36-6c3d-59c8-b5bd-beb6ea153821.html.

B. Courts Have Regularly Found A Public Interest In Knowing The Identities Of Presidential Finalists.

Courts across the country have interpreted state public records statutes, as the District Court below did and the dissent does, to enable the public to keep watch over the way state university presidents are selected. In an instructive case, *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348 (Ariz. 1991) (en banc), the Supreme Court of Arizona ruled that the university had to release the names of the 17 candidates who had been interviewed for the president's job. The court reasoned that: "Candidates who actively seek a job run the risk of their desire becoming public knowledge. Because they are candidates, they must expect that the public will, and should, know they are being considered. The public's legitimate interest in knowing which candidates are being considered for the job therefore outweighs the countervailing interests of confidentiality, privacy [and] the best interests of the state." *Id.* at 352 (internal quotes omitted).

A Louisiana appeals court ruled similarly in 2014, deciding that Louisiana State University ("LSU") trustees were obligated to release names of the candidates for the president's position who participated in the final round of interviews. *Capital City Press, L.L.C. v. La. St. Univ. Sys. Bd. of Sup'rs*, 168 So.3d 727 (La. App. 2014). The court found that the state legislature intended for the public to know the names of the candidates who interviewed with the board of

trustees: "By traveling to and participating in the interview process, these persons clearly were expressing a desire to be considered for the position," thus differentiating them from mere prospects whose names might have been idly floated. *Id.* at 742.

Contrary to the Regents' insistence in this case that transparency will compromise their autonomy, the Supreme Court of Minnesota rejected the notion that enforcement of open records obligations constitutes an intrusion into university management decisions: "[Open government laws] affect the presidential search process only in its interface with the outside world, that is, the extent to which this public institution, which is funded substantially by public tax dollars, must make the final part of that process accessible to the public." *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 286 (Minn. 2004). The court noted that the widespread practice of disclosing the names of finalists and inviting them to the campus to be vetted in a public process "does rebut any generalization that presidential searches cannot effectively be performed under such requirements." *Id.* at 287.

Courts in Georgia and Texas, applying their states' open government statutes, have reached similar conclusions. In *Bd. of Regents of the Univ. Sys. of Ga. v. The Atlanta Journal*, 378 S.E.2d 305, 308 (Ga. 1987), the Georgia Supreme

Court found that state law entitled the public to the names of candidates for the presidency of the University of Georgia, finding that the state's argument amounted to "a corporate preference for privacy" rather than protection of any legitimate expectation of privacy of the individual contenders. Similarly, in *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. 1983), the court found that the public's entitlement to the names of candidates for the presidency of Texas A&M University could not be overcome by asserting the privacy of the applicants, because being considered for a high-ranking government job was not a private matter. "We do not regard the candidates' names to be facts of a highly embarrassing or intimate nature, which, if publicized, would be highly objectionable to a reasonable person," the court held. "[M]any persons might well be honored that they were considered for the presidency of one of the state's large universities." *Id.* at 551. In both the Texas and Georgia cases, the courts directed university officials to the legislature, not the courts, if they wanted a special carve-out from the obligations of public records and meetings.[6]

[6] Resort to the General Assembly to amend the statute to limit disclosure to a sole candidate exists here as well. *See* Petition at n. 1 and §III at 18. If enacted, the legislation embodied in HB 21-1051, will change the law to conform to the Regents' position, but will not moot this dispute. *Id.*

C. The Need For Transparency And Public Input And Oversight Extends To All Governmental Executive Positions.

In briefing to the Court of Appeals, the *amici* supporting the Regents provided anecdotal evidence of how other state and local entities in Colorado have circumvented the requirements of CORA by naming sole "finalists." However, there can be no doubt that the Court of Appeals lending its imprimatur to such process will undermine the transparency and public participation in the selection of persons for state and local executive positions intended by the legislative enactments in CORA. Qualified candidates wishing to serve the public in roles of police chiefs, fire chiefs, town managers, and other critical state and local executive positions abound.[7] Recently, the city of Aurora, which was under a

[7] *See, e.g.*, Mike Bunge, *Finalists named for new Albert Lea city manager*, KIMT.COM (Aug. 25, 2020), https://www.kimt.com/content/news/Finalists-named-for-new-Albert-Lea-City-Manager-572217461.html (identifying five finalists for the position of city manager in Albert Lea); Kelsey Thompson, *Meet the 4 finalists for Hutto's next city manager*, COMMUNITY IMPACT NEWS (Aug. 6, 2020), https://communityimpact.com/austin/round-rock-pflugerville-hutto/government/2020/08/06/meet-the-4-finalists-for-huttos-next-city-manager/; Suzanne Cheavens, *District announces three superintendent finalists*, TELLURIDE DAILY PLANET (Feb. 13, 2020), https://www.telluridenews.com/news/article_70ad6aba-4eb9-11ea-b150-3b228fabb01f.html; Trevor Reid, *Public invited to meet 6 finalists for Front Range Fire chief*, GREELEY TRIBUNE (May 2, 2019), https://www.greeleytribune.com/2019/05/02/public-invited-to-meet-6-finalists-for-front-range-fire-chief/. Notably, in every one of these situations and dozens more like them across the state, the governing bodies referred to the final round of interviewees, accurately, as "finalists."

