

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 Appeal from Chaffee County District Court The Honorable Dayna Vise No. 2025CV2	DATE FILED July 29, 2026 11:53 PM FILING ID: 68869C3114BF7 CASE NUMBER: 2025CA2233
Plaintiff-Appellant: Adam C. Griffith v. Defendants-Appellees: Executive Director of CDOC and Warden of the Buena Vista Correctional Facility.	-Court Use Only-
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REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

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

Specifically, the undersigned certifies that:

- The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 2,812 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the applicable requirements of C.A.R. 28, and C.A.R. 32.

A handwritten signature in black ink, appearing to read 'A. Kurtz', written over a horizontal line.

/s/ Anna I. Kurtz

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INTRODUCTION

Mr. Griffith, imprisoned and pro se, tried to access the courts to exercise his right to seek C.R.C.P. 106.5 review of a disciplinary conviction that he alleged was unconstitutional and that resulted in drastic curtailments of his liberty, including his placement in restrictive custody in a max security facility. His freedom was so circumscribed that he was deprived of access to the law library and forced to rely on prison staff to access the means to file his case. Though he promptly asked for the materials, the prison did not respond until after the applicable 28-day deadline, which Mr. Griffith only learned about once it was too late, had passed. The district court found good cause to allow him additional time to file.

The government does not dispute these facts. Instead, it asks this Court to hold that that they are immaterial because C.R.C.P. 106(b)'s deadline is jurisdictional and therefore can never be extended. But that argument assumes the answers to the questions presented in this appeal. The government offers no tenable response to Mr. Griffith's textual and constitutional arguments that district courts must be permitted to consider the reasons for a prisoner's late Rule 106.5 filing and to grant additional time when warranted. The Answer Brief is largely an exercise in evasion, asserting strained preservation arguments that are especially misplaced as applied to a pro se litigant seeking to vindicate fundamental rights.

Rule 106.5(j) means what it says: the deadline “set forth above” in Rule 106.5(a) can be extended for good cause. Even accepting the faulty premise of *Brown v. Walker Commercial, Inc.*, 2022 CO 57, 521 P.3d 1014, that a court-authored procedural rule can ever divest a district court’s jurisdiction, the inclusion of a subsection expressly authorizing extensions distinguishes Rule 106.5 from Rule 106(a)(4). And ultimately, whether or not the deadline is labeled jurisdictional, strict application here would deny Mr. Griffith a meaningful opportunity to be heard and render Rule 106.5 unconstitutional as applied. The dismissal should be reversed.

ARGUMENT

I. Mr. Griffith’s arguments are preserved, and this Court should reject the government’s attempt to avoid the merits.

The government concedes that Mr. Griffith preserved the argument that the district court should exercise jurisdiction even though the complaint was filed late. Answer Br. at 7. It likewise concedes that the lower court expressly considered and ruled on whether the “set forth above” language in Rule 106.5(j) should be construed to apply to Rule 106.5(a). *Id.* at 15 n.1. It concedes that Mr. Griffith argued that the cases relied on in the government’s motion to dismiss should not control the outcome of his case, *id.* at 4, and that he opposed dismissal of his complaint on “fairness grounds,” asserting it would deprive him of the ability to access the courts and of his

constitutional right to due process. *Id.* at 4, 15 n.1. Preservation did not require more, and the Court should rule on the merits of Mr. Griffith’s arguments.

The government protests that Mr. Griffith did not specifically discuss below the interpretive canons of incorporation by reference or constitutional doubt. Answer Br. at 15 n.1. But preservation for appeal does not require “talismanic language,” *Rael v. People*, 2017 CO 67, ¶ 17, 395 P.3d 772, 775, especially from a pro se litigant, *People v. Bergerud*, 223 P.3d 686, 696-97 (Colo. 2010), and especially when important constitutional questions are at issue, *id.* Mr. Griffith should not be denied review because he did not “articulate his concerns within the legal lexicon.” *Id.* The issues were “brought to the district court’s attention and the court ruled on [them].” *Owens v. Dominguez*, 2017 COA 53, ¶ 21, 413 P.3d 255, 261-62. CF, pp. 144-47.

