Certiorari before Judgment

An Examination of C.A.R. 50

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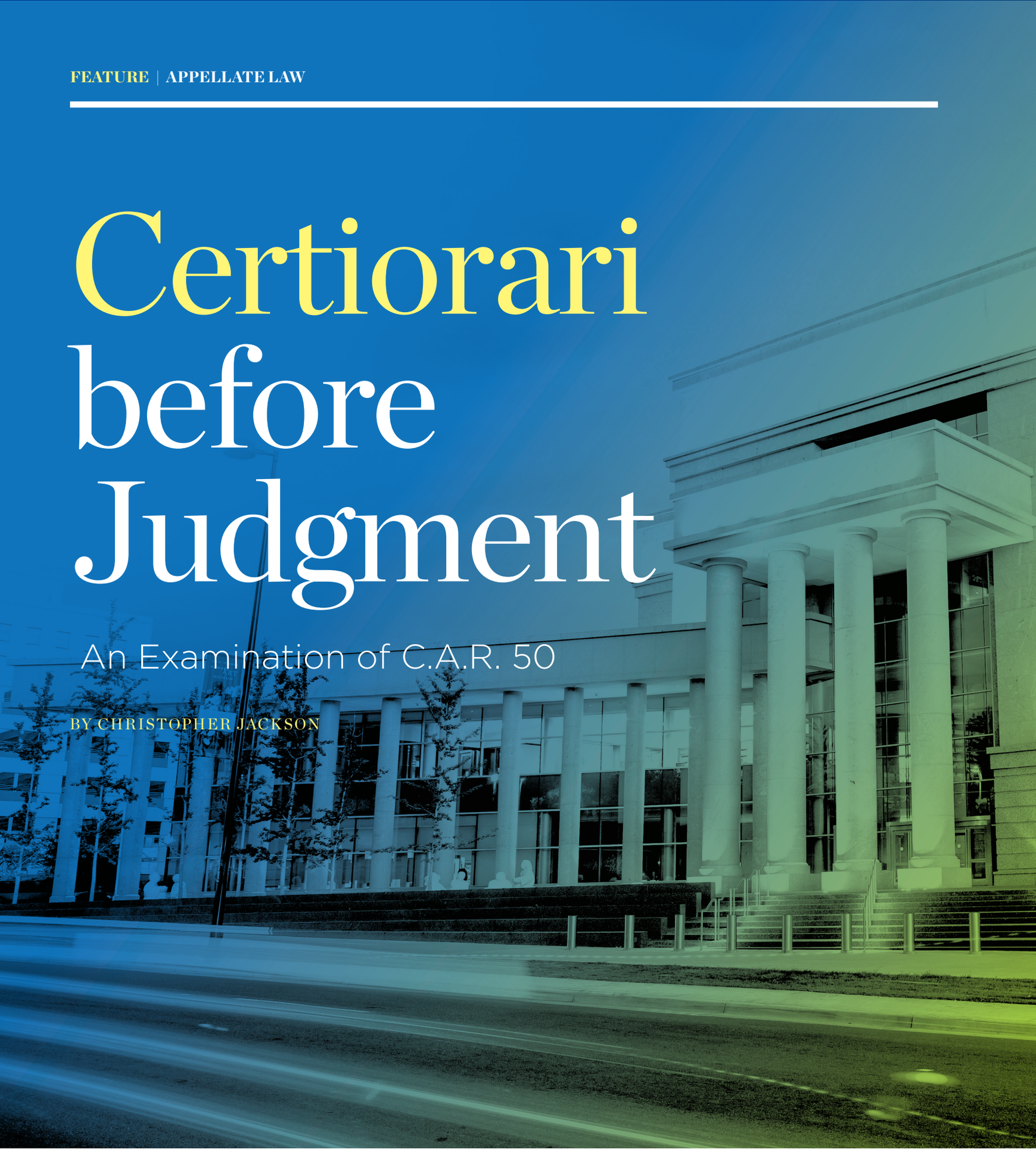

This article examines and offers insights on Colorado Appellate Rule 50, which allows the Supreme Court to review a case before the Court of Appeals renders a decision.

The Colorado Supreme Court's jurisdiction is surprisingly varied and complex. Broadly speaking, the Court's power to hear cases can be divided into three categories. The Court's *original* jurisdiction covers, among other things, writs like habeas corpus and mandamus, along with opinions on "important questions upon solemn occasions" when requested by the Governor or General Assembly.[1] The Court's *appellate* jurisdiction includes cases where the party seeking review of a judgment has the right to go directly to the Supreme Court, skipping any intermediate appellate review.[2] And the Court's *certiorari* jurisdiction extends to cases over which the Court has discretionary review to hear an appeal from another appellate court.[3]

This article takes up one facet of the Court's certiorari jurisdiction: its power under C.A.R. 50 to grant a petition *before* the Court of Appeals issues a judgment. It describes the mechanics of the rule and analyzes the factors the Court considers in deciding whether to grant a Rule 50 petition.

