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Court of Appeals, State of Colorado Court Address: Ralph L. Carr Judicial Center 2 E. 14th Ave. Denver, CO 80203 Appeal; District Court, County of Gunnison, State of Colorado; Hon. J. Steven Patrick, Case No. 2022CV30017	Case Number: 2022CA001119
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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PLAINTIFF-APPELLEE'S ANSWER 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 applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

> ☒ It contains 6,152 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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

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

> ☒ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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/ *Michael P. O'Loughlin*
Michael O'Loughlin, #38134

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SUMMARY OF THE ARGUMENTS

The Gunnison County Library District, a public library district and political subdivision of the state of Colorado, received formal written requests to move or remove certain materials from its collection ("Requests for Reconsideration"). R. CF, pp. 1 – 15. The Library District then received requests from the Appellant *Crested Butte News* ("CB News"), pursuant to the Colorado Open Records Act, for copies of those Requests for Reconsideration. *Id.* at pp. 8 – 9. The district court determined that the Requests for Reconsideration were subject to public disclosure, but only after the redaction of the personal identifying information of those that submitted the Requests. *Id.* at p. 41.

This case poses three issues of seminal importance to the Library District and public libraries throughout Colorado: 1) whether the documents generated by a member of the public in accordance with the Library District's Collection Development and Use Policy[1], (i.e., the subject Requests for Reconsideration[2]), are fully discoverable under Colorado's Open Records Act, Colo. Rev. Stat. § 24-72-201, *et seq*. ("CORA"), including the personal identifying information of the Requestors; 2) whether a formal attempt, resulting in a voluntarily written and

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[1] *See* R. CF, pp. 22 – 26.
[2] *Id.* at pp. 10 – 15.

submitted document, to remove, move, or otherwise censor or limit access to the collections and services of a public library is a "use" of the public library and subject to the statutory privacy protections provided by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1); and 3) whether or not the "necessary and reasonable operation" of a public library[3] requires the full disclosure of the Requests for Reconsideration given such Requests were submitted by individuals attempting to influence the actions and collections of a public library.

As a political subdivision of the state of Colorado[4], the Library District is subject to CORA and Colorado's Open Meetings Law. *See generally* Colo. Rev. Stat. §§ 24-72-201, *et seq*. and 24-6-401, *et seq.* As such, the Library District's records are "public records [that] shall be open for inspection by any person at reasonable times, except as provided by [part 2 of CORA] or as otherwise provided by law . . .". Colo. Rev. Stat. § 24-72-203(1)(a). A public official, like and including a public library director or library board of trustees, has no authority to deny the right of inspection, or redact the same, in the absence of a specific statute permitting the withholding of such information. *Denver Publ'g Co. v. Dreyfus,* 520

[3] Colo. Rev. Stat. § 24-90-119(2)(a) provides that library records may be disclosed "[w]hen necessary for the reasonable operation of the library" even when an exception to disclosure exists.

[4] *See* Colo. Rev. Stat. § 24-90-103(6) (states that "[a] library district shall be a political subdivision of the state.").

P.2d 104, 107 – 08 (Colo. 1974). In the context of public libraries, an exception to the disclosure of public library records exists for information that identifies a person as having requested or obtained specific materials or service or as otherwise having used the library. Colo. Rev. Stat. §§ 24-90-119(1) and 24-72-204(3)(a)(VII). However, exceptions to CORA, like this one for library user records, are to be narrowly construed, as CORA generally favors access to records of a public entity. *Daniels v. City of Commerce City,* 988 P. 2d 648, 650 – 51 (Colo. App. 1999); *Mountain Plains, Inc. v. Parkin Jordan Metro. Distr.,* 312 P. 3d 260, 265 – 66 (Colo. App. 2013).

This case presents a matter of first impression about whether members of the public that request the removal or movement of a certain book within a public library's collection on their own volition (the "Requestors") are deemed library "users" as contemplated by Colo. Rev. Stat. § 24-90-119(1), and whether such Requestors should enjoy the anonymity protections afforded by such statute and Colo. Rev. Stat. § 24-72-204(3)(a)(VII), a subsection of part 2 of CORA.

