

COLORADO SUPREME COURT  
Ralph L. Carr Colorado Judicial Center  
2 East 14<sup>th</sup> Avenue, 4<sup>th</sup> Floor  
Denver, Colorado 80203

On Certiorari to the Colorado Court of Appeals  
Court of Appeals Case No. 2021CA1880  
Denver District Court Case No. 2021CV31519

**THE GAZETTE, CHRISTOPHER N. OSHER,**  
reporter at *The Gazette*,  
and **THE INVISIBLE INSTITUTE**  
Petitioners

v.

**ERIK BOURGERIE, in his official capacity as  
custodian and Director of the Colorado Peace Officer  
Standards and Training Board**  
Respondent

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Case No:

**PETITION FOR WRIT OF CERTIORARI**

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Petition complies with all requirements of C.A.R. 53, and C.A.R. 25, 28 and 32. Specifically, the undersigned certifies that the Petition complies with the word limit, and it contains 3,797 words (3,800 limit).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 53, 28, and 32.

*/s/Rachael Johnson* \_\_\_\_\_  
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## **ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Colorado Open Records Act, §§ 24-72-201, C.R.S. *et seq.* (“CORA”), and not the Colorado Criminal Justice Records Act, §§ 24-72-301, C.R.S. *et seq.* (“CCJRA”), governs the disclosure of records Petitioners requested from Colorado Peace Officer Standards and Training (“POST”).

2. Whether the Colorado Court of Appeals erred as a matter of law when it concluded that POST is a “criminal justice agency” as defined in § 24-72-302(3), C.R.S.

## **OPINION FROM WHICH REVIEW IS SOUGHT; BASIS OF JURISDICTION**

Review is sought from *The Gazette v. Bourgerie*, No. 2021CA1880, slip op. (Colo. App. Apr. 27, 2023) (“Opinion”) (App. A). Jurisdiction is based on §§ 13-2-127 & 13-4-108, C.R.S. and C.A.R. 49, 52(b).

Petitioners are unaware of any pending case in which the Court has granted certiorari review of the legal issues presented in this Petition.

### **STATEMENT OF THE CASE**

This is a case of first impression presenting issues of statutory interpretation under the Colorado Open Records Act, §§ 24-72-201, C.R.S. *et seq.* (“CORA”) and the Colorado Criminal Justice Records Act, §§ 24-72-301, C.R.S. *et seq.* (“CCJRA”). If left undisturbed, the Opinion will impose far-reaching limitations on the public’s ability to access government records.

Petitioners are a journalist and news organizations whose reporting in Colorado and nationwide on law enforcement, including police misconduct, frequently relies on government records. TR 10/05/21, pp. 113:6–22, 114:1–20, 116:1–15, 181:19–183:25, 184:1–25 (App. B).<sup>1</sup> Defendant, named in his official

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<sup>1</sup> The District Court did not issue written orders; it issued bench rulings following hearings on August 3, 2021 and October 5, 2021. Those orders are set forth in the transcripts marked TR 08/03/21 and TR 10/05/21, which are designated in the Case File of the record on appeal. This Petition cites to the District Court’s



capacity, is the Director of the Board of Colorado Peace Officer Standards and Training (“POST”), the state agency charged with ensuring that peace officers comply the professional standards the General Assembly has determined are necessary for them to serve the people of Colorado safely and effectively.

Petitioners made two separate CORA requests seeking copies of electronic records maintained by the POST in a database that houses training, certification, decertification, appointment, and separation data for peace officers statewide (the “POST Database”).<sup>2</sup> Petitioner Christopher N. Osher (“Osher”), on behalf of *The Gazette*, also submitted a third request seeking all 2020 notifications of peace officer appointments to, and separations from, law enforcement agencies— information that is also maintained in the POST Database. TR 08/03/21, pp. 61:25–62:2.

Respondent denied each of Petitioners’ requests in full. EX, pp. 99–100, 103–104, 107–108 (App. D). Each denial asserted that the request was governed by the CCJRA, *see id.*, and that “[i]n our discretion, we decline” to either

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orders and relevant testimony in the transcripts, as App. B (TR 10/05/21) and App. C (TR 08/03/21).

