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District Court, County of Teller, 22CV30023

Petitioner:

Erin O'Connell
v.

Respondents:

Woodland Park School District, et al.

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Case No: 2024SC34

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S POSITION

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29, C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This amicus brief complies with the applicable word limits set forth in C.A.R. 29(d). It does not exceed 4,750 words. It contains 2,879 words.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*

The *amici* are the American Civil Liberties Union Foundation of Colorado, ("ACLU"), Colorado Freedom of Information Coalition ("CFOIC"), League of Women Voters of Colorado ("LWVCO"), the National Freedom of Information Coalition ("NFOIC"), and Parents-Safety Advocacy Group ("P-SAG"). Each of these organizations is committed to ensuring transparency in government and to maintaining public trust by encouraging compliance with the Colorado Open Meetings Law (COML). For this reason, these organizations (on behalf of their members and the public whose interests they represent), respectfully ask this honorable Court to consider their views on the important questions presented by this appeal, as set forth below.

SUMMARY OF ARGUMENT

The central issues in this appeal are whether, pursuant to the COML, public bodies are precluded by their past violations of the COML from properly enacting the same policy or decision they previously sought to adopt unlawfully, and whether they can do so without being held accountable to citizens who have borne the cost of bringing enforcement actions in our courts to ensure compliance with the COML.

The term "cure," in the judicially created "cure" doctrine, is a misnomer, at least with respect to COML violations; a violation, once it has occurred, is never

"cured." However, public bodies are permitted to enact policy at any time, so long as they do so in full compliance with the COML. By analogy, a driver who previously exceeded the speed limit is free to drive the same stretch of roadway again, in full compliance with the posted speed limit. But her doing so does not absolve her of her prior legal infraction.

Thus, "cure" (a word that causes too much confusion to warrant continued use in the COML context) refers only to the legal effect to be given to a properly enacted policy decision; such a lawfully enacted policy is "valid," going forward, and it thereby puts into effect a policy that was previously *attempted to be adopted* but was, by law, *invalid*.

The plain language of the COML, C.R.S. §§ 24-6-402(8) and 24-6-402(9)(b), does not allow (1) erasing public bodies' violations of COML through retroactive ratification of those violations, or (2) eliminating accountability by cutting off COML's enforcement arm: awarding attorneys' fees where plaintiff's lawsuit has resulted in a judicial finding of a COML violation.

The COML does not prevent public bodies from moving forward and lawfully re-enacting the same decision by taking new actions in full compliance with COML. But when they do so, ***public bodies remain accountable for their past violations***,

e.g., they are responsible for attorneys' fees incurred to take enforcement action against the public body to remedy the violation of the statute.

ARGUMENT

As Justice Louis D. Brandeis stated decades ago, "Sunlight is said to be the best of disinfectants." Louis D. Brandeis, *What Publicity Can Do,* Harper's Weekly, Vol. 58 (Dec. 20, 1913). Transparency and citizen participation in government processes are among the most fundamental principles of a democracy. Allowing retroactive validation of public bodies' prior unlawful decisions, taken in violation of the COML, while eliminating penalties for such violations eviscerates our sunshine laws.

In this context, the *amici* respectfully offer their responses to two of the questions the Court has granted *certiorari* to address.

1. THE *O'CONNELL* PANEL'S INTERPRETATION OF THE JUDICIALLY CREATED CURE DOCTRINE CONTRAVENES THE PLAIN MEANING OF THE STATUTE AND LONGSTANDING PRECEDENT.

Any "cure" of a COML violation by a public body is purely *prospective*—***not*** *retroactive*. Any retroactive ratification would directly negate the plain language of the COML and the General Assembly's intent to ensure transparency and public participation in government processes.