The Appellee Library District, the Appellant CB News, and *Amicus Curiae* Colorado Freedom of Information Coalition all believe that the district court erred by extending Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) beyond their plain meaning to include privacy protections for those trying to limit or

influence the ability of others to “use” the library. This extended application is not permissible since CORA’s statutory framework must be narrowly construed. *Daniels,* 988 P. 2d at 651; *Mountain Plains, Inc.,* 312 P. 3d at 266. In addition, since the word “use” is not ambiguous, it was an error by the district court to go beyond the plain language of Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) & 24-90-119(1) and instead rely on *Martinelli v. Dist. Court,* 612 P.2d 1083 (Colo. 1980) and *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044 (Colo. 2002) as authority for its holding.

This Court is only being asked to consider whether the Library District is required to redact the Requestors’ personal identifying information prior to the public release of the Requests for Reconsideration pursuant to CORA. This Court is not being asked to consider the public nature of non-written, or informal, requests to re-evaluate a public library’s collections or any other aspect of privacy related to the public library. The Library District urges this Court to find that this case is not moot and that the Requests for Reconsideration should be subject to public release in their entirety with no redactions because:

First, the Court of Appeals should address the merits of the issues on appeal despite the disclosure by the district court of the unredacted Requests for Reconsideration to counsel for the CB News. The Library District agrees with the

CB News that such disclosure does not moot this controversy. The Library District seeks a determination by this Court, as the issue of how to publicly disclose said Requests for Reconsideration has already repeated itself and is likely to continue. *See* CB News' Opening Brief at pp. 11 – 13. This issue is also likely to continue repeating itself as there has been an influx of these requests to remove, move or ban books nationwide over the past few years. *Id.* at pp. 7 – 8.

Second, the exceptions to CORA's mandate to disclose public records are not applicable in this matter. This is the case because the Requests for Reconsideration are not "user" records pursuant to Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), and the identities of those who submit them are therefore not exempt from public disclosure. The district court has improperly extended CORA's protections for library "users" and has otherwise interfered with "the necessary and reasonable operation of the library" by allowing a public governmental process to be cloaked in secrecy.

The legal questions of this case arise because neither the word "use," nor the phrase "reasonable operation of the library," are defined in the applicable statutes. Therefore, this Court must construe the meaning of the word and phrase. The Library District asserts that an attempt to deny the public access to a library resource is not a "use" of the library. The Library District also asserts that the

"necessary and reasonable operation of the library" requires transparency into the forces influencing its actions and decisions as a public entity.

Third, the district court improperly relied on *Martinelli v. District Court*, 612 P. 2d 1083 (Colo. 1980) and *Tattered Cover, Inc. v. City of Thornton,* 44 P. 3d 1044 (Colo. 2002) when it ordered the redaction of the Requestors' names and other identifying information from the Requests for Reconsideration. *Martinelli* and *Tattered Cover* dealt with very different legal matters that do not address or provide legal authority for the constitutional privacy protections that the district court granted to the Requestors.

Thus, the Library District requests an order from this Court overturning the district court decision and authorizing it to publicly release the Requests for Reconsideration without any redactions.

ARGUMENT

I. The Court of Appeals should address the merits of the issues on appeal despite the disclosure by the district court of the unredacted Requests for Reconsideration to counsel for the Appellant Crested Butte News

A. *Standard of Review and Preservation of the Issue*

The question of whether the case may be moot due to the transfer of the record by the district court to this Court in which the unredacted Requests for Reconsideration were provided to counsel for the CB News is an issue that was not

preserved on appeal. This is the case because the issue arose during the transfer of the record and was not otherwise part of the case. The transfer of the record was not due to any action or inaction of the parties, so it would be highly prejudicial to the litigants to dismiss this case for mootness based on the transfer of the record by the district court. There is no clear standard of review for such a question.

