DATE FILED: July 13, 2020 5:15 PM

COLORADO SUPREME COURT
Colorado State Judicial Building
Two East 14th Avenue
Denver, CO 80203

CERTIORARI TO COLORADO COURT OF APPEALS
Appeals Court Case No. 2019CA001130

Appeal from the Denver District Court, Honorable Judge David H. Goldberg, District Court Judge, Case No. 2019CV30973.

Petitioners: CINDI MARKWELL, Secretary of the Senate, and LEROY M. GARCIA, JR., President of the Senate,

v.

Respondents: JOHN B. COOKE, Senator, ROBERT S. GARDNER, Senator, CHRIS HOLBERT, Senate Minority Leader.

Attorneys for Petitioners:
Mark G. Grueskin, No. 14621
Marnie C. Adams, No. 39395
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, Colorado 80202
Tel: 303-573-1900
Fax: 303-446-9400
mark@rklawpc.com
marnie@rklawpc.com

□ COURT USE ONLY □

Case Number:

Attorneys for Respondents:
John S. Zakhem, No. 30089
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202
Tel: (303) 390-0351
Fax: (303) 390-0177
jszakhem@jacksonkelly.com

JOINT PETITION FOR WRIT OF CERTIORARI, PURSUANT TO C.A.R. 50

TABLE OF CONTENTS

ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW.....1
DISTRICT COURT OPINION FROM WHICH REVIEW IS SOUGHT 1
PENDING CASES PRESENTING SAME LEGAL ISSUE.....2
JURISDICTION.....3
STATEMENT OF THE CASE.....3
Introduction 3
FACTS.....4
PROCEEDINGS BELOW 6
LEGAL ARGUMENT IN SUPPORT OF PETITION 7
A. This substantive question has not yet been decided by the Supreme Court 9
B. This is an important state question to be decided by this Court.....10
C. This matter requires near-term, definitive resolution by this Court. 11
D. Other equitable considerations 12
CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Bloomer v. Boulder Board of Comm'rs, 799 P.2d 942, 946 (Colo. 1990) 9
Colo. Gen. Assembly v. Owens, 136 P.3d 262, 264 (Colo. 2006) 14
In re Interrogatories from House of Representatives, 254 P.2d 853, 856-57 (Colo. 1953) 11
In re Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 557 (Colo. 1999) 14
People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1230 (Colo. 2003) 14
Rocky Mtn. Gun Owners v. Polis, Case No. 2020CA000997, Colorado Court of Appeals 2
Rocky Mtn. Gun Owners v. Polis, Case No. 2019CV31716, Denver District Court. 2, 16
Vaughn v. McMinn, 945 P.2d 404, 406 n.4 (Colo. 1997) 8

Statutes

C.R.S. § 13-4-108(3) 2

Rules

C.A.R. 50 ..... passim

Constitutional Provisions

Colo. Const., art. V, § 22 ..... 3, 6, 11, 13
Colo. Const., art. V, § 12 11
Colo. Const., art. X, § 20 14
Colo. Const., art. V, § 20 and §22b 6, 7

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Petition complies with C.A.R. 53(f) as it contains 2,494 words.

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

s/ Mark G. Grueskin
Mark G. Grueskin

ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

1. Did the District Count err in finding that a dispute over the manner of the State Senate's "reading" of a pending bill, pursuant to Colo. Const., art. V, Sec. 22, was justiciable, rather than finding it was a political question and thus refuse to exercise jurisdiction?
2. Did the District Court correctly evaluate the requirements for injunctive relief to direct the manner of the State Senate's "reading" of a pending bill?
3. Did the District Court err in granting declaratory relief, in light of non-textual parameters it established to direct bill readings in the State Senate for House Bill 19-1172 and future bills?

DISTRICT COURT OPINION FROM WHICH REVIEW IS SOUGHT

At the time of this application for certiorari under C.A.R. 50, the only decision below is the one rendered by the Denver District Court granting a preliminary injunction, attached as Appendix A. Thereafter, the parties stipulated to a permanent injunction so the appellate courts could consider the matter, and that order is attached as Appendix B. Timely appeal was taken from the District Court to the Court of Appeals, all briefs have been filed with the Court of Appeals, and the case is pending there at this time.