As the Colorado legislature has declared: "it is 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." Colo. Rev. Stat. § 24-6-401. The COML was enacted to "afford the public access to a broad range of meetings at which public business is considered." *Benson v. McCormick*, 578 P.2d 651, 652 (Colo. 1978). In light of this purpose, this Court has consistently interpreted the COML broadly to further the General Assembly's intent to give the public—COML's ultimate beneficiary—the opportunity to participate meaningfully in the decision-making process by becoming fully informed on issues of public importance. *Bagby v. School District No. 1,* 528 P.2d 1299, 1302 (Colo. 1974) ("The statutes' prohibition against making final policy decisions or taking formal action in other than a public meeting is not meant to permit rubber stamping previously decided issues. The statutes are remedial, designed *precisely* to prevent the abuse of secret or star chamber sessions of public bodies." (cleaned up) (emphasis in original)).

"Cure," in COML context, is a judicially created doctrine developed to balance enforcing compliance with transparency requirements of COML against the practical consequences of invalidating actions taken in violation of those requirements. COML does not forever foreclose a public body from ***moving forward*** by preventing public bodies from taking subsequent actions to put in place

policies or decisions that were invalid due to their prior COML violations, as long as their subsequent actions fully comply with COML—no rubber-stamping. *See, e.g*., *Bagby*, 528 P.2d at 1302; *Colo. Off-Highway Vehicle Coalition v. Colo. Bd. of Parks & Outdoor Rec*. ("COHVC"), 2012 COA 146, ¶ 27.

The validity of this judicially created doctrine itself is also conditioned on its full compliance with the COML. It cannot negate the plain language of the statute to transform what is invalid under the statute and retroactively grant it validity. The prior unlawful decision remains invalid by operation of law, *see* § 24-6-402(8), C.R.S.; but a newly adopted decision, effectuated through full compliance with COML's provisions for "adopting positions" or taking formal action, is effective as of the date it is properly adopted.

In furtherance of the COML goals, the General Assembly created mandates in two categories of violations, those involving ***discussions*** held in improperly noticed meetings, and those involving ***formal actions*** taken at improperly noticed meetings.[1]

[1] These *amici* quite regularly challenge both forms of COML violation by public bodies across the state: (1) ***discussion of public business*** by 3 or more members (local) or 2 or more members (state) outside of a properly noticed and open public meeting—even when *no decision is made*; (2) ***decisions*** reached by a public body, adopting any position, outside of a properly noticed and open public meeting.

The plain language of the COML states that "***No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section***." § 24-6-402(8), C.R.S. (emphasis added). The Court of Appeals ruling below, Slip Op., ¶¶ 20-21, 36, violates the plain language of that provision. No subsequent action taken by a public body can alter or erase the historical fact that its earlier act was unlawfully made and remained invalid until the new COML compliant action was taken. The "cure" doctrine only acknowledges the existence of an avenue for permitting a public body *to take a second shot at enacting policy* (making legally valid decisions) in compliance with COML.

COHVC's analysis of the attorneys' fees issue (addressed more fully *infra*, section 2) is especially informative here. Unlike the analysis of the panel in *O'Connell*, the COHVC panel does not use ratification and retroactivity synonymously. If a properly enacted decision could entirely "cure" or erase a prior unlawful decision, then no plaintiff would ever be entitled to recover attorney's fees and costs for having caused a public body to comply with the law.
This was *not* the holding of *COHVC*; rather, no attorney's fees were awarded to plaintiffs there not because the "cure" doctrine "erased" the prior admitted

violations of that public body but because the public body's newly-enacted and lawful *decision* was made "more than three weeks *before* plaintiffs filed their lawsuit," 2012 COA 146 ¶ 39 (emphasis in original). Accordingly, the *COHVC* panel concluded that the plaintiffs' subsequently filed lawsuit (unlike the plaintiffs in *Van Alstyne*) had not "*caused* a public body to comply with the Open Meetings Law." *Id.*[2]

Therefore, nothing in *COHVC* suggests that a public body's subsequent adoption of a policy or decision in a lawful manner can completely *erase* either of the prior *two* forms of COML violation: (a) *discussion* of public business, and (2) taking formal action or other such decision-making, outside of a public meeting.