B. *The Library District agrees with the Crested Butte News that this Court should address the merits of the appeal*

The Library District is aligned with the CB News in that it desires for this Court to address the legal questions at issue on appeal, which are argued below, and does not otherwise believe the case is moot, or that there is an issue or problem with the transfer of the record containing the unredacted Requests for Reconsideration.

The Library District agrees with the opinions and legal analysis of the CB News that this Court should hear and decide on this controversy since it has a high likelihood of presenting recurring constitutional privacy questions. *See* CB News Opening Brief at pp. 11 – 13. The Library District has continued to receive requests to move or ban books from its collections and believes such requests will continue in the future. Additionally, this appeal presents an issue of "great public importance" in which an opinion from this Court is warranted and necessary. *People ex rel. Ofengand,* 183 P. 3d 688, 691 (Colo. App. 2008). It is of "great public importance"

because this case relates to the ability of third parties to potentially influence the books, materials, and other information that may become or are available at a publicly funded library.

The Library District respectfully requests this Court to address whether it is required to redact the personal identifying information of the Requestors before providing the public with the Requests for Reconsideration, as this issue will arise again and is a matter of great public importance in Gunnison County and to the Library District.

II. The Requests for Reconsideration are not "user" records pursuant to Colo. Rev. Stat. §§ 24-90-119(1) or 24-72-204(3)(a)(VII), and the identities of those who submit them are therefore not exempt from public disclosure

A. *Standard of Review and Preservation of the Issue*

The Library District agrees that this issue was preserved on appeal, as stated in the CB News' Opening Brief. *See* CB News Opening Brief at p. 13. The Library District also agrees with the CB News regarding the standard of review. *Id.* at p. 14. Since this appeal involves questions of statutory construction and the application of CORA, the legal questions are reviewed by the Court of Appeals *de novo*. *Prairie Mountain Publ'g Co., LLP* at 475 (Colo. App. 2021); *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

B. *The Requests for Reconsideration are "public records," and the CORA exceptions at issue that may preclude public disclosure, Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), are inapplicable*

i. *The district court erred by not giving "user" it's plain and ordinary meaning in construing the statutory intent*

It does not make practical or legal sense to define a person seeking to remove, move, or otherwise limit access to a book or public library resource as a "user" of the public library, as the Requestors are actually attempting to hinder others' "use" of the resource. Simply, since the Requestors are attempting to preclude the "use" of a specific book, they should not enjoy the privacy protections afforded to library "users" by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1).

It is undisputed that the Requests for Reconsideration are "public records." R. CF, pp. 38 – 40. "'Public records' means and includes all writings made, maintained, or kept by . . . [a] political subdivision of the state . . . 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." Colo. Rev. Stat. § 24-72-202(6)(a)(I). A library district is a political subdivision of the state of Colorado. Colo. Rev. Stat. § 24-90-103(6).

The Requests for Reconsideration fall within this definition of "public records" since they are "writings maintained and kept" by the Library District, a

"local-government-financed entity," and are intended to influence a public library board and their executive director's decisions regarding the library's resources, services, and collections.

The district court never specifically addressed how or why the Requestors are "users" of the library and enjoy the exceptions to disclosure provided by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) based on the plain language of these statutes. R. CF, pp. 38 – 41. An exception to disclosure exists for "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."[5] Colo. Rev. Stat. § 24-90-119(1). Instead of addressing how the Requestors are "library users" pursuant to these statutes, the district court erred by applying legal analysis from *Martinelli* and *Tattered Cover* to find that "user in the statute under this [*Martinelli* and *Tattered Cover*] analysis is not limited to someone who reads material in the library, or, checks out material, but inclusive of any person 'using' library services."[6] R. CF, p. 37. Based on this analysis, and without otherwise reconciling how a request to remove or move a public library book, the result of which limits or hinders others'

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[5] Even when these exceptions to disclosure may exist, a public library still may disclose a record "when necessary for the reasonable operation of the library," among other bases. Colo. Rev. Stat. § 24-90-119(2).