Why is Rule 50 Important?

Most lawyers are familiar with the commonly used C.A.R. 49 certiorari process, under which a case is appealed to the Colorado Court of Appeals and that court issues an opinion.[4] The losing party then files a petition for a writ of certiorari, which the Supreme Court can choose to grant or deny.[5] But under C.A.R. 50, the Supreme Court can review a case pending in the Court of Appeals *before* that court renders a judgment—bypassing intermediate appellate review and resolving the case on a much shorter timeline.

Though the Supreme Court doesn't utilize Rule 50 very often, it's an important component of the Court's supervisory authority over the judicial branch.

Rule 50 Mechanics

Under the Colorado Constitution, the Supreme Court has "a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."[6] Consistent with this constitutional authority, the General Assembly gave the Supreme Court the power to review a case before the Court of Appeals has made a final determination.[7] That power is governed by C.A.R. 50, which provides that the Supreme Court may issue a writ if

1. "the case involves a matter of substance not yet determined by the supreme court" or would involve "the overruling of a previous decision of the supreme court";
2. the Court of Appeals has been "asked to decide an important state question which has not been, but should be, determined by the supreme court"; or

3. "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court."[8]

Rule 50 deviates from Rule 49's traditional certiorari review in a few key ways. First, unlike a petition under Rule 49, which states that issuing a writ "is a matter of sound judicial discretion,"[9] Rule 50 explicitly requires that at least one of the three above-listed conditions be satisfied. Second, the factors the Supreme Court considers are similar, but not identical. While both Rules 49 and 50 evince a concern about a matter of "substance not yet determined by the supreme court,"[10] the similarities end there. Rule 50 is primarily concerned with the importance of the issues; Rule 49, in contrast, contemplates Supreme Court review in appeals where there are conflicting opinions on the same legal question and where a lower court has "so far departed from the accepted and usual course of judicial proceedings" that the Supreme Court must intervene.[11] In a final twist, a Rule 50 petition need not be filed by any party. While a litigant certainly may file a petition, the Court of Appeals can request that the Supreme Court issue a writ, and the high court itself can order a transfer of the case.[12]

Petitioning for review under Rule 50 is fairly straightforward. Because it's a petition for certiorari, the Rule 53 requirements apply: The petition must include the sections outlined in C.A.R. 53(a), including an advisory listing of the issues, a jurisdictional statement, and an argument about why the Court should grant the petition.[13] Likewise, the rules on filing, service, and form of appellate documents cover Rule 50 filings.[14] But unlike a petition under Rule 49—which requires a party to file within 42 days after entry of judgment on appeal or, if a petition for rehearing is filed, 28 days after the denial[15]—Rule 50 doesn't impose any specific time limit. Instead, the rule requires that the underlying case be "newly filed or pending in the court of appeals, before judgment is given in said court . . . ."[16] Attorneys are advised to file their Rule 50 papers as quickly as possible. Doing so prevents the Court of Appeals from wasting its time and resources, and a prompt filing underscores the litigants' argument that the issue presented is a critical one that cannot await intermediate appellate review.

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One concern about filing a Rule 50 petition warrants mention. A party considering filing under the rule might worry that the Supreme Court's grant of the Rule 50 petition will preclude certiorari review of other issues in the case.[17] While no opinion directly addresses this issue, the case law strongly suggests that additional review remains available. In *Goebel v. Colorado Department of Institutions*, the Supreme Court granted a Rule 50 petition that covered "only one of several issues raised on appeal."[18] It reversed the decision in part and "remand[ed] the case to the court of appeals to consider the other issues raised on appeal."[19] More generally, the Supreme Court has often held that the Court of Appeals retains jurisdiction to decide issues left unresolved after the high court grants certiorari and issues a decision.[20] Thus, the Court's decision to address an issue under Rule 50 won't prohibit a litigant from later seeking review of any other issue under Rule 49.

Relevant Factors

As noted above, Rule 50 calls out three conditions that justify a Rule 50 petition. But while one of these three conditions is necessary, it isn't sufficient. The Supreme Court retains the discretion to decide whether to issue a writ even if the requisite showing has been made.[21] Understanding when the Court chooses to exercise that discretion requires a deeper dive into the case law.

