COLORADO SUPREME COURT 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 Colorado Court of Appeals Case No. 2022CA002054 Honorable Judges Tow, Brown, and Martinez Teller County District Court, Case No. 2022CV030023 Honorable Judge Scott Sells	DATE FILED November 12, 2024 9:30 PM FILING ID: CE261882967DF CASE NUMBER: 2024SC34
Petitioner: Erin O'Connell, **v.** **Respondents:** Woodland Park School District; Woodland Park School District Board of Education; Chris Austin, in his official capacity as Board Member; Gary Brovetto, in his official capacity as Board Member; David Illingworth II, in his official capacity as Board Member; Suzanne Patterson, in her official capacity as Board Member; and David Rusterholtz, in his official capacity as Board Member.	**▲COURT USE ONLY▲**
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with all requirements of C.A.R. 57, which incorporates C.A.R. 25 and C.A.R. 28 by reference. Specifically, the undersigned certifies that:

The opening brief complies with the word limit set forth in C.A.R. 28.

☒ It contains 9,500 words (9,500 limit).

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

/s/Carrie Lamitie
Carrie Lamitie

Attorney for Petitioner
Erin O'Connell

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Attorneys Carrie Lamitie and Eric Maxfield, on behalf of Petitioner Erin O'Connell, file this Opening Brief.

ISSUES PRESENTED FOR REVIEW

Pursuant to this Court's July 22, 2024 Order, the following issues are presented:

I

Whether the judicially created cure doctrine allowing public bodies to "cure" prior violations of Colorado's Open Meetings Law (COML) contravenes COML's plain meaning and longstanding precedent.

II (Formerly III)[1]

Whether the court of appeals erred by expanding the judicially created cure doctrine to permit formal actions under section 24-6-402(8), to be reinstated retroactive to the date of the original violation and thereby preclude an award of prevailing-party attorney fees under section 24-6-402(9), to the plaintiff who successfully proved the original violation.

III (Formerly II)

Whether expanding the judicially created cure doctrine to apply to intentional violations of statutory notice requirements for the purpose of addressing a controversial issue outside the public eye contravenes the plain language and intent behind COML and this court's mandates regarding its interpretation.

[1] Issue order changed to facilitate compliance with word limit.

STATEMENT OF THE CASE

Nature of the Case

Seeking preliminary and permanent relief, Plaintiff Erin O'Connell sued Defendant Woodland Park School District's (WPSD) Board of Education (the Board) and its members, alleging violations of the Colorado Open Meetings Law, §24-6-401, *et seq.,* ("COML"). O'Connell alleged violations of §24-6-402(2)(c)'s notice requirements for meetings where formal action is taken, or at which a majority or quorum is in attendance. CF:1-14 (Complaint); 20-36 (Emergency Motion for Preliminary Injunction).

This suit arose from the Board's use of "BOARD HOUSEKEEPING" to notice its plan to introduce, discuss and vote to adopt a Memorandum of Understanding (MOU) transforming the process for chartering Merit Academy into the District. The MOU was designed to eliminate both Board participation and public access to discussions on issues including Merit's financial viability, HR practices, facility/location and exceptional student practices. Ex. 6:4-43.

Following an April 26 preliminary injunction (PI) hearing, the district court granted preliminary injunctive relief, holding that the BOARD HOUSEKEEPING" agenda item "was a conscious decision to hide" [2] the planned discussion and action on the MOU. CF:163. The court further found that "[a]n ordinary member of the community would not have understood or known what 'BOARD HOUSEKEEPING'" meant, and enjoined the Board to "comply with the OML by clearly, honestly, and forthrightly listing all future Agenda items regarding Merit Academy," and from "rubber stamping" prior decisions. CF:672. CF:655.

In October, 2021, however, although the court reaffirmed the January 26 COML violations and found that O'Connell's lawsuit "assured greater transparency by the school board," *id.*, it dismissed the case on summary judgment and denied O'Connell's request for attorney fees under §24-6-402(9)(b) finding that the January 26 violations were "cured"[3] under the doctrine established in *Colorado Off-Highway Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Recreation's*, 2012 COA 146 ("*COHVC*"). Specifically, the court held that the April 13 meeting -- where the

[2] C.R.C.P. 57 also authorizes courts to provide declaratory relief when a party's "rights, status, or other legal relations are effected by a statute."

Board re-discussed and re-voted on the MOU -- cured the prior violations, rendering O'Connell "not the prevailing party and [] not entitled to attorney fees as per C.R.S. 24-6-402(9)." On appeal, in *O'Connell v. Woodland Park 22CA2054,* the Court of Appeals (COA) expressly sanctioned this retroactive application of *COHVC*'s cure to erase the January 26 violation and strip O'Connell of entitlement to fees under §24-6-402(9)(b). *See e.g. O'Connell v. Woodland Park 22CA2054* at ¶21 ("without the ability to give retroactive effect to prior invalid actions, the work of public bodies would be stymied").

All three Issues Presented arise from the contradiction between, on the one hand, the finding of intentional COML violations, and, on the other, the application of the judicially created "cure" to eliminate both those violations and the statutorily prescribed attorney's fees. Because these contradictory rulings nullify the plain language and intent behind COML, this Court should correct course by reversing *O'Connell*, clarifying that formal action taken pursuant to §24-6-402(8) can only be valid prospectively and that once a violation is found, the violator must pay attorney's fees under §24-6-402(9)(b).

Statement of Facts

Background

In 2020, Merit, which was not yet a functioning school, applied to the Board to become chartered into the District. EX:1. Assessment of the 2020 application followed the Charter School Application ("CSA") Process published on WPSD's website, which involved Community Meetings, Information Sessions, Focus Groups, presentation to the Board, and a capacity interview. *See* "Addendum B ("Charter Authorizing Procedure" published on WPSD's site). EX.6:35; EX:41-43. WPSD's prior Board unanimously rejected Merit's application on "financial viability" and other concerns. CF:295:3-296:24; *See also* CF:155.

After the denial, Merit opened as an Education ReEnvisioned Board of Cooperative Education Services ("ER-BOCES") contract school, but was still interested in becoming chartered into WPSD. EX:1:1. Following an election in 2021, four new Board members -- Rusterholtz, Illingworth, Patterson, and Brovetto-- joined incumbent Austin on the Board. All four new members had campaigned on chartering Merit. EX:10-13; CF:663.

The Process for Chartering Schools within WPSD

In December, 2021, the posted CSA Process used to vet Merit's 2020 application was the only path to becoming chartered within WPSD. At the December 15 meeting held shortly after the election, Gustafson, WPSD's Executive Director of Business Services, presented the CSA process to the Board and the link to it on WPSD's site. EX. 6:41-43. *See* Addendum B. The question then arose as to whether, since Merit was already operating as an ER-BOCES school, there might be a "transfer pathway for them to be chartered by the District." EX:35. WPSD's attorney stated that such a process would be "precedent setting." *Id.* To prepare for this "potential direction," Gustafson noted that he had a meeting scheduled with the "Charter School Institute to discuss if and how to authorize a transfer." *Id.* The discussion closed with a plan for the District to bring to the January 12, 2022 meeting, a proposal for a transfer process to charter Merit into the District. *Id.* Neither the minutes nor the agenda from the January 12 meeting, however, are of record.

