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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
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On Certiorari to the Colorado Court of Appeals
Case No. 21CA1608
Denver District Court Case No. 21CV31379
Honorable Darrel F. Shockley, Judge

Petitioner:

AMANDA BRUBAKER, IN HER OFFICIAL CAPACITY AS THE RECORDS CUSTODIAN OF THE COLORADO DEPARTMENT OF HUMAN SERVICES,

v.

Respondent:

COLORADO SUN AND COLORADO SUN, INC., D/B/A KUSA-TV/9NEWS,

▲ **COURT USE ONLY** ▲

Case No. 2023SC927

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PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 25 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. 53(f)(1).

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/s/Jennifer L. Carty

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ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred as a matter of law in concluding that section 19-1-307(1)(a), C.R.S. (2022) is ambiguous.

If section 19-1-307(1)(a) is ambiguous, whether the court of appeals erred in concluding the legislative history and *Peck v. McCann*, 43 F.4th 116 (2022), support its interpretation of the statute.

CASE REPORTED

Colorado Sun and Colorado Sun, Inc., d/b/a KUSA-TV/9News v. Amanda Brubaker, in her official capacity as the Records Custodian for the Colo. Dep't of Human Servs., 2023 COA 101 (copy attached).

JURISDICTIONAL STATEMENT

This Court's certiorari jurisdiction is invoked under article VI, section 2 of the Colorado Constitution, § 13-4-108, C.R.S. (2023), and C.A.R. 49.

On November 2, 2023, the court of appeals published a decision reversing the judgment of the lower court and remanding the case with directions. This Court granted an extension of time through December 28, 2023, to file a petition for certiorari. This Petition is timely.

RELATED PENDING CASES

Undersigned is not aware of any pending case where a petition for writ of certiorari has been granted on these issues.

STATUTORY PROVISION AT ISSUE

Section 19-1-307(1)(a), C.R.S. (2022): "**Identifying information--confidential**. Except as otherwise provided in this section and section 19-1-303, reports of child abuse or neglect and the name and address of any child, family, or informant or any other identifying information contained in such reports shall be confidential and shall not be public information."

STATEMENT OF THE FACTS AND CASE

The Department of Human Services (Department) licenses and regulates residential childcare facilities (RCCFs), which provide "24-hour group care and treatment for children" with complex mental and behavioral health needs. § 26-6-903(29), C.R.S. (2023). Some of Colorado's most vulnerable children, including many who are placed

after being removed from their homes by court order, reside in RCCFs. 12 C.C.R. 2509-8, § 7.705.1.

On March 26, 2021, 9News submitted a Colorado Open Records Act (CORA) request to the Department seeking in part, "any documents that show how many calls have been made to the child abuse hotline from Mount Saint Vincent (RCCF) and Cleo Wallace (RCCF) from 1/1/2018 to 3/26/2021." CF, p 8.

On April 5, 2021, the Department received a second CORA request, from the Colorado Sun, requesting records including "[t]he number of hotline calls/abuse and neglect reports/runaway reports from Tennyson Center, Mount St. Vincent and Cleo Wallace to local child welfare authorities in the last three years, and how many were screened in." CF, p 11.

The Department properly denied both requests under CORA section 24-72-204(1)(a) as contrary to a state statute. Responsive records were confidential pursuant to section 19-1-307(1)(a). Colorado Sun and 9News (Requesters) asked the Department to reconsider.

The Department confirmed the denials, explaining that the name of a RCCF facility was sufficient to identify its location—confidential information under section 19-1-307(1)(a). Because the request referred to hotline calls made from identifiable residential facilities, the information was likely to *identify the confidential address* of the child or informant associated with the calls. The Department offered to provide the aggregate number of hotline calls for the requested dates from all three facilities, and the aggregate number of hotline calls that were referred to the county.

Requestors filed a Complaint in district court. The Department's Motion to Dismiss for failure to state a claim on which relief could be granted was granted. The Court determined information related to hotline calls made from specific, identified residential facilities, and naming specific facilities "necessarily identifies the address or specific location of a reported incident." Acknowledging that linking individual calls to a specific child or informant might be difficult, the district court concluded the Department properly withheld the information.

Court of Appeals Proceedings

Requesters appealed, claiming the district court incorrectly concluded that disclosure of the number of calls from the facilities would potentially identify a child or informant and thus constituted identifying information. Requesters argued that section 19-1-307(1)(a) only prohibited disclosing "identifying information" about individuals and there had been no showing that this information would be identifying.

