Testimony of Frank D. LoMonte, attorney and media-law professor
HB21-1051, "Public Information Applicants For Public Employment"
Colorado Senate State, Veterans and Military Affairs Committee
Submitted for committee hearing of April 20, 2021

I have been asked by the Colorado Freedom of Information Coalition to provide the Committee with the benefit of our research at the Brechner Center for Freedom of Information regarding the subject of search procedures for hiring presidents at public universities. I am pleased to do so, with the understanding that neither I nor the Center take any positions on particular pieces of legislation.

Founded in 1977 at the University of Florida, the Brechner Center is the nation's only university-based think-tank focused exclusively on issues of accessibility of civically essential information. I have been the Center's director for four years, and a practicing attorney for 21 years. As an academic, my research regularly appears in scholarly journals, including *University of Kansas Law Review*, *University of Nebraska Law Review*, *Case Western Reserve Law Review*, and many others. I am a full professor on the faculty of the University of Florida, but to be clear, my testimony is given today in my personal and individual capacity and not on behalf of my employer.

In recent years, multiple states have moved in the direction contemplated by HB21-1051, allowing universities (and other public employers) to publicly name "one or more" finalists before making the hiring decision for an executive position. In none of these states is it the practice to actually name more than one finalist. Government agencies have unanimously interpreted "one or more" to mean "one." Consequently, the committee should assume that enactment of this legislation will mean that the public does not see any candidate other than the one hired.

The proponents of closing university presidential searches typically have cited statistics indicating that fewer people will submit applications if the search is advertised as an "open" search rather than a "closed" search. This is a misleading statistic. Anyone familiar with the contemporary presidential hiring process knows that people do not attain presidencies by "applying." Applications mailed in response to advertisements are not regarded as serious inquiries. The only candidates who receive serious consideration are the candidates who have already placed their résumés on file with the executive search firm. That the solicitation may produce fewer "applications" is irrelevant.

The proponents of closing university presidential searches typically argue that top candidates will not agree to have their names placed under consideration if they know that the public will learn who is in contention and who has been rejected, for fear of suffering retaliation at their present institutions. To test this hypothesis, our researchers engaged in two studies, one of which has been published and the other that is in the process of being prepared for publication.

First, we compared the outcomes of a decades' worth of presidential searches at state universities in Southeastern states that hire under a "closed" versus an "open" model. If the assertion that a closed search produces better outcomes were accurate, we would expect to find that more people leave prestigious higher-education jobs for presidencies in "closed search" states as opposed to "open search" states. However, we found no such evidence. There was no discernible distinction in the credentials of the hires made in states with "closed" searches versus those that conduct "open" searches. A state that makes the hire without a public evaluation process was no more likely to hire away a person from a highly ranked institution than a state bringing multiple finalists to the campus for public evaluation. The one striking difference in "closed" versus "open" states is that presidents in "closed" states were far more likely to be "internal" hires – people promoted up through the ranks of the institution or hired laterally from sister institutions within the same state university system. This supports the conclusion that a "closed" process is more likely to favor a candidate with "insider" connections to the decision-makers (regents, trustees, or chancellor), whose credentials might not compare favorably with "outsider" candidates if the search was conducted in the open. It also calls into question the assertion that fear of retaliation is a significant driver in diluting the field of candidates, as an internal or lateral candidate would have no fear of retaliation. If fear of retaliation were a significant driver, one would expect to see a meaningful increase in "outsider" candidates hired in states with closed searches. Our research found the opposite to be true.

Second, we used publicly available data to examine the outcomes of 242 searches for university chief executives across institutions with enrollment of 10,000 students or greater. Regardless of whether multiple finalists were or were not disclosed to the public, we did not find any statistically significant difference in the success of luring away a top-ranking executive from another university; open searches result in hiring away another college's executive 54.5 percent of the time and closed searches produce that result 61.8 percent of the time. Most significantly, we looked at what happened to the finalists who were publicly identified but not hired, to test the assertion that people who are rejected for presidencies suffer professional damage. We found no such evidence. In looking at the career trajectory of people who competed unsuccessfully in an open presidential search, by far the most common result for those candidates (84.5 percent of all publicly identified candidates) was: (1) securing a comparable executive position at another higher-education agency, or (2) remaining in the current job. Of the remaining 15.5 percent, many went on to secure executive positions of comparable stature outside the field of higher education. Only one

out of 155 publicly identified candidates appears to have discernably suffered an act of retaliation by the current employer.

In recent days, the consequences of hiring presidents with inadequate background checking has become painfully apparent at Oregon State University, where President F. King Alexander resigned under pressure after it came to light that, during his prior position as president of Louisiana State University, his institution had a pattern of mishandling Title IX sexual misconduct cases, including chronically understaffing the office responsible for Title IX investigations. As the controversy became public knowledge, Alexander released a rather remarkable public statement in an attempt to save his presidency at Oregon State, denouncing his former institution and making clear that his departure from LSU was the result of a broken relationship with its Board of Trustees. None of this information was known to the participants in the Oregon State presidential search, because no background check was performed before Alexander was hired in a closed search. Had Alexander's name been aired publicly as a finalist prior to the hiring decision, it is likely that the questions about his performance at LSU – for instance, his decision to make himself unavailable to the law firm hired to investigate Title IX noncompliance – would have become known to the search committee, enabling the committee to thoroughly evaluate Alexander alongside any competing candidates.