The Shift to an MOU as the Pathway to Chartering

Although discussion at the December 15, 2021 indicated that Tom Weston and his "Charter School Institute" would be involved in any chartering process, *id.*, Board attorney Miller concluded that the Board could approve the concept of

chartering Merit through an MOU, while leaving the "sausage-making issues" such as the "adequa[cy of] finances. . . exceptional student services. . . HR practices, waivers, facilities, et cetera" to be addressed during the contracting phase. EX:160:5-161:23.

The January 26 Board Meeting

Meeting Agenda and Agenda Approval

"Merit Academy" did not appear on the agenda posted for the January 26 meeting. EX:49. Rather, item V noticed "BOARD HOUSEKEEPING." EX:49. During the first order of business, agenda approval, the following discussion occurred :

> AUSTIN: I'm not comfortable approving the agenda, because I . . . don't know what BOARD HOUSEKEEPING means. . . .
>
> RUSTERHOLTZ: I thought . . . we . . . discussed that [yesterday]. . .
>
> AUSTIN: . . .I don't know exactly what we're going to talk about tonight and [I] assume that the general public. . . also do not know. . . .[I]n the spirit of transparency [the Board should ensure] that our agendas are very clear in . . . the action items that we want to discuss and vote on . . . not to just me in a private conversation . . . but. . . to the general public. . . .
>
> [Board Attorney] MILLER: -- it's not an absolute necessity to provide granularity to the public. . . .I get that there's ambiguity here, but as long as the Board is not surprised completely. . . It's not a duty to tell the public in advance about every single thing that's

being issued. . . .Dr. Neal and I have been working towards a possible approach to the Charter School issue and not having not been complete in that thinking process, this was an approach to use to get down that road.

AUSTIN: [L]eaving it ambiguous is an approach [to avoid a houseful of people who have opinions about that road? . . . . . I will have a difficult time approving this agenda, not knowing clearly what that agenda item is.

MILLER: You don't need universal approval to approve the agenda. You just need a majority. . .

RUSTERHOLTZ: . . .I am concerned about Mr. Austin's concern . .I was asked [about it] as well. . . . The only reason that it is on the agenda as housekeeping . . .is because of advice of counsel . . .

AUSTIN: [T[he lack of transparency in matters as large as discussing - or, perhaps, taking motion . . . on the chartering of Merit . . . that's a pretty big deal. . .EX:96:19-100:22

Ultimately, the agenda was approved 4-1 over Austin's objection. EX. 101:10 – 23.

COML Training

During COML training, Board attorney Miller stated:

"[W]here . . .the community thinks . . . there might be changes afoot . . .that gives rise to angst. . . . and [creates] increased scrutiny. And Chris [Austin] is exactly correct to acknowledge that people care right now about what's going on and . . . your decisions . . [T]here's probably a lot of apprehension out there. . . . And I want you to be highly attuned to that, because that means behavior, of necessity, needs to be more scrupulous, better, more transparent than before" EX. 102:15-103:21.

Later, however, Miller instructed the Board that, "if there's three of [Board members], or a quorum, and you get together, that's an open meeting." EX. 128:2-3. In contrast:

> [T]wo of you can get together for any purpose at all, privately. You can connive, you can secretly. . .whisper about school Board stuff. . . the takeaway. . .here is two of you can get together and be sneaky and private and secretive. EX. at 127:21–128:25.

Discussion and Vote on the MOU

Presentation of the MOU under the "BOARD HOUSEKEEPING" agenda item was next. Miller explained that MOU approval would serve as a "proxy for [the] charter approval [process outlined in Addendum B]," EX:168:1-3, *see also* CF:156, but that chartering would not be complete until a final up or down Board vote on the contract. See e.g. EX:17-22. Since "the majority of this Board is already likely" to support the chartering of Merit, the plan was to vote to approve the MOU, with the "sausage making issues," "operational concerns" such as the "adequ[acy of] finances . . . attention to exceptional student services. . . HR practices, waivers, facilities, et cetera," left for the contracting phase. EX:160:22-161:23. Superintendent Neal explained that the existing chartering process was causing:

> "irritation on multiple parties. . . splintering or hurtful relations. . . but this Board is not going to vote

> unfavorably on the charter application, and so it was feeling laborious and unnecessary. . . . EX:162:9-163:6.

Pursuant to the MOU, if Merit and District executives were successful in negotiating a contact, the publicly accessible portion of the chartering process would be eliminated with the exception of 1) the current discussion (i.e. at the January 26 meeting) prior to the vote, and later 2) the final up or down vote on the contract. EX. at 168:1-3, *see also* CF:156. Ultimately, the Board approved the MOU 5-0. EX:188:15-189:10.

The February 9 Meeting

Aware of the problems caused by noticing discussion and action on the MOU as "BOARD HOUSEKEEPING," the Board planned a re-vote on February 9 noticed under the agenda item: "IX. ACTION ITEMS a. Re-Approval of MOU with Merit Academy." EX:62. After Superintendent Neal introduced the MOU, there "being no discussion," the Board re-voted to approve the MOU 5-0. EX:370:16-371:20.

Filing of the Lawsuit

O'Connell filed her Complaint on March 30, 2022, alleging that both the "BOARD HOUSEKEEPING" item from the January 26 agenda and the "Re-Approval of MOU with Merit Academy" item from the February 9 agenda failed to

provide adequate notice[4] under C.R.S. § 24-6-402(2)(c)(I). CF:11-13. O'Connell sought a PI invalidating the votes taken on those dates under §24-6-402(8), an injunction enjoining the Board from further violations, and attorney fees and costs under §24-6-402(9)(b). CF:20-36.

The April 13 Meeting and the Board's Response to O'Connell's PI Motion

On March 30, the Board received O'Connell's Complaint challenging, *inter alia*, the use of "re-approve MOU with Merit" to notice its planned February 9 re-vote. CF:11 at ¶48-49. Nonetheless, the Board used identical language to notice the planned April 13 re-vote: "Discussion and Reconsideration of Re-Approval of MOU with Merit Academy." EX:90 at X. At the April 13 meeting, after a full discussion, Austin switched to vote against MOU approval, stating that the Board lacked sufficient information to charter Merit, for a final 4-1 vote to approve. CF:309:25-310:19; CF:160.

On April 19, 2022 Defendants Responded to O'Connell's Emergency PI Motion, arguing, *inter alia*, that "[e]ven if the [January 26] BOARD HOUSEKEEPING agenda item was inadequate, the Board cured the alleged

[4] O'Connell also challenged the vote taken on February 9 based on the absence of discussion. CF:11 at #48.

violation by properly noticing meetings on February 9th and April 13th to reconsider the MOU." CF:81.