A divided division of the court of appeals agreed with Requesters' interpretation and remanded the case. *Colorado Sun*, ¶ 44. The majority focused its reasoning on the statutory meaning of "the name and address of any child, family, or informant or any other identifying information." *Colorado Sun*, ¶ 24. It concluded that section 19-1-307(1)(a) did not prohibit the disclosure of an address contained in a child abuse report under *all* circumstances. *Colorado Sun*, ¶ 3. Rather, the majority determined it was the legislature's intent to

prohibit disclosure of only information that would identify a particular child, family, or informant associated with a report. *Id.* at ¶¶ 4, 41.

To do so, the majority had to conclude that section 19-1-307(1)(a) was ambiguous. *Id.* at ¶ 32. It acknowledged that the Department's reading of the statute was reasonable and consistent with the rules of grammar, but concluded that (1) use of the conjunctive word "and" to connect "name and address" *might* signal that the legislature did not intend for any address on its own to be confidential, but rather only addresses that are also disclosed with the specific associated names, and (2) the phrase "or any other identifying information" *may* limit and modify the enumerated term "name and address." *Id.* at ¶¶ 25-28. Employing a "sort of reverse ejusdem generis" rule of syntax, the majority claimed the statute could be read as protecting names or addresses from disclosure *only* if they constituted identifying information. *Id.* at ¶ 28 (citing *United States v. Williams-Davis*, 90 F.3d 490, 509 (D.C. Cir. 1996)).

The majority then looked to legislative history for interpretation. Reiterating the legislative investigation discussed in *Peck v. McCann*, 43 F.4th 1116, 1126 (2022), the majority noted that the amendments were made close in time to the decision in *Gillies v. Schmidt*, 556 P.2d 82 (Colo. App. 1976), which challenged the original statute as a violation of Colorado's Public Meetings Law, and addressed a lower court order that drew a line between confidential and nonconfidential information. *Id.* at ¶¶ 15-20. The majority concluded the legislature was likely attempting to adopt the lower court's dividing line overruled in *Gillies*. *Id.* at ¶ 34. In the majority's view, based on this history, the Department's reading made "less sense." *Id.* at ¶¶ 34-36.

Despite acknowledging that the Department's reading of the statute treated names and addresses as *per se* "identifying information," the majority decided that the Department's construction would require that some *non*-identifying information be kept confidential. Citing *Peck*, the majority asserted that the Department's construction could

not be squared with other sections of the Children's Code and suggested it could raise "difficult constitutional problems." *Id.* at ¶¶ 38-39.

In a incisive dissent, Judge Pawar explained that the statute was *un*ambiguous and the only reasonable reading based on the clear statutory language is the Department's– *i.e.*, that names and addresses in child abuse reports are always identifying and thus protected from disclosure. *Colorado Sun*, ¶ 45 (Pawar, J., dissenting). Accordingly, Judge Pawar would not have looked beyond the statute's unambiguous language. *Id.* Even accepting Requesters' interpretation as grammatically reasonable, Judge Pawar concluded it was unreasonable in substance. *Id.* at ¶ 49. In her view, the idea that the legislature intended to protect the names and addresses of child abuse victims only in certain circumstances, and that decisions regarding disclosure of that information were in the hands of a records custodian, was absurd and illogical. *Id.*

WHY THIS COURT SHOULD GRANT THE WRIT

The court of appeals' incorrect decision doesn't heed the statute's plain language, misapplies caselaw, relies heavily on foreign jurisdiction caselaw, and untenably concludes that an agency records custodian must disclose a name or address in a child abuse report unless they can definitively show it would lead to identification of a particular child, family, or informant. This significantly enhances the agency's burden to determine whether an address is, in fact, identifying.

This Court's review is necessary to resolve this novel question of statutory interpretation with statewide impacts.

I. The court of appeals erred in concluding the statute is ambiguous.

Contrary to the court of appeals' conclusion, section 19-1-307(1)(a) unambiguously prohibits disclosure of the names and addresses of children, family, or informants contained in child abuse reports.

A. The statutory language is plain, so the majority's resort to tools of statutory interpretation was inappropriate.

Section 19-1-307(1)(a) states that "[e]xcept as otherwise provided in this section and section 19-1-303, reports of child abuse or neglect and the name *and address* of any child, family, or informant or any other identifying information contained in such reports shall be confidential and shall not be public information." (Emphasis added).

