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2024 CO 74

No. 23SC70, *Archuleta v. Roane*—Government—Public Records—Colorado Open Records Act—Public Records Open to Inspection—Production and Exemption from Production of Records—Civil Procedure—Colorado Rules of Civil Procedure—Disclosure and Discovery

In this case, the supreme court addresses whether a public entity may deny inspection of public records because the requestor is in litigation with the public entity and the records are related to the ongoing litigation. The supreme court concludes that that nothing in the Colorado Open Records Act ("CORA") permits a public entity to deny inspection of documents simply because the requestor is litigating against the public entity. The Colorado Rules of Civil Procedure also do not prohibit a litigant from using CORA to inspect public records. Therefore, Roane's status as a litigant should not have prevented him from obtaining records under CORA.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 74

Supreme Court Case No. 23SC70
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 22CA204

Petitioner:

Kristy Archuleta, in her official capacity as the Clerk and Recorder of Archuleta County,

v.

Respondent:

Matt Roane.

Judgment Affirmed
en banc
December 9, 2024

Attorneys for Petitioner:
Archuleta County Attorney's Office
Todd A. Weaver, County Attorney
Pagosa Springs, Colorado

Respondent Matt Roane, pro se
Pagosa Springs, Colorado

Attorneys for Amici Curiae ACLU of Colorado and Colorado Freedom of Information Coalition:
Timothy R. Macdonald
Anna I. Kurtz
Laura Moraff

Denver, Colorado

Attorneys for Amicus Curiae Colorado Counties, Inc.:
Hall & Evans, L.L.C.
Andrew D. Ringel
Denver, Colorado

JUSTICE HOOD delivered the Opinion of the Court, in which **JUSTICE BOATRIGHT**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
CHIEF JUSTICE MÁRQUEZ, joined by **JUSTICE SAMOUR**, concurred in the judgment.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 Respondent Matt Roane was engaged in litigation with the Archuleta County Board of Commissioners ("Board") when he sent a Colorado Open Records Act ("CORA"), §§ 24-72-200.1 to -205.5, C.R.S. (2024), request to Archuleta County Clerk and Recorder, Kristy Archuleta. In that request, Roane sought a copy of a recent Board meeting recording. Archuleta denied the request, claiming it unlawfully circumvented the Colorado Rules of Civil Procedure. Roane had not sought any records through discovery in his civil action against the Board. Reasoning that his civil action and his CORA request were not legally interdependent, Roane sued Archuleta alleging that Archuleta had violated CORA.

¶2 Section 24-72-204(1)(c), C.R.S. (2024), provides that inspection of a public document may be denied when "[s]uch inspection is prohibited by rules promulgated by the supreme court or by the order of any court." The issue we address today is whether this provision allows a public entity to invoke the Rules of Civil Procedure to deny a CORA request to inspect documents related to pending litigation. We hold that a litigant may obtain records under CORA even if those records are relevant to pending litigation and the litigant has propounded no document requests under the Rules of Civil Procedure.

I. Facts and Procedural History

¶3 In 2020, Roane initiated a declaratory-judgment action against the Board, alleging that the Board should have taken minutes at its September 22 "work session." This action was subject to C.R.C.P. 16.1, but Roane chose not to submit any document requests under that rule. Instead, Roane submitted a CORA request for documents related to the September 22 meeting as well as for a tape recording of a related October 6 meeting. Archuleta denied the CORA request in a letter from the Archuleta County Attorney, who cited section 24-72-204(1)(c) and *Martinelli v. District Court*, 612 P.2d 1083, 1093 (Colo. 1980). The letter asserted that Archuleta didn't have to produce the requested materials because Roane was "seeking information to support [his] Motion for Summary Judgment in [his suit against the Board]" in violation of CORA and C.R.C.P. 34. (The letter didn't explain how the request would violate Rule 34.)

¶4 In January 2021, Roane filed a CORA action against Archuleta. In his complaint, Roane sought an order to show cause why the October 6 recording should not be made available and sought an order requiring Archuleta to make the recording available to him. The district court granted the motion to show cause, noting that Archuleta's argument "presupposes that [C.R.C.P.] 16.1 prohibits [Roane] from preparing his case by obtaining evidence independent of the discovery and disclosure procedures outlined in Rule 16.1." Because Rule 16.1

creates no such prohibition, the district court ordered Archuleta to produce the recording.