The April 26 Preliminary Injunction Hearing

Opening Statements

At the PI hearing, the Board again argued that any prior COML violations were cured by the February 9 and/or April 13 meeting(s), *e.g.* CF:284:19-24, and denied that "Merit Academy was . . . approved . . . in private". CF:285:1-6. Board attorney Carlson argued that Merit was "the most prominent and . . .publicly discussed item" since the election, CF:285:19-286:19, and that "the MOU was not a critical or necessary step in the board's ultimate decision to charter Merit." CF:286:9-11.

Testimony regarding the January 26 meeting

According to testimony at the hearing, shortly before the January 26 meeting, a draft of the MOU was ready. Illingworth first learned of it on January 24 when Rusterholtz contacted him and sent a draft via email. CF. 324:25-325:9; 339:23-340:2. Although Austin did not see the MOU until the January 26 meeting,[5]

[5] There is no evidence in the record indicating any public release of the MOU prior to the January 26 meeting.

EX:304:19-24, on January 25, Rusterholtz called and said that the chartering of Merit would "probably be [discussed] on that [BOARD HOUSEKEEPING] agenda item." EX:387:13-16. During the call, Austin reiterated his support for the process involving Tim Weston and Charter School Initiatives; Rusterholtz supported the MOU process instead. EX:299:22-301:21; 303:11-304:18.

At the hearing Austin confirmed that he had not been clear about what would be addressed under the BOARD HOUSEKEEPING agenda item, CF:292:23-293:21; Board members Pattersen and Brovetto were similarly confused by the item.[6] Austin also explained that he voted in favor of the MOU based on the understanding that concerns over issues like financing could be addressed in the contract phase. CF:299:1-21; 301:22-302:3. Similarly, Brovetto and Patterson believed that the Board would address the issues during the contracting phase. Brovetto stated:

> "my concern is . . . will we have work sessions and board meetings to dialogue on these things and address it and that's where I would, you know, find out. . . specifically what issues are being addressed." CF:355:21-356:4.

[6] *See* CF:376:3-17 (Patterson: "I did not know [the "BOARD HOUSEKEEPING" agenda item] was in reference to Merit, but I suspected it was.") CF:358:14-17 (Brovetto also "confused" about the BOARD HOUSEKEEPING agenda).

Patterson testified:

> I was led to understand that [the MOU] . . . opens up the channel so we can discuss a contract and that's where all the meat and potatoes is, is in a contract. CF:374:13-17.

Rusterholtz, apparently confused himself, stated, "some of the information that we might get in advance in the so-called application side of things, we'll just get it in the contract side of things." EX:171:7-16.

Pursuant to the MOU, however, these expectations were unfounded. Ultimately, Superintendent Neal clarified that, after MOU approval, all discussions would move into private negotiations between Merit and District executives. The Board's only additional role in chartering Merit would be the up or down vote on the final contact. EX:168:1-3; 170:7-10. "This Board is going to get a chance to rest over a 90-day period on the discussion of charter school." EX:169:17-170:18. Ultimately, the Board approved the MOU by a vote of 5-0. CF:159.

Testimony regarding the "Reapproval of MOU with Merit" language used to notice the February 9 and April 13 meetings.

Austin testified that he interpreted the February 9 agenda item "reapproval of MOU with Merit Academy" to mean that the Board would re-vote on the MOU. He believed, however, that, unless they were familiar with the MOU, a community member would not have understood that "reapproval of MOU with Merit Academy"

would eliminate the need for approval of a charter application, CF:305:20-308:14, and that the agenda item failed to clearly state what was going to be discussed, based on "assumptions about what the public understood about [the] MOU." CF:309:7-24; 312:20-25. O'Connell testified that the April 13th Agenda item was "confusing", "redundant" and "misleading." CF:160:25-161:16

The April 29 Order Granting a Preliminary Injunction

In an April 29, 2022 Order, the trial court found that only Board attorney Miller, Superintendent Neil, and Board members Rusterholtz and Illingworth "saw the MOU prior to the January 26th meeting. CF:64. On the issue of the January 26 agenda, the court found :

> "The 'BOARD HOUSEKEEPING' Agenda item was a conscious decision to hide a controversial issue regarding Merit, the MOU and intent to charter. . . . The Board "rubber stamped" the decision at two [2/9 and 4/13] subsequent meetings. An ordinary member of the community would not have understood or known what 'BOARD HOUSEKEEPING' or Re-Approval of MOU with Merit Academy meant," CF:671 at #1, and "cannot demonstrate any legitimate reason for hiding their real Agenda at Board meetings" [and ordered the Board to] "comply with the OML by clearly, honestly, and forthrightly listing all future Agenda items regarding Merit Academy. Perhaps something as simple as 'Merit Academy Charter School Application.' [and enjoined the Board from] rubber stamping". CF:163-164.

WPSD's Answer to the Complaint

In a May 4, 2022 Answer, relying on "cure," WPSD defended on mootness grounds and argued that O'Connell failed to state a claim upon which relief could be granted. CF:177.

Approval of the Final Contract

A draft of the final contract was available the week before the April 26, 2022, preliminary injunction hearing. CF:381:1-10. The Board discussed it in a 2:17 hour executive session on April 27, CF:629 (Board Minutes), and again in 1:36 hour May 4 executive session, CF:626, before the final May 19 approval. CF:618. While the transcript from the May 19 meeting is not in the record, the meeting minutes indicate that Rusterholtz "opened up a discussion for the Board . . . Directors to share their thoughts or questions before voting."[7] CF:617. The entire meeting lasted 37 minutes, including the call to order, amending the agenda, agenda approval, reading of the resolution, discussion and the vote (4-1, Austin opposed). CF:617.

The Contempt Citation and Response

[7] On May 18, a meeting was heled to "gather feedback from stakeholders." Although there was a public comment and a Q & A session" between Merit representatives and the Board, there is no indication that any Board discussion took place at this meeting. CF:615.

In June, O'Connell sought contempt for violation of the April 29 PI Order enjoining the Board to "clearly, honestly, and forthrightly list[] all future Agenda items regarding Merit Academy." CF:181-188; 208-213. O'Connell's Affidavit cited the agenda item "Feasibility Study Presentation" to notice a discussion of locating Merit Academy within Woodland Park Middle School. On April 28, the same day she received the May 4 meeting agenda, O'Connell made a CORA request for the Study, which, although the Board denied as "work product", CF:207; 270-273 –- it later admitted it lacked grounds to withhold the Study. CF:652. O'Connell's Affidavit further referenced a published news story quoting a Board press release stating that the Board "prevailed legally on the key issues" at the PI hearing, despite having been found to have intentionally violated COML. CF:270-272.

