COLORADO COURT OF APPEALS 2 East 14th Ave. Denver, CO 80202 DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO Case Number: 2019CV30973 **JOHN B. COOKE, Senator; ROBERT S. GARDNER, Senator, and CHRIS HOLBERT, Senate Minority Leader, Appellees-Plaintiffs,** **v.** **CINDI MARKWELL, Secretary of the Senate, and LEROY M. GARCIA, JR., President of the Senate, Appellants-Defendants.**	▲ COURT USE ONLY ▲
Attorneys for Appellants: Mark G. Grueskin, #14621 Marnie C. Adams, # 39395 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No.** 2019CA1130
Appellants' Reply Brief	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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s/ Mark G. Grueskin
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INTRODUCTION

In their Answer Brief, Appellees Cooke, Gardner, and Holbert ("Cooke") argue the political question doctrine has no effect in Colorado. The Supreme Court debunked that contention, lest the legislature be "swallowed up" by the judiciary or we forget our Constitution is premised upon "separating the powers of state government." Accordingly, courts commit the "form and manner" of constitutional compliance to the General Assembly.

Further, Cooke searches for voter intent from 1876 by using definitions that were not published for more than a decade *after* voters adopted this requirement. The common meaning of "read" whenever Section 22 of article V of the Colorado Constitution ("Section 22") was addressed by voters was more direct. It simply meant, and means, "to utter aloud." Markwell and Garcia ("Markwell") met this standard.

I. The District Court erred by deciding a non-justiciable political question.

A. Cooke's political question analysis omits a key consideration: Colorado courts leave the determination of the "form and manner" of compliance with constitutional procedures to the legislature.

Cooke fails to address this consistent limitation on judicial review: the "manner and form" of compliance with constitutional requirements about legislative process are in "the sole province of the Legislature." *In re Interrogatories from the*

House of Representatives Concerning Senate Bill No. 24, 254 P.2d 853, 857 (Colo. 1953) ("*Interrogatories re Senate Bill No. 24*"). "Whatever manner or form the Legislature may provide" is such compliance. *Id.*

At most, Cooke highlights an obvious point: courts determine if the General Assembly ignored a constitutional requirement or acted to meet it. Answer Brief at 16-17, citing *In re Interrogatories of Governor Regarding Certain Bills of Fifty-First Gen. Assembly*, 578 P.2d 200, 209 (Colo. 1978) ("*In re Interrogatories*"). In *In re Interrogatories*, the Supreme Court compared Section 22's non-specific legislative procedures constitutional provisions for a governor's vetoes that contained "specific procedures and time limitations." *Id.* A government officer must "strictly comply" with a mandate (such as the veto process) in which "the Colorado Constitution required a particular manner" for compliance. *Id.*

The provision that a bill be "read" has no identified "procedures or limitations." *Id.* Cooke acknowledges there is no mandatory form or manner of compliance by relying on an array of non-textual bases to construe "read." Answer Brief at 22-28. Similarly, the District Court justified interfering with the Senate's conduct of legislative business by pointing to amorphous "legitimate limits" of legislative discretion. R., 108-09.

When a constitutional provision establishes a legislative procedure but "is intentionally vague and leaves the General Assembly to determine, on a case-by-case basis" how to comply, *Grossman v. Dean*, 80 P.3d 952, 963 (Colo. App. 2003), the legislature can satisfy that requirement by taking "some" step in that direction. *Id*. at 964 ("some committee consideration" would satisfy constitution). Markwell took that step in using computerized reading of HB 1172.

The judicial branch does not decide if the step chosen was optimal or even the best possible choice. Where a "question is entrusted to one of the political branches" (here, the legislative branch), "the judicial department has no business entertaining the claim of unlawfulness" of that branch's decision. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

Having repetitively conceded HB 1172's "reading" occcurred, R. 107, the District Court cannot, without violating separation of powers, decide the nonjusticiable question of whether the reading conformed to nonexistent constitutional standards. The form and manner of reading employed is the Senate's, not the judiciary's, decision to make.

