COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

DATE FILED: November 21, 2022 6:49 PM
FILING ID: 186E933D747E6
CASE NUMBER: 2022CA1119

Appeal from: The District Court for the City and County of Gunnison

District Court Judge: Hon. J. Steven Patrick

District Court Case Number: 2022CV30017

Plaintiff-Appellee:
ANDREW BROOKHART, in his official capacity as the executive director and custodian of records of the Gunnison County Library District

v.

Respondent-Appellant:
MARK REAMAN, in his capacity as editor of the *Crested Butte News*

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Court of Appeals Case No. 2022CA001119

RESPONDENT-APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, 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 6,749 words and does not exceed 9,500 words.

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

> For each issued raised by the Respondent-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 or 28.1, and C.A.R. 32.

/s/Rachael Johnson
Rachael Johnson, #43597

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2. Whether the district court erred in holding that individuals who submit Request for Reconsideration Forms seeking to remove or move material from the Library District's collection are "users" as defined in § 24-90-119, C.R.S. and § 24-72-204(3)(a)(VII), C.R.S., thereby rendering the identities of such individuals exempt from disclosure under the Colorado Open Records Act ("CORA").

3. Whether the district court erred in ordering redaction of each requestor's name and other identifying information from the Request for Reconsideration Forms, including by misinterpreting or misapplying the factors set forth in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980).

STATEMENT OF THE CASE

A. The Public Records Request

Respondent-Appellant Mark Reaman is editor of the *Crested Butte News*, which publishes a paper of general circulation based in Crested Butte, Colorado. CF, pp. 1, 31. This case concerns a Colorado Open Records Act ("CORA") request made by Respondent-Appellant on March 28, 2022 for access to "all Requests for Reconsideration Forms filed with the [Gunnison] library district since January 1, 2022 via email" (hereinafter the "March 28 Request"). CF, p. 8.

Request for Reconsideration Forms or Request to Reconsider Materials Forms are generated by the Gunnison Library District ("Library District") as part of their Collection Development and Use Policy. CF, pp. 14, 24. Any person—whether a library patron or not—may submit such a form to the Library District asking that it remove or move a book from the Library District's collection, and completed forms may include the requestor's name, phone number, and address. CF, pp. 1–2. (The requestor does not need to complete the form in its entirety for it to be considered. *Id.* And, the disclosure of any information on the Request for Reconsideration Form is completely voluntary. *Id.*) The Library District identified four Request for Reconsideration Forms in response to the March 28 Request. CF, p. 2.

Prior to submitting the March 28 Request, Respondent-Appellant sought, through CORA, access to a November 19, 2021 Request for Reconsideration Form from the Library District. CF, pp. 3, 31. That Request for Reconsideration was made by a member of the public who sought removal of the book *Gender Queer* by Maia Kobabe from the Library District's collection on grounds that it was a "[p]ornographic book on the Young Adult shelves in Gunnison Libraries" (hereinafter the "November 19 Request for Reconsideration"). CF, p. 14. The November 19 Request for Reconsideration claimed that the book included "sexually exploitive material" designed to convince "underage minor children to accept pedoph[i]lia, underage sex, gender d[y]sphoria as normal," and that its presence in the Library District's collection was in "violation of C.R.S. 18-6-403(3) and other laws." *Id*.

Thereafter, in accordance with the Library District's policy at the time,[1] the November 19 Request for Reconsideration was added to the public agenda and discussed during a public meeting of the Library District's Board of Trustees on January 20, 2022. CF, p. 3. During subsequent public meetings, the individual

[1] After the November 19, 2021 Request for Reconsideration, the Library Board amended its Collection Development Policy to remove the requirement that Requests for Reconsideration appear on the public agenda and be discussed at a public meeting of the Library Board. CF, p. 4.

who had submitted the November 19 Request for Reconsideration spoke publicly on or around January 20, 2022 and/or February 14, 2022 about her desire for the book *Gender Queer* to be removed from the Library District's collection, revealing her identity. CF, pp. 20, 32. After the public meeting, on or around February 24, 2022, the *Crested Butte News* filed a CORA request for the November 19 Request for Reconsideration Form, and the Library District released a copy of the form to Respondent-Appellant, revealing the requestor's personal identifying information, including her name. CF, pp. 3, 14. In response, the individual who made the November 19 Request for Reconsideration filed a police report against Plaintiff-Appellee Brookhart under § 24-90-119(3), C.R.S., which provides that any library official who discloses information in violation of this section "commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars." CF, p. 3. An investigation by the Office of the District Attorney for the Seventh Judicial District resulted in no charges; however, the District Attorney released a letter detailing its decision, explaining: "It does not appear that the 'Request for Reconsideration' would constitute the type of information the statute is attempting to protect," because the requestor had not "'requested or obtained specific material or service' nor in this instance had she 'used the library.'" CF, pp. 20–21.