¶5 In February 2022, Archuleta appealed the district court's order, arguing that the district court erroneously permitted Roane to use a CORA request to "supplant discovery practice in civil litigation, in complete contradiction to" *Martinelli* and *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998). A division of the court of appeals disagreed. In a unanimous published opinion, it held that the plain language of CORA, relevant Colorado caselaw, and persuasive precedent from other jurisdictions support Roane's position that litigation against a public entity doesn't preclude a litigant's use of CORA to inspect that entity's public records. *Roane v. Archuleta*, 2022 COA 143, ¶¶ 1, 12, 526 P.3d 220, 223–24. Accordingly, the division affirmed the district court's inspection order. *Id.* at ¶ 64, 526 P.3d at 231.

¶6 We granted Archuleta's certiorari petition for review of the division's decision.[1]

[1] We granted certiorari to review the following issue:

> 1. Whether the lower courts committed reversible error by allowing a party, who is litigating a civil action against a public entity, to use an open records request to obtain documents relevant to the pending litigation[] instead of complying with the rules of discovery as set forth in the Colorado Rules of Civil Procedure.

II. Analysis

¶7 After addressing the standard of review and commonplace principles of interpretation, we focus on the language of CORA and our rules of civil procedure. Next, we examine Colorado caselaw before turning to federal precedent interpreting the Freedom of Information Act ("FOIA"). Lastly, we consider other states' understanding of similar open records statutes.

A. Standard of Review and Principles of Interpretation

¶8 We review de novo a lower court's interpretation of CORA, *Reno v. Marks*, 2015 CO 33, ¶ 20, 349 P.3d 248, 253; *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 195 (Colo. 2005), and the Rules of Civil Procedure, *City & Cnty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1275 (Colo. 2010). We review our rules in a manner "consistent with principles of statutory construction." *People v. Shell*, 148 P.3d 162, 178 (Colo. 2006).

¶9 The goal of statutory interpretation is to give effect to the intent of the General Assembly. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). To do that, we look to the plain language of the statute and "consider it within the context of the statute as a whole." *Id.* Further, "[w]e give effect to words and phrases according to their plain and ordinary meaning," and "[w]e avoid interpretations that would lead to an absurd result." *Id.* at 1089. We look to the statutory scheme as a whole "to give consistent, harmonious, and sensible effect

to all its parts." *Dep't of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 20, 486 P.3d 250, 256.

B. CORA

¶10 When it comes to public records, Colorado law favors transparency. In enacting CORA, the General Assembly declared 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. (2024) (emphases added); *see also Denver Publ'g Co. v. Dreyfus*, 520 P.2d 104, 107 (Colo. 1974) ("[W]e are guided by the clear legislative intent manifested in the declaration of policy and the language of [CORA] itself. Public records are to be open for inspection except as provided for in the act itself or otherwise *specifically* provided by law."). CORA imposes no limitation "as to the reason or reasons for which the inspection is undertaken." *Martinelli*, 612 P.2d at 1093.

¶11 Section 24-72-204(1)(c) provides that a custodian of a public entity "shall allow any person the right of inspection of such records" unless "[s]uch inspection is prohibited by rules promulgated by the supreme court." The phrase "rules promulgated by the supreme court" encompasses the Rules of Civil Procedure. *Martinelli*, 612 P.2d at 1093.

¶12 We turn then to the relevant rules of civil procedure. Rule 34 governs the production of documents, but it doesn't address open records requests. Likewise,

Rule 16.1, which governs cases subject to simplified procedures such as Roane's declaratory-judgment action against the Board, limits litigants to five document requests, but it doesn't address CORA requests by litigants. C.R.C.P. 16.1(k)(4). More to the point, none of the relevant rules prohibits a CORA request during litigation. And we are not at liberty to fashion such a rule here. *Farmers Reservoir & Irrigation Co.*, 239 P.3d at 1275 ("Words and provisions should not be added to a rule [of civil procedure] . . . ."). [2] Likewise, we are not free to simply treat a CORA request as constituting a request for production of documents in related litigation. Even if we could, line-drawing problems would quickly emerge. When would a CORA request be sufficiently related to litigation to constitute a request for production of documents under the civil rules? When would parties be sufficiently related to count for these purposes? Should we look to the law of agency to resolve a request from a third party acting at the behest of someone like Roane? Would a party who's requesting documents for a separate purpose be precluded from doing so simply because they're in litigation with the entity?

[2] Article VI, section 21 of the Colorado Constitution vests this court with the power to "make and promulgate rules governing practice and procedure in civil and criminal cases." But this court has not promulgated a rule prohibiting the use of CORA by litigants. Therefore, we need not address any separation-of-powers concerns that arguably exist in this context.