Moreover, this Court is empowered to consider “any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal.” *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 550–51 (Colo. 2006); C.A.R. 1(d). Exercising that discretion is especially appropriate where the issue presented is a question of law requiring no deference to the lower court’s reasoning; where the party always opposed and never acquiesced in the result of the ruling below; where the issue is robustly briefed on appeal; where the issue has broad

impact or directly affects the validity of judgments, such as the constitutionality of statutes and related issues; where the issue concerns the alleged infringement of fundamental constitutional rights; and when necessary to do justice. *See Roberts*, at 550-51; *People ex. Rel. E.S.*, 2021 COA 79, ¶ 14; *W Const. Co., Inc. v. Elliott*, 253 P.3d 1265, 1271 (Colo. App. 2011); *People in Interest of C.E.*, 923 P.2d 383, 385 (Colo. App. 1996); *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 17 (1934). All of these considerations are present here. This Court should reject Appellees' attempts to avoid the merits of this case.¹

¹ Mr. Griffith understands that this Court is bound by *Brown* and does not ask it to hold that that case or its predecessors were wrongly decided. Making that argument in the district court would likewise have been futile. *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 43, 287 P.3d 842, 852-53 (Coats, J., dissenting); *Susan D. Flynn Revocable Tr. v. Scott*, 24CA0004, 2025 WL 718427, at *3 (Colo. App. Mar. 6, 2025). Should the Colorado Supreme Court review the question of the district court's jurisdiction, Mr. Griffith's pro se argument below would not constrain the Court's "fundamental obligation to ascertain controlling law." *People v. Lulei*, 2026 CO 17, ¶ 31, 586 P.3d 184, 194 ("A party's failure to identify the applicable legal rule certainly does not diminish a court's responsibility to apply that rule . . . when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." (citations omitted)). That is especially true here given that subject matter jurisdiction "is not conferred *or taken away* from a court based on the position of a party." *Winslow Const. Co. v. City & Cnty. of Denver*, 960 P.2d 685, 690 (Colo. 1998) (emphasis added).

II. The Colorado Rules of Civil Procedure may neither create substantive rights nor divest district court jurisdiction.

The government does not deny the general rule that under the constitutional separation of powers, the judiciary cannot vest or divest district court jurisdiction. *See* Answer Br., 18-21; *People In Interest of S.A.G.*, 2021 CO 38, ¶ 22, 487 P.3d 677, 681 (“In Colorado, trial courts are courts of general subject matter jurisdiction and their unrestricted and sweeping jurisdictional powers are only limited by statute or constitutional provision.” (quoting *Currier v. Sutherland*, 218 P.3d 709, 712 (Colo. 2009)) (cleaned up)). Nor does it deny the corollary that “a time limit prescribed only in a court-made rule . . . is not jurisdictional.” *Hamer v. Neighborhood Hous. Servs.*, 585 U.S. 17, 18-19 (2017). Instead, citing no law, the government invents an exception for Rules 106 and 106.5 on the theory that they are “court-created substantive right[s]” over which the court “can limit its own jurisdiction.” Answer Br. 6, 18-21.

But the Colorado Rules of Civil Procedure cannot create substantive rights. C.R.S. § 13-2-108 (The Rules “shall neither abridge, enlarge, nor modify the substantive rights of any litigants.”). Nor is there any exception to the express rule that they “shall not be construed to extend or limit the jurisdiction of any court.” C.R.C.P. 82. In any event, in addition to being wrong on the law, the government is also wrong on the facts: as *Brown* itself explains, Rule 106 (and 106.5) did *not* create

new substantive rights. 2022 CO 57, ¶¶ 22-23, 521 P.3d 1014, 1019. They merely simplified the procedure attending “the substantive forms of relief available under . . . special remedial writs” that predated the Rules and were provided for in the former Code of Civil Procedure—a code of *statutes* enacted by the General Assembly. *Id.* The government’s attempt to reconcile *Brown* with constitutional limits on the separation of powers is therefore unavailing.