The Board defended, arguing that, despite its failure to use "something as simple as Merit Academy Charter School Application," PI Order, CF:672, "both O'Connell and the public know exactly what the Feasibility Study was, the Agenda was clear, honest and forthright," and that the Board went "above and beyond to make sure that the Merit Academy charter is as transparent as possible."

Characterizing the Contempt Citation as a "frivolous" attempt to "harass the Board." the Board sought fees, CF:195.

While the contempt hearing transcript is not of record, the September 16, 2022 Order found that, despite knowing about the PI Order, the Board "chose not to follow the [court's] suggestion of listing Merit Academy Charter School Application on the agenda" to ensure compliance with the court's order that it be "completely forthright and transparent" regarding Merit Academy, CF:650. The court further found:

the Board was not completely forthright and transparent with their Agenda posting, and . . .wrongly chose to keep the Feasibility Study from the public. CF:653-54. (emphasis added).

Nonetheless, holding that the "Feasibility Study" agenda item did not constitute an independent COML violation,[8] the court declined to find contempt. *Id.*

Cross Motions for Summary Judgment

[8] Regardless of whether the "Feasibility Study" item constituted an independent COML violation, the court's findings conclusively demonstrated the *prima facie* elements of contempt including that the contemnor was subject to the order, knew of the order, was able to comply but failed to do so. Here, the court found each of these elements. CF:653.

After the contempt order, the parties cross-moved for summary judgment (SJ). CF:461-491; CF:512-526. O'Connell sought invalidation of formal actions taken on January 26, February 9 and April 13 and attorney fees based on WPSD's COML violations on each of these dates and argued, *inter alia*, that, because no additional facts were presented on the issue between the April 29 PI Order, and the October 7 SJ order, CF:658, and because the parties agreed that "the underlying facts are not in dispute,"[9] CF:539, the court's finding it its PI Order that "[a]n ordinary member of the community could not have understood or known what . . . Re-Approval of MOU with Merit Academy meant," CF:671, constituted law of the case and that no new evidence was presented to reverse it. CF:489-491; CF:589-590. Further, she argued that, while the court's October 7 SJ Order found the April 13 discussion sufficient to avoid being a "rubberstamp," the court never reversed prior finding, CF:658, that the public would not have understood what "MOU with Merit" meant.

For its part, the District argued that any prior COML violations were cured, under the authority of *COHVC,* by the April 13 meeting. Rather than a "narrow opportunity," WPSD argued that *COHVC's* judicially created "cure" is "qualified

[9] O'Connell properly objected, CF:589, to WPSD's improper insertion of newspaper articles not presented at the PI hearing, into its summary judgment motion. CF:523 at n.9.

only in that a cure cannot be a rubber stamp of a previous decision," CF:513, and thus, fully available to boards, such as WPSD, found to have intentionally thwarted COML for the purpose of conducting a controversial discussion outside the public eye.[10] *Id.*

Defending the April 13 meeting as a source of cure, WPSD argued that, in its April 29 PI Order, the court had misapplied the *Town of Marble v. Darien* standard,[11] 07SC01 and requested reversal of the court's April 29 finding that, on April 13, "an ordinary community member would not have understood or known" what MOU with Merit meant.

[10]On appeal, *O'Connell v. Woodland Park School District, et. al*, 2022CA2054, December 7, 2023 ("*O'Connell"*), the COA agreed, stating that the issue of intentionality "never factored into the [*COHVC*] division's analysis on whether the entity had cured its prior violations." (citing *COHVC* at ¶¶ 33-34). *O'Connell* at 26.

[11] Analysis of *Darien*, 181 P.3d 1148 (Colo. 2008), demonstrates that it provides no cover to a board attempting to adopt a policy [i.e.: the transformation of the chartering process to one from which the Board and public would be excluded] of which the public had ***no inkling that the Board was even considering.*** Further, while such behavior was not at issue in Darien, this Court expressly held that "the OML prohibits bad-faith circumvention of its requirements," which is precisely what was found to have occurred here. *Id.* at *25.

The Summary Judgment Order

In an October 7, 2022 Order, despite expressly affirming the January 26 violations and finding that O'Connell's lawsuit "assured greater transparency by the . . . [B]oard," relying on *COHVC's cure*, the court held that O'Connell "is not the prevailing party and is not entitled to attorney fees" under §24-6-402(9)(b). CF, p. 658. On appeal, the COA sanctioned the retroactive application of *COHVC's* cure --in the context of a conscious attempt to thwart COML—to erase the original violation, finding "no outstanding violations of the OML remained" to support the award of fees under §24-6-402(9).

O'Connell at ¶35.

Argument Summary

O'Connell highlights the flaws inherent in the judicially created cure doctrine. This court should reverse *O'Connell* and decline to sanction the judicially created cure doctrine.

FIRST: *O'Connell*, demonstrates how the judicially created "cure" doctrine inexorably undermines COML. In *O'Connell,* the doctrine was applied to retroactively reinstate a formal action invalidated under §24-6-402(8) back to the date of the initial violation. Because such retroactive rekindling violates both the

plain language and longstanding precedent interpreting §24-6-402(8), *O'Connell* should be reversed.

SECOND: *O'Connell's* application of *COHVC*'s retroactive "cure" to erase the original violation such that "no outstanding violation . . .remained" to support the award of attorney fees under §24-6-402(9)(b) violates the plain language and intent behind §24-6-402(9)(b) and longstanding precedent.

THIRD: By its own terms, *COHVC's* "cure" was never intended to apply to bad faith boards found to have consciously violated COML's notice requirements for the purpose of conducting public business in secret. Even if this Court were to sanction *COHVC's* retroactive cure, extending it apply here would violate the letter and spirit of COML and this court's mandates regarding its interpretation.

Standard of Review (all issues)

This Court reviews the construction and application of COML and the grant of summary judgment de novo. *Harris v. Denver Post*, 123 P.3d 1166, 1170 (Colo. 2005) (COML); *Pierson v. Black Canyon Aggregates, Inc.* 48 P.3d 1215 (Colo. 2002) (summary judgment).

POINT I

Whether the judicially created cure doctrine allowing public bodies to "cure" prior violations of Colorado's Open Meetings Law (COML) contravenes COML's plain meaning and longstanding precedent.

Yes. Because *COHVC's* cure is inherently retroactive, it violates the plain meaning of 24-6-402(8) and long standing precedent interpreting it.

Preservation

This issue was preserved in the district court at CF:485 n. 4, p. 546 n. 2.

Introduction

COML grants courts the power to issue injunctions to enforce COML,[12] and in the case of certain violations, prescribes specific remedies – i.e.: invalidation of

[12] The injunctive power granted under §24-6-402(9)(b) is limited enforcing "the purposes of [COML]." *See e.g*. CF:672. In contrast, the issuance of ***permanent injunctions*** barring the re-taking of formal action invalidated under §24-6-402(8) exceeds the jurisdiction granted in §24-6-402((9)(b). *Compare, Pueblo v. Flanders*, 122 Colo. 571 (1950)(after finding *ultra vires* action – a conclusion later reversed on appeal – trial court permanently enjoined district from taking the action).