Oregon State is not the only example of a closed search producing a candidate who turned out to have potentially disqualifying "skeletons" that would have been unearthed in a more open search. To cite a few other examples: Penn State offered its presidency to a sitting college president who was under active criminal investigation for misappropriating money from his current employer. Ithaca College hired a president who, unbeknownst to the public, had a criminal record for engaging sexual misconduct with a patient. Central Oregon Community College identified as its presidential "finalist" a candidate who was being sued by a former colleague who alleged he had sexually assaulted her. None of these "skeletons" came out until the names of the candidates (or hires) were made public, at which point whistle-blowers came forward. In recent years, several universities have quickly parted ways with presidents hired in closed searches after becoming dissatisfied with their performance, including Kennesaw State University (forced to resign after 13 months), Norfolk State University (fired after two years), and the University of Wyoming (resigned under pressure after four months). Just last year, the University of Wisconsin was forced to restart its presidential search after the "sole finalist" hired as the product of a closed search was deemed so unacceptable to the community that he resigned without ever taking office. There is no data

indicating that presidents hired in closed processes perform better, stay longer, or are otherwise any more successful or better-credentialed than those hired in open processes.

A primary reason that closed searches have produced such poor results is that the executive search firms tasked with identifying presidential candidates do not perform background checks with the candidates' current employers out of fear of compromising confidentiality. The inadequacy of background checking has been well-documented by George Mason University researchers James Finkelstein and Judith Wilde, the leading academic experts studying the presidential hiring process, who have strongly cautioned against closing searches because of the proven failings of the "closed" model.

In summary, closing presidential searches to public participation has proven to present significant downside risks of making an unsuccessful hire, and has not produced any discernible benefit in terms of credentials, longevity, or other indicators of a successful hire.

Respectfully submitted,

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To the honorable members of the Senate State, Veterans and Military Affairs Committee:
I am writing to ask you vote against HB21-1051 as it is a step in the wrong direction for open governance.
The Colorado Sunshine Act was passed in 1972 at a time when the state House, Senate and Governor's office were controlled by the Republican Party. The Sunshine Law's public declaration was clear and unambiguous: "It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." C.R.S. 24-6-401.
If passed, HB21-1051 will undo the transparency in government provisions enacted forty nine years ago.

The Sunshine Law's intent was to allow public access to a broad range of meetings at which public business was considered. This in turn allowed the public to listen to what their elected officials were considering and to offer suggestions and opinions on those matters. Some of the input is helpful, some is not. Regardless, the public should be able to hear what the officials are thinking and proposing before action is taken.
The Colorado Supreme Court held the Open Meetings Law should be interpreted broadly in order to further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved. *Cole v. State*, 673 P.2d 345 (Colo. 1983).
When it came to hiring decisions, the Sunshine Law addressed concerns and allegations of cronyism and nepotism through its requirement that several finalists be named, their applications be made public and the actual hiring decision be made in open session.

HB21-1051, narrows the opportunity to become informed and shuts out meaningful participation in the state and local body's decision making process. A final decision includes alternatives that were considered but not selected as well as candidates selected.
"What did they consider?" "What did they reject?" "Why?" are questions that will not be answered making those officials unaccountable to the very public they serve.
In addition the public will never know if the state and local entities considered diverse candidates and the reasons they were chosen or shut out from consideration. By not making their names and applications public, state and local governments will potentially face serious accusations of hiring misconduct that the current Sunshine Law attempts to avoid.

State and local bodies are entrusted by the people of this state to do the work of the people. Many decisions are routine and cause little scrutiny or controversy.
Other decisions have larger implications affecting the populous and require public scrutiny and input. These are the decisions that must be made in public.
The decision to hire an executive to lead a state or local body necessarily includes candidates that were considered and not selected as well as the one selected.
If the state and local bodies are allowed to choose only 1 finalist and not disclose the names of the other applicant/finalists, the constituents will have no information as to why the 1 person was selected and will not have the opportunity to provide positive and negative feedback on several candidates.

One recent example of shutting out public input and scrutiny was when the University of Colorado Board of Regents hired a new President. A firm was used to seek out candidates privately after which the Regents interviewed 6 candidates in person. From that list they selected and announced 1 finalist. When they announced the sole finalist, there was an outcry from the community based on previous behavioral issues and to his anti-LBGTQ stance. However, since he was the sole finalist, the Regents went forward and hired him.
Had the Regents been required to name 3 finalists, and publicly vetted them, the public would have had an opportunity to present the previous bad behavior to the Regents, thus allowing them to select one of the other finalists.

One of the stated purposes of this bill is to alleviate concerns by applicants who are not selected as finalists. The concern appears to be that allowing public inspection of the application has a chilling effect on applicants who are not selected. This may be a legitimate concern, however, transparency in government is required by the Sunshine Law. In order to balance that tension, the law as it stands only requires the release of the finalists-plural. Allowing a state or local entity to select 1 finalist circumvents the transparency requirement of the Sunshine Law. This in turn has a chilling effect on open government. Applicant's strengths and weaknesses will never be publicly vetted, the public's input will never be received and open and honest discussions will never be held prior to final decisions being made.
The ripple effect of this bill is that the information citizens have to make a decision at the ballot box will be minimized when those same state and local officials run for reelection.

I therefore ask that you vote "No" on HB21-1051.

Respectfully submitted,

Kyle Dumler