Brown’s error reflects a long history of Colorado decisions being “less than meticulous in . . . us[ing] the term “jurisdictional” to describe emphatic time prescriptions in rules of court.” *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004). Opening Br. at 13-17. These cases strayed from foundational principles of law, and Appellees’ circular reliance on their reasoning, Answer Br. at 18-21, is unpersuasive. While this Court cannot revisit those decisions, it should decline Appellees’ invitation to perpetuate their mistake here.

III. Reversal is required under the plain language of Rule 106.5, under *Brown*, and under constitutional guarantees of due process and court access.

A. Rule 106.5 is distinguishable from Rule 106(a)(4).

The remainder of the Answer Brief fails to engage substantively with Mr. Griffith’s arguments. The government asserts that courts have historically treated the failure to timely file a Rule 106(a)(4) action as a jurisdictional defect subject to

no equitable exceptions. Answer Br. 8-12. Mr. Griffith does not disagree. As discussed above, however, that precedent rests on a fundamental legal error. And in any event, the question raised by this appeal—a question unanswered by any binding authority on this Court—is whether the same conclusion should apply to untimely filings under Rule 106.5.

Mr. Griffith identified several reasons why it should not, including that *Brown* expressly distinguished rules that expressly authorize extensions for good cause, like Rule 106.5. Opening Br. at 30-37; *Brown*, ¶ 45. To this, Appellees respond that Rule 106.5(j)'s authorizing language does not apply to the deadline for filing a complaint set forth in Rule 106.5(a), which only incorporates by reference deadlines literally spelled out in Rule 106(b). But Appellees do not explain why that reference should not be treated as “just the same” as if the legislature “had copied into the latter act the[] provisions of the former.” *Schwenke v. Union Depot & R. Co.*, 4 P. 905, 907 (Colo. 1884). See Opening Br. at 20-25. They posit that had the drafters of Rule 106.5 wished to make its complaint-filing deadline less strict than Rule 106(a)(4)'s, it could have “easily and clearly said so within Rule 106.5 but did not.” Answer Br. at 21. But they do not explain why Rule 106.5(j) does not, as Mr. Griffith argued, accomplish exactly that distinction.

Moreover, while the government understandably wishes to avoid the consequences of the canon of constitutional doubt in this case, Opening Br. at 25-30, 37-39, it offers no support for its assertion that Mr. Griffith’s plain reading of the Rule—which merely assigns an incorporating reference its ordinary and essential effect—is not a reasonable one. Answer Br. at 16. Nor could it.

Finally, the government makes no effort to grapple with the distinctive context in which Rule 106.5 operates or Mr. Griffith’s argument that *Brown*’s policy rationale—which balanced a citizen’s right to have their case heard against the need for “efficient municipal planning”—does not translate here. Opening Br. at 35-37.

Afforded its plain meaning, Rule 106.5(j) grants courts authority, where good cause exists, to extend the time period that is set forth in Rule 106.5(a) by reference. Under *Brown*, such language “expressly allow[ing] for an extension of time” means even a so-called “jurisdictional” deadline can be relaxed. *Brown*, ¶ 45 n.7. Finally, the constitutional concerns implicated by treating Rule 106.5’s deadline as inflexible—which Appellees do not even attempt to address—are fatal to their preferred interpretation.

B. Strict construction of the filing deadline invites constitutional questions and is unconstitutional as applied to Mr. Griffith.

Resting on its contention that the deadline is jurisdictional, the government offers *no* response to the substance of Mr. Griffith’s constitutional arguments. That

is in part because it misapprehends them. It characterizes Mr. Griffith as alleging that “CDOC’s actions in impeding his ability to file his Complaint were unconstitutional or violative of his Fourteenth Amendment rights.” Answer Br. at 12. Not so. Mr. Griffith does not challenge CDOC’s actions outside the COPD hearing. What he challenges is the constitutionality of the lower court’s strict construction of the deadline under the circumstances to prevent him from filing his complaint. CF, p.133-34 (“The same agency I am seeking review of caused the delay that the Defendants claim renders my complaint time-barred and divests the court of subject matter jurisdiction. . . . Unless I pursue this case through this complaint I will never get the review of the CDOC’s action I deserve and am guaranteed by the Constitution for the violation of my rights.”); *id.* at 134 (Defendants’ interpretation would invite CDOC to make it “impossible for offenders to challenge COPD convictions”); *id.* (“It is unconstitutional to prevent me from filing a complaint . . . [where] the agency I’m filing against is the one that caused the delay in filing.”). The government is thus wrong that he sought review of matters beyond the scope of review in a C.R.C.P. 106.5 action. Likewise, the possibility of suing CDOC for interfering with his right to access the courts is no answer to the relevant constitutional concern, Answer Br. at 13, which is Mr. Griffith’s ability to seek review of his COPD conviction.

