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| DISTRICT COURT, DENVER COUNTY, COLORADO<br>Court Address:<br>1437 BANNOCK STREET, RM 256, DENVER, CO, 80202 | DATE FILED: February 27, 2020 10:11 AM<br>CASE NUMBER: 2019CV31716 |
| **Plaintiff(s)** RCYMT GUN OWNERS et al.<br>v.<br>**Defendant(s)** JARED S POLIS IN HIS OFFICIAL CAPACITY A | ⚠ **COURT USE ONLY** ⚠<br>Case Number: 2019CV31716<br>Division: 409 Courtroom: |

**Order:Governor Polis's Motion to Dismiss Under C.R.C.P. 12(b)(1) & 12(b)(5)**

The motion/proposed order attached hereto: SET FOR HEARING.

The Court asks that this matter be set for a half-day hearing on or before March 18, 2020, if possible. As this is Defendant's Motion to Dismiss, Defendant will obtain potential dates from the Court's clerk, confer with opposing counsel, and then issue a Notice of Hearing.

Issue Date: 2/27/2020

ERIC MARTIN JOHNSON
District Court Judge

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| DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO<br><br>1437 Bannock Street<br>Denver, CO 80202 | |
| Rocky Mountain Gun Owners, a Colorado nonprofit corporation; Representative Patrick Neville, House Minority Leader; Representative Lori Saine; and Representative Dave Williams,<br><br>Plaintiffs,<br><br>v.<br><br>Jared S. Polis, in his official capacity as Governor of the State of Colorado,<br><br>Defendant. | ▲ **COURT USE ONLY** ▲ |
| PHILIP J. WEISER, Attorney General<br>ERIC R. OLSON, Solicitor General*<br>STEPHANIE LINDQUIST SCOVILLE, First Assistant Attorney General*<br>GRANT T. SULLIVAN, Assistant Solicitor General*<br>1300 Broadway, 10th Floor<br>Denver, Colorado 80203<br>Telephone: (720) 508-6548 / 6573 / 6349<br>Fax: (720) 508-6032<br>E-mail: eric.olson@coag.gov;<br>stephanie.scoville@coag.gov;<br>grant.sullivan@coag.gov<br>Registration Numbers: 36414 / 31182 / 40151<br>*Counsel of Record | Case No. 19CV31716<br><br>Courtroom: 409 |
| **GOVERNOR POLIS'S MOTION TO DISMISS UNDER C.R.C.P. 12(b)(1) & 12(b)(5)** | |

## INTRODUCTION

Plaintiffs claim the legislature did not follow the procedure of reading the bill at length when it passed HB 19-1177, the Emergency Risk Protection Order statute. But rather than complain then to the legislature, they kept quiet until the session ended, not allowing the legislature an opportunity to cure the alleged defect, and now ask this Court to intervene in a hotly-contested political issue.

On a motion to dismiss, the rules require that the Court assume that Plaintiffs factual allegations are true.[1] Even making those assumptions, these Plaintiffs cannot use this lawsuit to challenge the political outcome in the legislature for three separate reasons.

*First*, Plaintiffs do not demonstrate any actual injury to them because of the claimed lack of a full reading. Without that actual injury, Plaintiffs each lack standing to bring this challenge because this Court only decides actual controversies with actual injuries. Without showing that any injury flowed from the claimed lack of a full reading, Plaintiffs do not meet the basic requirement for bringing this lawsuit.

*Second*, the Plaintiffs ask this Court to address a political dispute. The political question doctrine bars this Court's review of such a political question. The

[1] The Governor has substantial disagreement with the claimed facts outlined in Plaintiffs' complaint and will address those disagreements when appropriate under the rules.

House of Representatives, not the courts, determines compliance with its internal rules of procedure.

*Third*, Plaintiffs' deliberate decision to delay filing suit until the second-to-last day of the 2019 legislative session prevented the General Assembly from curing the alleged deficiency. Because Plaintiffs waited to bring this lawsuit until after the time the legislature could cure the claimed lack of a full reading, the doctrine of laches bars Plaintiffs' claims. Experience from similar challenges shows that Plaintiffs could have sought court intervention in as little as one day, when time remained in the legislative session to fix the alleged procedural error. Equity forbids a plaintiff from lying in wait to intentionally prevent a solution to the claimed problem.

Each of these reasons supports the dismissal of Plaintiffs' complaint.