[6] *See Martinelli* and *Tattered Cover* analysis in Section III of this Answer Brief below.

access to said book, is a “use” of the library, the district court provided the Requestors with privacy protections by ordering the redaction of their personal identifying information before the public release of the Requests for Reconsideration. *Id.* at p. 41. This court order allows the Requestors to remain anonymous while trying to influence public policies, actions, and the collections of books available at the public library. This holding is not supported by the statutory framework, *Martinelli* or *Tattered Cover.*

The overriding goal of statutory construction is to effectuate the legislature's intent. *Prairie Mountain Publ’g Co., LLP* at 474; *Dep't of Revenue v. Agilent Techs., Inc.*, 441 P.3d 1012, 1016 (Colo. 2019). In so doing, courts “look first to the statute's language, giving words and phrases their plain and ordinary meanings.” *Prairie Mountain Publ’g Co., LLP* at 475. This requires “reading applicable statutory provisions as a whole in order to accord consistent, harmonious, and sensible effect to all their parts.” *Id*. at 475 – 76. However, when the plain language is unambiguous, courts are instructed to look no further. *Id.* Additionally, exceptions to the disclosure of public records under CORA must be narrowly construed. *Sargent Sch. Dist. No. RE-33J v. Western Services, Inc.,* 751 P.2d 56, 60 (Colo. 1988); *Bodelson v. Denver Publ’g Co.,* 5 P.3d 373, 377 (Colo. App. 2000). Courts must avoid a strained or forced construction of a statutory term and must look to the context in which a

statutory term is employed. *Miller v. Byrne,* 916 P.2d 566, 576 – 77 (Colo. App. 1995). Thus, the CORA exception for library users provided by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) must be construed narrowly by Colorado courts. *Bodelson,* 5 P.3d at 377.

"User" or "used" are commonly used terms, which are unambiguous, and is likely why a specific definition or definitions were not included in the statutory framework. Merriam-Webster simply defines a "user" as "one that uses." *See* Merriam-Webster Dictionary, November 30, 2022, https://www.merriam-webster.com/dictionary/user. Similarly, Merriam-Webster defines "used" as "having been used before." *Id.* at https://www.merriam-webster.com/dictionary/used. In the context of a public library, "use" may be thought of as the consumption of books and other resources or materials in the pursuit of searching out and obtaining information for one's own purposes.

Requesting the removal of a book is clearly and unambiguously not "one who uses" or one that "has used" the library. Since the words "user" and "used" are both unambiguous, the district court erred by going beyond the statutory framework to include additional analysis pursuant to *Martinelli* and *Tattered Cover. Prairie Mountain Publ'g Co., LLP* at 475 – 76 (providing when the plain language of a statute is unambiguous, courts are required to look no further). (Emphasis added).

Instead of relying on *Martinelli* and *Tattered Cover*, the district court should have analyzed the statutory language as written and provided an order as to how and why the Requestors are "users" or had "used" the library based on the plain language of Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), and why those laws provide an exception to disclosure under the facts of this case. Reversible error occurred because this analysis was not propounded by the district court and privacy protections were granted that are otherwise not available under Colorado law.

ii. *The legislative history and legislative declaration of Colorado's Library Law provides no privacy protections for the Requestors*

The Library District concurs with the analysis of the CB News that the Colorado legislature did not intend to include an individual that requests the removal or movement of books from a public library as qualifying as a "user" or having "used" the public library for purposes of the privacy protections afforded by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1). *See* CB News Opening Brief at p. 18; *see also* Legislative Records, Colorado State Archives, https://archives.colorado.gov/collections/legislative-records (last visited December 2, 2022). There is nothing in the applicable legislative history that suggests the Colorado legislature intended to include those requesting the removal, banning, or movement of public library books or materials as "users" of library services or

materials. CB News Opening Brief at pp. 18 – 20; s*ee also generally Hr'g on H.B. 83-1114, Before the H. State Affairs Comm.,* 54th Gen. Assemb. (Colo. Jan. 18, 1983) and *Hr'g on H.B. 83-1114, Before the S. State Affairs Comm.,* 54th Gen. Assemb. (Colo. Feb. 23, 1983).