B. Cooke is incorrect that Colorado courts reject the political question doctrine.

Cooke argues *Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991), which did not find a political question present under those facts, "all but decides the

justiciability issue here." Answer Brief at 14. *Bledsoe* is not controlling because it presented a very different posture than this case. At issue there was whether there was *any* compliance with a constitutional provision, not whether the legislative body could decide the form and manner of its compliance.

In *Bledsoe*, plaintiffs sued to enforce a constitutional prohibition on members "commit[ting] themselves or any other member or members, through a vote in a party caucus or any other similar procedure, to vote in favor of or against any bill." Colo. Const., art. V, §22a, cited by *Bledsoe, supra*, 810 P.2d at 209. Despite this specific constitutional constraint, the majority-party caucus twice recessed until it had commitments from its members about how they would cast votes in the House of Representatives. *Id*. at 204.

Similar to the specific mandates in *In re Interrogatories of Governor*, *supra*, concerning gubernatorial vetoes, *Bledsoe* presented a clear constitutional standard, a ban on participation in party caucuses to lock in commitments on specific bills. That standard was violated. The majority-party caucus did not argue it was acting pursuant to House rules or its interpretation of indefinite legislative procedural guidelines in the Constitution. It simply met as if this constitutional standard didn't exist. Had Markwell heard Cooke's request that HB 1172 be read but refused any

reading at all, *Bledsoe* would be applicable here. Those are not these facts, and *Bledsoe* does not govern this dispute.[1]

Moreover, Cooke incorrectly argues that, in *Lobato v. State*, 218 P.3d 358 (Colo. 2009), the Supreme Court undermined the vitality of the political question doctrine as to cases in our state courts. Answer Brief at 13-14. The Court determined there that state courts could resolve whether Colorado met the specific "constitutional mandate" that education funding be "thorough and uniform" throughout Colorado. *Id.* at 374. But, in finding no political question, it held only that "the *Baker* [*v. Carr* political question] test does not apply **to this case**." *Id*. at 368 (emphasis added).

Further, in *Lobato*, the Court cited Chief Justice Marshall in observing, "without the restraints imposed by the political question doctrine,… other departments would be swallowed up by the judiciary." *Id.* at 376. The Court noted that Marshall's "view remains compelling today." *Id*.

Undoubtedly, Marshall's admonition is compelling here. The political question doctrine is grounded in the separation of powers that defines our government. "The judiciary's avoidance of deciding political question finds its roots

[1] None of the other political question decisions cited by Cooke were form-and-manner questions pertaining to legislative procedures either. *See* Answer Brief at 17, n.5.

in the Colorado Constitution's provisions separating the powers of state government." *Id.* at 377 (citations omitted). As such, the political question inquiry is alive and well in Colorado today.

C. Cooke does not dispute the District Court's failure to evaluate Baker v. Carr factors in deciding the case below.

The District Court did not analyze any of the factors from *Baker v. Carr*, 369 U.S. 186, 217 (1962), even though it knew of them. *See* Opening Brief at 9, 22-29. Cooke does not argue the Court conducted such an analysis or it justifiably ignored factors used by the Supreme Court in such cases. *Bledsoe, supra*, 810 P.2d at 205.

Specifically, Cooke did not: (1) refute the reading requirement's "textually demonstrable constitutional commitment… to a coordinate political department;" (2) identify a "judicially discoverable and manageable standards for resolving" the dispute; or (3) examine how a court could independently resolve this question "without expressing lack of the respect due coordinate branches of government." *Id.* There is no legal basis for refusing to even consider these factors. The District Court (and Cooke) erred in bypassing this analysis.