Thus, under the statute's plain language, absent exceptions not applicable here, the following pieces of information are confidential:

- Reports of child abuse or neglect;
- The name and address of any child, family, or information contained in such report; and
- Any other identifying information contained in such report.

§ 19-1-307(1)(a). This is the clear statutory language.

The majority acknowledges, as a matter of grammar, the phrase could instantly be understood as a series consisting of the terms "name," "address," and "any other identifying information." *Colorado*

Sun, ¶ 25. Likewise, it confirms that U.S. and Colorado Supreme Court precedent supports this reading. *Id.* at ¶ 26 (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008); *Indus. Claim Appeals Off. v. Ray*, 145 P.3d 661, 664 (Colo. 2006)).

But the majority erroneously grafted on an unwritten statutory exception to apply the phrase "or any other identifying information" in such a way as to require proof that the items listed before it – reports, names, and addresses – are also specifically identifying in each instance. *But see Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) (This Court does "not add words to the statute[.]") (citing *Colorado Dep't of Revenue v. Hibbs*, 122 P.3d 999, 1004 (Colo. 2005). Section 19-1-307(1)(a) contains no such restriction. *Colorado Sun*, ¶¶ 27, 31.

To reach this conclusion, the majority entertained an unreasonable reading. It surmised it was *possible* that the legislature used the word "and" in the phrase "name and address" to signal that it did not intend for an address on its own to be confidential. Rather, only

addresses that are disclosed with associated names were confidential. *Colorado Sun*, ¶27.

This interpretation treads far into the realm of statutory interpretation, disregarding the plain meaning of the words. Applying the majority's logic to its necessary end demonstrates its absurdity. Armed only with an address, a person could show up at the location and determine who resides there. All that would be required is for that person to knock on the door or talk to neighbors to determine who lives in the home. Similarly, searching public property records would identify the owner of the property and the family likely residing there. Accordingly, the majority's suggestion that the legislature *only* intended addresses to be confidential when disclosed with a name belies common sense and is objectively unreasonable.

Likewise, applying the majority's same construction logic to "name" demonstrates this reading's absurdity. A requirement that the legislature did not intend for *a name* on its own to be confidential, but rather only a name disclosed with an address, is objectively

unreasonable since a "name" is inherently defined as and used as a specific identifier. *See Name,* MERRIAM-WEBSTER DICTIONARY (2023) ("A word or phrase that constitutes the *distinctive designation* of a person or thing.") (emphasis added); *Name*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A word or phrase *identifying* or designating a person or thing and distinguishing that person or thing from others") (emphasis added).

In construing a statute, courts "must respect the legislature's choice of language" and "not add words to the statute or subtract words from it." *Oakwood Holdings, LLC v. Mortgage Invest. Enter. LLC*, 2018 CO 12, ¶ 12. The majority ignored this principle. Section 19-1-307(1)(a) includes no language indicating that its confidentiality provisions should be limited, and such a reading is directly at odds with the statute's plain language.

B. The court of appeals misapplied governing case law and reverse *ejusdem generis*.

In its attempt to buttress its conclusion that section 19-1-307(1)(a) was ambiguous, the court of appeals misapplied governing and foreign

case law, failed to properly apply reverse *ejusdem generis*, and disregarded other Colorado precedent.

The majority heavily relied on *United States v. Williams-Davis*, 90 F.3d 490, 509 (D.C. Cir. 1996), and *Mortgage Brokerage Co. v. Mills*, 67 P.2d 68 (Colo. 1937), to conclude that "any other identifying information" could be read as modifying or limiting the enumerated terms "name" and "address." *Colorado Sun*, ¶¶ 28-30 (citations omitted). It reasoned that the statutory principles from these cases permitted a reading of the statute that disclosure of an address is only prohibited when it constitutes "identifying information." *Id.* at ¶¶ 28, 31. Notably, *Williams-Davis* is not controlling, and the majority should not have relied on it as primary authority. Additionally, this reasoning is misguided and requires this Court's correction.

Both *Williams-Davis* and *Mortgage Brokerage Co.* employ the doctrine of reverse *ejusdem generis*, meaning the general term reflects *back* on the more specific terms. *See Williams-Davis*, 90 F.3d at 508-09. The basic principle is that if the phrase is "**A**, **B**, or any other **C**," then **A**

is a subset of **C**. *Id.* (emphasis added). Accordingly, application of the rule to this case requires reading **(A)** "name" and **(B)** "address" as subsets of **(C)** "any other identifying information." Said differently: "name" and "address" are always identifying, as they are specific *types* of identifying information.