Nevertheless, as the *O'Connell* panel's opinion best illustrates, the choice of the terms "cure" and "ratify," neither of which are used in COML, have created substantial confusion among courts and litigants because of the possibility of their retroactive, rather than purely prospective, effect, in other contexts.

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[2] The defendant in *COHVC* admitted, both in its Answer and ***prior to the litigation,*** that it *had committed three violations* of the OML. 2012 COA 146 ¶¶ 10, 12, 39. Thus, to the extent those violations could have served as the basis for an award of attorney's fees, the defendant could have sought to have those claims dismissed as moot. If, however, the defendant had contested its prior violations, the plaintiffs would have been entitled to recover their attorney's fees upon the Court's finding that violations had occurred.

Strongly impacted by this confusion, the Court's ruling in *O'Connell* violates the plain language of the statute, which specifically mandates invalidation of COML violations, eviscerating COML's most significant enforcement mechanism, which depends on the attorneys' fees provision to empower citizens to act as private attorney generals. *See* § 24–6–402(9); *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 34 (citing *Van Alstyne v. Hous. Auth. of City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999) (describing citizen-plaintiffs as "private attorneys general")).

The *amici* request that this Court set forth clear guidance for all Colorado public bodies and courts that:

- Each violation of COML ((a) any *discussion* of public business by a quorum outside of a public meeting, and (b) any decision made outside of a public meeting) is both independent and permanent.
- A subsequent lawful discussion and decision—in a properly noticed and convened open public meeting—allows public bodies to take action, subsequent to a violation, to properly engage in the formation of public policy.

- A valid post-violation decision made at such a subsequent lawful meeting is valid ***but it cannot obliterate or erase the prior unlawful "discussion" or "decision***."
- A plaintiff ***whose enforcement actions caused a public body to comply with the law or resulted in a judicial finding that a violation occurred is entitled to recovery of attorney fees and costs***, pursuant to Section 24-6-204(9)(b).

2. THE COURT OF APPEALS ERRED BY PRECLUDING AN AWARD OF PREVAILING-PARTY ATTORNEY FEES TO THE PLAINTIFF WHO SUCCESSFULLY PROVED THE ORIGINAL VIOLATION.

In our democracy, citizens are indispensable in ensuring government transparency. Those who sue to enforce the law are "private attorneys general" because "through the exercise of their public spirit and private resources," they cause public bodies "to comply with the Open Meetings Law." *Van Alstyne*, 985 P.2d 97, 100.

Their actions ensure transparency in government by preventing backroom dealings. They also create and sustain public trust by allowing and encouraging public participation and by holding public bodies accountable for violations of the COML. Therefore, the legislature commanded that such private attorneys general be awarded their reasonable attorney fees if they succeed in a lawsuit under that law.

To preserve its enforcement power, the COML does not allow any "cure" of violations of the sunshine laws that circumvents the mandatory requirement to pay the attorney fees of those members of the public who, at their own and their families' financial (and emotional) expense, have stepped up to safeguard and support our democracy. § 24-6-402(9)(b), C.R.S. ("In ***any*** action in which the court finds a violation of this section, the court ***shall*** award the citizen prevailing in such action costs and reasonable attorney fees." (emphasis added)); *see also Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 601-602 (Colo. App. 1998) (holding that any finding of a violation of the COML entitles the plaintiff to a fee award and there is no requirement that the violation be knowing or intentional).

The *O'Connell* opinion states:

> Here, ***the district court found*** in its summary judgment order that, even though ***the Board had violated the OML*** at the January 26 meeting, it cured that violation at the April 13 meeting. Because the April 13 meeting effectively cured the prior violation, *no outstanding* violations of the OML remained.