¶13 Moreover, we must construe statutes as a whole, and section 24-72-204(5)(b) indicates that both avenues—discovery requests and CORA—are available to litigants. This section provides that unless the CORA court determines that the denial of the inspection request was proper, that court "shall award court costs and reasonable attorney fees to the prevailing applicant . . . except that no court costs and attorney fees shall be awarded *to a person who has filed a lawsuit* against [a public entity] . . . if the court finds that the records being sought are related to the pending litigation and are discoverable pursuant to" the rules. *Id.* (emphasis added). Thus, section 24-72-204(5)(b) envisions a scenario in which a litigant against a public entity also successfully seeks related and discoverable records under CORA from the same public entity.

¶14 Nothing in CORA's plain language limits inspection simply because the public entity is being sued by the requester. On the contrary, the plain language strongly suggests that Roane's request to Archuleta was proper under CORA. But, like the division, we will consider precedent before finishing our analysis.

C. Colorado Precedent

¶15 Archuleta argues that *Martinelli* interpreted CORA as preventing civil litigants from using the statute to bypass discovery procedures. The division observed, however, that *Martinelli* simply "stands for the proposition that CORA

does not bar production of documents otherwise producible in civil litigation." *Roane*, ¶ 21, 526 P.3d at 225. We agree with the division.

¶16 In *Martinelli*, the petitioners argued that certain limiting language in CORA—protecting personnel files from disclosure—also prevented those files from being discoverable in civil litigation. 612 P.2d at 1093. We disagreed, reasoning that Colorado's open records laws aren't intended to "supplant discovery practice in civil litigation." *Id.* Rather, they are "directed toward regulation of the entirely different situation of the general exploration of public records by any citizen during general business hours." *Id.* (quoting *Tighe v. City & Cnty. of Honolulu*, 520 P.2d 1345, 1348 (Haw. 1974)). In other words, the petitioners' effort to engraft statutory requirements onto the Rules of Civil Procedure failed. Likewise, Archuleta's effort to insert generic rules of civil procedure into a CORA exception fails here. The two legal regimes are distinct.

¶17 In *City of Colorado Springs*, we considered whether Colorado common law contains a deliberative-process privilege that protects documents from inspection under CORA. 967 P.2d at 1045. Because "the General Assembly 'did not intend that the open records laws would supplant discovery practice in civil litigation,'" we concluded that CORA incorporated common-law privileges. *Id.* at 1055 (quoting *Martinelli*, 612 P.2d at 1093). Thus, as the division noted, we interpreted CORA and the rules of civil procedure to incorporate certain common-law

privileges; we did not interpret them to prohibit the use of CORA by litigants against a public entity. *Id.*; *Roane*, ¶ 21, 526 P.3d at 225–26.

¶18 In short, we agree with the division that this court's precedent does nothing to curtail a litigant's right to inspect public documents under CORA during litigation against a public entity. *Roane*, ¶ 21, 526 P.3d at 225 ("[*Martinelli*] does not support Archuleta's contention that individuals litigating against public entities are precluded from obtaining documents from those entities through CORA."). Rather, *Martinelli* and *City of Colorado Springs* offer adjacent opinions with which our decision today is consistent. Here, Roane didn't give up his right to inspect public documents in the Board's possession just because he sued the Board.

¶19 Having examined our caselaw, we now assess persuasive precedent from other jurisdictions.

D. FOIA

¶20 Colorado courts have relied on interpretations of CORA's federal counterpart, FOIA, to inform interpretation of analogous CORA provisions. *Wick Commc'ns Co. v. Montrose Cnty. Bd. of Cnty. Comm'rs*, 81 P.3d 360, 363 (Colo. 2003). Additionally, "the intent [of CORA and FOIA] is the same: an agency cannot improperly withhold agency records, and if it does so, the courts are empowered to remedy the situation." *Id.*

¶21 For example, in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975), the Supreme Court noted that FOIA "seeks 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" (Quoting S. Rep. No. 89-813, at 3 (1965).) In that case, Sears sought inspection of National Labor Relations Board ("NLRB") records under FOIA while also litigating against the NLRB. *Id.* at 135–36. The Court noted that FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants." *Id.* at 143 n.10. That meant that "Sears' rights under [FOIA] are neither increased *nor decreased* [because its interest in the NLRB's documents is] greater than that shared by the average member of the public." *Id.* (emphasis added).

¶22 The division below correctly understood that FOIA doesn't prevent litigants from exercising their right to inspect public documents without a clear statutory exception. *See Roane*, ¶ 46, 526 P.3d at 229. So too under CORA, which features no clear statutory exception for a person litigating against a public entity in Colorado.