Months later, several more Request for Reconsideration Forms were submitted to the Library District seeking the relocation or removal of the book *Gender Queer*. CF, pp. 10–14 (marked as Exhibits B-1–B-4). *Crested Butte News* sought, through CORA, access to those forms in its March 28 Request.

B. Proceedings Before the District Court

In response to Respondent-Appellant's March 28 Request, Plaintiff-Appellee filed an Application for Judgment Pursuant to § 24-72-204(6)(a), C.R.S. with the Gunnison district court on April 13, 2022. CF, p. 1. By that application, Plaintiff-Appellee asked the district court to determine whether § 24-90-119, C.R.S., which pertains to privacy of library user records, precludes public disclosure of the Requests for Reconsideration, and, if it did not, whether disclosure would cause substantial injury to the public interest under § 24-72-204(6)(a), C.R.S. *Id.* Specifically, the application sought a determination as to whether the Library District was obligated to either: (i) release the Request for Reconsideration Forms in their entirety; (ii) release the forms with redactions; or (iii) refuse to release the forms to Respondent-Appellant. CF, p. 6.

In his May 3, 2022 letter response to the district court, Respondent-Appellant argued, among other things, that the Request for Reconsideration Forms are public records, and are not "user documents" under § 24-90-119, C.R.S. or

contemplated by § 24-72-204(3)(a)(VII).[2] CF, pp. 31–32. Respondent-Appellant asserted that individuals who voluntarily submit requests to remove material from the Library District's collection are not "users" within the meaning of § 24-90-119, C.R.S. *Id*. Respondent-Appellant further argued that because Requests for Reconsideration of Materials are "a voluntary public submittal to the administration of the public Library District to alter current library district policy and/or practices," the public has a strong interest in knowing who has requested that books be removed from the Library District's collection. *Id.*

The district court held a status conference on May 2, 2022, at which both parties agreed that a formal hearing was unnecessary. TR 05/02/22, pp. 3:17–4:11. When Plaintiff-Appellee filed his application on April 13, 2022, he submitted the unredacted Request for Reconsideration Forms at issue marked as Exhibits B-1, B-2, B-3, B-4. CF, pp. 10–14. On May 16, 2022, the district court issued its final order concluding that the four Request for Reconsideration Forms sought by Respondent-Appellant should be disclosed on the grounds that "user in the statute under this analysis is not limited to someone who reads material in the library, or, checks out material, but inclusive of any person 'using' library services." CF, pp. 36–37. The court further decided, after applying the three-prong test set forth in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), that "the name and any

[2] Respondent-Appellant represented himself *pro se* before the district court.

other identifying information shall be redacted, as being the least drastic alternative, and preserving the anonymity discussed in *Tattered Cover*[*Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002)]." *Id.*

Respondent-Appellant filed a Notice of Intent to Appeal on July 5, 2022. CF, p. 42. Upon transfer of the certified Record on Appeal, or the case file, the unredacted Exhibits B-2, B-3, B-4, and C were transferred to Respondent-Appellant.

C. Disclosure of Unredacted Public Records To Respondent-Appellant's Counsel

Thereafter, the four Request for Reconsideration Forms at issue in this case were disclosed in unredacted form to Respondent-Appellant's counsel during the transfer of the Record on Appeal from the district court to this Court. Respondent-Appellant has not reviewed, or otherwise had access to, the case file disclosed to undersigned counsel; only Respondent-Appellant's counsel of record, and one other attorney working directly on this matter, have reviewed the case file.

SUMMARY OF ARGUMENT

At a time of public controversy regarding coordinated demands to censor and remove literature from public library systems—Jonathan Friedman and Nadine Farid Johnson's *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN America (Sept. 19, 2022), https://perma.cc/AZG3-HBVA found that from July 2021 to June 2022 there were 2,532 instances of books being banned in

schools and libraries from 32 states—Respondent-Appellant, editor of *Crested Butte News*, submitted a public records request for any Request for Reconsideration Forms seeking to remove books from the Gunnison Public Library collection. There is no dispute that such forms are public records under CORA, but Respondent-Appellant was nevertheless denied access to key portions of them under an exception to CORA that prohibits the disclosure of records that would identify an individual who "used" the library. The district court's decision to order all identifying information redacted from the Request for Reconsideration Forms should be reversed for the following reasons.