<sup>2</sup> Petitioners anticipated they would receive an Excel spreadsheet or “CSV” file in response to their CORA requests. TR 10/05/21, p. 191:2–5. Neither request sought officers’ personal contact information, social security numbers, medical, or financial information. TR 10/05/21, pp. 117:13–17, 190:14–191:1.

“manipulate the requested data in response to your request” or “create [a] new record in response to your request.” *Id.*

On May 14, 2021, Petitioners filed their Complaint in Denver District Court alleging that Respondent violated its statutory obligation to release the requested records under CORA. CF, p. 1 (App. E). Respondent did not file a responsive pleading.

Following a July 16, 2021 status conference, the parties submitted simultaneous briefing on the issue of which statutory scheme—CORA or the CCJRA—applied to Petitioners’ requests. CF, pp. 137 (Petitioners’ brief), 161 (Respondent’s brief); *see* CF, p. 113 (notice of status conference). On August 3, after hearing testimony from Respondent and argument from the parties, the District Court held that the CCJRA provided the applicable statutory framework. TR 08/03/21, pp. 89:3–90:5. This conclusion was based on the District Court’s interpretation of the statutory definition of “criminal justice agency” in the CCJRA. TR 08/03/21, p. 88:8–14.

On October 5, 2021 the District Court heard testimony from the Chief Deputy Attorney General Natalie Hanlon-Leh (“Hanlon-Leh”), TR 10/05/21, pp. 9–111, Osher, *id.* at 113–178, and Sam Stecklow, a reporter at The Invisible Institute, *id.* at 180–221. Thereafter, in an oral bench ruling, the District Court

denied Petitioners’ application, *id.* at 227:21–23, and entered final judgment for Respondent, *id.* at 227:25–228:5. Petitioners timely appealed. CF, p. 4141.

During oral argument on March 28, 2023, members of the three-judge panel expressed concern about the implications of deciding that POST is a “criminal justice agency” within the meaning of the CCJRA. Appellate Court’s Live Broadcast (2023),

<https://cojudicial.ompnetwork.org/sessions/265190?embedInPoint=1260&embedOutPoint=3303&shareMethod=link> at 36:02, 37:50. Nevertheless, on April 27, 2023, the Court of Appeals affirmed the District Court’s determination that POST is a “criminal justice agency” as defined in the CCJRA because of its “collection and storage of criminal records information during its revocation process,” which “qualifies POST as a criminal justice agency.” Opinion at 8-10. The Court thus concluded that POST had broad discretion to deny Petitioners’ requests in their entirety.<sup>3</sup>

## **APPLICABLE STATUTORY FRAMEWORK**

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<sup>3</sup> The Court of Appeals also found that Hanlon-Leh did not abuse her discretion in denying Petitioners’ requests. Opinion at 23. Petitioners do not seek review of the Court of Appeals’ decision as to Hanlon-Leh’s exercise of discretion except insofar as that decision would be moot should the Court grant this Petition and reverse.

**A. The POST Act, § 24-31-303, C.R.S.**

POST—like other state licensing agencies—is charged with ensuring that peace officers meet the professional standards that the General Assembly has determined are necessary for them to serve the people of Colorado safely and effectively. To fulfill that purpose, POST has statutory authority to: establish standards that applicants to the profession must meet,<sup>4</sup> formulate procedural rules designed to ensure those standards are satisfied,<sup>5</sup> certify and revoke licenses, and require—but not conduct—background checks for applicants.<sup>6</sup>

**B. CORA and the CCJRA**

Enacted in 1968, CORA declares “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. Since its passage, CORA’s statutory definition of “public records”<sup>7</sup> has “determine[d]” its “reach.” *Denver Publ’g Co. v. Bd. of Cnty.*

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<sup>4</sup> § 24-31-303(1)(c), C.R.S.