Courts must choose a construction of a statute that serves the purpose of the legislative scheme and should not strain to give statutory language other than its plain meaning unless the result is absurd. *City of Westminster v. Dogan Construction Co.,* 930 P.2d 585, 590 (Colo. 1997); *Ritter v. Jones,* 207 P.3d 954, 957 (Colo. App. 2009).

The legislative declaration for Colorado's Library Law makes it seem quite unlikely that the Colorado General Assembly intended to extend "user" privacy protections to those seeking to remove or ban books from public view. This legislative declaration provides, "that it is the policy of this state, as part of its provisions for public education . . . to ensure equal access to information without regard to age, physical or mental health, place of residence, or economic status, to aid in the establishment and improvement of library programs, to improve and update the skills of persons employed in libraries through continuing education activities, and to promote and coordinate the sharing of resources among libraries in Colorado and the dissemination of information regarding the availability of library resources." Colo.

Rev. Stat. § 24-90-102. (Emphasis added). Given this statutory language, along with the legislative history of Colo. Rev. Stat. § 24-90-119, it is antithetical to conclude that those seeking to remove books from public view are ensuring "equal access to information"; seeking "to promote and coordinate the sharing of [library] resources"; and are certainly not proffering the "dissemination of information" consistent with the legislature's intent for Colorado's Library Law. To give the statutory framework, including Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII), 24-90-119(1) and 24-90-102, any other meaning than what is provided by the plain language is a strain on and thus an impermissible extension of such statutory language.

Extending anonymity protections to the Requestors pursuant to Colorado's Library Law and CORA is not only inconsistent with the plain language of the applicable statutes, Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) but is also in derogation of the legislative history and legislative declaration for how Colorado's Library Law is intended to work. This Court must overturn the district court decision, as the Requestors do not enjoy anonymity protections under CORA, Colorado's Library Law, or otherwise.

iii. *The public disclosure of the Requests for Reconsideration, including the personal identifying information of the Requestors, is necessary for the "reasonable operation of the library"*

The Requestors are attempting to influence the Library District's public collections and decisions by requesting the removal or movement of a certain book from its collections. R. CF, pp. 10 – 15. The district court provided anonymity protections for the Requestors' by shielding their personal identifying information from public view. *Id.* at p. 41. This decision was an extension of CORA's plain language and erroneous because there is simply no authority in Colorado's Open Meetings Law or CORA for the ruling, as discussed above. *See generally* Colo. Rev. Stat. §§ 24-6-401, *et seq*. and 24-72-201, *et seq*. A person simply does not, and should not, have anonymity protections when they are trying to influence public policy and the decisions and resources that may be offered to the public at large by a tax funded entity, like a public library.

Colo. Rev. Stat. § 24-90-119(2)(a) allows a public library to disclose its records, notwithstanding the exception to disclosure provided by subsection (1) of this statute, "[w]hen necessary for the reasonable operation of the library." Additionally, the Library District Board is obligated by Colo. Rev. Stat. § 24-90-109(1) to: (a)[7] "[a]dopt such bylaws, rules, and regulations for its own guidance and policies for the governance of the library as it deems expedient; (b) "Have custody of

[7] The letters used in this paragraph mimic the statutory subsections of Colo. Rev. Stat. § 24-90-109(1) and do not relate to alphabetical order.

all property of the library;" (c) "Employ a director," whose duties include (I) implementing policies adopted by the board of trustees, and (c)(III) "performing all other acts necessary for the orderly and efficient management and control of the library;" and (m) "Adopt a policy for the purchase of library materials and equipment." The meetings, actions, and decisions of library boards, including the adoption of policies, budgets, and the like, are required to occur in public meetings that must be "open to the public at all times." Colo. Rev. Stat. § 24-6-402(2). In addition, the Library District is required to provide advanced public notice of its meetings with an agenda of the proposed meeting topics to keep the public informed of what it is doing and the decisions and actions that it may take. *Id.* at 402(2)(c)(I).