Slip Op. at 20 (emphasis added). Based on this finding the Panel concluded: "because O'Connell was not successful at summary judgment on any issues before the court, ***she was not the prevailing party***." *Id*. (emphasis added)

This analysis ignores the express language of the COML. The "cure" of a prior unlawfully made *decision* is to engage in a new thorough discussion in a properly

convened and open public meeting before voting, in public, to make a *decision* on the same issue. Even when a public body does so, however, it's new lawful action does not **erase** its prior violation of having denied the public its right to observe *a discussion of public business*, regardless of whether any decision resulted from it. Therefore, a COML compliant act of "curing"—if the Court were to continue to use this term despite the confusion it has caused—must involve an acknowledgment by the public body or a determination by the court of a legal violation—that which needed to be "cured." And that acknowledgment or judicial determination triggers the mandatory attorney fee provision of Section 24-6-402(9)(b) *every time* a public body "cures" a violation *after* an enforcement action has begun.

Making the allowance of a "cure" for violations of sunshine laws contingent upon the payment of attorney fees to citizens *whose enforcement efforts predated the cure* not only aligns with but is also required by several key objectives of the COML.

- Preventing Abuse of the Cure Provision. Without the requirement to pay attorney fees, public bodies might be tempted to view the cure provision as an easy way out of compliance, knowing they can simply rectify violations if caught, without significant repercussions. Making attorney fees a condition of any post-filing "cure" prevents this

potential abuse and sends a clear message that this judicially created doctrine is not a Get Out of Jail Free Card.

- Creating and Sustaining Public Trust. The public's trust in government is partially predicated on its ability to access information and the assurance that there are consequences for violating transparency laws. Removing penalties for non-compliance could erode public trust in governmental institutions and the effectiveness of transparency laws.
- Encouraging Prompt Compliance. Making clear that an uncorrected violation exposes public bodies to liability for COML violation would incentivize public bodies to correct violations promptly when they occur. A financial obligation to cover attorney fees would deter public bodies from delaying compliance.
- Acknowledging Citizen Efforts and Empowering Citizens to Hold Their Government Accountable Without Bearing Undue Costs. Citizens who take steps to enforce sunshine laws , as these *amici* do routinely, strive to maintain transparency and thereby promote accountability in government. Reimbursing them for their attorney fees recognizes their role in this process and ensures that the financial

burden of enforcing compliance does not fall unfairly on individuals and organizations that challenge violations.

- Deterring Frivolous Defenses. Public bodies that know they will be responsible for attorney fees if a cure is necessitated by an enforcement action might be less likely to engage in legal defenses that prolong the resolution of clear violations. This can lead to more efficient resolution of disputes and better allocation of public resources.
- Leveling the Playing Field. Litigating against public bodies can be financially daunting for individuals and non-profit organizations. Requiring public bodies to pay attorney fees as part of a "cure" helps level the playing field, ensuring that the financial burden of enforcing compliance does not fall disproportionately on members of the public.
- Promoting Transparency and Accountability. This policy sends a clear message that all violations of sunshine laws are serious and that there are tangible consequences for failing to adhere to these principles.

To hold otherwise would allow public bodies to effectively moot any litigation by holding a meeting in compliance with the COML months, or even years, after their initial violation occurred, thereby evading accountability for their violations and burdening citizens who stood up for open government with considerable the

costs of litigation. This is contrary to the clear legislative intent to incentivize members of the public to bring public bodies into compliance with the law.

CONCLUSION

The *amici* respectfully request that this honorable Court clarify the parameters of the judicially-created "cure" doctrine. To fully effectuate the clear legislative intent of the COML, public bodies who adopt invalid policies through violations of the COML should not be permanently precluded from enacting public policy on the same subject *if* they take subsequent actions in full compliance with COML. Such subsequent lawful formation of public policy, however, cannot erase any prior violations. And plaintiffs whose enforcement *actions caused a public body to comply with the law or resulted in a judicial finding that a violation occurred* are entitled to recovery of attorney fees and costs, pursuant to Section 24-6-204(9)(b).

Respectfully submitted on this 24th day of October 2024.

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CERTIFICATE OF SERVICE

I certify that on the 24th day of October 2024, the foregoing was served via Colorado Courts E-filing, which will generate service on all parties, including:

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