PENDING CASES PRESENTING SAME LEGAL ISSUE

The parties are unaware of any other cases pending before this Court that present the issues in this matter.

A Denver District Court recently addressed whether the leadership of the State House of Representatives gave effect to two members' objection to unanimous consent for bypassing the reading of a bill at length.[1] On May 19, 2020, the District Court issued an order granting the defendant's motion to dismiss that lawsuit, attached as Appendix C. That District Court found that the dispute involved a nonjusticiable political question, and thus the District Court lacked jurisdiction to decide it.

The District Court's decision has been appealed to the Court of Appeals (Case No. 2020CA997).

1 *See Rocky Mtn. Gun Owners v. Polis*, Case No. 2019CV31716, Denver District Court.

JURISDICTION

This petition arises from the District Court's order dated May 8, 2019, certified as Final Judgment and a Permanent Injunction. This Court may invoke jurisdiction over a matter now before the Court of Appeals, pursuant to C.R.S. § 13-4-108(3) and C.A.R. Rule 50.

STATEMENT OF THE CASE

Introduction

At issue is a district court decision that held that the Colorado State Senate failed to comply with a constitutional procedure, referred to generally as the "reading" of legislative bills at length. Article V, Section 22 of the Colorado Constitution ("Section 22") is the provision of law at issue and states: "Every bill shall be read by title when introduced, and at length on two different days in each house; provided, however, any reading at length may be dispensed with upon unanimous consent of the members present."

The District Court held that the issue before it was not a political question, that the District Court could interpret the Colorado Constitution to determine when a bill "reading" has taken place, and that Appellants had not complied with this interpretation of what constitutes a bill "reading." The Court went on to identify

certain standards to be applied in meeting the constitutional requirement for reading a bill at length. Regardless of the outcome before the Court of Appeals, this matter will undoubtedly be brought for review to this Court in the future.

FACTS

Appellant Markwell is the Secretary of the State Senate. Appellant Garcia is the President of the State Senate.

Appellees Cooke and Holbert are Assistant Minority Leader and Minority Leader, respectively, of the Colorado State Senate. Appellee Gardner is also a member of the State Senate.

In March, 2019, the State Senate considered House Bill 19-1172 ("HB 1172"), a recodification of existing statutes related primarily to the regulation of professions and occupations. HB 1172 was a 2,023-page, 560,254-word bill.

Appellee Cooke asked that all 2,023 pages of HB 1172 be read in the Senate prior to passage on second reading. Appellants initially authorized this bill reading through the reading by a single person at the front of the Senate chamber. After about 3½ hours, Appellant Markwell directed Senate staff to set up multiple computers on the Senate floor to effect a simultaneous reading through the use of those computers. There were as few as four (4) and as many as six (6) such

computers used to achieve this objective. Appellees objected to the mechanized, simultaneous reading of different sections of HB 1172 at approximately 625-650 words per minute, through multiple computers.

Appellees argued to the District Court that the process used did not satisfy the constitutional provision pertaining to the "reading" of a bill at length. Appellants argued that it was the Senate's prerogative to determine how best to meet the reading requirement in Section 22 and that the bill was read.

The District Court found in favor of Appellees and "direct[ed] the Secretary of the Senate, upon a proper objection, [to] comply with Const. art. V, §20 and §22b and employ a methodology that is designed to read legislation in an intelligible and comprehensive manner, and at an understandable speed." Appendix A at 8.[2] The District Court's holding cited certain principles ("intelligible," "comprehensive," and "understandable") to which a reading would have to adhere. Regardless of the party or the individuals holding legislative leadership positions in the future, these concepts are likely to be the subject of future litigation if the question of what constitutes an acceptable reading at length under Section 22 is not resolved. The

2 The District Court mistakenly attributed its ruling to the requirements of these two sections of the Colorado Constitution. In fact, it is Section 22 of Article V of the Constitution that addresses the requirement of reading bills.

parties agree it is critical for the State Senate to know what is required of it to comply with Section 22.