## FACTUAL BACKGROUND AND LEGAL FRAMEWORK

### I. The reading requirement

Like most states, Colorado requires that bills introduced in the General Assembly be "read" before they are voted upon by legislators. The reading requirement states that each 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, § 22. The Constitution gives the legislature the authority to make and enforce its own rules of its proceedings. Colo. Const. art. V, § 12. House

Rule 27(b) states that unanimous consent to dispense with the reading-at-length requirement "shall be presumed" unless a member requests that the bill be read at length on second or third reading. Compl. ¶ 19.

Enacted before the digital age of posting all bills online, reading requirements provided notice to legislators of the bills under consideration and ensure an "opportunity for the expression of public opinion and due deliberation." *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980). Reading requirements helped "cure the evil of rushing bills from second to third reading without giving the members of the Legislature an opportunity to study their contents." *Application of Forsythe*, 450 A.2d 594, 596 (N.J. App. Div. 1982) (quotations omitted). Courts recognize, however, that no strict formula must be followed to satisfy the reading requirement. Substantial compliance is sufficient. *See U.S. Gypsum Co. v. State Dep't of Revenue*, 110 N.W.2d 698, 699 (Mich. 1961).

**II. House Bill 19-1177**

An enacted, HB 19-1177 adds article 14.5 to Title 13, entitled "Extreme Risk Protection Orders," or "ERPO." The bill creates a comprehensive process for the temporary removal of firearms from persons who the Court determines, after hearing, pose a significant risk of causing personal injury to themselves or others. *See* HB 19-1177, § 1.

The process created by HB 19-1177 contains robust due process protections. Among other protections, a person petitioning for an ERPO must state under oath

and subject to the penalty of perjury the specific circumstances giving rise to a reasonable fear of future dangerous acts by the respondent. § 13-14.5-104(3)(a). The court must promptly schedule a hearing on the ERPO petition and have the notice of hearing and petition served on the respondent. § 13-14.5-105(1)(a)-(c). The respondent has the right to have counsel appointed for them free of charge. § 13-14.5-104(1). At the hearing, both the petitioner and the respondent may present evidence and cross-examine witnesses. § 13-14.5-105(5)-(6). After the hearing, the court may issue an ERPO only if it finds by clear and convincing evidence that the respondent poses a significant risk of causing personal injury to themselves or others by having a firearm in his or her custody. § 13-14.5-105(2). If an ERPO is issued, the court must state the reasons supporting the order and advise the respondent that he or she has the right to request that the ERPO be terminated. § 13-14.5-105(9)-(10). Unless renewed, the ERPO may not exceed 364 days. § 13-14.5-105(2).

According to the complaint, HB 19-1177 was introduced in the House of Representatives on February 14, 2019. Compl. ¶ 17. The House passed the bill on second reading on March 1, 2019, and on third reading on March 4, 2019. *Id.* The Colorado Senate passed HB 19-1177 with amendments on March 28, 2019. *Id.* The House concurred in the Senate's amendments and repassed the bill on April 1, 2019. *Id*. The Governor signed HB 19-1177 on April 12, 2019. *Id*. The bill does not take effect until January 1, 2020. § 13-14.5-114(4).

## III. Complaint Allegations

Plaintiffs' complaint alleges that in the initial stages of the proceedings in the Colorado House, two members, Representatives Dave Williams and Lori Saine, requested that HB 19-1177 be read at length.[2] Compl. ¶¶ 20–21. They allege that the chair of the Committee of the Whole denied these requests for a full reading and that HB 19-1177 was never read at length in the House of Representatives. *Id.* ¶¶ 20–22. Plaintiffs' complaint does not explain why the House of Representatives denied their requests for a full reading. Similarly, the complaint does not specify whether any of the legislator-plaintiffs took any action to protest the alleged denial of their requests for a full reading.

Plaintiffs claim that the alleged failure to read the bill led to two "injuries-in-fact." First, they assert this bill will lead to "unlawful government expenditures" and that causes injury because they pay taxes. Compl. ¶ 5. Second, the legislator-plaintiffs claim injury arises from their "legally protected interest of their right to insist upon the reading" of the bill. Compl. ¶ 29. No one claims the lack of a full reading actually deprived them of notice of what the bill said. Compl. ¶ 6.

The legislator-plaintiffs' requests for a full reading were allegedly denied on March 1, 2019. Despite two months remaining in the legislative session, Plaintiffs

[2] Governor Polis accepts the well-pleaded factual allegations in the complaint for purposes of this motion to dismiss only. *See W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). He reserves his right to challenge Plaintiffs' factual allegations at later stages of this litigation should the need arise.

did not file this lawsuit until 62 days later (May 2, 2019), on the second-to-last day of the legislative session.