E. Other States

¶23 Courts in Indiana, Tennessee, and Virginia have interpreted their states' respective open records acts to permit an individual to request inspection from a public entity with which the individual is engaged in litigation. *See Kentner v. Ind.*

Pub. Emps.' Plan, Inc., 852 N.E.2d 565, 575 (Ind. Ct. App. 2006) (concluding that whether the requester "intends to use the requested documents to watch over IPEP's conduct . . . [,] to supplement his case in . . . [l]itigation, or to paper the walls of his house with and write a song about[] has absolutely no bearing on whether he is entitled to those documents"); *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 360–61 (Tenn. 2008) (concluding that neither Tennessee's discovery rules nor its public records statutes "expressly limit or prevent persons who are in litigation with a government entity . . . from filing petitions under [Tennessee's public records act] seeking access to public records relevant to the litigation" and noting that "[a] growing number of courts, construing public records statutes similar to ours, have decided that persons should not be denied access to public records solely because they are involved . . . in litigation with a governmental entity"); *Stevens v. Lemmie*, 40 Va. Cir. 499, 1996 WL 33472511, at *11 (Va. Cir. Ct. 1996) (concluding, based on precedent from the Supreme Court of Virginia, that "no exception to [Virginia's open records act] . . . precludes its use where the information sought may become evidence in a pending or contemplated civil action").

¶24 By contrast, states that *do* have a pending-litigation exception put the statutory exception on the books. For example, Michigan's statute has an exception for "[r]ecords or information relating to a civil action in which the

requesting party and the public body are parties." Mich. Comp. Laws Ann. § 15.243(1)(v) (West 2023). Vermont, too, has an explicit statutory exception. Vt. Stat. Ann. tit. 1, § 317(c) (West 2023).

¶25 If, like the legislatures of Michigan and Vermont, Colorado's General Assembly wishes to add a CORA exception to restrict litigants, it could do so (subject, of course, to judicial review). It hasn't done so yet, and we won't read in such an exception.

III. Conclusion

¶26 We affirm the court of appeals' judgment.[3]

CHIEF JUSTICE MÁRQUEZ, joined by **JUSTICE SAMOUR**, concurred in the judgment.

[3] Nothing in this opinion should be construed to limit the authority of the court presiding over the declaratory-judgment action to otherwise regulate discovery and the admissibility of evidence in that action. Records and information obtained under CORA are not immune from scrutiny under the governing procedural and evidentiary rules once a party seeks to deploy them as evidence in a civil proceeding. Legal authority to obtain records does not automatically bestow authority to use those records in court.

CHIEF JUSTICE MÁRQUEZ, joined by JUSTICE SAMOUR, concurring in the judgment.

¶27 I ultimately agree that Matt Roane was entitled to obtain the recording of the Archuleta County Board of Commissioners' meeting, but only because it amounted to a proper discovery request under the rules of civil procedure promulgated by this court—*not* because it was a proper request under the Colorado Open Records Act ("CORA"), §§ 24-72-200.1 to -205.5, C.R.S. (2024).

¶28 I write separately to express my grave concern with the majority's ruling today, which misconstrues CORA, misreads our decision in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), and inexplicably cedes our exclusive constitutional authority to promulgate rules governing litigation in our courts. In so doing, today's decision creates a lopsided litigation environment that will disadvantage public entities subject to CORA and will undermine trial courts' ability under the Colorado Rules of Civil Procedure to actively manage discovery in civil cases involving such public entities. And it will impact not only cases governed by C.R.C.P. 16.1, but also more complex cases governed by C.R.C.P. 16.

¶29 Moreover, today's decision does all of this unnecessarily. The same result could easily be reached by treating Roane's request as appropriate under the rules of civil procedure. Because today's decision needlessly undermines Colorado's

constitutional separation of powers and distorts the litigation process for public entities across the state, I respectfully concur only in the judgment.

I. Our Constitutional Rulemaking Authority

¶30 The question before us is whether a party who is litigating a civil action against a public entity may rely on CORA to request documents for purposes of that specific litigation, rather than follow the discovery rules set forth in the Colorado Rules of Civil Procedure promulgated by this court. The answer is no. As we made clear decades ago in *Martinelli*, Colorado's open records laws are not intended to "supplant discovery practice in litigation." 612 P.2d at 1093. Once a litigant invokes the court's jurisdiction by commencing litigation, the rules of procedure govern discovery in that litigation, including limits on the production and inspection of documents.

¶31 The proper starting point for this analysis is not CORA. It is the Colorado Constitution.

