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| COURT OF APPEALS, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, Colorado 80203<br><br>Appeal of Denial of Motion to Dismiss<br>District Court, Elbert County,<br>Case Number: 2023CV30058<br>Honorable Theresa M. Slade presiding. | DATE FILED: February 16, 2024 4:56 PM<br>FILING ID: BE4ABFB08DF1A<br>CASE NUMBER: 2023CA1969 |
| Plaintiff-Appellee:<br>**MATT ROANE,**<br><br>**v.**<br><br>Defendant-Appellant:<br>**ELIZABETH SCHOOL DISTRICT.** | |
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**_AMICI CURIAE_ BRIEF OF ACLU OF COLORADO AND COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF PLAINTIFF-APPELLEE MATT ROANE**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this *Amici Curiae* brief complies with all requirements of C.A.R. 28(a)(2), 28(a)(3), 29(c), and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 3,245 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

*s/ Eric Maxfield*

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## IDENTITY AND INTEREST OF *AMICI CURIAE*

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members and supporters, is a state affiliate of the ACLU. The ACLU of Colorado is dedicated to the constitutional rights and civil liberties of all Coloradans, and vigorously supports the public's right to access government meetings and decision-making as fundamental to our democracy. The organization has a unique interest in ensuring that access to public business conducted in public meetings remains available to all persons, including those who seek to hold the government accountable through litigation.

The Colorado Freedom of Information Coalition (CFOIC) is a nonpartisan alliance of groups, news organizations and individuals dedicated to ensuring the transparency of state and local governments in Colorado by promoting freedom of the press, open courts and open access to government records and meetings. The CFOIC has a significant interest in the issues of this case. The CFOIC represents both individual and institutional members of the press, as well as advocacy groups for freedom of information and freedom of the press, that all work toward ensuring the public is meaningfully informed about the activities of their government.

## INTRODUCTION

The Colorado Open Meetings Law (COML) is designed to ensure that government meetings are accessible to the public. To achieve that goal, the COML expressly confers standing to sue upon "any person" who is denied or threatened with denial of rights under the COML. C.R.S. § 24-6-402(9)(a). This case arose when Mr. Roane, believing the Elizabeth School District Board of Education ("the District") violated the COML's requirements for executive sessions, filed suit against the District. The District moved to dismiss, arguing that Mr. Roane lacked standing to sue because he "has no connection to the Town of Elizabeth." The district court judge denied the motion, correctly concluding that Mr. Roane, as a citizen of Colorado, "has a legally protected interest in having public bodies conduct public business openly in conformity with the provisions in the [Colorado Open Meetings Law]."

The District and its *amici* advance the same flawed argument on appeal. In their briefing, they state that Mr. Roane has brought similar lawsuits on several occasions, and they highlight the burdens they face as a result of his litigation. They ask this Court to prevent Mr. Roane from bringing future suits by stripping him of his standing to sue. But their reasoning runs counter to the text and purpose of the COML, which reflects the calculation that the need for open meetings outweighs the burden on the government to ensure those meetings are open.

Rewriting the statute to spare the District from the burdens of litigation by one person would cause grave harm to the public interest.

*Amici* urgently caution that a reversal of the District Court's decision on standing would drastically and substantively alter the protections of the COML not only for Mr. Roane, but for all persons. *Amici* urge this Court to reaffirm that "any person," for purposes of the COML, includes journalists, advocates, researchers, government watchdogs, ACLU, CFOIC, Mr. Roane, and any other person denied access to a public meeting in the manner guaranteed by the COML.