<sup>5</sup> § 24-31-303(1)(g), (1)(m), C.R.S.

<sup>6</sup> § 24-31-303(1)(f), C.R.S.

<sup>7</sup> “Public records” is defined in CORA to mean and include “all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation . . . or 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.” § 24-72-202(6)(a)(I), C.R.S.

*Comm'rs of Arapahoe*, 121 P.3d 190, 197 (Colo. 2005). That definition reflects the legislature's desire for "a content-driven inquiry" that ensures that public records "tied to public functions or public funds," *id.*, are publicly available. § 24-72-202(6)(a)(I), C.R.S.; *see also* § 24-72-201, C.R.S.

In 1973, the General Assembly enacted the CCJRA to ensure Colorado's compliance with the federal Crime Control Act. Pub. L. No. 93-83, 87 Stat. 297 (1973); *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1171 (Colo. 2005).

"[C]ompliance in part required creation of a scheme for managing and disseminating criminal records information." *Harris*, 123 P.3d at 1172.

Accordingly, "the General Assembly created the separate 'criminal justice records' category" exception to CORA, *id.*—a statutory carveout for the "criminal justice records" of a "criminal justice agency" that fall within the scope of the CCJRA, *see* § 24-72-202(6)(b)(I), C.R.S. As with all exceptions to CORA's disclosure mandate, that carveout must be narrowly construed. *See City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 589 (Colo. 1997).

"Criminal justice records"—those falling within CCJRA's disclosure framework, as opposed to CORA's—are defined in relevant part as:

all books, papers, cards, photographs...that are made,  
maintained, or kept by any criminal justice agency...

§ 24-72-302(4), C.R.S. Under § 24-72-302(3), C.R.S., a "criminal justice agency" is defined as:

any court with criminal jurisdiction and any agency of the state . . . that performs any activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information.

§ 24-72-302(3), C.R.S.

### **PRESERVATION AND STANDARD OF REVIEW**

The scope of the definition of “criminal justice agency” in the CCJRA is a question of law reviewed by this Court *de novo*. *Harris*, 123 P.3d at 1170 (questions of law concerning the correct construction and application of CORA and the CCJRA are reviewed *de novo*). Whether POST is a “criminal justice agency” as defined in the CCJRA is an issue that was preserved at the District Court and at the Court of Appeals. CF, pp. 8–10, 137; TR 08/03/21, pp. 3:13–16, 87:11–19, 89:24–90:5; Opinion at 1–12.

### **REASONS FOR GRANTING THE PETITION**

This Petition should be granted for the following special and important reasons. *See* C.A.R. 49.

#### **I. The Opinion creates a gaping hole in CORA that is contrary to the General Assembly’s intent.**

The Opinion broadens the definition of a “criminal justice agency”—and, thus, the scope of the CCJRA—beyond recognition. If permitted to stand, the

Opinion’s expansion of what was intended to be a narrow exception to CORA’s disclosure mandate will jeopardize the public’s long-standing ability to access the records of numerous state agencies that necessarily obtain criminal records for professional licensing purposes—agencies that do not resemble those that would be included in any commonsense definition of “criminal justice agency.”<sup>8</sup> In doing so, the Opinion undermines the very purpose of Colorado’s public records laws: to foster transparency and ensure public access to information about government activities and the use of public funds.

The Court of Appeals’ sole basis for finding POST to be a “criminal justice agency” under the CCJRA was Respondent’s testimony that when POST receives “a notice . . . that a peace officer has been fingerprinted in a criminal case,” it “go[es] into the courts database and track[s] the case through disposition” in order to determine whether that peace officer’s certification should be revoked. Opinion at 9. According to the Court of Appeals, as part of that process, POST collects “criminal records . . . from the [courts] database,” *id.*, stores those records if there is a conviction for a revocable offense, and occasionally “contact[s] the arresting law enforcement agency in order to receive” arrest records to inform its revocation decisions. Opinion at 9; *see id.* at 12 (“POST advances other reasons[,] . . . [b]ut we need not decide whether those grounds are sufficient because, as discussed,

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<sup>8</sup> *Denver Publ’g Co.*, 121 P.3d at 197.