II. Cooke is incorrect about what it means to have a bill be "read" under Section 22.

A. Cooke failed to establish what voters could have understood by "read" in adopting this constitutional provision.

The electorate adopted and re-adopted the phrase, "Every bill shall be read" in 1876,[2] 1883,[3] and 1950.[4] Instead of considering what voters likely understood in 1876 or even 1950, the District Court relied on a dictionary from 1984 – 108 years after voters adopted Section 22 and 34 years after voters last amended it. *See* R., 109 n.2; 111 n.4 (Court noted alternative definitions of "read" found in *Webster's Ninth New Collegiate Dictionary*). These late 20th century definitions are so misplaced and unrelated to voter understanding that Cooke does not advocate or even refer to them on appeal.

Instead, Cooke asserts "read" means "to advise, explain, and understand." Answer Brief at 26. But to establish voter intent "in 1876 when the [Reading] Clause was adopted," Cooke relies solely on dictionary definitions of "read" from 1890 and

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[2] "**Every bill shall be read** at length, on three different days in each house." *Nesbit v. People*, 36 P. 221, 223 (Colo. 1894) (citing original voter-ratified language of Colo. Const. art. V, sec. 22) (emphasis added).

[3] "**Every bill shall be read** by title when introduced, and at length on two different days in each house." *People v. Leddy*, 123 P. 824, 825 (Colo. 1912) (citing first voter-approved amendment of Colo. Const. art. V, sec. 22) (emphasis added).

[4] "**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." Colo. Const., art. V, sec. 22 (current wording; adopted by voters in 1950) (emphasis added).

1903.[5] *Id*. Thus, Cooke points to definitions that were unavailable to voters until *after* they cast their ballots in 1876.

Ambiguous terms in voter-approved amendments are clarified based on the electorate's likely understanding at the time of the election. *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988) (words in voter-approved constitutional amendment must be given "natural and popular meaning usually understood by the people who adopted them"). To gauge this intent, courts use definitions from dictionaries that were available to voters when ballots were cast. *Davidson v. Sandstrom*, 83 P.3d 648, 655 n.5 (Colo. 2004). Courts will not infer a change in meaning where lawmakers "did not change the phraseology" of the law at issue. *People v. Martin*, 27 P.3d 846, 863 (Colo. 2001).

The 1866 edition of Webster's Dictionary set forth the primary definition of "read" ten years before the Constitution was ratified. At that time, voters were on notice that the most prominent meaning of "read" was "[t]o utter or pronounce written or printed words, letters or characters in the proper order; to repeat the names or utter the sounds customarily annexed to words, letters or characters." *A*

[5] Even the 1903 definition referenced by Cooke defines "read," first and foremost, as uttering words out loud. Answer Brief at 26, n.9, citing *Chambers Twentieth Century Dictionary of the English Language* 771 (1903) (first-listed meaning of "read" was "to utter aloud written or printed words").

Dictionary of the English Language 818 (10th ed. 1866); online copy viewable at www.tinyurl.com/1866Websters (last viewed on Jan. 15, 2020). This definition would have framed voters' view of this provision in 1876.

In fact, this definition was virtually unchanged for decades. *American Dictionary of the English Language* (1828 online ed.); http://webstersdictionary1828.com/Dictionary/read (last viewed Jan. 15, 2020). The 1828 Webster's definition made it clear that "to speak, to utter" was "the primary sense of *read*." *Id*. (italics in original).

This meaning of "read" endured through the time of the 1950 election when Section 22 was last amended. "[T]he definition[] of widest application" in a prominent 1951 dictionary was "To utter aloud or render something written." *Bazemore v. Bertie Cty. Bd. of Elections*, 119 S.E.2d 637, 642 (N.C. 1961), citing *Webster's New International Dictionary* (2d ed. 1951). This widely accepted definition – "to utter aloud or render something written" – would have been the basis for voter understanding at the 1950 election.

1. Section 22's use of "read" is unrelated to "explain" or "advise."

Cooke now equates "read" with "advise" and "explain." Answer Brief at 26. Colorado courts find those terms to be different in meaning and effect.