The U.S. Supreme Court has weighed in, generally, on the openness required of our governments. "Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately. . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "'did not trust any government to separate the true from the false for us.'" *Detroit Free Press v. Ashcroft,* 303 F.3d 681, 683 (6th Cir. 2002); *Kleindienst v. Mandel,* 408 U.S. 753, 773 (1972) (quoting *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J.,

concurring)). The intent is to protect the people against secret government. *Detroit Free Press,* 303 F.3d at 683. (Emphasis added).

By allowing the Requestors to operate in anonymity, the statutorily mandated public process required of public entities, like the Library District, is subverted by allowing the request for reconsideration process to be cloaked in secrecy. *Id.* To avoid this result, and to otherwise comply with the processes required of public entities under CORA, it is "necessary for the reasonable operation of the library" to release the personal identifying information of those attempting to influence public library policies and collections. It is also necessary to disclose the Requestors' identity to keep the public informed of those attempting to limit or influence the books and materials that are publicly available, and of the responses of the public entity to the same.

Ultimately, the Library District is run using public dollars by a Board that must operate in public view. Transparency of the Library District, including what goes into its policy decisions and the books, materials and other resources that make up its collections, along with those attempting to influence those decisions and collections, are matters of public concern. It is thus necessary "for the reasonable operation of the library" that matters involving public policies, discussions, actions, or library materials, resources or information be fully transparent since those decisions directly

affect the public. In order not to let the public influencers and the responsive actions and decisions of the Library District to evade public view and, in essence, "die behind closed doors," this Court must overturn the district court decision and permit the entirety of the Requests for Reconsideration, including the Requestors' personal identifying information, to be open to public inspection.

III. The district court erred in ordering the redaction of the Requestor's names and other identifying information from the Requests for Reconsideration pursuant to *Martinelli* and *Tattered Cover*

A. *Standard of Review and Preservation of the Issue*

The Library District agrees with the CB News that this issue was preserved on appeal. *See* CB News Opening Brief at p. 24. The Library District also agrees with the CB News regarding the applicable standard of review. *Id.* Since this appeal, including the specific issues referenced in the briefs, involve questions of statutory construction and application of CORA, the legal questions and issues on appeal are reviewed by the Court of Appeals *de novo*. *Prairie Mountain Publ'g Co., LLP* 491 P.3d at 475; *Harris*, 123 P.3d at 1170.

B. *Martinelli does not provide legal authority for privacy protections for the Requestors*

Colorado courts are required to follow the plain language of a statute when the plain language is unambiguous and must look no further in such instances. *Prairie*

Mountain Publ'g Co., LLP at 475 – 76. Additionally, exceptions to the disclosure of public records under CORA must be narrowly construed. *Bodelson,* 5 P.3d at 377.

Despite the lack of ambiguity of Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), as discussed above, the district court erred by going beyond the plain language of these statutes and instead relied on the *Martinelli* balancing test in determining that the personal identifying information of the Requestors must be redacted prior to the public release of the Requests for Reconsideration. R. CF, pp. 40 – 41. Such reliance on *Martinelli* does not "narrowly construe" the CORA exception found in Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) but expands those statutes to provide additional and new exceptions to disclosure that are not provided therein or are otherwise available under Colorado law or existing constitutional protections. This is not permissible under Colorado's principles of statutory construction. *Prairie Mountain Publ'g Co., LLP* at 475 – 76.

C. *Even if Martinelli was applicable, the district court erred in its application*

In addition to its improper reliance on *Martinelli* that resulted in the expansion of the CORA disclosure exception provided by Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), the district court also erred in its application of the *Martinelli* balancing test.

