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COLORADO COURT OF APPEALS
2 East 14th Ave
Denver, Colorado 80203

Appeal from Rio Grande County District Court
Honorable Crista Newmyer-Olsen
Case No. 2021CV30032

LAURA ANZALONE,

Plaintiff/Appellant

v.

BOARD OF TRUSTEES OF THE TOWN OF EL NORTE; and the **TOWN OF EL NORTE**,

Defendants/Appellees

▲COURT USE ONLY▲

Attorney for Proposed *Amicus Curiae*
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Court of Appeals Case No.:
2022CA2181

PROPOSED BRIEF OF PROPOSED *AMICUS CURIAE* THE COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF APPELLANT

EXHIBIT 1

CERTIFICATE OF COMPLIANCE

I hereby certify that this Proposed Brief of *Amici Curiae* in Support of the Appellant complies with the requirement of Rule 29(d) that an amicus brief must contain no more than 4,750 words. This amicus brief contains 2,045 words. In addition, I certify that this brief complies with the content and form requirements of C.A.R. 29 and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/Steven D. Zansberg
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IDENTITY OF THE *AMICUS* AND ITS INTEREST IN THIS CASE

The Colorado Freedom of Information Coalition (CFOIC) is a 501(c)(3) non-profit, headquartered in Denver, Colorado which commenced operations in 1987. CFOIC is a coalition of news media organizations, professional associations, citizen groups, and individuals dedicated to (1) educating the public on their rights to access information necessary for informed participation as citizens and to speak out on public issues, (2) informing legislators, and occasionally lobbying them, in regards to actual or contemplated bills that would amend the state's so-called Sunshine Laws, and (3) sponsoring litigation to enforce the public's rights under those laws. The organizational members of CFOIC are listed at https://coloradofoic.org/about/.[1] CFOIC maintains a website, https://www.coloradofoic.org, that reports the status of public interest litigation to the public; for that information, CFOIC (and its media members who would also report it) are necessarily dependent upon the willingness of involved attorneys to advise and explain the nature and status of newsworthy litigation.

CFOIC has a significant interest in the issues before this Court. CFOIC routinely reports upon cases litigated across the state in which citizens,

[1] The views expressed herein do not necessarily reflect those of every member of the Coalition.

organizations, and other individuals seek to exercise their rights under Colorado's Open Meeting Law (COML). CFOIC also provides information to the public, free of charge, about how that law operates and how Colorado's courts have interpreted it. *See, e.g.,* https://coloradofoic.org/open-government-guide/.

ARGUMENT

I. INTRODUCTION/SUMMARY OF ARGUMENT

The District Court's ruling declares that a meeting of a local public body that was duly noticed and an advance agenda published, at which they voted in public to conduct an executive session, and upon emerging therefrom promptly voted to sanction an absent member of that body – was, in fact, not a "meeting" at all. The error in this ruling is so obvious, it hardly needs explanation. Nevertheless, in holding that the District Court erred, hopefully in published ruling to come, this Court should provide clear guidance to all trial court judges in the state, to inform future rulings about how such cases should be decided.

First, this Court must remind trial court judges that the Colorado Open Meetings Law (COML) is a remedial statute that must be construed broadly in favor of the public, and that all exceptions to it must be narrowly construed.

Second, examining the statute as a whole, the Court should direct trial court judges (and public bodies) to take a prospective view of when a future meeting will, or might, involve the discussion of public business, not an after-

the-fact retrospective view.

Third, and finally, this Court should make clear that discussion of "public business," which triggers the Open Meeting Law, must not be narrowly confined to the actual passage of laws, ordinances, regulations or other "official action." The text of the statute makes quite plain that "public business" encompasses any actions that a public body is authorized by law or administrative rule to take, including deciding whether to conduct an executive session on any authorized topic, in which decisions (formal or informal) cannot be made. Even when a public body decides in a meeting open to the public *not* to take proposed course of action, the discussion that prompted the public body deciding *not* to take that action, is unquestionably the discussion of "public business."