First, as an initial matter, although the Request for Reconsideration Forms at issue were disclosed to Respondent-Appellant's counsel in unredacted form during the transfer of the Record on Appeal, and further disclosure, including to Respondent-Appellant, is not prohibited by any protective order, this Court should decide the remaining issues on appeal because it may decide "a moot case involving issues of great public importance or recurring constitutional violations," *People ex rel. Ofengand*, 183 P.3d 688, 691 (Colo. App. 2008). A decision by this Court on the merits is especially warranted where, as here, the legal issues presented are capable of repetition, yet evading review. *Id.*

Second, the district court erred in applying § 24-72-204(3)(a)(VII), C.R.S. and § 24-90-119, C.R.S. to withhold names and all identifying information from

the Request for Reconsideration Forms because the individuals who submitted them are not library "users" within the meaning of those statutory provisions. Seeking to remove material from the Library District's collection is not "request[ing] or obtain[ing] specific materials or [a] service" from the library. § 24-90-119(1), C.R.S.

Moreover, even if the CORA exceptions for identifying information of library "users" were applicable—which they are not—the district court erred by failing to "narrowly construe" those exceptions as required by law. *Daniels v. City of Com. City*, 988 P.2d 648, 651 (Colo. App. 1999) (exceptions to CORA must be narrowly construed); *Shook v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 411 P.3d 158, 160 (Colo. App. 2015) (any exceptions to CORA must be narrowly construed in favor of disclosure); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). Instead, broadly interpreting the statutory provisions, the district court expanded the meaning of the word "user" to include, effectively, any person who contacts a library for any purpose. Accordingly, the district court's decision must be reversed as contrary to well-established precedent mandating that courts narrowly apply CORA exceptions to effectuate the statute's transparency goals.

Third, the district court erred as a matter of law in ordering the redaction of the names and identifying information of the individuals who submitted the

Request for Reconsideration Forms by misapplying the three-part test in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980). The *Martinelli* test balances an individual's expectation of privacy with a compelling government interest in disclosure, requiring courts to find a legitimate privacy interest and apply the least restrictive alternative to full disclosure. The district court erred as a matter of law when it improperly applied the reasoning in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), to conclude that individuals seeking to censor and remove literature from public libraries have a cognizable right of privacy in connection with such requests. And, in balancing that purported privacy interest against the compelling public interest in access to the names of those individuals, the district court again erred in concluding that the least restrictive alternative to producing the records at issue, in full, would be to redact not only their personal identifying information, *i.e.*, home address and phone number, but also their names from the records.

For these reasons, the Court should reverse and remand this matter with instructions to the district court to release the Request for Reconsideration Forms in their entirety to Respondent-Appellant.

ARGUMENT

I. The Court should reach the merits of all issues on appeal despite the disclosure of the four Request for Reconsideration Forms at issue in unredacted form.

As noted above, the four Request for Reconsideration Forms responsive to the March 28 Request were disclosed in unredacted form to Respondent-Appellant's counsel when the case file was transferred from the district court to this Court. Despite the fact that the records at the heart of the controversy in this case now have been disclosed, in their entirety, to counsel for Respondent-Appellant, the issues presented by this appeal should not be deemed moot.

To be clear, although the records at issue have yet to be given to Respondent-Appellant himself, there is nothing to prohibit him from obtaining them from his counsel. The records were not sealed by the district court, nor are they subject to a protective order that precludes counsel from sharing the records with her client. *People v. Bryant*, 94 P.3d 624, 632 (Colo. 2004) ("An accidental leak of privileged information does not necessarily entitle a court to punish or impose a secrecy order upon the media."). Thus, Respondent-Appellant now, effectively, has access to the unredacted Request for Reconsideration Forms responsive to the March 28 Request.