POST’s collection and storage of criminal records information during its revocation process alone qualifies it as a criminal justice agency.”).

The Court of Appeals’ conclusion that a state agency that performs “any activity directly relating to the . . . collection [and] storage . . . of arrest and criminal records information” as part of its certification revocation process, Opinion at 7 (emphasis omitted), is a “criminal justice agency” under § 24-72-302(3), C.R.S., and not subject to CORA, is an absurd result. *Town of Erie v. Eason*, 18 P.3d 1271, 1276 (Colo. 2001) (“[W]hen construing a statute, courts **must not** follow [a] statutory construction that leads to an absurd result” that would be “inconsistent with the purposes of the legislation.” (emphasis added)); *Prairie Mountain Publ’g Co., LLP v. Regents of Univ. of Colo.*, 491 P.3d 472, 480 (Colo. App. 2021) (Jones, J., dissenting) (the literal meaning of a statute under CORA shouldn’t be adopted if it leads to an “absurd result”). Many state licensing agencies, including the Board of Mortgage Loan Originators, and the State Board of Pharmacy, for instance, collect and review the results of criminal history checks as part of their certification (and decertification) processes, § 12-10-704(6), C.R.S.; § 12-280-304(1)–(2), C.R.S. Indeed, every school in the state (K-12 and higher education) is required to collect and store the criminal background check information for all teachers. § 22-2-119(3)(a)(II), C.R.S.; § 23-64-110(1)(a), C.R.S. If the Opinion is left undisturbed, such agencies may hold themselves out



as “criminal justice agenc[ies]” to avoid CORA’s requirements; their records would no longer be “public records” subject to CORA. § 24-72-202(6)(a)(I), C.R.S.; *see Prairie Mountain Publ’g*, 491 P.3d at 481–82 (to “allow[] each appointing entity unfettered power to determine who is a finalist” would lead to an absurd result under the “finalist” exception, § 24-72-204(3)(a)(XI)(A), C.R.S., of CORA).

By further illustration, the Colorado Dental Board may take disciplinary action if a dentist is convicted of a felony or any crime, or engages in fraud, misrepresentation or deception to secure his or her license—a criminal offense. *See* § 12-220-201(1)(a)–(b), C.R.S. In order to determine if fraud or another criminal offense disqualifies a licensee, the Dental Board, as part of its statutory duties, must “gather evidence”—presumably arrest records, records of conviction, or other law enforcement and court records—and conduct hearings to inform its revocation decision. *See id.*; § 12-220-106(1)(b)(I)(A), (E), C.R.S. (citing § 12-20-403, C.R.S. (“[A] regulator may investigate, hold hearings, and gather evidence[.]”). Other than the substitution of the word “gather” for “collect,” the Dental Board’s statutory responsibility is nearly identical to what the Court of Appeals deemed sufficient to qualify an agency as a “criminal justice agency.” Almost certainly, the Dental Board, too, “stores” the evidence it gathers for administrative investigations it conducts as part of its revocation process in exactly

the way POST “collects, stores, and disseminates arrest and criminal records information” during its revocation process. TR 08/03/21, pp. 23:5–24:13, 71:13–15; Opinion at 8–10.

Simply put, the Court of Appeals’ interpretation of “criminal justice agency” under the CCJRA would exempt myriad state agencies’ records from CORA’s mandatory disclosure framework. The General Assembly could not have intended such a drastic—and absurd—result.

On the contrary, it is the General Assembly’s stated intent that “all public records shall be open for inspection by any person at reasonable times.” § 24-72-201, C.R.S.; *see also Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999) (explaining that CORA creates strong presumption in favor of public disclosure). And, accordingly, both the General Assembly and this Court require that exceptions to CORA’s disclosure mandate be narrowly construed. *City of Westminster*, 930 P.2d at 589. Such “exceptions to the broad, general policy of [CORA],” *id.*, include the CCJRA, which “favor[s] . . . less broad disclosure,” *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t*, 196 P.3d 892, 899 (Colo. 2008) (“The legislative policy regarding access to criminal justice records under the CCJRA *is more limited than* access to public records under CORA.” (emphasis added)).