II. THE DETERMINATION WHETHER A NOTICED PUBLIC MEETING IS TO DISCUSS "PUBLIC BUSINESS" MUST BE MADE PROSPECTIVELY, NOT RETROSPECTIVELY

The most fundamental error the District Court committed was to apply a *post-hoc* analysis of whether a particular meeting involved the discussion of "public business." It was undisputed that the Board of Trustees formally noticed the Special Meeting at which they planned to discuss with their attorney the possible removal of a sitting member of the Board. CF 220 (Order of Oct. 31, 2022) ¶¶ 5 -10. According to the District Court, had the Board

carried forward on that announced plan of action, the meeting then might be deemed to have involved the discussion of public business, CF 234, (though no explanation is given for why actual removal constitutes "public business" but formal censure and threat of removal, does not). The District Court concluded, completely irrationally, that because the Board *decided* behind closed doors – something it is specifically prohibited from doing[2] – *not* to remove Ms. Anzalone from the Board, the entire discussion that led up to that decision (adopting a position) did not involve the discussion of its "public business."

As discussed further below, the District Court's excessively narrow view of what constitutes "public business" was its second fundamental error. But by far the Court's most egregious error was its adopting a *post-hoc* view to determine the question in the first place (regardless of the substantive criterion it applied). This demonstrates a fundamental misunderstanding of the *purpose* of the Open Meetings Law, which is to afford the public the opportunity to observe for themselves, in real time, "the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board and influenced the vote announced without

[2] *See* § 24-6-402(4), C.R.S. (2023) ("no adoption of any proposed policy, position, resolution, rule, regulation, or formal action . . . shall occur at any executive session that is not open to the public").

discussion at the later public meeting." *Bagby v. School Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974); *id.* ("One has not participated in a public meeting if one witnesses only the final recorded vote."); *see also Benson v. McCormick*, 57 P.2d 651, 653 (Colo. 1978) ("Our Open Meetings Law . . . reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if *its decisional processes* are open to public scrutiny."

It is not the actual decision that gets made – to adopt a proposed course of action or to reject it – but the *discussion* that serves as *the basis for that decision* (either way) that the public is entitled to observe. And that is why the definition of "meeting" is not limited only to those gatherings at which *decisions are made*, but to "any kind of gathering, *convened to discuss public business*, in person, by telephone, electronically, or by other means of communication." § 24-6-402(1)(b), C.R.S. (2023). A meeting is defined by what information it is being "convened <u>to</u> *discuss*" – in advance, prospectively – regardless of what decision ultimately emerges from that discussion. It is also why the COML specifically requires certain "public meetings" to be noticed in advance, including those at which "any formal action *may* be taken." § 24-6-402(2)(b), C.R.S. (2023); *see also Benson,* 57 P.2d at 653 ("Absent adequate and fair notice, however, the salutary purposes

of the Open Meetings Law could easily be defeated.").

Accordingly, the question whether any gathering of three or more members of a local public body is a "public meeting" must be determined *before* the meeting begins – prospectively – not after the fact (retrospectively). Here, the Board formally noticed its Special Meeting and posted an agenda announcing it would meet with its attorney privately to discuss *possible removal* of a Board member, and then (following that executive session) it would vote on a proposed course of action with respect to that member of the Board. From that vantage point, the correct one, there can be no serious argument made that the gathering was not "convened to discuss public business" regardless of what course of action the Board was subsequently to take.