Because §24-6-402((9)(b) does not permit injunctions barring boards from re-taking formal actions under §24-6-402(8), *COHVC*'s concern with "permanent condemn[ation]" was unfounded. In *COHVC*, however, the plaintiffs sought a permanent injunction not under COML, but under the court's general authority to prevent *ultra vires* board action. See *COHVC, supra (*Dist. Ct.) at *9 (plaintiffs sought a permanent injunction and "a declaration that the [challenged decision] exceeded [the board's] statutory authority"). Thus, *COHVC* improperly conflated the COML issue with the substantive claim. *See id.* at *22 ("[T]his Court does not believe that the General Assembly intended, upon promulgating the OML statute,

formal actions under §24-6-402(8), and mandatory attorney fees under §24-6-402(9)(b) -- while permitting boards to freely re-take actions previously invalidated under §24-6-402(8), prospectively.

Here, despite final findings that both discussion and formal action violations occurred on January 26, *O'Connell* applied *COHVC's* cure to eliminate the prescribed remedies of invalidation and the mandatory award of attorney fees in contravention of the letter and spirit of COML. Thus, *O'Connell* must be reversed.

A. Section 24-6-402(8) Provides Clear, Workable Sanctions for COML Violations while Allowing Public Bodies to Move Forward After a Violation.

Section 24-6-401, declares it 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." *See also Cole v. State*, 673 P.2d 345, 347 (Colo. 1983)(citing *Benson v. McCormick,* 195 Colo. 381, 578 P.2d 651(1978)("The Colorado Open Meetings Law was clearly intended to afford the public access to a broad range of meetings at which public business is considered"); *Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004)(the Legislature intended to afford the public

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to forever bar a governing body from properly ratifying a decision made in a prior violative manner"). Permanent injunctions, however, have no place in COML jurisprudence.

access to a broad range of meetings at which public business and decision-making takes place so that citizens may be informed of their government's work and to prevent the abuse of 'secret' meetings"); *see also Gumina v. City of Sterling*, 119 P.3d 527, 531 (Colo. App. 2004).

In furtherance of these goals, the General Assembly created mandates in two categories of violations, those involving either ***discussions*** or ***formal actions*** taken at non-compliant meetings.

Provisions applicable to both discussion and formal action violations include:

> §24-6-402(2)(b)
>
> "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."
>
> §24-6-402(2)(c)
> Any meetings at which the adoption of any proposed policy. . . or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.
>
> §24-6-402(9)(b)
>
> The courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section. . . 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.

§24-6-402(8), in contrast, is applicable only to formal action violations:

> "No . . . 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)

The overriding goal of statutory construction is to effectuate the legislature's intent. *Dep't of Revenue v. Agilent Technologies, Inc.*, 2019 CO 41, ¶ 16, 441 P.3d 1012, 1016. If the statutory language is clear, it must be applied as written. *Id.*

COML's prescribed remedies are narrowly tailored to ensure transparency while freely allowing boards to move forward after COML violations. The language of §24-6-402(8) both invalidates formal actions taken in violation of COML while inviting boards to re-take the action in a compliant meeting, effective prospectively.

By its plain terms, this provision creates two categories of formal actions, those not taken at a conforming meeting --which are not valid -- and those taken at a conforming meeting -- which are valid prospectively. Section 24-6-402(8) provides no bar to retaking – at a compliant meeting -- actions previously invalidated under §24-6-402(8); indeed, its plain language invites just that. "[N]o. . . formal action . . . shall be valid *unless* taken. . . at a [compliant meeting]." *Walton v. People*, 2019 CO 95, ¶14, (likening "unless" to creating an exception)(i.e.: no formal action shall be

valid with the exception of formal action taken at a COML-compliant meeting). *See also* Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/unless (defining "unless" as "except on the condition that, under any other circumstance than")(i.e.: no formal action shall be valid except on the condition that it be taken at a COML-compliant meeting). Caselaw reaffirms the simple proposition that invalidation under §24-6-402(8) does not bar the subsequent taking of the same action in a compliant meeting.[13]

And while §24-6-402(8) creates no bar to the re-taking of formal action after a violation, Colorado courts have consistently interpreted its "invalid[ation]" to render ***the original action*** null and void such that it can never be

[13] *See e.g. Wisdom Works Counseling Servs., P.C. v. Colo. Dep't of Corr.*, 360 P.3d 262, 267 (Colo.App. 2015)(board free to re-take formal action invalidated under §24-6-402(8)); *Van Alstyne, supra* at 99 (plaintiff sought to have the defendant "ordered to reconsider the sale of the property in full compliance with the law" and the Housing authority did so); *Hyde v. Banking Bd.*, 552 P.2d 32, 34 (Colo. App. 1976) (finding, under a similar provision that, "[s]ince full and timely notice was not given, the order of the board . . . is invalid, and the cause . . . remanded for reconsideration of the application, voting, and issuance of a new order after compliance with § 24-6-401, et. seq., C.R.S. 1973"); *Darien v. Town of Marble*, 169 P.3d. 761, 766(Colo. App. 2006)(*rev'd* on other grounds)("enjoining the Town to give public notice in accordance with the OML if it intends to vote on the . . . project again.")

rekindled. For example, in *Van Alstyne v. Hous. Auth.*, 985 P.2d 97 (Colo. App. 1999), the court interpreted §24-6-402(8) to:

> render[] null and void any actions taken at a meeting held not in compliance with [COML] mandates… Plainly, any such actions taken at any meeting that is held in contravention of the Open Meetings Law ***cease to exist or to have any effect, and may not be rekindled by simple reference back to them***. *Van Alstyne*, 98CA1009, *101 (citing Hyde v. Banking Board, 552 P.2d 32 (1976))(emphasis added).

See also Wisdom Works Counseling Servs., P.C, 360 P.3d at 267 ("To be sure, and as the [the defendant] concedes, the OML voids . . . actions taken at a meeting that does not comply with the requirements of section 24-6-402(2)"; *Colo. Med. Bd. v. Boland*, 2018COA39 at ¶24 (aff'd on other grounds at 2019 CO 94) (interpreting §24-6-402(8) to render invalidated action "null and void"); *Rogers v. Bd. of Trustees for Town of Fraser*, 859 P.2d 284, 286 (Colo. App. 1993) (formal action taken outside an open public meeting declared "null and void"); *See also City & County of Denver v. Bd. of County Comm'rs*, 661 P.2d 1185, 1187 (Colo. App. 1982)(equating void and void *ab initio*). *See also Legal Information Institute*

https://www.law.cornell.edu/wex/void#:~:text=Having%20no%20legal%20effect%20%20from,relationship%20between%20the%20parties%20involved

(defining "void" as "having no legal effect from the start). Since §24-6-402(8) bars the retroactive reinstatement of invalidated actions, the re-taken action can only be effective prospectively from the date of the compliant meeting.