## ARGUMENT

The plain text of the COML confers standing to sue on "[a]ny person denied or threatened with denial of any of the rights that are conferred on the public" by the COML. C.R.S. 24-6-402(9)(a). The District and its supporting *amici* contend that "any person" "must be read to contemplate an individual who has some legitimate nexus to the local jurisdiction and the challenged conduct." Pet. Br. at 25. Limiting standing to those "constituents and others who prove a direct, personal interest," they say, would "not stifle public engagement but rather ensure[] that those challenging local government actions have a legitimate interest in the issues at hand." Colorado Association of School Boards and Colorado Rural Schools Alliance *Amicus* Br. at 17. But such a test, invented as it would be from

whole cloth, defies the plain language of the statute and would invite government secrecy and unaccountability.

Moreover, COML's permissive standing requirements are essential to ensuring that journalists, advocates, watchdogs, public interest organizations, and members of the public can access public meetings with ease and challenge barriers to access when they arise.

## I. The Language, History, and Context of the COML Indicate That Any Person Has Standing to Sue for Violations.

A court's primary task in construing statutes and citizen initiatives is to determine and give effect to the intent of the General Assembly and the electorate, respectively. *Coloradans for a Better Future v. Campaign Integrity Watchdog*, 2018 CO 6, ¶ 16. A court will look primarily to the language of a statute to determine its intent. *Jones v. Cox*, 828 P.2d 218, 221 (Colo. 1992); *People v. Lente*, 2017 CO 74, ¶ 16.

When reviewing a specific provision of a statute, a court considers the statutory scheme as a whole in an effort to give consistent, harmonious, and sensible effect to all its parts. *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1192-93 (Colo. 2004). If interrelated statutory sections are implicated, courts apply the same rules of construction to further the

underlying intent of the statutory provisions. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 59 (Colo. 2003).

**A. The Plain Text of the COML Confers Standing on "Any Person"**

The language of the COML is unambiguous. If "any person" is barred from a public meeting, they may petition the district court for a remedy. C.R.S. § 24-6-402(9)(a). There is no cause to read the statute more narrowly than written.

As defined in CORA, the open records corollary to the COML, "person" "means and includes any natural person, including any public employee and any elected or appointed public official acting in an official or personal capacity, and any corporation, limited liability company, partnership, firm, or association." C.R.S. § 24-72-202(3). The statute could have used other words to limit the availability of standing; the phrase "any person" could have been modified by the phrase "in interest," meaning "the person who is the subject of a record or any representative designated by said person," as it is in some subparts of CORA. C.R.S. § 24-72-202(4). Or standing could have been limited to persons with a particular type of interest, as in some sections of the COML itself. *See, e.g.*, C.R.S. § 24-6-402(3)(a)(I) (in provision pertaining to matters that justify executive sessions, referring to "a person whose personal, private interest . . . ."); C.R.S. § 24-6-402(4)(a) (referring to a member of the public body with a "personal interest"). Alternatively, the law could have used a narrower term, such as

"constituent." But the COML plainly confers standing on "any person," C.R.S. § 24-6-402(9)(a).

Moreover, the COML defines "public meetings" as:

> All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.

C.R.S. § 24-6-402(2)(b).

The COML goes no further in defining what "open to the public" means, because it is self-evident. No one must declare a specific, legitimate, or personal interest in entering the meeting. Likewise under the related Colorado Open Records Act, the General Assembly has declared that, with certain specified exceptions, it is "the public policy of this state that all public records shall be open for inspection by any person at reasonable times . . . ." C.R.S. § 24-72-201. This public policy means that, unless there exists a legitimate reason for non-disclosure, any member of the public is entitled to review all public records. *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996). There is no requirement that the party seeking access must demonstrate a special interest in the records requested. *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 106 (Colo. 1974).

This Court should decline the invitation of the District and its *amici* to re-write the unambiguous language of the COML.

### B. A Broad Grant of Standing Is Consistent with the COML's Purpose of Promoting Government Transparency.

The purposes of the COML indicate that the statute should be read broadly. In determining the meaning of a statute, a court must adopt a construction that will serve the purposes underlying the enactment. *Howard Elec. & Mech., Inc. v. Dep't of Revenue*, 771 P.2d 475, 479 (Colo. 1989); *Gumina v. City of Sterling*, 119 P. 3d 527, 530 (Colo. App. 2004); *Lente*, 2017 CO 74, ¶ 16.