nationwide scrutiny after the August 2019 death of a 23-year-old African-American man in police custody, hired its first female police chief after a nationwide search that attracted applicants from much larger police departments including Baltimore and Dallas, four of whom were declared finalists and interviewed in publicly viewable sessions.[8] The public was able to see that a diverse and well-qualified slate of candidates received careful consideration, rather than being left to "trust the system" at a time of enormous distrust and skepticism of all government operations, especially policing. While some candidates undoubtedly would like to be secretly considered for a position they may not obtain, the Court of Appeals' decision disregarded the intent of the General Assembly requiring disclosure of the "final group of applicants" and all candidates in the "list of all finalists" and fostered secrecy and opacity when it read CORA to allow for disclosure of a sole candidate despite the Regents interviewing six candidates before the sole candidate appointed was disclosed. Further, as noted in the Petition, the Court of Appeals' decision leads to an absurd result. Petition §I at

[8] Elise Schmelzer, *Longtime Aurora police officer will be first woman to lead the departmen*t, DENVER POST (Jun. 9, 2020), https://www.denverpost.com/2019/12/30/aurora-interim-police-chief-vanessa-wilson/; *see also* Janet Oravetz, *Aurora Police chief finalists face questions from community during virtual town hall*, 9NEWS.COM (Jun. 23, 2020), https://www.9news.com/article/news/local/local-politics/aurora-police-chief-finalists-town-hall/73-9592ea22-8d6f-44e0-b1b7-8b7acf1f8f37.

13. Despite Section 24-72-204(3)(a)(XI)(A), C.R.S. providing that if three or fewer candidates meet the minimum qualifications all the candidates are deemed "finalists," the Court of Appeals decision now allows a public body to choose to disclose a sole "finalist" whenever there are more than three qualified applicants. The Court of Appeals conceded that "this result makes little sense." *Regents* ¶ 30.

D. Colorado Law Plainly Requires Disclosure Of Records Necessary For The Public To Exercise Oversight Over Presidential Hiring.

CORA must be broadly construed to maximize public access to information. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153-54 (Colo. App. 1998). A public agency, such as the University of Colorado, has no authority to withhold access to public records unless a specific statute permits it, *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288, 520 P.2d 104 (Colo. 1974), and no such exemption exists here.

As the District Court below correctly held, concurred with by the dissent in the Court of Appeals, Colorado law plainly entitles the public to see the names of "finalists" for public university presidencies. In enacting a CORA exemption for the application materials for a candidate who is "not a finalist," C.R.S. § 24-72-204(3)(a)(XI)(A), the legislature struck a sensible balance that protects the identities of people who have no realistic possibility of becoming president, and whose names are therefore of no great import to the public, while making sure that

the public can see that the hiring process operates in a fair and above-board manner. As set forth in the District Court's ruling and the dissenting opinion below, and as more fully developed in the Daily Camera's Petition, the term "finalists" as used in CORA includes the six candidates who were selected to be interviewed by the Regents before they settled on Mr. Kennedy as their nominee.[9]

To allow the Court of Appeals' decision to stand, a decision which allows the Regents and any other public body confronted by disclosure requirements to define the term "finalist" as synonymous with "nominee," would deal a crippling blow to CORA. If agencies are permitted to invent novel and unintended definitions of commonly used words that defy common meaning and sense to avoid statutory disclosure obligations, the legislature's choice of terms will cease being of any legal significance and will become merely advisory.

III. CONCLUSION

Every consideration in this case points in favor of the District Court's and the dissent's correct reasoning: Colorado law unmistakably entitles the public to

[9] Had the Colorado General Assembly intended "finalists" be the equivalent of a "nominee," it knew how to do so. *See, e.g.,* C.R.S. § 22-2-105.5 ("The vacating board member shall not participate in the open meeting to vote on the selection of a nominee to fill the vacancy. … Selection of a nominee shall occur by a majority vote of the state board members present and voting at the meeting called for such purpose.").

the information that the Daily Camera is seeking, judicial decisions interpreting laws similar to Colorado's are broadly in agreement that disclosure is required, and public policy imperatives weigh lopsidedly in favor of transparency and accountability perhaps never more so than now, when universities are making life-or-death decisions about the safety of tens of thousands of students. Because the statutory entitlement to disclosure could scarcely be clearer, the Court of Appeals' decision improperly legislated by judicial fiat and rewrote the statute. For all of the aforementioned reasons, the Petition should be granted and this Court should reverse the decision below.

DATED: April 22, 2021

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