Rather than draconian, invalidation under §24-6-402(8) is narrowly tailored to enable courts to enforce COML while keeping them out of substantive policy issues. Despite its simplicity, this structure provides 1) a remedy—invalidation--to address actions taken in non-compliant meetings, 2) a path forward in the aftermath of violations through re-taking the action at a compliant meeting, and 3) the public access to the decision-making process that lies at the heart of COML.

While humble, the remedies created in COML; injunctive relief for the limited purpose of enforcing §24-6-401 *et seq.*, fee shifting to make the successful plaintiff whole, §24-6-402(9)(b), and invalidation coupled with an invitation to re-take the action going forward, §24-6-402(8), are critical to the enlightened goal of creating the foundation essential to the democratic process.

B. Seeing a problem where none existed, *COHVC* misread COML to open the door to permanently barring public bodies from moving forward after violations.

Analysis of *COHVC* reveals that its "cure" doctrine arose from a fundamental misapprehension of COML. *COHVC*'s analysis began with the proposition that whether a public body:

"can 'cure' a violation of the OML by holding a properly noticed meeting and openly and fully addressing the matters which formed the basis of the prior OML violations is an issue for which there is no clear precedent in Colorado [and which]. . . the OML does not explicitly address." *COHVC* at ¶¶16 and 25.

This conclusion misapprehends the plain language of §24-6-402(8) and extensive caselaw interpretating it. As discussed above, the use of the word "unless" in 24-6-402(8) expressly invites boards to re-take, in a compliant meeting, actions previously taken in violation of COML. *See Point I.A. above*. *COHVC's* flawed understanding of the legislative scheme was further demonstrated in the following quote:

> the purpose of the OML is to require open decision-making, not to permanently condemn a decision made in violation of the statute. . . [thus] ***it follows that the OML would permit ratification of a prior invalid action***, provided the ratification complied with the OML . . .

In this upside-down world, ratification is needed to address "permanent[] condemn[ation]" of substantive board decisions under COML. Permanent condemnation, however, has no place whatsoever in COML jurisprudence. *See n.* 13. And ratification is precluded under §24-6-402(8) and *Van Alstyne, supra*.

C. *COHVC's* retroactive "cure" undermines the invalidation prescribed in §24-6-402(8).

Unlike §24-6-402(8) -- which provides boards a way *forward* after a violation -- *COHVC* invites them *backwards* in time, offering a retroactive "cure" back to the date of the original violation. It is the retroactivity inherent in *COHVC's* "cure" that placed it on collision course with COML.

Although *COHVC* did not emphasize retroactivity, the caselaw cited to support its "cure" and its reliance on the language and theory of ***ratification*** injected retroactivity into the heart of its judicially created "cure." Rather than the prospective fresh start offered in §24-4-402(8), *COHVC's* cure provides retroactive reinstatement, effectively "rekindling" the invalidated action back to the date of the original violation.

The cases *COHVC* cited to support its cure doctrine confirm that it used the term "ratify" to mean a retroactive "fix" back-dated to the date of the original violation. *COHVC* at ¶30 citing *Gronberg v. Teton*, 247 P.3d 35 at ¶18-20 (WY 2011)(using "ratification" in the sense of a retroactive fix back to the date of the prior act which constituted the original violation) and *Valley Realty & Dev. Inc. v. Town to Hartford*, 685 A.2d 292 (Vt. 1996)(using "ratification" to mean the

retroactive reinstatement of a prior action taken in violation of the sunshine law back to the date of the original violation).

None of these cases, however, occurred in the context of Colorado's Open Meetings Law. Here, votes taken by the Board at the non-compliant January 26, February 9, and April 13,[14] 2022, meetings are subject to the prescribed remedy of invalidation under §24-6-402(8) and the mandatory award of fees under §24-6-402(9)(b). Invalidation under §24-6-402(8) was designed to attack ***the secrecy*** resulting from COML violations, not the substantive policy at issue. Thus, even though the chartering of Merit resulted from secrecy, unwinding a school in its third year of operation would not advance COML's transparency goals. COML's cohesive scheme of remedies contains no hint or suggestion of the undoing of a

[14] In its October 7 SJ Order, CF:655, the trial court reversed its prior finding that the April 13 meeting "rubberstamped" the prior vote, but it did not reverse its finding that "an ordinary member of the community could not have known or understood what . . . "Re-Approval of MOU with Merit Academy meant." CF:671. Further, even if the court intended to reverse this finding, since the record on this issue was identical on April 29 (the date the PI Order issued) and October 7 (the date of the SJ Order), such reversal would have constituted an abuse of discretion. *E.B. v. R.B. (In re People*), 2022 CO 55 "A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. . .". *See also* cases cited Point IV of Reply in COA. As a matter of law, the improperly noticed April 13 meeting cannot be the source of cure due to improper notice.

longstanding institution as a remedy for a transparency violation.[15] So long as the Board ultimately approves the MOU at a compliant meeting, there is no threat to Merit's on-going existence.

Rather than a hollow ritual, the mandate of a public airing and re-vote on the MOU is based on the fundamental belief that sunshine can impact both the quality and substance decisions. *See Town of Palm Beach v. Gradison* , 296 So. 2d 473, 475 (Fla. 1974)(" the decision-making process will be improved" with sunshine). It is not this Court's role to predict the impact that sunshine might have on decision-making or indeed, at the ballot box. It need only identify when violations occur, and apply COML's prescribed remedies.

At this point, the January 26 violations are undisputed, CF, p. 655 ("This Court previously found that the Board . . . violated the OML on January 26 with

[15] In some of the cases cited in *COVHC*, for reasons not explained in the opinion, the parties and the court agreed that the undoing of the formal action invalidated under the applicable sunshine laws would ultimately mandate the undoing of the entire project. *See e.g. Gronberg v. Teton Cnt'y Housing Authority,* 247 P.3d 45 at ¶2 (Wy, 2011)(identifying the Board's options on the re-vote as "ratification" of the original vote or "recission" of the contract, thus undoing the land deal the Board wanted to pursue). Here, however, the record is devoid of evidence to support a claim that invalidation of the January, February and April votes taken at non-compliant meetings will have any impact whatsoever on Merit's on-going operations. That genie is out of the bottle, and O'Connell seeks only the remedies of invalidation and the award of mandatory attorney fees, as prescribed by COML.

the agenda item "BOARD HOUSEKEEPING"), while the Board was free to re-vote on the MOU, §24-6-402(8) precluded retroactive reinstatement of the January 26 vote. Despite this statutory prescription, and based on *COHVC's* flawed conclusion that COML is "silent" on whether a board can "cure" [i.e.: move forward with the chosen policy after] a violation, *O'Connell* at 18, *O'Connell* erroneously concluded that "without the ability to backdate the effective date of formal actions, the work of public bodies would be stymied." *Id.* at ¶21. Thus, *O'Connell* violated §24-6-402(8)'s plain language and upended decades of precedent interpreting it, see *Van Alstyne*, et al cited on p. 35, in order to solve an imaginary problem.