However, the majority misconstrued the legal principles. It improperly focused on those courts' factual analyses of the defendants' actions in relation to the statutes instead of the courts' rule of construction for the statute itself. *Colorado Sun*, ¶¶ 29-30.

For example, in *Williams-Davis*, the issue was whether the district court should have instructed the jury that it could not consider various drug suppliers as people the defendants "supervised or managed" for purposes of triggering criminal liability under a criminal enterprise statute. 90 F.3d at 508. The statute defined criminal enterprise as follows: "in concert with five or more other persons with respect to whom such person occupies a position of *organizer, a*

supervisory position, or any other position of management." *Id.* (emphasis added).

In discussing prior cases, *Williams-Davis* noted the statutory language "or any other position of management" meant that an "organizer" and "supervisor" exercised some sort of managerial responsibility for purposes of the statute. *Id.* at 508-09 ("[T]o be an organizer *within the sense of this statute* more is required than simply being a steady customer.") (citation omitted) (emphasis added).

Here, though, the majority misconstrued that court's conclusion to mean that the Department must conduct an independent analysis as to whether either a name or an address is identifying before determining its release is prohibited. *Colorado Sun*, ¶¶ 29, 31. This is not so. And this reasoning flouts the clear statutory language. The *Williams-Davis* court's analysis reflects that, for purposes of that specific statute, **(A)** "organizers" and **(B)** "supervisors" are subsets of **(C)** "position[s] of management." An "organizer" might mean something different in another context, but for this statute—in applying reverse *ejusdem*

generis —the Court assumed that **(A)** and **(B)** *were always defined* as a subset/type of **(C)** for purposes of triggering statutory criminal liability. *Williams-Davis*, 90 F.3d at 508-09.

The majority made the same mistake in its reading of this Court's opinion in *Mortgage Brokerage Co.* While the defendant in that case did not act in a way that met the terms of the statute, the terms themselves were not the issue. 67 P.2d at 270. This Court noted that the terms within the statute could *not "be construed in any other way* than with the meaning that the terms used are intended to denote the specific acts of dishonesty named" based on the immediately following phrase "or any other act of fraud or dishonesty." *Id.* at 269 (emphasis added). Thus, while defendant's *actions* may not have been fraudulent or dishonest, the terms **(A)** "wrongful abstraction" and **(B)** "willful misapplication" were *per se* defined as subsets of **(C)** "fraudulent or dishonest" acts and could not be "construed in any other way" for purposes of that statute. *Id.* Therefore, to trigger liability, defendant's

actions had to be fraudulent or dishonest. *Id.* at 269-70. That rationale does not apply here.

Moreover, the majority disregarded more instructive federal and state caselaw involving statutes more similar to the one at issue here. Here, the Department argued, and the majority acknowledged, cases like *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-219 (2008), and *Indus. Claim Appeals Off. V. Ray*, 145 P.3d 661, 664 (Colo. 2006), supported its plain reading of the statute. *Colorado Sun*, ¶ 26. Similar to this case, *Ali* and *Ray* concerned statutes that were partly comprised of a list of enumerated nouns followed by a "catch all" phrase. *See Ali*, 552 U.S. at 220-21; *Ray*, 145 P.3d at 664. For example, *Ali* concluded that the catchall clause "any other law enforcement officer" was most naturally read to mean law enforcement officers of whatever kind, in addition to those specifically enumerated. 552 U.S. at 218-19. And when discussing the statutory definition of "wages," *Ray* characterized specific enumerated terms as "advantages" by concluding that "any

other similar advantages" provided a means for including employment benefits not otherwise specified. 145 P3d at 664-65.

Both cases treated the enumerated terms prior to their "catch all" phrase as subsets of that phrase. However, without explanation, the majority disregarded those cases in favor of its misapplication of *Mortgage Brokerage Co*. and *Williams-Davis*.

II. Even if the statute is ambiguous, legislative history does not support the court of appeals' conclusion.

In examining legislative history, the majority adopted the discussion of the Tenth Circuit in *Peck*, and yet misinterpreted its analysis and conclusion. *See Colorado Sun,* ¶¶ 14-20, 33-42.