The COML was enacted to promote government transparency and allow citizens to hold government leaders accountable when they deny the public access to public business. Promoted by watchdog group Common Cause, the Colorado Sunshine Act of 1972, which codified the COML, appeared on the ballot as a citizen-sponsored initiative and passed with 491,073 votes in favor to 325,819 against. Jeffrey A. Roberts, "Fifty Years Ago, Voter Approval of the Sunshine Law Ushered in a New Era of Government Transparency in Colorado. It Also Meant No More Beer for the State Capitol Press Corps," CFOIC (Oct. 6, 2022), https://coloradofoic.org/fifty-years-ago-voter-approval-of-the-sunshine-law-ushered-in-a-new-era-of-government-transparency-in-colorado-it-also-meant-no-more-beer-for-the-state-capitol-press-corps/. The Comments in the blue book available for consideration by voters included reference to the "general public" needing to be better informed as to the scope and extent of efforts of special interest groups to influence state government. Blue book for "An Act to amend

Chapters 3 and 63, C.R.S. 1963," available at https://coloradofoic.org/wp-content/uploads/2022/09/1972BlueBook_SunshineLaw.pdf; *see also* "Initiatives & Blue Book," Colorado General Assembly, https://leg.colorado.gov/content/initiatives/initiatives-blue-book-overview#:~:text=The%20ballot%20information%20booklet%2C%20or,or%20question%20on%20the%20ballot. The comments also recognized that citizens cannot know by whom or for whom decisions are made if they are excluded from governmental meetings. *See also Cole v State*, 673 P.2d 345, 347 (Colo. 1983). Consistent with its purpose, the COML must be interpreted broadly to further the electorate's intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved. *Id.*

The COML itself states: "It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." C.R.S. § 24-6-401; *Costilla County Conservancy Dist.*, 88 P.3d at 1192-93; *Benson v. McCormick*, 195 Colo. 381, 578 P.2d 651 (1978); *Van Alstyne v. Hous. Auth. of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

In response to the district court determining that the plaintiff in *Weisfield* lacked standing (and notwithstanding the Court of Appeals' reversal), the General

Assembly passed HB 14-1390, adding the following provision to the Open Meetings Law: "any person denied or threatened with denial of any of the rights that are conferred on the public by this part four has suffered an injury in fact, and therefore, has standing to challenge the violation of this part 4."" C.R.S. 24-6-402(9)(a); Legal Standing of Public Open Meetings Laws, H.B. 1390, 2014 Sess. (Colo. 2014); *see Weisfield v. City of Arvada*, 2015 COA 43, ¶¶ 34-35. Votes in all committees, House and Senate, were unanimously in favor of the clarification that "any person" denied the rights of COML had standing to sue. The amendment reflects the view that when a meeting is wrongly closed, everyone is injured—not just those residing nearby—because everyone is deprived of information about how public bodies are doing their public business. The uncontroversial, unamended bill was signed into law by the Governor on June 6, 2014. "Votes for – HB14-1390," Colo. Gen. Assembly, http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont/D9FD4D951A14FCA887257CB300762E96?Open&target=/clics/clics2014a/commsumm.nsf/GetVotes?OpenAgent&billnum=HB14-1390.

Permissive standing requirements are necessary to promote transparency and access to public meetings. If those who are denied the COML's protections lack standing to sue, then public bodies lack incentive to comply with the law, and its protections are merely theoretical.

## II. Restricting Standing Under the COML Would Have Disastrous Effects on Journalists, Public Interest Organizations, and Other Members of the Public.

Each day, Coloradans rely on the COML to inform themselves as citizens by attending government meetings. Reading the statute too narrowly would undermine its purposes and interfere with efforts to hold government actors accountable for their actions.