In sum, the Opinion interprets the CCJRA’s reach broadly, thereby undermining the Legislature’s intent that any exceptions to CORA’s broad disclosure mandate be construed narrowly.

**II. The Opinion’s conclusion that POST is a “criminal justice agency” under the CCJRA also ignores the General Assembly’s intent that POST serve only as a “certification and training” agency.**

In interpreting the CCJRA’s statutory definition of a “criminal justice agency” to include POST, the Court of Appeals also failed to consider POST’s enabling statute, which makes clear that the General Assembly intended it only to perform the functions of a regulatory agency that licenses and trains peace officers.

The POST Act, §§ 24-31-301–319, C.R.S., created POST “to establish certification standards and to certify qualified peace officers.” *Fraternal Order of Police, Colo. Lodge No. 27 v. City & Cnty. of Denver*, 926 P.2d 582, 585 (Colo. 1996); § 24-31-303, C.R.S. Nothing in the Act refers to or defines POST as a “criminal justice agency.” See §§ 24-31-301–319, C.R.S. Its statutory duties are expressly circumscribed, and are limited to regulatory and administrative functions. See § 24-31-303(1)(a)–(t), C.R.S. Indeed, as the District Court, below, correctly observed, “the main function of POST” is to “make sure that police officers are certified and are qualified and to provide assurance to the public that that is the case.” TR 08/03/21, p. 88:2–5; see also §§ 24-31-301–307, C.R.S. (statutes establishing POST’s duties); *Fraternal Order of Police, Colo. Lodge No.*

27, 926 P.2d at 585. POST’s strategic plan likewise notes that it is a “*regulatory agency* . . . created to establish certification and training requirements for law enforcement agencies and officers.” CF, p. 153 & n.11 (emphasis added); TR 08/03/21, pp. 32:21–33:1. Simply put, pursuant to its statutorily prescribed duties, POST is a training and certification body—not a “criminal justice agency.”

Indeed, though POST positioned itself as a “criminal justice agency” for purposes of denying Petitioners’ CORA requests, it had not done so previously. Respondent testified that the previous Director of the Board of POST had granted CORA requests for records in the POST Database in order “to maintain compliance with [CORA].” *See* TR 08/03/21, pp. 45:22–46:23; EX, pp. 59–60. POST also expressly requires recipients of its grants to make certain records—including POST training application materials and contracts pertaining to POST funds—publicly available under CORA. TR 08/03/21, pp. 39:2–40:15. Moreover, although the Court of Appeals did not rely on the fact that POST is in the Attorney General’s Office in reaching its decision, Opinion at 2, even the Attorney General’s Office does not take the extreme position that all records of every unit of the Department of Law are subject to the CCJRA. *See* Colorado Open Records Act & Colorado Criminal Justice Records Act, Colorado Office of the Attorney General, <https://perma.cc/C65K-QRCW> (last visited June 7, 2023) (The Attorney General’s

Office's policy is "to implement [CORA] and the [CCJRA] in a uniform manner and better serve the people of Colorado").

In sum, in holding that POST's collection and storage of court and arrest records, alone, renders it a "criminal justice agency," the Court of Appeals improperly ignored the clear legislative intent that POST function as a certification and training agency. Since POST's inception, courts that have considered its functions and purpose have consistently characterized it as a licensing, certification, and training board. *See Fraternal Order of Police, Colo. Lodge No. 27*, 926 P.2d at 585; *Jackson v. State*, 966 P.2d 1046, 1053 (Colo. 1998). And that is consistent with how courts and legislatures across the country have viewed their POST or POST equivalents: as licensing or administrative agencies. *See, e.g., Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1151 (10th Cir. 2001) ("POST has been set up as the state **licensing agency** for peace officers[.]") (emphasis added); *Doe v. Utah Dep't of Pub. Safety*, 782 P.2d 489, 493 (Utah 1989) (Utah Supreme Court noting the classification of Utah's POST as a licensing agency).