Unfortunately, Rule 50 has always been a bit of a legal backwater. Decisions even citing the rule are few and far between, and no opinion analyzes the rule in any detail.[22] The same dearth of authority holds in the federal system. The analogous federal rule—Supreme Court Rule 11—allows the US Supreme Court to hear a case before a federal court of appeals issues a judgment if "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination by this Court."[23] But the US Supreme Court grants certiorari review under this rule even less frequently than the Colorado Supreme Court grants review under C.A.R. 50.[24] Still, we can glean some guidance from reviewing the Colorado Supreme Court's previous Rule 50 decisions.

Case Significance

The first and most obvious criterion is the significance of the issue presented. Indeed, Rule 50 explicitly provides that a case must have "substance" or "importance" for the writ to issue.[25] In a recent appeal, the Court granted a Rule 50 petition in a case raising a constitutional question about the functioning of the state legislature. *Markwell v. Cooke* arose out of the General Assembly's 2019 session.[26] Republican lawmakers, apparently seeking to delay legislation in the Democratic-controlled Senate, asked

for proposed legislation to be read in full—a process that may, for some bills, take several days.[27] In response, Democratic leaders set up several computers to speed-read legislation through a program that ran through text so quickly the words were incomprehensible.[28] The district court ruled that the Democrats' move violated the state constitution. The ruling was appealed to the Court of Appeals, and the Supreme Court granted the parties' Rule 50 petition.[29] Though the Court's order granting review didn't provide any express rationale, the parties' joint Rule 50 petition emphasized the dispute's "great public importance."[30]

The Supreme Court has used similar express or implied reasoning in several other cases. In *In re Marriage of LaFleur and Pyfer*, the Court considered an issue involving same-sex couples and common law marriage.[31] In *A.L.L. v. People*, it addressed whether Colorado should adopt an *Anders*[32] briefing procedure for dependency and neglect proceedings.[33] And in *Colorado General Assembly v. Owens*, which involved a dispute between the governor and state legislature about line-item vetoes, the Court expressly acknowledged the dispute's "great public importance."[34]

The Supreme Court also hears important cases through its traditional Rule 49 certiorari jurisdiction. After all, nothing prevents the Court from agreeing to hear a case after the Court of Appeals renders its judgment. What drives the difference between those two sets of cases? It's hard to cite specific factors, but one likely explains some of the difference: Granting a Rule 50 petition ensures that the Supreme Court will actually hear the case. If the Court were to deny the petition it might not get another chance to decide the issues because the parties could settle or dismiss the appeal, the losing party might forego filing a certiorari petition, or the case might be mooted by intervening events. Thus, if the issue presented is of paramount public importance, the Supreme Court may wish to avoid the risk that the case will disappear before the justices can hear it.

Speed

An appeal's importance isn't the only factor the Supreme Court considers in acting on a Rule 50 petition. The need for a fast resolution matters as well. Perhaps the clearest example is *Ritchie v. Polis*, where the petitioners challenged an executive order that suspended requirements for ballot initiative proponents to collect a certain number of signatures from registered electors in person.[35] In March 2020, Governor Polis declared a disaster emergency due to the COVID-19 pandemic and signed an executive order authorizing the Secretary of State to issue temporary rules allowing signature-gathering by mail and email.

The petitioners filed a lawsuit claiming that the executive order violated the state constitution's requirement for in-person signature gathering. The district court denied the petitioners' motion for a preliminary injunction, and they appealed. The Supreme Court stepped in and "took jurisdiction of the appeal pursuant to C.A.R. 50(b)" specifically because "the deadline to gather signatures is fast approaching."[36] Speed has been a factor in other cases the Court has taken up as well.[37]

Jurisdictional and Procedural Concerns

Finally, the Supreme Court has evinced a willingness to grant a Rule 50 petition when a case involves a thorny jurisdictional or procedural issue. For example, two companion cases, *Langer v. Board of County Commissioners*[38] and *Yakutat Land Corporation v. Langer*,[39] posed a potential problem of appellate jurisdiction. Both appeals arose out of a contentious zoning dispute involving the construction of a roller coaster in the Estes Valley. In *Yakutat*, the district court determined that a portion of the applicable zoning code violated a provision of the state constitution.[40] The case was appealed to the Court of Appeals, which expressed some skepticism about whether it had jurisdiction, noting that it could not hear "[c]ases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional . . . ."[41] The Court of Appeals itself filed a motion for a determination of jurisdiction under C.A.R. 50, and the Supreme Court agreed to hear both cases.[42]