### IV. The *Cooke* case

In *Cooke v. Markwell*, Denver Dist. Ct. No. 2019CV30973, three Colorado senators sued the Secretary and President of the Colorado Senate, alleging violations of the reading requirement in article V, § 22. The *Cooke* plaintiffs alleged that the Senate majority violated the reading requirement by having five computers simultaneously speedread a bill. *Cooke*, *supra* (Complaint, ¶¶ 23–26, filed March 12, 2019). The *Cooke* plaintiffs filed their lawsuit and sought a temporary restraining order on March 12, 2019, just one day after the Senate majority attempted to utilize the speedreading computers to satisfy the reading requirement. *Id.* at ¶¶ 18–23. There, the defendants—fellow legislators—did not contest standing.

The district court in *Cooke* issued a preliminary injunction on March 19, 2019, holding that a speedreading computer does not satisfy the reading requirement and that the political question doctrine did not bar the court's consideration of the case. *Cooke*, *supra* (Order, March 19, 2019). The *Cooke* defendants have appealed the district court's injunction order, focusing on the political question issue. *See* COA Case No. 19CA1130.

## STANDARD OF REVIEW

Governor Polis brings this motion under Rules 12(b)(1) and 12(b)(5) of the Colorado Rules of Civil Procedure. This Court lacks jurisdiction under C.R.C.P.

12(b)(1) because Plaintiffs' complaint both fails to demonstrate standing and raises a nonjusticiable political question. In addition, Plaintiffs waited too long to bring suit. Dismissal is therefore required for failure to state a claim under C.R.C.P. 12(b)(5) based on laches.

**Rule 12(b)(1)**. "Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit." *Sandstrom v. Solen*, 370 P.3d 669, 672 (Colo. App. 2018) (quotations omitted). Whether a plaintiff possesses standing is a pure question of law. *In re Reeves-Toney v. Sch. Dist. No. 1 in the City & Cty. of Denver*, 2019 CO 40, ¶ 20. Like standing, nonjusticiable political questions may implicate the Court's jurisdiction and are therefore properly reviewed under C.R.C.P. 12(b)(1). *See People ex rel. Tate v. Prevost*, 134 P. 129, 134 (Colo. 1913); 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3534.3 at 809 (3d ed. 2008).

**Rule 12(b)(5)**. A motion under C.R.C.P. 12(b)(5) may be granted if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). That is, the complaint should be dismissed if "the substantive law does not support the claims asserted." *Sonitrol Corp.*, 187 P.3d at 1158.

## ARGUMENT

### I. Plaintiffs lack standing to challenge HB 19-1177.

None of the Plaintiffs have standing because (a) their claimed injuries were not caused by the House of Representatives' alleged failure to read the bill in full; and (b) the legislator-plaintiffs do not possess legislator standing.

### A. Plaintiffs' claimed injuries were not caused by the alleged failure to read HB 19-1177 at length.

In Colorado, the well-established *Wimberly* test governs a plaintiff's standing to sue: (1) the plaintiff must have suffered an injury-in-fact, and (2) the injury must be to a legally protected interest. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). The first prong, the injury-in-fact requirement, maintains the separation of powers mandated by article III of the state constitution by preventing courts from invading "legislative and executive spheres." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). The injury-in-fact requirement ensures that an actual controversy exists and that a "concrete adverseness" sharpens the presentation of issues to the court. *Id.* (quotations omitted). In the context of a challenge to a statute, the standing requirement distinguishes those "particularly injured" by government action from members of the general public whose interests are more remote and who must address their grievances through the political process. *In re Reeves-Toney*, 2019 CO 40, ¶ 22 (quotations omitted).

On the injury-in-fact prong, the "proper inquiry" is whether the action complained of "caused or threatens to cause the injury in fact" to the plaintiff. *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85, 92 (Colo. 1980)

(quotations omitted). An injury that is indirect or incidental to the challenged action of the defendant is not sufficient to confer standing. *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011). In other words, the plaintiff's injury must be fairly traceable to the defendant's complained-of actions. *See Collopy v. Wildlife Comm'n*, 625 P.2d 994, 1006 n.22 (Colo. 1981) (plaintiff lacked standing to challenge statute's constitutionality because his injury could not "intelligibly be traced" to the statute).