¶32 Article VI, section 21 of the Colorado Constitution specifically vests this court with rulemaking power. Under that provision, "[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases . . . ." Colo. Const. art. VI, § 21. This express power to adopt rules of procedure for the courts is plenary and exclusive. *Borer v. Lewis*, 91 P.3d 375, 380

(Colo. 2004); *Gold Star Sausage Co. v. Kempf*, 653 P.2d 397, 400 (Colo. 1982). Indeed, nearly a century ago, this court observed that, for the legislature to enact procedural rules for the courts, such power would have to be surrendered by the judiciary:

> We seriously question the power of the Legislature to make any rules or to enact any laws relative to procedure in courts. It is doubtful if the Legislature in Colorado could have enacted any law with reference to procedure in courts of record unless that power had been expressly or tacitly surrendered to it by the judiciary.

Walton v. Walton, 278 P. 780, 786–87 (Colo. 1929).

¶33 "Procedural" rules that fall within the ambit of this constitutional authority are those that are "adopted to permit the courts to function and function efficiently." *People v. Wiedemer*, 852 P.2d 424, 436 (Colo. 1993). Rules governing discovery (including limits on the production and inspection of documents) directly serve this objective and thus lie squarely within this court's constitutional power to promulgate "rules governing practice and procedure in civil . . . cases." Colo. Const. art. VI, § 21.

¶34 "The overriding purpose of the Colorado Rules of Civil Procedure is 'to secure the just, speedy, and inexpensive determination of every action.'" *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 27, 303 P.3d 1187, 1194 (quoting C.R.C.P. 1(a)). And the express purpose of the simplified procedures of Rule 16.1 in this case is to "enhance the provision of just, speedy, and inexpensive

determination of civil actions . . . and to *limit discovery and its attendant expense*." C.R.C.P. 16.1(a) (emphasis added).

¶35 This court has recognized that "[t]he discovery process can be abused by disproportionate and inappropriate requests that increase the cost of litigation, harass an opponent, or tend to delay a fair and just determination of the legal issues." *In re Attorney D.*, 57 P.3d 395, 399 (Colo. 2002). For this reason, "[t]he civil rules, and our cases interpreting them, reflect an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs." *DCP Midstream,* ¶ 4, 303 P.3d at 1190. Committee comments to Rule 16 make clear that active judicial management of cases, including discovery, is expected. *See* C.R.C.P. 16 cmt. 7 ("It is expected that trial judges will assertively lead the management of cases to ensure that justice is served."); C.R.C.P. 16 cmt. 19 (observing the principle that "discovery should be in proportion to the genuine needs of the case" and that the problems of discovery abuses "are greatly alleviated with the intervention of trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case"); C.R.C.P. 16.1 cmt. 1 (observing that the simplified procedure under Rule 16.1 was intended to enhance the "just, speedy, and inexpensive determination of cases," particularly cases seeking damages of less than $100,000).

¶36 Consistent with these principles, Rule 26(b)(1) allows trial courts to ensure that discovery is relevant and proportional to the needs of the case:

> [P]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

C.R.C.P. 26(b)(1).

¶37 In addition to these general limits on discovery, we have adopted specific limits on the quantity and timing of discovery requests—including the production and inspection of documents. Rule 16 limits discovery to what is allowed under C.R.C.P. 26(b)(2), unless otherwise ordered by the court. C.R.C.P. 16(b)(11). Rule 26, in turn, limits parties to twenty requests for production of documents and prohibits parties from seeking discovery before the court issues a case management order. C.R.C.P. 26(b)(2)(D), (d). Rule 16.1 is even more restrictive, limiting parties to five requests for production of documents. C.R.C.P. 16.1(k)(4)(B). Rule 34(a)(1) fleshes out the scope of permissible requests "to inspect and copy any designated documents." C.R.C.P. 34(a)(1). And Rule 34(b) establishes the procedure for requesting items to be produced for "inspection." C.R.C.P. 34(b). The rules also govern the timing of the production and inspection of documents, allowing thirty-five days to respond to requests for production, s*ee*

C.R.C.P. 16(b)(11), 26(b)(2)(D), 34(b), and permitting case management orders to establish discovery deadlines, *see* C.R.C.P. 16(b).

¶38 In sum, once the trial court's jurisdiction has been invoked through litigation, the rules of procedure promulgated by this court govern that litigation, including the rules of discovery that govern the production and inspection of documents. Nothing in CORA overrides this fundamental principle.

II. CORA and Martinelli

¶39 Contrary to the majority's reasoning, both CORA and our decision in *Martinelli* expressly recognize the primacy of this court's procedural rules in the context of litigation.