Procedural issues have also cropped up in Rule 50 writs. In particular, the Court has agreed to hear appeals under C.A.R. 50 to consider two cases raising similar issues together. For example, *M.A.W. v. People* involved the termination of parental rights in a dependency and neglect proceeding.[43] The father whose rights were terminated petitioned for certiorari under Rule 50, and the Court granted that petition "[b]ecause the present case raises many of the same issues as were presented in *A.R.*," another case pending before the Court.[44] The Supreme Court has granted certiorari before judgment for the same reasons in a few other cases, including *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodman Hills*[45] and *City of Englewood v. Harrell*.[46]

Conclusion

C.A.R. 50 gives the Colorado Supreme Court nearly unbridled discretion to truncate the normal appellate process—discretion that it exercises only on rare occasions. Still, it's a viable option in the right case where a party can justify skipping intermediate appellate review. It's thus important to understand Rule 50's procedures and gain insight into the Court's rationales for exercising Rule 50 jurisdiction.

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NOTES

1. Colo. Const. art. VI, § 3; C.A.R. 21.
2. These direct appeals include actions where a state or local law has been declared unconstitutional, cases concerning state public utilities commission decisions, and cases involving the adjudication of water rights, among others. *See* CRS § 13-4-102(1). The Court also has direct but discretionary review of certain actions arising under Colorado's election code. CRS § 1-1-113(3).
3. *See* C.A.R. 49–54. Generally, this involves review of a decision by the Court of Appeals, but the Court also has certiorari jurisdiction over appeals of a district court's decision on an appeal from a county court judgment. *See* CRS § 13-6-310(4).
4. *See* C.A.R. 3, 36.
5. C.A.R. 49, 52.
6. Colo. Const. art. VI, § 2.

7. CRS § 13-4-109. The Supreme Court's apparent first use of this power was in *Evans v. Simpson*, 547 P.2d 931, 933 (Colo. 1976).

8. C.A.R. 50(a).

9. C.A.R. 49.

10. *Compare* C.A.R. 50(a)(1) ("[c]ase involves a matter of substance not yet determined by the supreme court of Colorado"), *with* C.A.R. 49(a) ("[t]he district court on appeal from the county court has decided a question of substance not yet determined by the supreme court").

11. C.A.R. 49(b)–(d). Interestingly, Rule 49 doesn't explicitly call out cases where the Court of Appeals, rather than the district court, has "decided a question of substance not yet determined by the supreme court." But the rule also explicitly notes that the "character of reasons" listed is "neither controlling nor fully measuring the supreme court's discretion." C.A.R. 49.

12. C.A.R. 50(b).

13. C.A.R. 53(a)(1)–(9).

14. *See* C.A.R. 25 and 32.

15. C.A.R. 52(b)(1). But note that workers' compensation, unemployment insurance, and dependency or neglect cases have different deadlines. C.A.R. 52(b)(2) and (3).

16. C.A.R. 50(a).

17. Thanks to Marcy Glenn for raising this point.

18. *Goebel v. Colo. Dep't of Insts.*, 830 P.2d 1036, 1037 (Colo. 1992).

19. *Id.*

20. *See, e.g.*, *F.D.I.C. v. Am. Cas. Co. of Reading*, 843 P.2d 1285, 1287 (Colo. 1992) ("We accordingly reverse the judgment of the court of appeals and remand the case to that court for consideration of any other issues raised by the parties in the original appeal to that court and not resolved by the court of appeals in its opinion."); *In re Marriage of Bozarth*, 779 P.2d 1346, 1347 (Colo. 1989) ("We now reverse the judgment and remand the case to the court of appeals with directions to consider the other issues raised but not resolved in the father's appeal to that court.").

21. C.A.R. 50(a) ("A petition for writ of certiorari . . . *may* be granted upon a showing that . . . .") (emphasis added).

22. The first opinion that referenced Rule 50, *Bill Dreiling Motor Co. v. Court of Appeals*, 468 P.2d 37, 40 (Colo. 1970), mentions only in passing that "C.A.R. 50 through 57 clearly provides for appellate review in this court." Secondary sources don't offer much more guidance. Then-Justice Gregory Hobbs wrote an article on the Supreme Court's protocols, but he mentioned Rule 50 only once. Hobbs, "Protocols of the Colorado Supreme Court," 27 *Colo. Law.* 21, 22 (Mar. 1998) ("Under C.A.R. 50, the Court may grant certiorari in a case that is pending but has not gone to decision in the Court of Appeals. This power is rarely exercised.").