While the District and its supporting *amici* articulate concerns with the way Mr. Roane in particular has gone about his COML litigation, the implications of their arguments extend far beyond one person's law practice. Requiring a COML plaintiff to demonstrate a "legitimate nexus to the local jurisdiction and challenged conduct," Pet. Br. at 25, could prevent or deter large swaths of the public from attending public meetings and vindicating their right to observe the government conducting public business.

For example, heightening standing requirements to challenge the COML would impose undue burdens on journalists who have no personal connection with a particular jurisdiction or meeting topic but have other reasons to report on aspects of a meeting. Indeed, reporters often publish stories from outside of their own city or county; such reporting contributes to the role of the press in "serv[ing] as a powerful antidote to any abuses of power by governmental officials." *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966). A reporter from Durango attending a public

meeting in Denver should have the same rights under the COML as a reporter from Denver—or any other member of the public.

Similarly, heightened standing requirements would interfere with watchdogs looking for patterns in COML violations to identify which requirements are most often flouted; researchers studying the manner in which public bodies across the state conduct their public business; students looking to gain a better understanding of how public bodies operate generally; and anyone seeking to attend a meeting for reasons they prefer not to disclose. A person might be gathering facts relevant to expressive litigation, obtaining information about an incumbent she hopes to challenge, or preparing to speak out at a future meeting. Each of these purposes is entirely legitimate and in line with democratic values. *See, e.g.*, *In re Foster*, 253 P.3d 1244, 1251 (Colo. 2011) ("Litigation is one of the essential mechanisms by which citizens can exercise their right to petition."); *Bolles v. People*, 189 Colo. 394, 398 (1975) ("[A] function of free speech under our system of government is to invite dispute. 'It may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'") (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). And in each of these situations, the person's purpose for attending the public meeting would be undermined by a requirement that they disclose that purpose to the government.

Moreover, if public bodies knew there would be no consequences for denying individuals access to their public meetings so long as those individuals could not demonstrate a specific connection to the jurisdiction and contents of the meeting, then they could impose all kinds of barriers to prevent or deter the public from attending. They might implement ID checks and deny access to anyone whose address is more than 10 miles away. They might require all out-of-district individuals to submit a written application describing their purposes for attending the meeting. They might simply go into an unwarranted closed session any time they determined that no attendees had a legitimate interest in the meeting. Each of these measures would be a severe blow to the ideals of open government and an informed public. *See. e.g.*, "The ID Divide: How Barriers to ID Impact Different Communities and Affect Us All," Movement Advancement Project (Nov. 2022), https://www.mapresearch.org/file/MAP-Identity-Documents-report-2022.pdf (reporting that Black, Hispanic, and Native American adults were less likely to have a valid driver's license than white non-Hispanic adults, and 68% of transgender people lack a valid, accurate driver's license); "Barriers to IDs," Colorado Legal Services, https://coloradoidproject.wordpress.com/barriers-to-ids/ (explaining obstacles to obtaining ID for people experiencing homelessness); Donald Moynihan et al., "Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions," J. of Public Administration

Research and Theory (Feb. 27, 2014), https://academic.oup.com/jpart/article/25/1/43/885957 (administrative burdens "matter to whether citizens access services to which they are entitled and desire.").

As organizations dedicated to protecting and promoting government transparency, *amici* know how crucial COML lawsuits are to increasing public awareness of elected officials' conduct and promoting accountability from an informed electorate. *See, e.g.*:

- Jeffrey A. Roberts, "Court of Appeals Sides with Aurora Sentinel in Open Meetings Case, Orders Release of City Council Executive Session Recording," CFOIC (Dec. 7, 2023) (Member of the Press successfully sued City of Aurora for improper use of executive session, including taking a position or formal action in the session), https://coloradofoic.org/court-of-appeals-sides-with-aurora-sentinel-in-open-meetings-case-orders-release-of-city-council-executive-session-recording/;
- Jeffrey A. Roberts, "Advocacy Group Movimiento Poder Asks to Join News Organizations' Lawsuit Seeking Disclosure of DPS Board Executive Session," CFOIC (May 5, 2023) (Members of the press The Denver Post, States Newsroom DBA Colorado Newsline, Nextar Media, Group, KUSA 9News TEGNA, the Denver Gazette and Colorado Politics, and Chalkbeat Colorado successfully sued the Denver Public Schools Board of Education

for improper use of executive session, including taking a position or formal action in the session), https://coloradofoic.org/advocacy-group-movimiento-poder-asks-to-join-news-organizations-lawsuit-seeking-disclosure-of-dps-board-executive-session/;

- Steve Zansberg, "Colorado Lawmakers Commit to Stop Auto-Deleting Instant Messages With Other Lawmakers," CFOIC (Oct. 17, 2023) (State Representatives Elisabeth Epps of Denver and Robert C. Marshall from Douglas County sued Democrat and Republican party leaders for discussions of public business, resulting in a consent decree and COML compliance), https://coloradofoic.org/colorado-lawmakers-commit-to-stop-auto-deleting-instant-messages-with-other-lawmakers/;
- Jeffrey A. Roberts, "Lawmakers' Use of Anonymous 'Quadratic Voting' System Violates Colorado's Open Meetings Law, Judge Rules," CFOIC (Jan. 6, 2024) (Public Trust Institute and Douglas County resident David Fornof successfully sued democratic lawmakers for using a system, unavailable to the public, to access lawmakers' positions on bills), https://coloradofoic.org/lawmakers-use-of-anonymous-quadratic-voting-system-violates-colorados-open-meetings-law-judge-rules/;
- Jeffrey A. Roberts, "Douglas Couty Judge's Ruling on Serial School Board Meetings Isn't Binding on Other Courts, but It Still Could Be Persuasive,"

CFOIC (Jun. 21, 2023) (lawmaker Robert Marshall successfully sued school board for holding closed "daisy chain" meetings out of public view), https://coloradofoic.org/douglas-county-judges-ruling-on-serial-school-board-meetings-isnt-binding-on-other-courts-but-it-still-could-be-persuasive/;

- Jeffrey A. Roberts, "Judge Orders Woodland Park School Board to Comply With Colorado's Open Meetings Law by Listing Agenda Items 'Clearly, Honestly and Forthrightly," CFOIC (Apr. 29, 2022) (Citizen and parent of children in the District Erin O'Connell successfully urged the court to issue a preliminary injunction after the Woodland Park School Board made a conscious decision to hide a controversial discussion and vote through the use of the agenda item "BOARD HOUSEKEEPING"), https://coloradofoic.org/judge-orders-woodland-park-school-board-to-comply-with-colorados-open-meetings-law-by-listing-agenda-items-clearly-honestly-and-forthrightly/.

These lawsuits are critical to ensuring that the public has access to public meetings. COML's protections should not be diminished in response to the earnest efforts of one perceived as a gadfly such as Roane. Rewriting the law to exclude Roane could result in excluding the ACLU, the CFOIC, and other watchdog

groups and journalists who work diligently to increase the public's knowledge of governmental conduct.

## CONCLUSION

The founders of our country recognized the importance of an informed public during our nation's infancy, *see* 8/4/1822 letter to W.T. Barry from James Madison ("Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."), and it remains just as vital today. Transparency, reporting, and resulting advocacy are critical pillars to a functioning democracy. Limiting standing under the COML would be a step towards eroding them. For the foregoing reasons, this Court should affirm the district court's order.

Respectfully submitted this 16th day of February, 2024.

*/s/ Timothy R. Macdonald*
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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the **AMICI CURIAE BRIEF OF ACLU OF COLORADO AND COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF PLAINTIFF-APPELLEE MATT ROANE** this 16th day of February, 2024, upon all parties herein via the Colorado Courts E-filing System to the Court and the following:

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*/s/ Mahima Chaudhary*
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