D. Despite the narrow issue before the *COHVC* court, its expansive language coupled with its flawed rationale strengthened the ability of the judicially created cure doctrine to undermine COML.

The *COHVC* plaintiffs challenged three unnoticed discussions which occurred during a months-long process found to have "comported with the spirit and . . . intent" of COML. *COHVC* 2011 Colo. Dist LEXIS 2276 Dist. at *6-7; 15, 19-21. Because *COHVC* involved only a single formal action (i.e.: the July 16 vote, *id.* at *8), the issue of retroactivity was not before the court. Nonetheless, *COHVC* held that COML "permit[s] ratification of a prior invalid action." The corrosive effect

of *COHVC*'s far-ranging discussion of issues not before the court is seen in *O'Connell*, which retroactively reinstated the January 26 vote, and used the putative erasure of the original violation to deprive O'Connell of the attorney fees mandated under §24-6-402(9).

If this court were to sanction *COHVC's* retroactive cure, motions like that filed in *Jensen v. Loveland City Counsel, Larimer Cty. Dist. Crt., Case # 2023 CV 246*, appended hereto, will flood the courts. Using the *COHVC* quote cited in *O'Connell*: "the purpose of the OML is . . . not to permanently condemn a decision made in violation of the statute," *Jenson* at 5, and assuming, *arguendo*, that the alleged COML violations occurred, the Loveland Council moved to dismiss the plaintiff's COML claims under C.R.C.P 12(b)(5), on the grounds that, "any violation was cured during the subsequent . . . meeting." *Jenson* at 6.

And why not? If *COHVC*'s retroactive cure erases the prior violation, as held in *O'Connell,* then why wouldn't dismissal be appropriate, so long as a cure is ultimately made. If sanctioned by this Court, *COHVC's* retroactive cure will be cited to support dismissal of COML claims before they even see the light of day. In the aftermath of a violation, the state or local body can simply wait, confident that *COHVC's* cure will entitle it to dismissal regardless of the merits of the

original claim. For these reasons and for the reasons set forth in Point II, this Court should reverse *O'Connell* and decline Defendant's invitation to sanction *COHVC's* judicially created cure.

POINT II

Whether the court of appeals erred by expanding the judicially created cure doctrine to permit formal actions invalidated under §24-6-402(8) to be reinstated retroactive to the date of the original violation and thereby preclude an award of prevailing-party attorney fees under section 24-6-402(9), to the plaintiff who successfully proved the original violation.

Yes. *O'Connell* erred when it used the judicially created cure doctrine to, in effect, eliminate the original violation, thus precluding the award of prevailing-party attorney fees under §24-6-402(9) in contravention of the plain language of the statute.

Preservation

This issue is preserved in the Complaint and in O'Connell's Summary Judgment Motion. CF, p. 4, 491.

COML, designed to ensure governmental transparency, cannot protect public access without enforcement. Section 24-6-402(9)(b), provides a key enforcement mechanism within COML:

> "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."

Pursuant to this provision, citizens bringing suit under §24-6-402 function as "private attorneys general, who, through the exercise of their public spirit and private resources, caused a public body to comply with the open meetings law." *Van Alstyne*, 985 P.2d at 100; *See also Weisfield v. City of Arvada*, 2015 COA 43, ¶13.

At this point, the January 26 COML violations are undisputed. CF:655, *see also* CF:671. On the basis of the January 26 discussion and formal action violations alone, even disregarding the subsequent violations on February 9 and April 13, O'Connell "prevail[ed]," in her lawsuit, thus mandating an attorney fee award pursuant under §24-6-402(9)(b). *Van Alstyne, supra*, at *99-100 (denial of an attorney fee award on the original violation on "mootness" grounds, regardless of whether the action was later retaken at compliant meeting, "overlooked the General Assembly's establishment of mandatory consequences for a violation of the statute, provided for in §24-6-402(9)(b).")

In contravention of this mandate, even as it found that O'Connell's lawsuit "assured greater transparency by the school board," the court denied attorney fees,

finding that O'Connell was "not the prevailing party".[16] CF:658. On appeal, the COA affirmed the denial of mandatory fees, stating:

> 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.[17] *O'Connell, supra,* at ¶35.

If affirmed by this Court, *O'Connell* would effectively eliminate the fee-shifting enforcement mechanism codified in §24-6-402(9)(b), by handing boards the playbook to avoid them. The judicially created cure doctrine, however, cannot

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[16] To the extent this Court reads *COHVC* to base its denial of attorney fees on the *COHVC* board's prompt admission of violations and properly noticing a meeting where the issue was "fully and openly" discussed and voted on, ***before the lawsuit was filed,*** *id.* at *8-9, *COHVC,* 2011 Colo. Dist. Lexis 2276 at *20, this rationale is inapplicable here in light of the Board's intransigence and fierce defense of its actions long after the filing of the suit.

[17] *COHVC's* brief analysis of attorney fees under §24-6-402(9)(b) turned on the board's prompt "cure" before a lawsuit was filed [i.e.: the plaintiff did not "prevail" since her suit did not "*cause"* compliance with COML]. *COHVC, supra* (Dist. Ct.) at *14-16; *COHVC,* 2012COA46 at ¶36-39]. As demonstrated in *O'Connell,* however, even in the presence of "causation," as here, *COHVC's* retroactive cure provides an independent reason to deny fees, on the grounds that "no outstanding violations" remained after the "cure."

trump §24-6-402(9)(b)'s clear mandate. Absent the distorting effect of the judicially created "cure," the analysis will recenter back where it belongs, with the text and spirit of COML.

POINT III

Whether expanding the judicially created cure doctrine to apply to intentional violations of statutory notice requirements for the purpose of addressing a controversial issue outside the public eye contravenes the plain language and intent behind COML and this court's mandates regarding its interpretation.

Yes. Due to the retroactivity inherent in *COHVC's* judicially created "cure," expanding it to apply to boards who intentionally violate the law contravenes the letter and spirit of COML.

Preservation

Preserved at CF:2-3, 9; CF:25, 35; CF:544-53; CF:587.

TIMELINE

1/26	Introduction, discussion and vote to approve the MOU under "BOARD HOUSEKEEPING"
2/9	First "cure" attempt
4/13	Second "cure" attempt
Week before 4/27	Final contract draft complete
4/27	2:17 hour executive session discussing final contract
4/28	O'Connell's CORA request for the Feasibility Study
5/4	WPSD's Answer filed 1:37 hour executive session discussion of the final contract Study finally released to O'Connell "Feasibility Study" Meeting
5/19	Final Contract approved in 37 minute meeting
9/16	Contempt Order issued
10/7	Summary Judgment Order issued

Argument

As an initial matter, §24-6-402(8) invites ***all boards*** – good and bad faith alike – to retake formal actions in compliant meetings, effective ***prospectively***. *See Point I above.* WPSD never needed a judicially created cure to discuss and re-vote to prospectively adopt the MOU at a compliant meeting. The question presented here is whether *COHVC's* ***retroactive cure*** can be extended to apply to bad faith boards. By its own terms, *COHVC's* "cure" was never intended to hand bad faith boards a tool to thwart COML's transparency goals.