In *Martin v. Dist. Ct.*, 375 P.2d 105 (1962), the Supreme Court determined that service of pleadings required only that documents be delivered to a person. Delivery did *not* require any of three other separate acts, described distinctly by the Court as "a **reading aloud** of the documents so served, or… **explaining what they are**, or… verbally **advising** the person sought to be served as to **what he or she should do with the papers**." *Id.* at 107 (emphasis added); *accord*, *Goodman Assocs., LLC v. WP Mt. Props., LLC*, 222 P.3d 310, 318 (Colo. 2010).

These three acts are not synonymous. "Reading" is identifying words on a page and stating them aloud. "Explaining" is interpreting the meaning of spoken or written words. "Advising" is prescribing what future steps should be taken or avoided.

During the legislative process, bills are "explained" by legislators. A legislator can "explain[]" a bill's "overall" objectives as well as any "specific[]" provisions called out during floor debate. *People v. Scott*, 2019 COA 174 at ¶25 (Colo. App. 2019). Legislators' "statements of purpose are particularly persuasive in resolving ambiguity." *Id*. at ¶26; *see City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 84-85 (Colo. 1996) (bill sponsor provided "explanation of the bill to the full Senate immediately before the Senate voted to approve the bill on second reading" and, in legislative committee, "described the impact and genesis of the bill"). A bill

reading clerk doesn't provide such explanations, and a mere bill reading doesn't rise to that level of explaining a measure's context, scope, or impact.

One "advises" by telling a person "what he or she should do" under certain facts. *Martin*, *supra*, 375 P.2d at 107. In the same vein, reading clerks do not advise lawmakers what they should do as to legislation.

The context of the constitutional requirement to have bills "read" makes inapplicable the other definitions of "read" highlighted by Cooke.

2. Section 22's use of "read" is legally distinct from "understand."

Cooke equates these terms, but Colorado lawmakers do not treat "read" and "understand" as synonymous concepts.

"Each clause and sentence of either a constitution or statute must be presumed to have purpose and use, which neither the courts nor the legislature may ignore." *Colo. State Civil Service Emp. Ass'n v. Love*, 448 P.2d 624, 630 (Colo. 1968). Cooke agrees. "Every word and every provision is to be given effect…." Answer Brief at 27 (citation omitted).

The General Assembly adopts statutes requiring a person to both "read and understand" documents. An initiative petition circulator must swear "he or she has read **and understands** the laws governing the circulation of petitions." C.R.S. §1-40-111(2)(a) (emphasis added). An applicant for a driver's license is tested for "his

or her ability to read **and understand** highway signs that regulate, warn, and direct traffic." C.R.S. §42-2-111(1)(a) (emphasis added). A person who uses real estate as collateral for a bail bond must "read **and understand**" the documents affecting that realty. C.R.S. §§10-2-705(3.5)(a); 10-23-108(3.5)(a) (emphasis added).

If "read" means "understand," the General Assembly must use redundant, meaningless verbiage by including both words to communicate a single concept. But statutes are not interpreted as if their terms are "redundant or superfluous." *Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005).

The Supreme Court has noted the difference between reading and understanding. Where an initiative petition affidavit failed to include the "read and understands" clause, "The omission of the required affidavit language conclusively demonstrates that the circulators of the petition **did not read** those laws **much less understand** them." *Loonan v. Woodley*, 884 P.2d 1280, 1286 (Colo. 1994) (emphasis added). Regarding petitioning duties, the "read and understand" mandates meant circulators were both "aware of [the laws'] existence" and also had "a basic understanding of what [the laws] require the circulator to do." *Id*. at 1289.

Given the distinction between these terms by the legislature and the Supreme Court, the District Court erred in conflating the concepts of "read" and "understand."

B. Protection against "hasty and ill-considered" legislation is achieved independently of any requirement for reading of a bill.

1. Ill-considered legislation was avoided by four constitutional provisions, adopted for this express purpose.

Cooke argues the Constitution's framers saw the reading of bills as the single constitutional tool that can block ill-considered legislation. Answer Brief at 3. Four such constitutional provisions were included for this purpose.