Yet despite the fact that the records at the heart of the controversy in this case have been disclosed to Respondent-Appellant's counsel in full, the issues presented on this appeal should not be deemed moot. Under Colorado law, there are two exceptions to the mootness doctrine. First, a court may resolve a moot case when the issue involved is one that is capable of repetition, yet evading

review. *People ex rel. Ofengand*, 183 P.3d 688, 691 (Colo. App. 2008) (hereinafter "*Ofengand*"). Second, a court may decide "a moot case involving issues of great public importance or recurring constitutional violations." *Id.*

The opinion in *City of Fort Morgan v. Eastern Colorado Publishing Co.*, No. 08CV2, 2008 WL 8095520 (Colo. Dist. Ct. Dec. 4, 2008), is instructive, as it involves application of the exceptions to the mootness doctrine in the context of a CORA matter. Applying *Ofengand* to a petitioner's CORA request for performance review documents that had been destroyed by the defendant before they could be disclosed, the court in *City of Fort Morgan* concluded that the case should not be treated as moot because there were still unresolved questions of law for the court's consideration, including whether the petitioner would have access to additional documents in the agency's possession that were withheld on similar grounds. *Id*. The court held that notwithstanding the fact that petitioner had requested performance reviews that were now destroyed, "the issue is one that is likely to arise again because city officials are subject to period performance reviews. Additionally, because of the document destruction practices that the City Attorney followed in this case, the issue may evade review unless it is determined in this lawsuit." *Id.*

Similarly, here, there is a strong likelihood that the issues raised in this appeal concerning the public's right to access Requests for Reconsideration Forms

in their entirety will reoccur. Indeed, without review by this Court, the proper meaning of "user" under § 24-90-119, C.R.S. and § 24-72-204(3)(a)(VII), C.R.S., will not be resolved, and individuals who submit such requests, and Colorado public library districts who receive them, will be deprived of guidance on this important issue. Moreover, the issues raised in this appeal, which pertain to coordinated statewide efforts to remove literature from Colorado public libraries, Friedman & Johnson, *supra*, are "issues of great public importance" to the community of Gunnison and the people of Colorado, as described more fully *infra*, Argument § II. As such, this Court should reach and resolve the issues presented in this appeal because they are both capable of repetition, yet evading review, and concern issues of great public importance.

II. The Request for Reconsideration Forms are not "user" records under § 24-90-119, C.R.S. and § 24-72-204(3)(a)(VII), C.R.S., and the identities of those who submit them are therefore not exempt from disclosure.

Standard of review and preservation on appeal:

This issue—that the Request for Reconsideration Forms are public records under CORA, §§ 24-72-201, C.R.S. *et seq.*, but may be exempt from disclosure as "user" records under § 24-72-204(3)(a)(VII), C.R.S.—was raised in Respondent-Appellant's Response to Application for Judgment Pursuant to § 24-72-204(6)(a), C.R.S., CF, pp. 31–32, and in the district court's May 16, 2022 order, CF, p. 36.

Courts "review de novo questions of law concerning the correct construction and application of CORA and the CCJRA." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). Matters of statutory interpretation, generally, including statutory interpretation of public records laws, are questions of law subject to *de novo* review on appeal. *People v. Sprinkle*, 489 P.3d 1242, 1245 (Colo. 2021). In interpreting statutes, a court's "duty is to effectuate the General Assembly's intent, giving all the words of the statutes their intended meaning, harmonizing potentially conflicting provisions, and resolving conflicts and ambiguities in a way that implements the legislature's purpose." *Harris*, 123 P.3d at 1170.

Because there is no dispute that the records at issue are public records, resolution of the legal issue before this Court turns on the correct interpretation of an exception to disclosure under CORA, § 24-72-204(3)(a)(VII) for "[l]ibrary records disclosing the identity of a user as prohibited by section 24-90-119." The district court framed its order as one resolving an "application for public records," CF, p. 34; and it cited and relied upon CORA's definition of public records, § 24-72-202(6)(a)(I), C.R.S., in that order, CF, p. 36. Therefore, this issue is properly before this Court on appeal.

Discussion:

A. The Request for Reconsideration Forms meet the definition of a public record under CORA.

CORA creates a strong presumption in favor of disclosure of public records. As the Colorado Supreme Court has recognized, CORA "generally favor[s] broad disclosure of records." *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899, 900 n.3 (Colo. 2008). Indeed, that general policy in favor of disclosure is explicit in the statute: "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." § 24-72-201, C.R.S.

Consistent with its statutory purpose, courts are required to construe exceptions to CORA's disclosure mandate narrowly. *See City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 589 (Colo. 1997) (explaining that "exceptions to the broad, general policy" of transparency underlying CORA "are to be narrowly construed" (quoting *Sargent Sch. Dist. No. RE-33J v. Western Servs., Inc.*, 751 P.2d 56, 60 (Colo. 1988))); *see also Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 378 P.3d 835, 838 (Colo. App. 2016) ("CORA's clear language creates a strong presumption in favor of disclosing records. . . . This strong presumption requires us to construe any exceptions to CORA's disclosure requirements narrowly." (internal citations omitted)).