¶40 Under CORA, "[a]ll public records shall be open for inspection by any person at reasonable times, except as provided [in the exceptions set forth in CORA] or as otherwise provided by law." § 24-72-203(1)(a), C.R.S. (2024). The CORA exception relevant here appears in section 24-72-204(1)(c), C.R.S. (2024). Under that provision, a custodian of public records "shall allow any person the right of inspection of such records" unless "[s]uch inspection is prohibited by rules promulgated by the supreme court or by the order of any court." *Id.*

¶41 The majority acknowledges that the phrase "rules promulgated by the supreme court" in section 24-72-204(1)(c) encompasses the rules of civil procedure. Maj. op. ¶ 11. Our decision in *Martinelli* established as much. 612 P.2d at 1093.

The majority then reasons that "none of the [rules of procedure governing discovery] prohibits a CORA request during litigation." Maj. op. ¶ 12. But as discussed above, the Colorado Rules of Civil Procedure expressly limit the production and inspection of documents in litigation—the very subject matter of CORA. § 24-72-204(1) (providing a "right of *inspection*" of public documents) (emphasis added). Section 24-72-204(1)(c) acknowledges that this right of inspection is circumscribed by rules promulgated by this court, which include the rules of civil procedure. *Martinelli*, 612 P.2d at 1093.

¶42 Put differently, CORA, through section 24-72-204(1)(c), contemplates the existence of court rules that inhibit the public's right to inspect documents. And our rules of civil procedure impose express limitations on discovery, including the right to inspect documents during litigation. *See, e.g.*, C.R.C.P. 16.1(k)(4), 26(b)(1), 26(b)(2)(D), 34(a)–(b). The majority's suggestion that section 24-72-204(1)(c) requires our court rules to expressly refer to CORA—even though they clearly apply to CORA's subject matter—both disregards *Martinelli* and elevates form over substance.

¶43 More fundamentally, the majority's analysis misconstrues CORA's relationship to this court's rulemaking authority. Section 24-72-204(1)(c) is not a legislative grant of permission; rather, consistent with separation of powers principles, it is the general assembly's acknowledgment of this court's inherent

constitutional authority to promulgate rules governing practice and procedure in civil and criminal cases.[1] We made that clear in *Martinelli* when we observed that the language in section 24-72-204(1)(c) "indicates that the legislature did not intend that the open records laws would supplant discovery practice in civil litigation." 612 P.2d at 1093.

¶44 I also disagree with the majority's reading of *Martinelli*. There, the plaintiff sued the City and County of Denver, the Denver Police Department, and individual police officers in a civil action alleging police misconduct. The plaintiff sought production of the officers' personnel files and internal investigation reports. *Id.* at 1086. The defendants objected to discovery of these documents on the grounds that the documents were (1) irrelevant to the plaintiff's causes of action; (2) privileged materials; (3) protected by the officers' right to privacy; and (4) exempted from discovery under CORA sections 24-72-204(3)(a)(II) and 24-72-305(5), C.R.S. (2024). *Martinelli*, 612 P.2d at 1087. This court analyzed each of these arguments under the rules of procedure. It evaluated the defendants' first

[1] Section 13-2-108, C.R.S. (2024), likewise recognizes our inherent constitutional authority to govern court procedure. That provision reiterates that the supreme court has the power to create rules of "practice and procedure in civil actions and all forms in connection therewith." *Id.* As we observed over a century ago, section 13-2-108 "was not a delegation of legislative authority. The regulation of its own practice and procedure has always been a matter for the court . . . ." *Ernst v. Lamb*, 213 P. 994, 995 (Colo. 1923).

two arguments regarding relevance and privilege under Rule 26. *Id.* at 1087–91. In addressing the defendants' constitutional privacy argument, the court likewise considered Rule 26 and the possible issuance of a protective order. *Id.* at 1092–93, 1093 n.4. Finally, the court rejected the defendants' argument that the requested documents were exempted from discovery under CORA, reasoning that CORA did not "supplant discovery practice in civil litigation." *Id.* at 1093–94.

¶45 The majority accurately states that *Martinelli* stands for the proposition that "CORA does not bar production of documents otherwise producible in civil litigation." Maj. op. ¶ 15 (quoting *Roane v. Archuleta*, 2022 COA 143, ¶ 21, 526 P.3d 220, 225). But the point of *Martinelli* is that this court's rules of procedure—not CORA—establish the applicable limits of what is discoverable in the context of litigation. Indeed, the *Martinelli* court remanded the case to the district court with directions to conduct another in camera inspection of the personnel files and investigation reports and to order discovery of materials contained in those reports, subject to appropriate protective orders. 612 P.2d at 1094. The upshot: The rules of civil procedure governed the litigation, not CORA.