> To afford protection from hasty legislation, it is required [1] that all bills shall be printed; [2] that only one subject shall be embraced in each bill, which shall be clearly expressed in its title; [3] that it shall be read on three different days in each house before being passed, and [4] that no bill shall be introduced, except for the general expenses of the government, after the first twenty-five days of the session.

Proceedings of the Constitutional Convention of 1875 at 725 (1907). Nevertheless, Cooke states bill reading "ensures the body will act with complete information and with deliberation." Answer Brief at 25. Bill reading is not the sole or even the best tool to accomplish this goal.[6]

The printing of bills, Colo. Const., art. V, §21, builds delay into the legislative process. A policy concept must be reduced to writing, formatted for printing, reproduced, and made available to legislators and the public. This keeps bare ideas

[6] The prohibition on introducing non-appropriation bills after the 25th day of the legislative session is no longer part of the Constitution.

from being hastily thrown before a legislative body for ultimate action. Once bills are printed, the public can provide feedback to derail or change poorly thought out proposals.

The importance of printing of bills mirrors Section 22's requirement for printing of "[a]ll substantial amendments… before the final vote is taken on the bill." Printing of amendments will "prevent, so far as possible, fraud and trickery and deceit and subterfuge in the enactment of bills, and to prevent hasty and ill-considered legislation." *In re House Bill 250*, 57 P. 49, 50 (Colo. 1899). As to this requirement, "in the judgment of the framers of such constitutional safeguard, the dangers anticipated are greatly lessened, if not altogether avoided." *Id.* Thus, printing of legislation protects against surprise or poorly drawn legislation.

The single subject requirement for bills also ensures a multi-subject bill is not used to enact "ill-considered" policy. If not for this requirement, one piece of legislation could hurry a body's consideration of topics bearing no relationship to one another. The single subject requirement "prevents joining in the same act disconnected and incongruous measures" and thus "avoid surprise and fraud upon the legislators and people in the enactment of laws." *In re Breene*, 24 P. 3 (Colo. 1890). This tool is as relevant in modern times as it was in the 19th century. *In re*

Interrogatory by Gov. Roy Romer on House Bill No. 1353, 738 P.2d 371, 373 (Colo. 1987) (bill invalidated where it addressed eleven unrelated subjects).

Thus, the requirement that bills be "read" was not the only or the most effective way of avoiding hasty or ill-considered legislation.

2. Hasty legislation is avoided by the fact that all bills must be considered in each house on at least multiple, different days.

Cooke carefully evaluated many elements of Section 22, arguing each one must be given meaning. In the phrase, "Every bill shall be read…", Cooke stresses that "shall" means mandatory, and "every" means all.[7] Answer Brief at 24.

However, Cooke skips over the (and does not even mention in the Answer Brief) the one aspect of Section 22 that does provide the protection that he argues is at the heart of this constitutional provision. Section 22's requirement that a bill, introduced by bill title, must be read at length "on two different days" unless

[7] While the application of "every" is not at the center of this legal dispute, Cooke is wrong about universal application of Section 22. The Supreme Court has recognized an exception for lengthy legislation that codifies statutes.

> **[T]he usual constitutional limitation on the enactment of new laws,** and the repeal or amendment of existing laws, strictly speaking, is not applicable, and **does not generally prevail in the matter of legislation enacting an official code, or compilation or revision of existing laws.** A peculiarly distinct field is entered by the introduction and passage of legislation enacting a codification and revision of the general law.

Interrogatories re Senate Bill No. 24, supra, 254 P.2d at 855 (emphasis added).

dispensed with by unanimous agreement is what effectively protects against "hasty" enactment of "ill-considered" legislation. This requirement (first a reading by title and, thereafter, substantive consideration of every bill on two additional, separate days) means a bill must come before a legislative body multiple times;[8] it cannot simply surface and be passed in a single day, avoiding careful scrutiny by legislators and the public.