Courts have recognized that this causation element of standing can bar plaintiffs from attempting to use a reading requirement like article V, § 22 to invalidate newly-enacted legislation. *See Dimond v. District of Columbia*, 792 F.2d 179, 190–91 (D.C. Cir. 1986). In *Dimond*, a car accident victim challenged the District of Columbia's no-fault insurance law claiming the bill was not read twice in the city council as required by the District's reading requirement. *Id.* at 184. The challenger argued that the no-fault law prevented him from recovering noneconomic damages that he sustained following his car accident. *Id.* at 183–84.

The *Dimond* court concluded that while the challenger's claimed injury "stems from the substantive provisions" of the no-fault law and thus confers standing on him to challenge the law itself, the same was not true for the city council's *procedural* failure to read the bill at length. *Id.* at 190. The challenger's inability to recover noneconomic damages, the court explained, was not "fairly traceable" or "attributable" to the city council's procedural error. *Id.* at 191. Rather, the nexus between the challenger's injuries and the lack of two full readings was "unduly

speculative." *Id.* The challenger had not alleged, for instance, that reading the bill at length "would have led a sufficient number of Council members to vote against [the no-fault act]." *Id.* In fact, the extensive debate on the bill suggested that "the Council members understood the contents of the bill and would have been unlikely to have changed their votes had the Council fully complied with the second-reading requirement." *Id.* Nor did the challenger allege that the "substantive content" of the bill might have been different if the reading requirement were followed. *Id.* Because the court discerned "no causal connection" between the alleged procedural violation and the challenger's injury, it affirmed the dismissal for lack of standing. *Id.*

In this case, the same analysis reveals no causal connection between Plaintiffs' claimed injuries and the House of Representatives' alleged failure to read the bill twice at length. Even taking the complaint's allegations as true, Plaintiffs' alleged injury is the "unlawful government expenditures" that will result if HB 19-1177 is enforced. Compl. ¶ 5. As in *Dimond*, this claimed injury is not fairly traceable to the House of Representatives' alleged failure to read HB 19-1177 twice in full. Plaintiffs' alleged injury results instead from the "substantive provisions" of the bill itself. *Dimond*, 792 F.2d at 190. Indeed, government expenditures to enforce HB 19-1177 would be incurred even if the bill had been read at length on two occasions.

Plaintiffs base their standing in part on Colorado's taxpayer standing doctrine. Compl. ¶ 5. The causation element is just as critical, if not more so, for taxpayer standing as individual standing. *See Freedom from Religion Found., Inc.*, 338 P.3d at

1008 (holding challenger lacked taxpayer standing and stating "the plaintiff must demonstrate a *clear nexus* between his status as a taxpayer and the challenged government action." (emphasis added)). The tenuous connection between Plaintiffs' alleged injury (government expenditures) and the action complained of (the lack of a full reading) is too remote to generate standing. *See In re Reeves-Toney*, 2019 CO 40, ¶ 29 (challenger lacked taxpayer standing where payment of teachers' salaries was at most "incidental" to the mutual consent provisions being challenged as unconstitutional). Indeed, as *Reeves-Toney* recognized, when the expenditure of funds "is, at most, incidental to" the basis of the challenge, there is no taxpayer standing because "[t]axpayer standing does not flow from every allegedly unlawful government action that has a cost." *Id.* ¶¶ 29–30.

The legislator-plaintiffs' ability to demonstrate causation based on their official status as legislators is even more attenuated. The legislator-plaintiffs do not assert that they did not know the bill's substance because of the claimed lack of a full reading. Nor do they allege that reading the bill at length would have persuaded other representatives to vote against it. Rather, the legislator-plaintiffs contend they have standing to insist that the government follow prescribed procedures, even when they face no concrete injury. *See* Compl. ¶ 6 (alleging legislator-plaintiffs have standing "to vindicate the legislative process").

But this sort of claimed abstract injury does not confer standing. *See Freedom from Religion Found., Inc.*, 338 P.3d at 1009 (citing *Valley Forge Christian Coll. v.*

*Ams. United for Separation of Church & State*, 454 U.S. 464 (1982)). An "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of [standing] without draining those requirements of meaning." *Valley Forge*, 454 U.S. at 483. Plaintiffs must demonstrate that they have suffered "negative consequences at the hands of the government" to have standing. *Freedom from Religion Found., Inc.*, 338 P.3d at 1009. Merely insisting that the government act in accordance with the law, without also identifying a "'personal injury suffered by them as a consequence,'" is not enough. *Id.* (quoting *Valley Forge*, 454 U.S. at 485); *see also Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (stating that "an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer [standing]." (quotations omitted)). Because Plaintiffs do not claim that the failure to read the bill actually caused them real, recognizable injury, Plaintiffs' complaint fails to satisfy the causation element of standing.