Here, the Request for Reconsideration Forms clearly qualify as public records subject to CORA's strong presumption of openness. Under CORA, a

public record "means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." *See* § 24-72-202(6)(a)(I), C.R.S.

The documents at issue in this case are titled "Gunnison County Libraries Request for Reconsideration of Materials Form" and are produced and generated by the Library District. CF, p. 14 (marked as Exhibit C). Once completed, the request form must be "submitted to the Library Director" for review. *Id*. These forms are thus made, maintained and kept by the Library District in the exercise of its public functions. CF, pp. 16, 18. Accordingly, the Request for Reconsideration Forms requested by Respondent-Appellant are public records subject to a strong presumption of disclosure under CORA.

B. The CORA exceptions at issue, § 24-72-204(3)(a)(VII), C.R.S. and § 24-90-119, C.R.S., are inapplicable to the Request for Reconsideration Forms.

The district court erred in interpreting the CORA exceptions found in § 24-72-204(3)(a)(VII), C.R.S. and § 24-90-119, C.R.S. as requiring redaction of the

names and personal identifying information of the individuals who submitted the Request for Reconsideration Forms. CF, p. 37.

Under § 24-72-204(3)(a)(VII), C.R.S.:

> The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that the custodian shall make any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, available to the person in interest in accordance with this subsection (3):
>
> . . . .
>
> (VII) Library records disclosing the identity of a user as prohibited by section 24-90-119.

Id. And § 24-90-119(1), C.R.S., states the following:

> Except as set forth in subsection (2) of this section, a publicly supported library shall not disclose any record or other information that identifies a person as having requested or obtained specific materials or service or as otherwise having used the library.

Id.

The foregoing provisions are inapplicable to the public records responsive to Respondent-Appellant's March 28 Request because individuals who submit Request for Reconsideration Forms to remove books or other materials from the Library District's collection are not library "users." Despite the district court's recognition that "[t]his statutory framework does not define 'user,'" CF, p. 35, it nevertheless incorrectly held that the term library "user" should be broadly

interpreted. CF, p. 37. This Court should reject the district court's strained interpretation of "user" for the following reasons.

i. The legislative history makes clear that the General Assembly did not intend for Request for Reconsideration Forms to be considered library "user" records.

The General Assembly did not intend to include in the definition of a "user" under § 24-72-204(3)(a)(VII), C.R.S. or § 24-90-119, C.R.S. an individual who requests that materials be removed from a library. The legislative history of the bill that led to § 24-90-119, C.R.S., H.B. 1114,[3] indicates that in legislating to protect the identity of library users, the General Assembly intended to ensure the privacy (and thus unimpeded access) of patrons and readers of library materials, not the privacy of those who seek to censor or remove a book from a library's shelves.

Before the Senate State Affairs Committee, State Senator Traylor—one of the bill's co-sponsors—testified that the bill would prohibit sharing of private

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[3] Appellate courts may take judicial notice of the history of a statute. *Indus. Comm'n v. Milka*, 410 P.2d 181, 183–84 (Colo. 1966); *see also* Colo. R. Evid. 201(f). Here, Respondent-Appellant asks this Court to take judicial notice of a legislative hearing on H.B. 1114. This audio testimony is on file with the State Archives, which houses the state's legislative records. *Legislative Records*, Colorado State Archives, https://archives.colorado.gov/collections/legislative-records (last visited Nov. 21, 2022). Per Colo. R. Evid. 901(b)(7), a public record obtained in any form from the public office where it is kept (such as the State Archives) is sufficient to support a finding that it is authentic, and this Court may consider the issue of authentication of a record for the first time on appeal. *People v. Bernard*, 305 P.3d 433, 434 (Colo. App. 2013).

information "unless you have the written consent of the ***user***, *i.e.*, ***the person checking out the books and so on***." *Hr'g on H.B. 83-1114, Before the S. State Affairs Comm.* ("*S. State Affairs Comm. Hr'g*"), 54th Gen. Assemb., at 3:40 (Colo. Feb. 23, 1983), HB 83-1114_Senate State Affairs Committee (emphasis added); *see also Hr'g on H.B. 83-1114, Before the H. State Affairs Comm.*, 54th Gen. Assemb., at 1:22 (Colo. Jan. 18, 1983), HB 83-1114_Senate State Affairs Committee (testifying that there has been "pressure on some of the library systems to divulge information . . . on their patrons"). Illustrating the privacy concern the drafters intended the bill to address, Senator Traylor noted that federal law enforcement officials had recently sought to obtain records from a Colorado library detailing the reading history of John W. Hinckley Jr., the attempted assassin of President Reagan. *S. State Affairs Comm. Hr'g* at 2:45; Albert B. Crenshaw, *Library snoops*, Wash. Post (June 21, 1981), https://perma.cc/4TRD-RHB2.