¶46 Even section 24-72-204(5)(b) reflects the supremacy of this court's authority and rules in the context of pending litigation. That provision prohibits the award of attorney fees and costs under CORA to a person who has filed a lawsuit against a public entity and who attempts to rely on CORA provisions for access to records

that instead fall within the rules of discovery (i.e., records that "are related to the pending litigation and are discoverable pursuant to chapter 4 of the Colorado rules of civil procedure"). § 24-72-204(5)(b). In other words, section 24-72-204(5)(b) makes clear that persons who have commenced litigation cannot use CORA to circumvent the rules of discovery. Specifically, they may not seek attorney fees under CORA from the public entity against which they have brought suit.

¶47 To be clear: Outside the context of litigation, CORA governs records requests made of public entities.[2] Individuals and organizations may—and routinely do—submit any number of CORA requests to public entities to gather records, often to prepare for litigation. But once litigation commences and the court's jurisdiction has been invoked, the rules of civil procedure govern the discovery pertaining to that litigation.[3]

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[2] The Public Access to Administrative Records Rules ("P.A.I.R.R.") govern requests for administrative records of the Judicial Department. P.A.I.R.R. 2 states, "This rule is intended to be a rule of the Supreme Court within the meaning of CORA, including section 24-72-204(1)(c) . . . ." Although the majority appears to suggest that the Civil Rules Committee could simply incorporate similar language into the rules of civil procedure, *see* Maj. op. ¶ 12 & n.2, it is unnecessary. It is clear that the rules of civil procedure are "rules promulgated by the supreme court." § 24-72-204(1)(c); *Martinelli*, 612 P.2d at 1093.

[3] A party is free, of course, to rely on CORA to seek records from a public entity that are unrelated to the specific litigation at hand. In any event, the majority's hypothetical "line-drawing" concerns should not preclude us from resolving the case on the facts here. *See* Maj. op. ¶ 12. It is undisputed that Roane requested the recording at issue for use in this litigation. *Roane*, ¶ 6, 526 P.3d at 223.

III. Non-Colorado Law

¶48 Because of the uniqueness of Colorado's constitution and CORA, non-Colorado law is unhelpful here. In the federal context, "Congress has undoubted power to regulate the practice and procedure of federal courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Although Congress has given the United States Supreme Court the power to make court rules in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, it has done so as a legislative grant of authority. Article III of the United States Constitution contains no language comparable to article VI, section 21 of the Colorado Constitution, which directly vests this court with rulemaking power. Thus, to the extent FOIA may conflict with federal court rules, it does not give rise to the same constitutional separation of powers concern present here.

¶49 Additionally, nothing in FOIA expressly allows requests to be denied under court rules of procedure. 5 U.S.C. § 552(b). Section 24-72-204(1)(c) thus marks a material difference between CORA and FOIA. The majority cites *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975), for the notion that both FOIA and CORA "seek[] 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" (Quoting S. Rep. No. 89-813, at 3 (1965)); *see also* Maj. op. ¶ 22. But section 24-72-204(1)(c) *is* Colorado's "clearly delineated statutory language," which recognizes that CORA is constitutionally limited in the litigation context.

¶50 Other states' laws are similarly unhelpful. State statutes dealing with access to public records are diverse, and none of the statutes cited by the majority broadly prohibit record requests that conflict with rules of procedure or court orders, as does section 24-72-204(1)(c). *See* Ind. Code Ann. § 5-14-3-4 (West 2024); Tenn. Code Ann. § 10-7-504 (West 2024); Va. Code Ann. § 2.2-3705.1 (West 2024); Mich. Comp. Laws Ann. § 15.243 (West 2024); Vt. Stat. Ann. tit. 1, § 317 (West 2024). Moreover, unlike in Colorado, the constitutions of Indiana and Tennessee do not expressly vest their supreme courts with rulemaking power. Ind. Const. art. VII, §§ 1–21; Tenn. Const. art. VI, §§ 1–12. And the rulemaking authority granted to the Virginia Supreme Court is qualified, in that "such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Va. Const. art. VI, § 5. Finally, if anything, the pending litigation exceptions found in Michigan and Vermont's public records acts effectively confirm the constitutional rulemaking power granted to the supreme courts of those states. Mich. Comp. Laws Ann. § 15.243(1)(v); Vt. Stat. Ann. tit. 1, § 317(c)(14). Given the diverse constitutions and statutes across this country, the law from other states cited by the majority does not support its position.

IV. The Impact of Today's Ruling

¶51 The impact of today's ruling is far-reaching. Although this case involves a single request for production of documents in a simplified Rule 16.1 proceeding,

today's decision will affect all civil litigation. By ceding this court's plenary and exclusive authority to promulgate rules governing the production and inspection of documents in litigation, today's decision effectively nullifies our discovery rules in civil litigation involving public entities subject to CORA.