As the first step in addressing a First Amendment claim, the *Peck* court considered whether section 19-1-307(1) improperly restricted the disclosure of identifying and *non*-identifying information contained in child abuse reports. The *Peck* court concluded that "the plain text of Section 307(1)(a) limits its scope to identifying information only, as indicated by the subheading '[i]dentifying information.'" 43 F.4th at

1125. The court also indicated that "the name and address of any child, family, or informant or any other identifying information" was limited "by its own terms to the identifying information contained in a report" and *reached* "*only identifying disclosures*." *Id.* at 1125 (emphasis added). The court *did not* suggest that the statute required a case-by-case analysis of whether each enumerated term constituted identifying information. Rather, it assumed that this provision discussed identifying information only—including, implicitly, the address provision.

Further, to the extent that *Peck* discussed *Gillies v. Schmidt*, 556 P.2d 82 (Colo. App. 1976), and subsequent legislative changes, it was only to support the plain-text reading it had already made. As the *Peck* court noted, the post-*Gillies* amendment to the statute deleted the phrase "the contents of any record or report" so that the statute "effectively stated the same rule as Section 307(1) does today." 43 F.4th at 1126. The amendment narrowed the statute from one that

prohibited disclosure of the *entire contents* of the report to one that covered the identifying information therein. *Id.*

Contrary to the majority's reading, the *Peck* court analysis did not create a question of whether "name and address" were identifying information. It simply indicated that "Section 307(1), on its own, prohibits and penalizes only the disclosure of identifying information from child abuse reports," so the plaintiff had not alleged any injury under that section. *Peck*, 43 F.4th at 1126. This was in contrast to section 19-1-307(4), which prohibited disclosure of "data or information contained in the records and reports"— an overly broad provision that included clearly *non*-identifying information. *Id.* at 1127. The majority incorrectly relied on the *Peck* court's analysis of Section 307(4) to justify its improper reading of Section 307(1). *Colorado Sun*, ¶¶ 38-39.

Here, the majority never should have reached the legislative history because the plain meaning of the statute is clear. *See Carerra v. People*, 2019 CO 83, ¶ 18 (courts only turn to other rules of statutory construction if the statutory language is ambiguous). However, even

were the statute ambiguous, the legislative history still does not compel the majority's conclusion. The amendment subsequent to *Gillies* indicates only that the previous prohibition on disclosing the "entire contents" of a child abuse report was overly broad and confounded the intent of Public Meetings Law. *See Peck*, 43 F.4th at 1126.

What the legislative history actually reveals is that the original version of the statute did not allow for a proper balancing of the best interests of children with the need for government agency transparency during public meetings. The narrowing of the statute was to allow child protection teams to publicly discuss agency responses, *not* to force a case-by-case analysis by a records custodian as to whether an address would definitively identify a child, family, or informant. Ch. 246, sec. 1, § 19-10-102, 1977 Colo. Sess. Law 1020.

Accordingly, the legislature amended the statute to permit the discussion of agency responses in public meetings. *Id.* at sec. 8, § 19-10-115, 1977 Colo. Sess. Laws at 1023. But it constructed the statute to protect the privacy of a child, family, or informant and ensured that

they would not be the accidental casualty of transparency. The new language prohibited disclosure of names and addresses as per se identifying, and included its "catch all" phrase so that any other additional identifying information apart from and in addition to a name and/or address could also be withheld to protect the child's privacy (*e.g.*, the information is the basketball coach at a named middle school). *Id.* The legislative history does not compel a different conclusion.

Finally, this reading of the history and the structure of the statute is supported by the current legislative declaration, which recognizes that information obtained in the investigation of child abuse or neglect "is highly sensitive and has an impact on the privacy of children and members of their families" and disclosure of sensitive information carries the risk of stigmatization, while also recognizing that disclosure of certain information may be in the public interest. § 19-1-302(1)(a), (2), C.R.S. (2023).

CONCLUSION

This Court needs to address appropriate parameters of disclosure for highly sensitive information in reports of child abuse and neglect. Protection of the confidentiality of children, families, and informants is essential to ensuring both the safety of children and the willingness of witnesses to come forward. The court of appeals' opinion not only is legally erroneous, but it also puts the safety and privacy of children, families, and informants in jeopardy. Given these statewide considerations of first impression, this Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI, upon all parties herein electronically via Colorado Courts E-filing, at Denver, Colorado, this 28th day of December, 2023 to the Clerk of Court and to Respondent.

/s/ Maddie Vines