In sum, the Opinion contravenes the General Assembly's intent and court precedent concerning the function and purpose of Colorado's POST, and it is out

of step with other states.<sup>9</sup> As a regulatory licensing agency, POST’s statutory authority (and, accordingly, its activities) simply do not bring it within the CCJRA’s definition of a “criminal justice agency.”

### **III. Whether POST is a “criminal justice agency” is an issue of significant public importance.**

This case squarely implicates the ability of Coloradans to scrutinize the actions of state agencies by obtaining access to those agencies’ records under Colorado public records laws, including, specifically, the agency tasked with ensuring that the peace officers charged with protecting their communities are properly trained and professionally qualified.

In *Freedom Colorado Information, Inc. v. El Paso County Sheriff’s Department*, 196 P.3d 892, 902 (Colo. 2008), this Court recognized that the discharge of a law enforcement officer for malfeasance is a matter of public interest. In order to promote accountability and transparency in law enforcement, the General Assembly enacted the Law Enforcement Integrity Act, S.B. 20-217; it did so, in part, in recognition of that strong public interest. The peace officers that

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<sup>9</sup> Colorado courts, including this Court, have recognized police departments, *see In re T.L.M.*, 39 P.3d 1239 (Colo. App. 2001); *Madrigal v. City of Aurora*, 349 P.3d 297 (Colo. App. 2014), criminal courts, *see Office of the State Court Adm’r v. Background Info. Servs., Inc.*, 994 P.2d 420 (Colo. 1999), and the Department of Corrections, *see Kopec v. Clements*, 271 P.3d 607 (Colo. App. 2011), to be “criminal justice agencies” under § 24-72-302(3), C.R.S.

POST licenses become members of law enforcement agencies across the state. As such, their qualifications and compliance with professional standards are matters of vital public concern. Access to the POST Database, where POST maintains training, certification, decertification, appointment, and separation data for peace officers statewide, is of immense importance to the public. Such data not only provides crucial information about law enforcement officers in Colorado, but also provides transparency into the activities and efficacy of POST itself.

Indeed, using government records, Osher wrote a series of articles for *The Gazette* showing how Colorado law enforcement officers have been able to migrate from department to department within the state despite having records of conduct that would bar them from law enforcement employment in other states. TR 10/05/21, p. 119:10–20; EX, pp. 124–156. And The Invisible Institute has sought and obtained, via public records requests, access to police standards and training databases for more than half of the fifty states, TR 10/05/21, p. 196:2–19; EX, pp. 168–175, resulting in public interest reporting carried out in collaboration with other news organizations nationwide. TR 10/05/21, pp. 183:14–25, 192:13–20.

The licensing status of numerous working professionals charged with ensuring the public’s safety is public information. *See, e.g.,* Verify a Colorado Professional or Business License, Colo. Dep’t of Regul. Agencies,

<https://apps.colorado.gov/dora/licensing/Lookup/LicenseLookup.aspx> (last visited June 7, 2023). The information in the POST Database should not be an exception.

## CONCLUSION

In *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983), this Court observed that “[a] free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.” The Opinion, if allowed to stand, will permit numerous state agencies to shield vital information that the General Assembly intended to be public because, under the CCJRA, unless the record of the agency is a record of “[o]fficial action,” § 24-72-302(7), C.R.S., custodians of “criminal justice records” have broad discretion to withhold them from the public. This Court previously has warned against precisely this type of secrecy. *Freedom Colo. Info.*, 196 P.3d at 904 (providing judicial review of discretionary inspection determinations “to prevent the custodian from utilizing surreptitious reasons for denying inspection of law enforcement records”). It should now, for the reasons herein, grant the Petition for Writ of Certiorari and reverse the Opinion.

Respectfully submitted this 8th day of June 2023.



By /s/Rachael Johnson

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of June 2023, a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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