Factual Context

WPSD's claim that "Merit was not approved in private" CF:285:1- 287:6 is belied by the record. The ultimate chartering decision turned on the resolution of issues such as "adequacy of finances . . . exceptional student services . . . HR practices . . . [and] facilities" (EX:17-23). Historically, and according to the posted CSA process, these discussions involved the Board and were open to the public.

The MOU, however, eliminated not only public access, but Board participation itself from these discussions, allowing the Board to "rest," EX:169:17-170:18, while negotiations between Merit and District leaders proceeded behind

doors. It was not the larger plan to charter Merit, but the transformation of the process to eliminate both Board participation and public access that the Board "made a conscious decision to hide," and about which the public had no inkling. The January 26 vote was designed to complete this transform before the public knew that a plan was afoot.

The MOU was introduced with such lightening speed that not even the Board members were clear what would be discussed under the BOARD HOUSEKEEPING item. *See n.6 and accompanying text.* Further, once it was introduced, there was extensive confusion, even among Board members, as to the role of the Board in discussion of critical issues in the event of MOU approval. Austin believed the Board would be involved in discussions of the underlying issues during the contract phase. CF:299:1-21: 301:22-302:3. Similarly, Patterson testified that she understood the MOU to open the "channel so we can discuss a contract and that's where all the meat and potatoes is." CF:374:13-17. Brovetto expressed an expectation that the Board would"

> "have work sessions and board meetings to dialogue on these things and address it and that's where I would, you know, find out. . .specifically what issues are being addressed." CF:355:24-356:4. See also EX:171:7-16 (Rusterholtz confirms the Board would learn in the contract phase what it did not learn in the approval phase due to the MOU.)

This theme, echoed by attorney Carlson's April claim that the MOU "acknowledge[d] that ***the board would consider*** the issues through the contracting phase," CF:286:20-22. was belied by attorney Miller's and Superintendent Neil's ultimate clarification that the Board, like the public, would be excluded from that discussion with the exception of the vote on the final contract. EX:168:1-3; 170:7-10.

January 26 was also where Board attorney Miller trained the Board that under COML, two Board members were free to "connive," and be "sneaky and private and secretive," EX:37:21-38:25, where Dr. Neal stated that, regardless of the content of Merit's application, the Board would not "vote unfavorably [it]," CF:436:9–437:6 and it was where Board attorney Miller described the MOU as an approach to " get down the road" despite "not [being] complete in that thinking process."[18] EX:98:8-21. January 26 was a textbook example of content COML was designed to ensure access to.

[18] Other examples of the Board's obfuscation, include WPSD's again hiding a planned Merit-related under the agenda item "Feasibility Study," *see* CF:654 ("I find that the Board was not completely forthright and transparent" and "wrongly chose to keep the Feasibility Study from the public," id., and the District's issuance of a press release falsely claiming the Board had "prevailed legally on all key issues" at the PI hearing. CF:279-272.

Even though Board discussion of the final contract was the *only* public access point, the bulk of those discussions were also private. While the Board held "extensive[]", CF:381:5-15 (i.e. a total of three hours and 43 minutes on 4/27 and 5/4, CF: 626; 629) executive session discussions on the final contract, the entire public meeting at which the Board shared thoughts on and voted to accept the final contract was 37 minutes, including reading the resolution, agenda amendment, agenda approval and opportunity for Board members to "shar[e]" thoughts or questions" before voting. CF:617.

The contrast between the *COHVC* board's proactive, good faith efforts to comply with the letter and spirit of COML and WPSD's obfuscation and conscious decisions to violate both COML and the court's orders could not be more stark.

The consequences of handing *COHVC*'s retroactive "cure" to boards intent on circumventing COML's requirements

COHVC's retroactive cure was adopted in the context of a good faith board, which, upon receiving notice of COML challenges to three unnoticed discussions, *COHVC, supra,* at ¶8, immediately admitted the violations, and properly noticed a

meeting where it "openly and fully" discussed the changes under consideration before the plaintiff filed suit. *COHVC*, *supra* (Dist. Ct.) at *8-10, 16. Further, in contrast to the *COHVC* discussion violations, which took place in the context of a nine-month process which "comported with the spirit and the underlying legislative intent of the OML," *id.* at *21 the BOARD HOUSEKEEPING agenda item was a conscious attempt to hide ***the only planned discussion of the MOU and the vote that would transform of the chartering process by moving the substantive discussions behind closed doors***. *COHVC's* cure was crafted in the context of, and was limited to situations where, the defendant promptly admits the violation, and voluntarily comes into compliance at a properly noticed meeting absent rubberstamping prior to the filing of a lawsuit,. By its own terms, *COHVC*'s retroactive cure cannot be extended to apply here. To do so is to hand boards intent on thwarting COML the tool to circumvent its mandates with impunity. Further, this Court has recognized that "the OML prohibits bad-faith circumvention of its requirements". *Darien*, 181 P.3d at 1155. Because the combination of bad faith boards and retroactive cure would gut COML beyond recognition, this Court should reverse *O'Connell.*

Request for attorney fees on appeal

Here, for the reasons presented in Point II above, *O'Connell* is entitled to the award of reasonable attorney fees and costs on appeal pursuant to §24-6-402(9). Further, where fees are awardable, they include the attorney fees incurred on appeal. *See e.g. Anzalone v. Bd of Trs. of the town of Del Norte*, 2024 COA 18, ¶48 (cert denied); *Van Alstyne*, (awarding plaintiff attorney fees under 24-6-402(9)(b) for "both the trial and appellate phases."). Further, C.A.R. 39.1's pleading requirements cannot trump § 24-6-402(9)(b)'s prescriptive mandate of attorney fees to prevailing plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant O'Connell, requests the Court to answer each issue for which certiorari was granted in the affirmative, to affirm the trial court's finding that violations occurred on January 26 and February 9, to reverse, as an abuse of discretion, the trial court's finding that cure took place on April 13, and to reverse the trial court's denial of attorney fees, and award attorney fees in trial court, the Court of Appeals and the Colorado Supreme Court.

Respectfully submitted this 12th day of November, 2024.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have duly served the Opening Brief this 12th day of November, 2024, by filing and serving via the Colorado Courts E-filing System to counsel for the Defendants-Appellees to:

Bryce Carlson, Esq.
Miller Farmer Carlson Law

s/ Eric Maxfield