¶52 After today, litigants who sue public entities can file unlimited CORA requests for the inspection of documents they would otherwise have to acquire through the rules of discovery. And they can do so without regard to discovery deadlines or limitations. This subverts both Rule 16.1(k)(4)(B) and Rule 26(b)(2)(D)'s numeric limit on document requests. It also subverts Rule 16's discovery deadlines, which provide that discovery must be completed "not later than [forty-nine] days before the trial date." C.R.C.P. 16(b)(11).

¶53 If, as the majority holds, CORA represents a freestanding statutory right to inspect documents, then private parties can arguably ignore any timelines a court may set under a Rule 16(b) case management order.[4] And while C.R.C.P. 34(b) gives litigants thirty-five days to respond to a discovery request, CORA requires documents to be available for inspection within three to seven working days. § 24-72-203(3)(b). Thus, public entities faced with CORA requests in lieu of

[4] I acknowledge that today's decision seems to leave open the possibility that a case management order could expressly prohibit the parties from using CORA to obtain discoverable documents.

requests for production will have to turn over documents in an expedited manner—and must respond to such requests even after discovery deadlines have passed. Litigants can also use CORA to bypass relevancy and proportionality requirements in the discovery rules. C.R.C.P. 26(b)(1) requires trial courts to ensure discovery is proportional, meaning that discovery requests are relevant to the claims and defenses, that the costs of discovery do not outweigh its benefits, and that the amount of discovery is proportional to the amount in controversy and to the complexity of the issues. But after today, private litigants can make unlimited CORA requests of public entities during litigation, regardless of relevance or proportionality to the needs of the case. This will have an especially profound effect in Rule 16.1 cases, which are specifically intended to "limit discovery and its attendant expense." C.R.C.P. 16.1(a).

¶54 What is particularly unsettling about today's ruling is that it results in an uneven playing field in litigation for state agencies and local government entities subject to CORA. Those entities must abide by discovery limits and deadlines, but after today's ruling, their private opponents need not do the same. Indeed, a private litigant could submit a flurry of CORA requests simply to overwhelm an opposing public entity during litigation, including on the eve of trial. The potential impact on public entities cannot be overstated.

¶55 Any suggestion that a trial court can simply manage this new environment by regulating the admission of documents on the back end is wishful thinking and is unfair to our trial courts. The majority notes that its opinion should not limit courts' ability to "otherwise regulate discovery and the admissibility of evidence in [an] action" and that "[r]ecords and information obtained under CORA are not immune from scrutiny under the governing procedural and evidentiary rules." Maj. op. ¶ 27 n.2. But it is unclear how a trial court could be expected to use procedural or evidentiary rules to limit the impact of today's ruling on the management of *discovery* in litigation. Even if a trial court could preclude the admission of documents obtained through CORA, additional hearings will likely be necessary to determine which documents a party obtained through which request. These issues will spawn additional litigation, including by injecting appealable issues into the case. Such an approach undermines the intent of the rules of civil procedure, which require active management of the discovery process to secure the "just, speedy, and inexpensive determination of every action." C.R.C.P. 1(a).

¶56 Finally, all of these impacts could be readily avoided. Roane's single request does not appear to have violated any rule or court order (at least, Archuleta County has failed to identify any such violation). The underlying case between Roane and Archuleta County was subject to the simplified procedures in Rule 16.1,

and thus Roane was entitled to five document requests. C.R.C.P. 16.1(k)(4)(B). His request for the recording was the only request for any record. Further, Rule 16.1(f) does not require the court to issue a case management order, and it does not appear that the district court issued any such order or set any specific discovery deadlines. Accordingly, Roane's request did not violate any rules of civil procedure or court orders. To resolve the dispute before us, I would simply construe Roane's request as a proper discovery request and allow it.

V. Conclusion

¶57 Colorado's Constitution squarely vests this court with exclusive authority to promulgate rules governing practice and procedure in civil and criminal cases. Today's decision unnecessarily relinquishes that power despite CORA's express recognition of our rulemaking authority, and despite our rules specifically limiting the production and inspection of documents in litigation. As we said in *Martinelli*, CORA was not intended to "supplant discovery practice in civil litigation." 612 P.2d at 1093. But after today, I fear that CORA will be used to do exactly that.

¶58 Our rules of civil procedure demand active management of discovery in litigation to secure the just, speedy, and inexpensive determination of every action. Evenhanded application of those rules ensures equal treatment of all parties who come before our courts, including government and public entities. Today's decision not only upsets decades of settled expectations under *Martinelli*, but it

upends the litigation playing field and will negatively impact government and public entities subject to CORA.

¶59 I respectfully concur in the court's judgment only.

I am authorized to state that JUSTICE SAMOUR joins in this concurrence.