Moreover, unlike the reading requirement, the mandate that bills be considered on different days cannot be waived. If, for example, a body's members unanimously consented to hearing a bill for its second and third readings both on the same day, no one could argue that Section 22's specific calendaring requirement had been satisfied. Legislators have absolutely no discretion when it comes to considering bills "on two different days." This element of Section 22 is a constitutionally required brake on legislative action. Because it can never be dispensed with, the "two different days" mandate is the part of Section 22 that truly protects against surprise or ill-considered legislation.

C. Reading HB 1172 "at length" would be constitutionally compliant only if second and third readings occur on "two different days" – a practical impossibility given the District Court's order.

[8] Given Colo. Const., art. V, sec. 22a, legislative committees must consider a bill before it comes to the full body the second time. *Bledsoe, supra*, 810 P.2d at 209. This step, too, helps guard against hasty, ill-considered legislation.

There is a practice conflict in complying with both Section 22 and the vague mandates in the District Court order.

At a speed of 200 words per minute by a solitary clerk, it would have taken over 46 hours to read the 560,524 words of HB 1172. R.,70; *see* Answer Brief at 39 (200 words per minute rate consistent with Section 22 compliance generally). Even if the legislative reading clerk had read HB 1172 at 300 words per minute (twice as fast as estimates of the actual human staff reading of this bill[9]), a single reading would have taken over 31 hours. Either way, HB 1172 could not be read in 24 hours and, thus, its reading could not be finished in one "day."

If these speeds complied with the District Court order and if such order was applied to HB 1172, the two required readings would take four legislative days – two days for the second reading and another two days for the third reading. Yet, the Constitution allots only "two different days" for two readings, not four different days. As such, it is impossible to comply both with Section 22 and the District Court order.

[9] *If the Dems won't slow down in the state Senate, the Republicans will force them to*, Colorado Politics (Mar. 11, 2019) (www.tinyurl.com/Reading150wpm) (last viewed on Jan. 15, 2020).

A court must avoid, not impose, such conflicts. "[A]n unjust, absurd or unreasonable result should be avoided when construing a constitutional provision." *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994). Thus, the District Court's order, requiring bill reading on conditions that make constitutional compliance impossible, was erroneous.

D. Voters honed Section 22's purpose when amending it in 1950.

In 1950, Section 22 was amended to allow bill readings to be dispensed with by unanimous consent. When the voters made this change, they fundamentally altered Section 22, allowing legislative discretion in bill readings for the first time. Such discretion applied to *whether* a reading is required, a new companion to long-standing legislative discretion about *how* a reading is accomplished.

In 1876, the reading requirement was absolute. Each bill was read three times; voters allowed for no exceptions. In 1883, bill reading was still nondiscretionary. Each bill was introduced by the reading of the title and then read two times; again, no exceptions. If the required number of readings did not occur, the bill failed.

Since the 1950 election, a bill title must be read when introducing a bill. Any other bill reading is triggered only if a legislator withholds unanimous consent to waive reading. Voters controlled the reading process from 1876 through 1950. After that, they left the process to legislative bodies and their members to implement.

By delegating this decision making to legislators, voters knew the standards by which it would be legislatively applied. "The electorate, as well as the legislature, must be presumed to know the existing law when they amend or clarify that law." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000), citing *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) (legislature "presumed to be aware of the judicial precedent in an area of law when it legislates in that area"). Voters thus knew courts held that the legislature decides the form and manner by which procedural requirements are implemented. *See People v. Leddy*, 123 P. 824, 827 (Colo. 1912) ("form and manner" of Section 22 compliance "is left wholly to the legislative body").

In 1950, Section 22 was amended to "eliminat[e] another very time-consuming gesture" in the legislative process. *Memorandum, Proposed Amendment to Article V of the State Constitution*, House Journal, 37th General Assembly, 1st Reg. Sess. 760 (Mar. 17, 1949) *("Memorandum")*. Between Section 22's adoption in 1876 and its amendment in 1950, the reading requirement was only a "gesture," not the informational tool it is reputed to be.