23. *See also* 28 USC § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."). Note that the "imperative public importance" language is identical to that in C.A.R. 50(a)(3).

24. The most famous example is *United States v. Nixon*, 418 U.S. 683, 687 (1974), where the high court succinctly noted "the public importance of the issues presented and the need for their prompt resolution."

25. C.A.R. 50(a)(1)–(3).

26. *Markwell v. Cooke*, No. 20SC585, 2020 WL 6491611 (Colo. Nov. 2, 2020). The Court issued an opinion on March 15, 2021. *Markwell v. Cooke*, 482 P.3d 422 (Colo. 2021).

27. Paul, "A partisan lawsuit is looming over Colorado's 2020 legislative session—and getting costly for taxpayers," *Colo. Sun* (Jan. 8, 2020), https://coloradosun.com/2020/01/08/colorado-legislature-lawsuit-speed-reading.

28. *Id.*

29. *Markwell*, No. 20SC585, 2020 WL 6491611.

30. *Markwell v. Cooke*, Joint Petition for Writ of Certiorari, No. 20SC585, 2020 WL 7311483 at *10 (Colo. 2020). Likewise, the Court's published decision noted only that review was taken pursuant to Rule 50. *Markwell*, 482 P.3d at 426.

31. *In re Marriage of LaFleur and Pyfer*, 2021 CO 3, 2021 WL 79532 (Colo. 2021) (*cert. granted* "to address whether, in light of *Obergfell* [*v. Hodges*, 576 U.S. 664 (2015)], a same-sex couple may prove a common law marriage entered in Colorado *before* the state recognized same-sex couples' fundamental right to marry") (emphasis in original).

32. *Anders v. California*, 386 U.S. 738 (1967). *Anders* created a procedure to protect a criminal defendant's right to counsel where court-appointed counsel determines there are no viable issues for appellate review and withdraws from the case. Under *Anders*, where a court-appointed attorney determines the client's case to be wholly frivolous, the attorney may inform the court of such determination and request to withdraw.

33. *A.L.I. v. People*, 226 P.3d 1054, 1055 (Colo. 2010) ("We accepted prejudgment certiorari under C.A.R. 50 to clarify the duties of court-appointed counsel when their client exercises an appeal by right and yet cannot identify a meritorious legal argument to support their claim for relief.").

34. *Colo. Gen. Assembly v. Owens*, 136 P.3d 262, 264 (Colo. 2006) ("Because of the great public importance of this dispute between the Governor and the General Assembly, we exercised our authority under C.A.R. 50 . . . .").

35. *Ritchie v. Polis*, 467 P.3d 339 (Colo. 2020).

36. *Id.* at 342.

37. *Hall v. Moreno*, 270 P.3d 961, 964 (Colo. 2012) ("Due to the importance and time sensitive nature of this issue, we granted this request and ordered briefing and oral argument on an expedited schedule."); *Margolis v. Dist. Court*, 638 P.2d 297, 299–300 (Colo. 1981) (case involving pending petitions for referendum and initiative).

38. *Langer v. Bd. of Commr's of Larimer Cty.*, 462 P.3d 59 (Colo. 2020).

39. *Yakutat Land Corp. v. Langer*, 462 P.3d 65 (Colo. 2020).

40. *Id.* at 69.

41. *Id.* (citing CRS § 13-4-102(1)(b)). *See also Langer*, 462 P.3d at 62.

42. *Id.*

43. *M.A.W. v. People*, 456 P.3d 1284, 1285–86 (Colo. 2020).

44. *Id.* at 1289.

45. *Campaign Integrity Watchdog v. All. for a Safe and Indep. Woodland Hills*, 409 P.3d 357, 359 (Colo. 2018) ("[T]he court of appeals asked us to take the appeal directly under C.A.R. 50. We accepted jurisdiction, in part because this case is related to another that we decide today . . . .").

46. *City of Englewood v. Harrell*, 370 P.3d 149, 149–50 (Colo. 2016) ("We accepted transfer of this case from the court of appeals pursuant to section 13-4-109, C.R.S. (2015) and C.A.R. 50 because the issues raised involve matters of substance not previously determined by this court, and because this court granted certiorari in two cases raising similar issues.").

Notably, the Court also has the power to hold a petition for writ of certiorari pending another appeal and then summarily grant, vacate, and remand (or "GVR") that case for reconsideration in light of the new opinion. *See, e.g.*, *Ambrose v. People*, No. 20SC698 (Colo. Apr. 12, 2021). But in cases that are GVR'd, the parties don't have an opportunity to file a brief or otherwise argue before the Court.