### B. The legislator-plaintiffs do not possess legislator standing.

Each Plaintiff's failure to satisfy the causation element of standing fully resolves this case. The legislator-plaintiffs' claims, however, are barred for an additional reason: they lack legislator standing under *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). There, the U.S. Supreme Court clarified the contours of legislator standing when it concluded that the Arizona Legislature possessed standing as a body to challenge a voter

initiative. The Court explained that the Arizona Legislature was "an institutional plaintiff asserting an institutional injury" in a suit authorized by votes taken in both the Arizona House and Senate. *Id.* at 2664. But the Court cautioned that the same is not true for individual legislators—they *lack* standing in part because they are not authorized to represent the legislature as a whole in litigation.[3] *Id.* (citing *Raines v. Byrd*, 521 U.S. 811 (1997)); *see also Va. House of Delegates v. Bethune-Hill*, No. 18-281, 2019 WL 2493922, *5 (U.S. June 17, 2019) (citing *Arizona State Legislature* and stating "individual members lack standing to assert the institutional interests of a legislature"); *Colo. General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) (recognizing a "legislative body as a whole" may possess standing when it suffers "judicially cognizable injuries").

In this case, the legislator-plaintiffs comprise only three members of the Colorado House of Representatives. Their complaint does not claim that the House of Representatives as a whole authorized them to bring this claim. The legislator-plaintiffs are therefore mere "individual [m]embers" who lack standing to challenge HB 19-1177. *Ariz. State Legislature*, 135 S. Ct. at 2664; *see also Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016) (individual state legislators lack standing to challenge TABOR).

[3] Although *Arizona State Legislature* is a federal decision, Colorado courts often look to federal law for guidance when deciding standing issues under state law. *See Maurer v. Young Life*, 779 P.2d 1317, 1324 n.10 (Colo. 1989).

To the extent the legislator-plaintiffs assert that their alleged injury is a personal one, rather than an institutional injury, that argument fails as a matter of law. *See Cummings v. Murphy*, 321 F. Supp. 3d 92, 107–110 (D.D.C. 2018). In *Cummings*, as here, some members of the minority party in Congress alleged that the executive branch wrongfully denied them information that, as members of an oversight committee, they had a legal entitlement to obtain. *Id.* at 95–96. The congresspersons claimed a "personal" injury since they made their demands as members of the oversight committee, and thus all members of Congress did not share their injury. *Id.* at 109. The court rejected this argument, explaining that their right to the requested information "derive[d] solely" from their membership in Congress and, more specifically, their assignment to the oversight committee. *Id.* If one of the members "'were to retire tomorrow,'" the court explained, "'he would no longer have a claim'" to the requested information. *Id.* at 108 (quoting *Raines*, 521 U.S. at 821).

So too here. The legislator-plaintiffs' attempts to invoke article V, § 22 to receive a full reading of HB 19-1177 is a right derived solely from their membership in the General Assembly. That right is not a "prerogative of personal power" but rather "runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents." *Raines*, 521 U.S. at 821. As in *Raines* and *Cummings*, were the legislator-plaintiffs to retire tomorrow, they would no longer have the right to seek a bill's full reading under article V, § 22. Thus, their claimed injury is at most an institutional injury, not a personal one that confers standing.

## II. Plaintiffs' complaint presents a nonjusticiable political question, requiring dismissal.

In addition to lack of standing, Plaintiffs' lawsuit suffers from a second jurisdictional defect: it implicates a nonjusticiable political question requiring interpretation of the General Assembly's own internal rules. Because delving into a nonjusticiable political question exceeds the judicial branch's jurisdiction, this Court should dismiss this suit under C.R.C.P. 12(b)(1).

In Colorado, the political question doctrine establishes that certain constitutional provisions may be interpreted and enforced "only through the political process." *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009). The judiciary's avoidance of deciding political questions finds its roots in the Colorado Constitution's provisions separating the powers of state government. *See* Colo. Const. art. III; *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991). The political question doctrine recognizes that certain issues are best left for resolution by the other branches of government, or "'to be fought out on the hustings and determined by the people at the polls.'" *Bledsoe*, 810 P.2d at 205 (quoting *Prevost*, 134 P. at 133).