This matter has been fully briefed before the Court of Appeals. Given this extraordinary time in Colorado's history, the applicability and reach of the District Court's decision is of even greater consequence if the Senate is to achieve key legislative tasks under demanding conditions. Thus, this matter is now able to be, and should be, decided by this Court.

PROCEEDINGS BELOW

In the District Court, Appellees sought: (1) declaratory relief that the simultaneous reading of HB 1172 by four to six computers violated Article V, sections 20 and 22b;[3] (2) declaratory relief that the Secretary of the Senate must read legislation, including HB 1172, in an intelligible manner and at an understandable speed; (3) injunctive relief requiring a certain manner of reading of all legislation, including HB 1172, in an intelligible manner and at an understandable speed; and (4) injunctive relief to prevent the passage of HB 1172 unless the bill was read at length but not if the members of the Senate unanimously agreed to waive such reading.

3 *See* note 2, *supra*.

On March 13, 2019, Appellees sought and obtained a temporary restraining order after an *ex parte* hearing. On March 19, 2019, after the testimony of one plaintiff, the playing of a recording of a short portion of the computers' reading of HB 1172, and legal argument, the District Court issued a preliminary injunction. Appendix A.

On May 8, 2019, the District Court granted the parties' stipulated motion for the entry of a permanent injunction, Appendix B, thus obviating the need for further factual findings by the District Court and facilitating appellate review.

A timely notice of appeal was filed in the Court of Appeals on June 18, 2019. The District Court certified the record to the Court of Appeals on August 13, 2019. The parties' responsive briefing was completed earlier this year, and the matter has been pending before the Court of Appeals since January 17, 2020.

LEGAL ARGUMENT IN SUPPORT OF PETITION

C.A.R. 50 authorizes this Court to assume jurisdiction to grant a petition for writ of certiorari to review a case pending before the Court of Appeals. This case meets all three of Rule 50's criteria, although the Court may acquire jurisdiction so long as any one (1) of them has been met. That rule provides:

Rule 50. Certiorari to the Court of Appeals Before Judgment

> **(a) Considerations Governing**. A petition for writ of certiorari from the supreme court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted upon a showing that:
>
> (1) the case involves a matter of substance not yet determined by the supreme court of Colorado, or that the case if decided according to the relief sought on appeal involves the overruling of a previous decision of the supreme court; or
>
> (2) the court of appeals is being asked to decide an important state question which has not been, but should be, determined by the supreme court; or
>
> (3) the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court.

(Emphasis added.)

C.A.R. 50 is properly invoked as to any matter "newly filed or **pending** in the court of appeals." *Vaughn v. McMinn*, 945 P.2d 404, 406 n.4 (Colo. 1997) (emphasis added). Its application to any specific matter is discretionary, based on at least one of the aforementioned factors. Given that C.A.R. 50 uses "or" as to the three factors, the Court need only be satisfied that one of them is sufficiently weighty to warrant its accepting jurisdiction as to any given case. *See Bloomer v. Boulder Board of Comm'rs*, 799 P.2d 942, 946 (Colo. 1990) ("use of the disjunctive 'or' demarcates different categories") (citations omitted).

A. This substantive question has not yet been decided by the Supreme Court.

As to the first element of C.A.R. 50 – whether this matter is one that has not yet been decided by the Supreme Court – there has never been appellate review in Colorado concerning whether a non-human reading or simultaneous reading of different portions of a bill (or a combination of the two) meets the constitutional requirement that a bill has been "read." As reflected in the briefs to the Court of Appeals, this question has been addressed by appellate courts elsewhere, however.

Moreover, no Colorado decision from the modern era that has applied Section 22 in light of modern technology or existing resources by which interested parties may know the content of bills and amendments. Other states' appellate courts have considered whether a reading of a bill in the manner that occurred here meets a constitutional "reading" requirement, but the parties give very different weight to those out-of-state decisions.