During that same hearing, Maryanne Brush, an Assistant Director with the Jefferson County Public Library, testified in support of the bill. *S. State Affairs Comm. Hr'g* at 7:15. Assistant Director Brush emphasized that "in order for people to make full and effective use of library resources, they must feel unconstrained by the possibility that the books they read, materials they use, [and] the questions they ask could become public knowledge." *Id.* at 9:13. She summed

up the bill's purpose, therefore, as guarding against what she described as a "chilling effect on the freedom to read." *Id.* at 9:25.

Nothing in the legislative history suggests that the sponsors and supporters of the bill believed that a library "user" would include those who request the removal of library books and other materials. *Cf. id.* at 3:40 (Senator Traylor defining a "user" as "the person checking out the books"); *id.* at 9:13 (Assistant Director Brush emphasizing the importance of protecting the privacy of those who "make . . . use of library resources"). And the bill's purpose belies any such interpretation. Assistant Director Brush testified that the intent of H.B. 1114 was to prevent the "chilling effect on the freedom to read" that would flow from a third party being able to obtain an individual's reading history. *Id.* at 9:25.

Accordingly, the district court's decision interpreting CORA to exempt from disclosure forms submitted by members of the public—who may not also be patrons of the library and, indeed, may not even live in Colorado—requesting that the Library District remove materials from its collection so that library users cannot access them directly conflicts with the General Assembly's intent in enacting § 24-90-119, C.R.S.

ii. The district court erred in interpreting the exceptions broadly.

It is well-established that any exceptions to CORA's disclosure mandate must be "narrowly construed" to effectuate the General Assembly's purpose.

Western Servs., Inc., 751 P.2d at 60; *Bodelson v. Denver Publ'g Co.*, 5 P.3d 373, 377 (Colo. App. 2000); *Daniels*, 988 P.2d at 651 (exceptions to CORA must be narrowly construed); *Pitkin Cnty. Bd. of Cnty. Comm'rs*, 411 P.3d at 160 (any exceptions to CORA must be narrowly construed in favor of disclosure); *Freedom Newspapers, Inc.*, 961 P.2d at 1154. Thus, the district court erred in interpreting the term "user"—which is undefined in the statute—broadly to include any individual who submits a Request for Reconsideration Form. A narrow interpretation of the statute would compel the opposite conclusion: that merely submitting a form asking the Library District to remove materials from its collection is not "us[ing]" the library's services or materials.

Indeed, when a person completes a Request for Reconsideration Form they are not using any of what are commonly understood to be library services—like the inter-library loan service, the circulation service, or reference desk service. An individual need not even have a library card or have ever stepped foot in the library to submit the form. CF, p. 2. In fact, the individual need not even be a resident of the district's service area, or even of the state of Colorado[4]. *Id*.

[4] Further, the requestor does not need to complete the form in its entirety for it to be considered. CF, p. 2. And, the disclosure of any information on the Request for Reconsideration Form is completely voluntary. *Id*.

Moreover, unlike the library uses—like checking out books—that the exceptions set forth at § 24-72-204(3)(a)(VII), C.R.S. and § 24-90-119, C.R.S. are intended to protect from public disclosure, filling out a Request for Reconsideration Form necessarily involves a public process. Such forms are reviewed by the library director and staff—which is not a requirement to check out a book—for consideration. CF, p. 24. Indeed, prior to January 2022, the Library District's Collection Development and Use Policy provided that any individual who wants to challenge materials in the library must do so by filling out the form to be discussed at the regular, public meeting of the Library Board of Trustees. CF, pp. 18, 20. Thus, the very act of submitting a Request for Reconsideration Form necessarily requires that the submitter subject the request to a formal review and consideration process.

The district court's broad interpretation of the term "user" in the CORA exceptions at issue to encompass members of the public who submit Request for Reconsideration Forms is thus erroneous, and belied by the obvious differences between how such requests are treated by the Library District, and how they differ from the actual use of library services.

iii. An individual who submits a Request for Reconsideration Form does not meet the definition of a "user" under the statute because they do not "request[] or obtain[] specific materials or service[s]" of the library.