III. DISCUSSING POSSIBLE REMOVAL OR OTHER SANCTIONING OF A MEMBER OF A LOCAL PUBLIC BODY IS UNQUESTIONABLY THE "PUBLIC BUSINESS" OF THAT BODY

The second egregious error committed by the District Court was to give the term "public business" in the COML an excessively narrow construction. In so construing the statute, the District Court violated the well-established cannon of expansive construction for statutes, like the COML, that are "remedial" in nature and enacted for the benefit of the public. *See, e.g.,*

CO Off-Highway Vehicle Coalition v. CO Bd. of Parks and Outdoor Rec., 2012 COA 146, ¶ 23 ("The OML is intended to 'afford the public access to a broad range of meetings at which public business is considered.' In light of this purpose, *we interpret the OML broadly to further the General Assembly's intent to give citizens a greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance*.") (emphasis added) (citation omitted); *see also Cole v. State*, 673 P.2d 345, 349 (Colo. 1983) (holding that "the OML should be interpreted most favorably to protect the ultimate beneficiary, the public").

It is also important to set this discussion in the proper context: if "public business" is not going to be discussed at a gathering of a local public body, that gathering is **not a "meeting"** as defined by the COML. § 24-6-402(1)(b), C.R.S. (2023). That means (1) no public notice is required, and (2) the public is not entitled to attend the gathering – it can be closed to the public without satisfying the rigorous statutory prerequisites for convening an executive session. (Never mind that fact that the Board's Special Meeting of October 18, 2021 *was* noticed and the portions preceding and following the closed-door discussion *were* open to the public; under the District Court's ruling none of that was required, because the no "public business" was discussed at any time in that Special Meeting!).

Under the District Court's highly restrictive view of what comprises the Board's "public business," only actual adopted policies *that directly affect the general public* (such as removal of Board member, apparently) qualifies. By the District Court's standard, ordinary discussion of topics or issues presently pending before the Board, which do not result in such "formal action" affecting the public, is simply not the Board's "public business." Not only is this overly charry view of the scope of "public business" inconsistent with the spirit of the COML, it flies directly in the face of the statute's text.

Under the COML, regardless of what authorized topic of conversation a local public body intends to discuss behind closed doors, in order to properly convene a lawful "executive session," the Board is *required to meet in public*, announce the topic and the "particular matter" to be discussed in as much detail as possible, prior to *voting*, *in public*, to go into executive session. § 24-6-402(4), C.R.S. (2023). Clearly, voting to convene an executive session is not the adoption of a formal Board policy that directly affects the public, other than with respect to its rights under COML. And yet, that statute makes abundantly clear that all of those actions must be performed *in a public meeting.*

Similarly, the "day to day . . . supervision of county employees," cannot possibly be characterized as "formal action" or the adoption of any

public policy that directly affects the constituency of the Board of County Commissioners. And yet, gatherings of a quorum or three or more members of such a Board (whichever is fewer) to supervise the day-to-day operations of County employees is required to be an open meeting; such "public meetings" are only exempted from the statutory requirement of public notice. *See* § 24-6-402(2)(f), C.R.S. (2023).

Lastly, the act of a local public body, like the Del Norte Town Board, of approving the minutes of a prior executive session meeting cannot possibly be accurately characterized as the formulation of "public policy that directly affects the general public." And yet the COML authorizes such administrative actions to be taken in the context of a properly convened executive session, meaning one that has been properly announced and voted upon *in a public meeting*. § 24-6-402(4), C.R.S. (2023).

All of these statutory provisions make clear that "public business" under the COML is not to be narrowly construed, as the District Court did, as limited exclusively to formal action taken in adopting a policy that directly affects the general public. "Public business" of the Board is any action that it is authorized by law or administrative rule to perform as a Board – be it convening an executive session, approving the minutes of a prior meeting, or, as here, deciding whether to formally sanction a member of the Board and, if

so, which sanction to vote to impose on her.

CONCLUSION

For the reasons stated above, *Amicus Curiae*, the Colorado Freedom of Information Coalition, respectfully ask the Court to reverse the judgment below and hold that the Defendants violated the Colorado Open Meetings Law when they adopted a position in the course of an executive session – to publicly censure a member of the Board.

DATED: May 30, 2023

Respectfully submitted,

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