Colorado has adopted the well-known *Baker v. Carr* test for determining whether a controversy presents a nonjusticiable political question. *Meyer v. Lamm*, 846 P.2d 862, 872–73 (Colo. 1993) (citing *Baker v. Carr*, 369 U.S. 186, 198, 217 (1962)). *Baker* identifies six "features" that may characterize a case raising a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217 (bracketed numbers added). Although this case implicates all six features, the first and fourth features are most problematic.

### A. The Colorado Constitution commits to the General Assembly the exclusive power to promulgate and enforce its internal procedural rules.

Plaintiffs' claim in this case principally relies on House Rule 27(b). That rule provides that unanimous consent to dispense with the reading-at-length requirement "shall be presumed" unless a member requests a full reading during second or third reading. Compl. ¶ 19. The House adopted this rule, along with its other procedural rules, under Colo. Const. art. V, § 12, which states that "[e]ach house shall have power to determine the rules of its proceedings[.]"

The Colorado Constitution commits the issue of the House's procedure to the General Assembly as a co-equal branch of government. The power of the House of Representatives to act under its own internal procedural rules is "plenary" and "exclusive." *In re Speakership of the House of Representatives*, 25 P. 707, 710 (Colo. 1891). Even where the constitution mandates a requirement, the "form and manner"

of fulfilling the requirement "is left wholly to the legislative body." *People v. Leddy*, 123 P. 824, 827 (Colo. 1912). The House of Representatives "must judge for itself" compliance with its own internal procedural rules; the courts will "not inquire into the motive or cause" that might have influenced the legislature's actions taken in pursuit of its own rules. *In re Speakership*, 25 P. at 710. "[I]f a wrong or unwise course be pursued, there is no appeal under our system of government except to the ballot box." *Id.* For this reason, the judiciary's role is "limited to measuring legislative enactments against the standard of the constitution." *Bledsoe*, 810 P.2d at 210. It does not encompass determining whether the legislature complied with its own internal rules. *Id.* ("[T]he judiciary's authority to coerce legislators to comply with constitutional provisions governing the enactment of legislation is exceedingly limited.").

Here, the injury alleged by Plaintiffs stems from the alleged denial of the legislator-plaintiffs' requests for a reading under the House's rules. Compl. ¶¶ 20–21. The proper interpretation and application of the House of Representative's internal rules of procedure must be left to the judgment of the House itself. Doing otherwise risks improper judicial intrusion into the legislature's internal lawmaking process. For example, although Plaintiffs invite this Court to construe and apply House Rule 27(b), doing so would also require judicial interpretation of multiple *other* internal legislative rules. To name just a few, were the requests for a full reading of HB 19-1177 made out of order? *See* House Rule 10 ("Questions of order shall not be

debatable"). Did the requesting members fail to make the request in the proper form? *See* House Rule 13(a) ("No member rising to … make a motion … shall proceed before addressing and being recognized by the chair"). Did the requesting members protest the denials of their motions for a full reading? *See* House Rule 24 (stating member shall "have the right to protest any action of the House").

In essence, Plaintiffs seek to have this Court second guess procedural decisions made by the House of Representatives' chair of the Committee of the Whole, all with the benefit of 20/20 hindsight. But the constitution grants the House the authority to interpret and apply its own internal rules of procedure and does not burden the courts with doing so. *See People ex rel. O'Reilly v. Mills*, 70 P. 322, 323 (Colo. 1902) ("[T]he body to which has been delegated the power to pass laws must be left untrammeled, to act in such matters as its wisdom may dictate."). That "exclusive" task properly falls to the House itself.[4] *In re Speakership*, 25 P. at 710.

Against this backdrop, courts applying the *Baker* test frequently hold that the proper interpretation of the legislature's internal procedural rules presents a

[4] The district court in *Cooke* found the political question doctrine posed no hurdle to its exercising jurisdiction. *Cooke*, *supra*, at 4–5 (Order, March 19, 2019). But that erroneous decision does not bind this Court, particularly because that case is under appeal. In any event, *Cooke* is distinguishable because it involved a dispute between two different groups of legislators over whether a particular method of complying with the reading requirement satisfied the constitution while the legislature was in session—namely, using computers to speedread the bill at 650 words per minute. *Id.* Here, Plaintiffs do not seek the Court's decision on whether a particular method meets the constitution's requirements. Rather, they remained silent and now belatedly claimed a particular objection was made and not handled appropriately by the chair. Moreover, lack of standing and laches were not raised as defenses in *Cooke*.