Martinelli involved a case where officers of the Denver Police Department were accused of violating a criminal defendant's constitutional rights due to an alleged assault and false arrest, among other allegations of wrongdoing by the police officers and the Department. *Martinelli,* 612 P.2d at 1086. The criminal defendant sought to obtain the subject police officers' personnel files pursuant to C.R.C.P. 34, as part of the ongoing legal case, and not pursuant to CORA. *Id.* The Police Department argued, among other bases, that the personnel files are exempted from discovery pursuant to CORA. *Id.* at 1087. The legal question arose as to whether the police officers' personnel files were protected under CORA in the context of active litigation. The court held *Martinelli* applies "[w]hen the right to confidentiality is invoked to prevent disclosure of personal materials or information," and in such instance, "a tri-partite balancing inquiry must be undertaken by the court . . ." *Id.* at 1091.

The district court erred in applying *Martinelli* because neither the Library District, nor the CB News (i.e., the parties to the case), "invoked" the right to confidentiality, or argued that *Martinelli* applied at all. R. CF, pp. 1 – 33. Rather, the district court "invoked" the *Martinelli* balancing test on its own. *Id.* at pp. 35 – 37. This was in error, as there is no authority in *Martinelli* or otherwise for a court to

invoke the *Martinelli* balancing test when the right to confidentiality is not otherwise pled or argued in a case. *Martinelli,* 612 P.2d at 1091.

Additionally, even if the Requestors were parties to the case and "invoked" *Marinelli* by arguing that they enjoy a right to confidentiality thereunder, the Requestors would have to show that they had a "legitimate expectation" that the materials or information (i.e., the Requests for Reconsideration) were not subject to public disclosure. *Id.; see also Nixon v. Administrator of General Services,* 433 U.S. 425, 465 (1977). This "legitimate expectation" must align with *Martinelli's* right to confidentiality, which "encompasses the power to control what we shall reveal about our intimate selves, to whom, and for what purpose. This right is by no means absolute." *Martinelli,* 612 P.2d at 1091.

In order to pass the *Martinelli* balancing test and possibly obtain a "right to confidentiality," <u>the claimant</u> must show: (1) that he or she has an actual or subjective expectation that the information not be disclosed; and (2) the material or information which he or she seeks to protect against disclosure is "highly personal and sensitive" and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Id.* at 1091 – 92. Those items at the "top of the ranking" for confidentiality protections include materials and information which reflect on the "intimate relationships" of the claimant with other persons. *Id.* at 1092.

Confidentiality protections for things like the claimant's "beliefs and self-insights" and names and addresses enjoy progressively "lower tiers" of protection than those involving "intimate relationships." *Id.* It is not typical for confidentiality protections to exist for things like beliefs, self-insights, names, or addresses. *Id.* (Emphasis added).

The district court erred by not properly applying the *Martinelli* balancing test since it ordered "lower tier" confidentiality protections for the Requestors by shielding their beliefs and self-insights (i.e., personal feelings on removing or relocating a book) along with their personal identifying information from public view. Additionally, there was not a finding by the district court that the Requestors had a "legitimate expectation of privacy" or why they would have such an expectation. Meaning, without a specific finding of a "legitimate expectation," the Requestors had no right to obtain the *Martinelli* confidentiality protections. It is hard to fathom that the Requestors had a "legitimate expectation" of anonymity given they voluntarily submitted the Requests for Reconsideration to a public entity, included their personal identifying information thereon, and were requesting the removal or movement of book from a public library, a function and process that necessarily implicates the public at large.