Finally, and in any event, the exceptions at issue are inapplicable because a Request for Reconsideration Form is not the kind of record that would identify a person as "having requested or obtained specific materials or service[s] or as otherwise having used the library," within the plain meaning of that statutory language. § 24-90-119(1), C.R.S.; *see also* § 24-72-204(3)(a)(VII), C.R.S. When individuals submit such forms they are not using the library to obtain or request any materials—such as a book, or DVD. Nor are they accessing specific library services, such as a printer or copier, or the inter-library loan or reference services offered by the Library District. Instead, they are requesting that specific materials be ***removed*** from the library. Simply put, they have not "requested or obtained specific materials or service[s]" and the language "otherwise having used the library," which must be interpreted narrowly, should not be interpreted to mean and include any and all communication with the Library District for any purpose. Moreover, notably, unlike an individual's personal reading choices, a person who seeks the removal of a certain book or other material from the Library District's collection is attempting to remove access to it for the entire community.

In sum, for the reasons stated above, the CORA exceptions in § 24-72-204(3)(a)(VII), C.R.S. and § 24-90-119, C.R.S. do not apply to exempt the names and other identifying information of individuals who submit Request for Reconsideration Forms. Thus, the district court should have ordered the

disclosure, in their entirety, of the records requested by Respondent-Appellant in response to his March 28 Request.

III. The district court erred in ordering redaction of the names of the individuals who submitted Request for Reconsideration Forms, misapplying the three-part test in *Martinelli.*

Standard of review and preservation on appeal:

The issue—whether the district court properly applied *Martinelli*, which requires courts to balance any expectation of privacy against any compelling government interest in disclosure, and apply the least restrictive alternative—was raised in the court's May 16, 2022 order. CF, pp. 35, 37. Further, whether the district court misapplied and/or misinterpreted *Tattered Cover* in its analysis of whether the individuals who submit Request for Reconsideration Forms are entitled to anonymity was raised in the court's May 16, 2022 order. CF, pp. 36–37. Thus, these issues are properly preserved on appeal.

Appellate courts review the legal findings of a district court *de novo*. *In re Marriage of de Koning*, 364 P.3d 494, 496 (Colo. 2016) ("We review a trial court's findings of fact for clear error or abuse of discretion, but we review the legal conclusions the trial court drew from those findings de novo."). Here, the issue is whether the court properly interpreted *Martinelli*. Thus, the standard of review is *de novo*.

Discussion:

A. The district court erred in finding any privacy interest under the first prong of the test in *Martinelli*.

When determining whether the public disclosure of information would violate an individual's constitutional right to privacy, Colorado courts apply the three-part test set forth in *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980), which requires a court to consider the following:

> (1) does the party seeking to come within the protection of right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
> (2) is disclosure nonetheless required to serve a compelling state interest?
> (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?

Martinelli, 612 P.2d at 1091; *see also Todd v. Hause*, 371 P.3d 705, 710 (Colo. App. 2015).

If a court finds that an individual does not have a legitimate expectation of privacy, the inquiry ends, and the records must be released. *Todd*, 371 P.3d at 713 ("If no legitimate expectation of nondisclosure exists, the inquiry ends, and disclosure of the requested information is required under CORA."). However, if a court finds that an individual has a legitimate expectation of privacy, then it must determine whether disclosure nevertheless is required to serve a compelling interest. *Id.*; *see also Martinelli*, 612 P.2d at 1092 (explaining that "a compelling state interest can override the constitutional right to confidentiality which arises

from that expectation"). If a compelling interest mandates disclosure, the court then determines how disclosure may occur in the least intrusive manner. *Id*.

Here, the district court faltered at the first step of the analysis. Citing *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), the district court erroneously concluded that individuals who submit Request for Reconsideration Forms have a right to privacy in connection with such requests that is grounded in the First Amendment right to "receive information" through the acquisition of books. But *Tattered Cover* is wholly inapplicable because it rests on the proposition that individuals' First Amendment rights would be chilled if they were required to reveal their identities before receiving, or in order to receive, expressive materials. The issue here is the identities of individuals who have asked the Library District to ban, remove, or relocate certain books or other materials in its collection. Those individuals are not seeking to receive or obtain any expressive materials—quite the opposite; they are making a formal request that a government entity prevent others from receiving or obtaining certain specific expressive materials offering perspectives on topics, including, for example, gender identity, adolescence and adulthood, and sexuality. Simply put, individuals who submit Request for Reconsideration Forms are not engaging in the First Amendment protected "right to read and receive ideas and information" that was at issue in *Tattered Cover*, 44 P.3d at 1052–53. On the contrary, their effort to have

certain content removed from the public library is in direct ***conflict*** with the First Amendment interests sought to be protected by the decision in *Tattered Cover*.