nonjusticiable political question that belongs to the legislative branch to resolve. These decisions include legislative rules for impeachment proceedings, *Nixon v. United States*, 506 U.S. 224, 228–36 (1993); rules for the presentment of bills to the Governor, *Gilbert v. Gladden*, 432 A.2d 1351, 1354–55 (N.J. 1981); rules governing committee assignments, *Tallarino v. Oneida Cty. Bd. of Legislators*, 132 A.D.3d 1394 (N.Y. App. Div. 2015); rules for the release of legislative telephone records, *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496–502 (Iowa 1996); and rules governing access to legislative meetings, *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336–40 (Alaska 1987); *see also Moffitt v. Willis*, 459 So.2d 1018, 1021 (Fla. 1984) ("It is the final product of the legislature that is subject to review by the courts, not the internal procedures."). Critically here, one recent decision explicitly recognizes that the judiciary lacks jurisdiction under the political question doctrine to order the legislature to comply with a reading requirement, "even when those procedures are constitutionally mandated." *Gunn v. Hughes*, 210 So.3d 969, 971 (Miss. 2017). The same legal rule applies here.

### B. Judicial intervention would express a lack of respect due to the co-equal legislative branch.

Judicial intervention into this intra-legislative affair also presents a nonjusticiable political question because it risks expressing a lack of respect due to a coordinate branch of government. *See Meyer*, 846 P.2d at 872 (citing *Baker*, 369 U.S. at 217). Colorado courts have not needed to address this feature previously, but other courts find it applies in at least two scenarios: (1) when a court is asked to construe a

legislature's internal rule to invalidate certain legislative actions, *see, e.g.*, *Common Cause v. Biden*, 909 F. Supp. 2d 9, 31 (D.D.C. 2012); *Smigiel v. Franchot*, 978 A.2d 687, 701 (Md. 2009); and (2) when a court is asked to impute a motive to the legislature for acting or failing to act, *see, e.g.*, *State, Dep't of Natural Resources v. Tongass Conservation Soc'y*, 931 P.2d 1016, 1019–20 (Alaska 1997); *cf. In re Speakership*, 25 P. at 710.

This case presents both scenarios. On the first, Plaintiffs ask this Court to construe an internal procedural rule of the House to invalidate HB 19-1177. But doing so would present "acute problems," given the House's "independence in determining the rules of its proceedings and the novelty of judicial interference with such rules." *Common Cause*, 909 F. Supp. 2d at 31 (quotations omitted).

On the second, Plaintiffs' lawsuit asks this Court to impute improper motives to the House of Representatives for allegedly rejecting the legislator-plaintiffs' requests for a full reading. But the chair may have denied the request for a full reading for any number of legitimate procedural reasons. They could have made their requests out of order, House Rule 10, or using the wrong form, House Rules 7(a), 13(a). The House's decision denying the legislator-plaintiffs' requests on these or other (proper) grounds would provide no basis for invalidating HB 19-1177. Thus, by necessity, Plaintiffs ask this Court to ascribe *improper* motives to the House of Representatives' procedural decisions. Such inquiries into legislators' motives endanger "the separation of powers doctrine, representing a substantial judicial

'intrusion into the workings of other branches of government.'" *Tongass Conservation Soc'y*, 931 P.2d at 1019 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)); *accord In re Speakership*, 25 P. at 710 ("[T]he court will not inquire into the motive or cause which influenced the action of the legislative body"). Accordingly, this suit presents a nonjusticiable political question, requiring dismissal for lack of jurisdiction under C.R.C.P. 12(b)(1).

### III. Plaintiffs' eleventh-hour lawsuit is barred by laches.

In addition to the jurisdictional defects of Plaintiffs' claims, equity requires dismissal of this case for failure to state a claim. Specifically, laches prevents Plaintiffs' claims from moving forward. Not only did Plaintiffs fail to seek an immediate temporary restraining order to protect their right to a full bill reading—as was promptly done in *Cooke*—they waited until the late afternoon on the second-to-last day of the legislative session before filing this suit. By that late date, the House of Representatives had no ability to fix the alleged procedural error by re-reading the bill at length on two separate days. Because a plaintiff may not lie in wait to foreclose any chance of remedying their claimed injury, Plaintiffs' lawsuit should be dismissed with prejudice. *See* C.R.C.P. 41(b)(1) (stating any dismissal not provided for by Rule 41, with exceptions not applicable here, operates as an adjudication on the merits).