Thus, this Court must overturn the district court decision due to its reliance on *Martinelli* for the following reasons: (1) There was no "claimant" (i.e., a Requestor) seeking to invoke the privacy protections afforded by *Martinelli* or otherwise; and (2) even if there was a "claimant" or Requestor to "invoke" *Martinelli* and argue that its balancing test applied, the case does not provide confidentiality protections to the Requestors because: (a) the Requestors should have had no "subjective," "actual," or "legitimate" expectation that the Requests for Reconsideration were confidential; (b) there are no constitutional or statutory protections for the Requestors because they are not "users" of library services or materials[8]; and (c) the Requests for Reconsideration include the "beliefs and self-insights" of the Requestors, along with their names and addresses, none of which typically receive anonymity protections under *Martinelli* or otherwise. *Id.*

D. *The district court improperly applied and relied on <u>Tattered Cover</u>*

In addition to improperly finding that the Requestors enjoy confidentiality protections under *Martinelli*, the district court also erred in finding that they enjoy Constitutional First Amendment anonymity protections under *Tattered Cover.*

Tattered Cover involved a case where a bookseller brought suit seeking to restrain a police department and its officers from executing a search warrant that

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[8] *See* Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1).

sought to obtain customer purchase records from a bookstore. *Tattered Cover,* 44 P.3d at 1047. The court held that "the innocent bookseller be afforded an opportunity for an adversarial hearing prior to execution of the search warrant . . . At that hearing, the court must apply a balancing test to determine whether the law enforcement need for the search warrant outweighs the harm to constitutional interests caused by its execution." *Id.*

The court found that the First Amendment to the U.S. Constitution includes the right "to receive information and ideas." *Id.* at 1051. "Any government action that interferes with the willingness of customers to purchase books, or booksellers to sell books, thus implicates First Amendment concerns." *Id.* at 1052. "The need to protect anonymity in the context of the First Amendment has particular applicability to book-buying activity." *Id.* at 1053. "In sum, the First Amendment embraces the individual's right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read." *Id.* (Emphasis added).

Tattered Cover discusses privacy and anonymity protections for those that "purchase" and "read" books and for booksellers, and presumably libraries, that sell or otherwise provide books for people to read. *Id. Tattered Cover,* on the other hand, provides no authority for First Amendment anonymity protections for those seeking

to remove, ban, or relocate books from or within a public library or a bookstore. In fact, no such legal authority existed prior to the district court's order in this case.

The district court's holding impermissibly creates First Amendment anonymity rights for those seeking to ban books. Such rights have not existed in state or federal law prior to this order. This Court thus must reverse the order and find that the Requests for Reconsideration must be released publicly in their entirety without any redactions since such redactions provide anonymity protections for the Requestors with no legal authority under Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), *Martinelli, Tattered Cover*, the U.S. Constitution, or otherwise.

CONCLUSION

The Gunnison County Library District requests that this Court reverse the decision of the Gunnison County District Court, and order the public disclosure of the Requests for Reconsideration in their entirety because: (1) the applicable statutes that allow for exceptions to the disclosure of public library records, Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1), do not provide protections to persons seeking to ban, remove or relocate books from a public library, and even if they did, the public disclosure of the entirety of the Requests for Reconsideration is necessary for the "reasonable operation of the library" as a public entity subject to CORA; (2) the legislative history of Colo. Rev. Stat. § 24-90-119, and the

legislative declaration for Colorado's Library Law, provides no evidence that the legislature intended to include anonymity protections for those seeking to ban, remove, or relocate books within a public library; (3) the district court did not follow the plain and unambiguous language of Colo. Rev. Stat. §§ 24-72-204(3)(a)(VII) and 24-90-119(1) and instead extended these statutes beyond their plain meaning to impermissibly provide additional privacy protections under *Martinelli* and *Tattered Cover* that did not previously exist*;* and (4) even if *Martinelli* or *Tattered Cover* were proper authority to rely on, the district court erred in their application by: (a) extending the *Martinelli* anonymity protections to the Requestors even though they did not "invoke" the case, and by finding that the Requestors were entitled to "lower tier" anonymity protections for their names and personal beliefs, things that typically are not to receive such protections; and (b) extending the *Tattered Cover* holding to protect not only those that are purchasing and/or reading books, but also those seeking to ban and halt the ability of others to do the same. Such an extension of the applicable statutory framework and case law is not permissible, and thus the decision of the district court should be overturned.

Respectfully submitted this 23rd day of December 2022.

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CERTIFICATE OF SERVICE

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