The district court's focus on "the importance of 'anonymity' for the uninhibited exercise of First Amendment rights," CF, p. 36, also was misplaced because individuals who submit Request for Reconsideration Forms are not required to include their names or personal identifying information to make such requests. CF, pp. 2–3. For that reason alone, the district court's purported concern that revealing the identities of the individuals who submitted the Request for Reconsideration Forms at issue would infringe their right to anonymously engage in political speech was erroneous; those individuals could have submitted their requests anonymously, but chose not to. CF, p. 37 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)).

This appeal comes to the Court against the backdrop of a widespread, coordinated movement to censor books in schools and libraries across the country. The American Library Association (ALA) documented 729 attempts to censor library materials in 2021, which it describes as the "highest number of attempted book bans" in its 20-year history of collecting such data. *American Library Association Releases Preliminary Data on 2022 Book Bans*, American Library Association (Sept. 16, 2022), https://perma.cc/AJ2F-CZ6G. Further, the ALA expects the number of censorship attempts in 2022 to exceed that 2021 total. *Id.*

A PEN America report examining the period from July 2021 to June 2022 identified 2,532 instances of books being banned in schools and libraries in 32 states. Friedman & Johnson, *supra*.

While some of the calls for book bans may be from concerned community members, the PEN America report found that of the 2,532 book bans it identified, "at least half" were driven by 50 coordinated groups—including groups operating at the national and state level—who have used their outsize influence to push their political agenda in local communities. Ariana Figueroa, *An 'unprecedented flood' of book bans engulfs U.S. school districts, PEN report says*, Colorado Newsline (Sept. 21, 2022), https://perma.cc/6WMS-GGRA. Often cloaked in anonymity, such organized proponents of censorship are free to wage a widespread assault on public knowledge—even in communities far from their doorsteps—merely because they disapprove of certain works. As this nationwide effort to ban books hits communities like Gunnison County, residents have a compelling interest in knowing who is responsible, and how to use the democratic process to secure their right to unimpeded access to information in their public library.

In short, the First Amendment-based concerns animating *Tattered Cover* that were raised by the district court are misplaced and misapplied here. This case raises issues of profound public importance concerning the protection of the free

exchange of ideas, but those issues weigh heavily in favor of—not against—public access to the entirety of the Request for Reconsideration Forms at issue.

B. The district court improperly applied the least restrictive alternative prong of the *Martinelli* three-part test.

In addition to incorrectly concluding that the individuals who submitted the Request for Reconsideration Forms have a legitimate privacy interest in such requests, CF, p. 37, the district court also erred by not adopting the least restrictive alternative for making the records available to Respondent-Appellant. The district court determined that the "least drastic alternative" under the third prong of the *Martinelli* test would be to redact the individual requestors' names and any personal identifying information. *Id.* That conclusion was erroneous. In light of the district court's finding that there is a strong, compelling public interest in knowing "what requests and for what books and ***by which persons*** have been made for removal or relocation," *id.* (emphasis added), the district court should have merely redacted any ***personal identifying information***, *e.g.*, the requestors' home addresses and phone numbers—***not*** the requestors' names.

Indeed, Colorado courts have declined to recognize a privacy right in one's name. *See Freedom Newspapers, Inc.*, 961 P.2d at 1154, 1157 (applying *Martinelli* and finding no privacy interest in individual names or amounts paid under severance program unless disclosure would do substantial injury to the public interest by invading the employees' constitutional privacy rights); *see also*

Jefferson Cnty. Educ. Ass'n, 378 P.3d at 839 (requiring disclosure of records showing names of high-school teachers who reported in sick on particular days). Accordingly, the district court also erred by not properly applying the least restrictive alternative prong of the test in *Martinelli*, which would require, at most, the redaction of home addresses and phone numbers, not the names of the individuals who submitted the Request for Reconsideration Forms.

CONCLUSION

For the foregoing reasons, Respondent-Appellant respectfully requests that the Court reverse and remand this case with instructions to the district court to order the Request for Reconsideration Forms at issue released in their entirety.

Respectfully submitted this 21st day of November, 2022.

By */s/Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2022, a true and correct copy of the foregoing **OPENING BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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