This dispute presents the questions of: (1) how a bill is read, in light of modern capacity for such reading; (2)what is the scope of the General Assembly's authority to implement Colorado's constitutional requirements that apply to the legislative process; and (3) whether the judicial branch may such legislative authority. Given

the parties' agreement about the need for a definitive ruling on these questions, this Court should assume jurisdiction over the pending appeal rather than awaiting a decision by the Court of Appeals and filing of a petition for certiorari thereafter.

B. This is an important state question to be decided by this Court.

As to the second factor set forth in C.A.R. 50 – whether this controversy presents an "important state question" which "should be decided by the supreme court" – the matter of how much authority the General Assembly has over its own procedures and whether a district court has the authority to determine whether that authority is properly exercised clearly qualifies under that test. A matter of "great public importance" occurs when there is a controversy about the relative powers of co-equal branches of government. *Colo. Gen. Assembly v. Owens*, 136 P.3d 262, 264 (Colo. 2006) (addressing dispute between legislative and executive branches over the appropriation process); *cf. People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1230 (Colo. 2003) (matter of great importance when there is "a conflict between two officers of the state" – there, the attorney general and the secretary of state). Courts focus on avoiding an interpretation of a constitutional mandate that could "lead to absurd results" or "cripple the everyday workings of government." *See, e.g., In re*

Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 557 (Colo. 1999) (interpreting "TABOR," Colo. Const., art. X, §20).

Here, the dispute involves two co-equal branches – the judiciary and the legislature – each of which asserts authority to determine whether a constitutionally required legislative procedure has been adhered to. This matter also presents disputes between multiple officers of the state – the three plaintiff state senators and the Secretary of the Senate and the President of the Senate. Thus, the second factor of C.A.R. 50 is satisfied, making it appropriate for this Court to now address this controversy.

C. This matter requires near-term, definitive resolution by this Court.

As to the third factor of C.A.R. 50 – whether this matter is a question of imperative importance that warrants a deviation from normal appellate processes – this dispute implicates the law-making process in precarious times. The resolution of this matter, therefore, should be authoritative and final. Short of such a decision from this Court, there remains the possibility of multiple instances of litigation, filed to decide what methods may be used to satisfy Section 22's requirement for reading a bill at length.

Legislators and voters should be able to know, when the "reading" requirement is at issue, the extent of discretion to be exercised by the Senate (or the House of Representatives) to meet Section 22's requirements. All interested citizens should be able to rely on the fact that the processes used will not subject enacted legislation to post-enactment challenges.

Therefore, this final element of C.A.R. 50 is satisfied by the facts and law at issue here.

D. Other equitable considerations

Given that briefing of this matter before the Court of Appeals has been completed, a grant of certiorari now will allow the near term consideration of this matter by this Court. Even with oral argument (and, potentially, this Court's direction that the parties file simultaneous briefs on identified issues), this Court's decision on the issues presented by the appeal would limit the time and expense incurred by both parties and allow for prompt resolution of these issues. Thus, the granting of certiorari will benefit all parties in this matter.

CONCLUSION

The prospect of litigation over whether either the Senate or the House of Representatives is meeting the District Court's parameters for the reading

requirement is real. Because the legislative session is limited to 120 calendar days each year, time used to resolve such disputes is an unnecessary diversion from the policy-making objectives voters expect their legislators to achieve. This Court should address the lower court's decision now to bring finality to this important question.

Pursuant to C.A.R. 50, therefore, the parties jointly request that this Court assume jurisdiction over this appeal.

Respectfully submitted,

RECHT KORNFELD, P.C.

/s Mark G. Grueskin
Mark G. Grueskin, No. 14621
Marnie C. Adams, No. 39395
Attorneys for the Appellant

JACKSON KELLY PLLC

/s John Zakhem
John Zakhem, No. 30089
Attorney for Appellees