Under the amended Section 22, legislators became sole arbiters of "preserv[ing] the advantages of reading at length" as "any one member could block dispensing with the reading." *Id.* Voters knowingly and deliberately transferred all

authority to decide whether and how legislation would be read at length to legislative bodies and their members.

E. If the purpose of the "read" requirement was to slow the legislative process on the bill being read, that goal was achieved here.

The reading of HB 1172, using a single individual and then multiple computers, occupied almost an entire legislative day, stretching from 10:30 a.m. to about 5:20 p.m. on March 11, 2019. R., 107 (Order on Preliminary Injunction).

The General Assembly is authorized to meet for only 120 days. Colo. Const., art. V, §7. This artificial constraint on legislative process gives each day extraordinary value in achieving the work voters expect their legislators to address. If the reading requirement's purpose is to stave off "hasty" legislation by slowing the legislative process, the bill reading here achieved that goal. The Senate came to a standstill and used virtually an entire legislative day to read HB 1172. The full Senate could not consider additional bills, resolutions, gubernatorial nominations to executive branch offices and commissions, or other matters requiring the full Senate's attention.

Nothing in Section 22 requires a reading-induced stalemate to last over 46 hours in order to be constitutionally compliant. Neither does Section 22 mandate that a bill reading take as much time as is possible. How a bill is read is reserved to the Senate to decide.

Section 22 only provides that a bill be "read." Averting hasty enactment of legislation was achieved when Cooke refused to dispense with unanimous consent, forcing the Senate to use almost an entire legislative day to read HB 1172. Thus, Section 22's provisions were satisfied. The District Court erred in mandating that more legislative hours or days be allotted to this reading.

F. Cooke's goal was to slow progress of bills unrelated to HB 1172.

HB 1172 dealt with the recodification of statutes addressing the regulation of professions and occupations in Colorado. According to its bill title, HB 1172 would "conform similar provisions to achieve uniformity, eliminate redundancy, or allow for the consolidation of common provisions" or "eliminate provisions that are archaic or obsolete." R. 64 (citation omitted); *see* R. 121, F.S. #52.

Cooke was open about HB 1172's reading: his real concern was unrelated oil and gas legislation. Through a designated spokesperson using social media, Cooke and the minority-party caucus were quoted as stating, "If they won't slow this process down, we will. '@JohnCooke4SD13 said he talked with Democratic leadership last week about delaying the oil and gas hearing, but he said he was dismissed.'" R. 79.

Senator Gardner testified he, too, was concerned that "other bills" were "rammed through" the legislature, albeit "consistent with the rules." Transcript of

Mar. 19, 2019 Hearing at 27:22-23. He and Cooke were both "prime sponsors of the bill," but Gardner testified, "I can't say" that HB 1172 was ill-conceived legislation. *Id*. at 16:4-6, 29:7-9.

The District Court knew Cooke, Gardner, and Holbert did not seek a reading of HB 1172 out of concern it was hasty or ill-considered but refused to consider that fact. "The Court does not concern itself with the legislation at hand, the majority or minority party, or the number of days remaining in the legislative session." R. 109. HB 1172 was called out to be read because of its word-count, not its wording. And the Answer Brief does not contend otherwise.

The reading requirement was never intended to stall legislative progress generally so the General Assembly would be prevented from doing its assigned business as to unrelated bills. The District Court's order incorrectly allowed it to be misused this way.

III. The District Court erred in granting injunctive relief.

The lower court erred in considering the factors required for equitable relief. *Rathke v. MacFarlane*, 648 P.2d 648. 653-54 (Colo. 1982).

A. Likelihood of success on the merits

Cooke maintains he succeeded on the merits. Answer Brief at 33. But he admits the parties stipulated to the permanent injunction to make this appeal

possible. *Id.* at 31. Except in the context of the preliminary injunction, there was no ruling on the merits.