For the reasons discussed in the Opening Brief, the doctrine of constitutional doubt resolves any questions about Rule 106.5(j)'s meaning and requires reversal. Opening Br. at 25-30. But even if the deadline in Rule 106.5(a) were properly treated as jurisdictional, the district court was required to consider whether applying it to bar Mr. Griffith's complaint was constitutional—under the guarantees of due process and access to the courts—given the circumstances that prevented him from meeting it. *E.g.*, *Citizens for Responsible Growth v. RCI Dev. Ptnrs., a Colo. Corp.*, 252 P.3d 1104, 1108 (Colo. 2011) (“the loss of a right to judicial review [under C.R.C.P. 106] for failure to timely file in the absence of adequate notice would clearly violate due process of law”); *Walker Commercial Inc. v. Brown*, 2021 COA 60, ¶ 29; *Baker v. City of Dacono*, 928 P.2d 826, 827 (Colo. App. 1996); *Blehm v. Novak*, No. 16CV12, 2001 Colo. Ct. App. LEXIS 2655, at *4 (Colo. App. Sept. 6, 2001); *Allison v. Industrial Claim Appeals Office*, 884 P.2d 1113, 1119 (Colo. App. 1994); *Blehm*, 2001 Colo. Ct. App. LEXIS 2655, at *4; *Vigil*, 2018 Colo. Ct. App. LEXIS 2067, at *3.

It was not. Opening Br. at 25-30, 37-39. While the Colorado Rules of Civil Procedure cannot create substantive rights, Mr. Griffith agrees with the government that Rule 106.5 does *concern* a substantive right: the right to state judicial review of a quasi-judicial decision. And when a state creates a substantive right, “the

accompanying procedures must comport with defendant's constitutional rights, including the right to due process." *People v. Bell*, 2026 CO 28, ¶ 20; *Hoang v. People*, 2014 CO 27, ¶ 39, 323 P.3d 780, 788 ("Although no federal constitutional right to an appeal exists, when a state creates appellate courts . . . appellate procedures must comport with the United States Constitution"); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause").

Moreover, here, due process and access to courts concerns were at their height because Mr. Griffith (1) sought review of constitutional defects (2) in a proceeding that resulted in sanctions curtailing significant liberty interests, and (3) the very deprivation of liberty he sought to challenge allowed the opposing party to prevent him from filing timely. *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974) (where deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and . . . entitle[s] him to those minimum procedures appropriate. . . to insure that the state-created right is not arbitrarily abrogated); *id.* at 579 (noting access to courts concern where a prisoner is "denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"); *People v. Germany*, 674 P.2d 345, 353 (Colo. 1983) (A limitations period cannot

deprive a court of the ability to distinguish between “constitutional challenges which could and should have been asserted in a timely manner and those which, due to special circumstances or causes, could not have been.”).

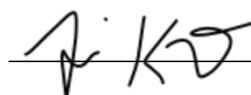
Appellees ask this Court to adopt a rule that deems these concerns legally irrelevant. Because that conclusion is contrary to the plain text of the Rule, Colorado precedent, and both the Colorado and U.S. Constitutions, this Court should reject the invitation and reverse the dismissal of Mr. Griffith’s complaint.

CONCLUSION

The district court’s conclusion that it had no choice but to dismiss Mr. Griffith’s complaint was error. Mr. Griffith respectfully requests that the Court reverse the order of dismissal and remand for further proceedings.

Date: July 29, 2026

Respectfully Submitted,

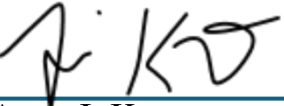


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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2026, I served via the Colorado Court E-Filing System a copy of the foregoing Reply Brief on all parties of record.



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