"Laches is an equitable doctrine that may be asserted to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom relief is sought." *In re Marriage of Johnson*, 380 P.3d 150, 154 (Colo. 2016)

(quotations omitted). Laches requires three elements: (1) full knowledge of the facts by the party against whom the defense is asserted, (2) unreasonable delay by the party against whom the defense is asserted in pursuing an available remedy, and (3) intervening reliance by and prejudice to the party asserting the defense. *Id.* Importantly, laches may bar a claim even if the plaintiff files a claim within the statute of limitations. *Id.* at 155; *see also Great W. Mining Co. v. Woodmas of Alston Mining Co.*, 23 P. 908, 911 (Colo. 1890). Where the elements of laches are apparent on the face of a complaint, it may be asserted in a motion to dismiss for failure to state a claim. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907 n.19 (D. Ariz. 2005).

In this case, each of the three laches elements is satisfied. On the first element, the complaint makes clear that the legislator-plaintiffs knew about the reading requirement, as shown by Representatives Williams's and Saine's attempts to request that HB 19-1177 be read at length. Compl. ¶¶ 20–21. They also undoubtedly knew about the *Cooke* case arising out of the Senate in which the district court entered a preliminary injunction barring the Senate majority from using speedreading computers to comply with the reading requirement. *Cooke*, *supra* (Order, March 19, 2019). After all, legislators are *presumed* to know about court decisions impacting legislation they are considering. *Hansen v. Barron's Oilfield Serv., Inc.*, 429 P.3d 101, 108 (Colo. App. 2018). The district court in *Cooke* entered its widely-reported preliminary injunction on March 19, 2019. Yet despite knowing that *Cooke* vindicated

their Senate colleagues' right to have a proposed bill read at length, no similar lawsuit was promptly filed by Plaintiffs.

On the second element, Plaintiffs unreasonably delayed in filing their lawsuit until late afternoon on May 2, 2019, the second-to-last day of the legislative session. That is, Plaintiffs waited more than two months after their alleged injury before filing this suit. By contrast, the plaintiffs in *Cooke* managed to file their lawsuit just *one day* after their alleged injury. Plaintiffs' delay here was no accident. By law, the General Assembly cannot extend its regular legislative session beyond 120 calendar days. Colo. Const. art. V, § 7. Thus, by waiting until the second-to-last day of the session, Plaintiffs guaranteed that the House had no ability to re-read the bill at length on two separate days. Tellingly, Plaintiffs' complaint does not request that HB 19-1177 be read at length. If that were their goal, they would have filed their lawsuit immediately. They instead seek to exploit a *procedural* rule to invalidate *substantive* legal provisions with which they have policy disagreements. That they cannot do. *Dimond*, 792 F.2d at 190–91.

On the third element, the Governor and both chambers of the General Assembly relied on Plaintiffs' silence. Had Plaintiffs timely brought their lawsuit, the House of Representatives could have taken corrective action to ensure that the bill was re-read in full to Plaintiffs' satisfaction. Instead, not knowing that Plaintiffs were planning to spring their lawsuit at the eleventh hour, the General Assembly

advanced HB 19-1177 through the normal legislative process. That process ended on April 12 when the Governor signed the final bill.

Even if Plaintiffs had awaited the outcome of the district court's decision in *Cooke*, which was announced March 19, time remained to remedy the alleged violation. At that stage, HB 19-1177 was still working its way through the legislative process. The Senate's passage of the bill was still nine days away (March 28), the House of Representatives' vote to concur in the Senate's amendments was 13 days away (April 1), and the Governor's signature was nearly a month out (April 12). Compl. ¶ 17. Had Plaintiffs timely brought their lawsuit, as in *Cooke*, the General Assembly could have taken corrective action to ensure that the bill was re-read in full to Plaintiffs' satisfaction. Plaintiffs' dilatory conduct in bringing their lawsuit thus prejudiced the Governor and the General Assembly. It should not be rewarded by this Court.



## CONCLUSION

Because Plaintiffs' complaints about the House's process do not satisfy the requirements of standing in this Court and, regardless, the political question doctrine prevents this Court from refereeing a dispute over how the House responded to a procedural objection, Governor Polis respectfully requests that this Court dismiss this suit.

Respectfully submitted this 27th day of June, 2019.

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **GOVERNOR POLIS'S MOTION TO DISMISS UNDER C.R.C.P. 12(b)(1) & 12(b)(5)**, upon all parties herein electronically via Colorado Courts E-filing, at Denver, Colorado, this 27th day of June, 2019 addressed as follows:

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