Regardless, Cooke and the District Court erred in their legal analysis of the text and purpose of Section 22. Neither used a contemporary (and thus reliable) basis for determining what voters understood "read" to mean. Cooke and the Court based their analyses on interpretations voters could never have used – dictionaries published 14 years (in Cooke's analysis) and 108 years (in the Court's order) *after* voters cast their ballots.

More importantly, neither the District Court nor Cooke even addressed the central issue – legislative control over the form and manner of compliance with legislative procedures in the Constitution. Precedent cited herein is consistent on this: these questions are left solely to the legislative body's discretion.

The District Court (in its order) and Cooke (in his complaint) conceded HB 1172 had been "read." Opening Brief at 31-33. Thus, Cooke's disagreement is with the legislature's form and manner decision, not whether there was compliance with Section 22's reading provision.

B. Irreparable, immediate injury

Cooke and his counterparts assert they suffered injury to "their legally protected interest in their constitutional power under the Consent Clause to insist

that a bill be read at length." Answer Brief at 34. But they had no legally protected interest in, or injury to, a "gesture." *Memorandum, supra,* at 760. Their actual interest is in being the "one member [who] could block dispensing with the reading" of a bill. *Id.* They asserted this right, which Markwell honored by delaying further consideration of the bill until after a bill reading occurred.

Because Cooke's interest in forcing a "reading" was vindicated, Cooke suffered no injury, irreparable or immediate.

C. Adequate remedy at law

Cooke insists he was entitled to injunctive relief and declaratory relief to require Markwell to conduct bill readings differently. Answer Brief at 42.

Cooke contends his right to a remedy at law is absolute. "*Bledsoe* definitively provides that legislators may seek - and obtain - declaratory relief, even against other legislators, for violations of article V, section 22, months and years after the offending actions took place, and even after the legislation in question has become law." *Id.* Since Cooke "definitively" maintains he has such remedy, he agrees it was sufficient.

D. Public interest

Cooke suggests the public interest was served by protecting against "the making of hasty and ill-considered law." *Id.* at 36-37. But HB 1172 was his bill.

He voted for it at all stages of the legislative process. And multiple other tools protect against such legislation, ones that were also applied here.

No member of the public sued or sought to alter the Senate's practice. HB 1172 was long; it wasn't controversial. This lawsuit was used to burden Senators in engaging in the important work for which they were elected, hardly advancing a public interest.

E. Balance of the equities

Cooke states the equities are in his favor "as no party or other affected person would be adversely affected by preserving the 19th century's method for reading bills." *Id.* at 38.

The repurposing of the reading requirement to render the Senate non-functional has no equitable value. HB 1172 was read because it was 2,000 pages long, and its reading could stop the Senate from considering the many matters before it for hours or even days. No equity runs to the person who blocks elected officials from doing the public's business.

F. Preservation of the status quo

For the first time in Colorado history, the judiciary is superintending the form and manner of the legislature's implementation of a legislative procedure. Cooke justifies this unprecedented judicial intrusion into matters that are textually,

exclusively committed by the Constitution to the legislative branch by arguing "district courts have long been held to have substantial discretion to fashion an appropriate remedy." Answer Brief at 40. In other words, Cooke agrees about the novelty of this remedy and admits the District Court departed from the status quo in deciding that the legislature no longer can decide the "form and manner" in which it complies with constitutional procedural mandates.

IV. The District Court erred by affording Cooke declaratory relief.

Cooke maintains the District Court was authorized to grant declaratory relief. *Id*. at 42. Cooke does not, however, counter that the open-ended standards the Court used failed to terminate this controversy. Opening Brief at 39-40.

Markwell is in legislative limbo as she must now divine the meaning of "intelligible," "comprehensive" and "understandable." R., 112. The vagueness of the Court's order establishes that declaratory relief was inappropriate here.

CONCLUSION

The District Court order should be reversed.

Respectfully submitted this 17th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2020, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was served electronically via Colorado Courts E-Filing to Counsel for the Appellees:

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