COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Court of Appeals, 2022CA2054 District Court, Teller County, 2022CV30023	
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**	
Rachel Amspoker, Atty. Reg. #55032 Hilary Daniels, Atty. Reg. #59505 Colorado Association of School Boards 2253 S. Oneida Street, Suite 300 Phone: 303-832-1000 ramspoker@casb.org; hdaniels@casb.org Denver, CO 80224 *Attorneys for the Colorado Association of School Boards*	Case Number: 2024SC34
BRIEF OF AMICUS CURIAE BY COLORADO ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF RESPONDENTS	

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 29(d). It contains 4,214 words (does not exceed 4,750).

The brief complies with the content and form requirements set forth in C.A.R. 29(c).

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

/s/ Rachel Amspoker

Rachel Amspoker, No. 55032
Attorney for Colorado Association of School Boards

STATEMENT OF INTEREST

The Colorado Association of School Boards is a statewide organization whose members are the boards of education throughout the state.

The question as to whether the cure doctrine, as articulated in *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*, (COHVC) is consistent with the purpose of the Open Meetings Law is of great significance to our members. 292 P.3d 1132 (Colo. App. 2012).

School board members are almost entirely volunteers who have a passion for their community and become a board member to engage with and help that community. Members often have children who attend the district, which inspires their decision to run for the board. Our members, occasionally appointed but most often elected with no previous experience in public office, go to great lengths to comply with technical requirements in the complex Open Meetings Law, which includes notice requirements, executive sessions, and more.

CASB plays a critical role in educating board members on their legal responsibilities and providing training. CASB strives to provide accurate, up-to-date information to school board members to enable them to succeed in their roles, which includes resources and training on the Open Meetings Law. Ensuring compliance with the Open Meetings Law is one of our members' top concerns, and

our resources and presentations frequently cover the topic. However, trainings and information, even if consistently provided, cannot entirely prevent everyday human error, which is why the cure doctrine is needed.

CASB files this brief in support of the Woodland Park School District and urge the Court to preserve the integrity of the Open Meetings Law and the legal process by upholding the cure doctrine and allowing boards to proactively remedy any violations, thereby improving access to public discussion for citizens, and helping find productive solutions for violations.

SUMMARY OF ARGUMENT

COHVC's cure doctrine, by providing a practical way for local governments to remedy errors, aligns with the text, history, and precedent of the Colorado Open Meetings Law (COML), whose primary purpose is consistently interpreted to ensure meaningful public participation in government meetings, without preventing the local government from taking action. Considering that the purpose of the law is increasing transparency, a cure doctrine promotes transparency in multiple ways. Additionally, a cure doctrine is appropriate regardless of the nature of the violation, because the statute does not distinguish remedies based on the type of violation, intent, or motivation behind a violation or intent, so introducing an analysis that incorporates intent would be contrary to the statute, would

overcomplicate the analysis, and would not be consistent with the OML's purpose of increasing transparency in all situations. Finally, permitting retroactive reinstatement of decisions after they are cured serves the public interest by promoting consistency of decisions and preventing the public from suffering if a decision is retroactively invalidated.

I. Allowing public bodies to "cure" violations benefits both public entities and the public, and is consistent with the Colorado Open Meetings Law's purpose.

The cure doctrine discussed in COHVC is wholly consistent with the OML because it promotes the longstanding purpose of transparency, and is consistent with OML caselaw that requires a flexible analysis of the requirements. *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation,* 292 P.3d 1132, 1138 (Colo. App. 2012). The Colorado Open Meetings Law was first enacted in 1972 by citizen initiative, as part of a nationwide trend to adopt open meetings laws "as part of a general move to a more responsive and responsible government." C.R.S. 24-6-401; Alex Aichinger, *Open Meetings Laws and Freedom of Speech,* Free Speech Center at Middle Tennessee State University; https://firstamendment.mtsu.edu/article/open-meeting-laws-and-freedom-of-speech. By 1976, all states had statutes that allowed the public access to government meetings. *Id.* In the Colorado Open Meetings Law's declaration of

policy, which has remained consistent through the last 50+ years, the law states that "the formation of public policy is public business and may not be conducted in secret." C.R.S. 24-6-401.

The Colorado Supreme Court has consistently emphasized that the primary purpose of the state's Open Meetings law is to "afford the public access to a broad range of meetings at which public business is considered." *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 227 (Colo. 2007); *Benson v. McCormick*, 578 P.2d 651, 652 (Colo. 1978); *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983); *Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008). In these rulings, this Court affirmed that the law is meant to ensure that the public can participate meaningfully in the decision-making process, beyond merely witnessing final votes. *Cole*, 673 P.2d at 349. As noted in *Cole*, the law intends to prevent a scenario where citizens only see the end result of a predetermined decision. *Id.*

The OML's requirements are built around the longstanding purpose of transparency. The law requires public entities to provide notice of meetings, and take minutes of meetings, and meet publicly in certain situations, among other requirements that increase public access. C.R.S. 24-6-402. Meetings must be properly noticed, by providing "full and timely" notice to the public, which includes, at the very least, posting notice of the meeting "with agenda information

where possible," at a designated public place no less than twenty-four hours prior to the holding of the meeting. *Id.*

To ensure that public policy is not formed in secret, any action taken at a meeting that does not comply with the Open Meetings Law is invalid. *Id.* This includes violations such as failing to provide enough detail in the notice of the meeting to enable the public to participate, and holding a closed meeting where a decision is made. *Id.* To further ensure transparency, the OML provides enforcement options for citizens. *Id.* Section (9) of the OML outlines a mechanism for citizens to challenge alleged violations by seeking injunctions. *Id.* However, whether the OML was violated such that injunctive relief is granted depends on the context of the meeting. *Benson v. McCormick*, 578 P.2d at 653. Enforcement of the Open Meetings Law must be balanced with practical considerations for public officials, as the law "was not intended to interfere with the ability of public officials to perform their duties in a reasonable matter." *Id.*

Commitment to transparency does not mean that the requirements are inflexible; as this Court has consistently interpreted the OML's requirements flexibly so as to permit public bodies to serve the public efficiently. *See Benson v. McCormick,* 578 P.2d. The Court in *Benson v. McCormick* explained that the law reflects Coloradans' belief that government best serves the state "if its decisional

processes are open to public scrutiny." *Id.* at 653. However, *Benson* interpreted the OML's notice requirement as a "flexible standard" aimed at providing fair notice to the public, tailored to the type of meeting and to the public body involved. *Id.* A rigid interpretation, the Court found, could unduly interfere with the ability of public bodies to perform their duties reasonably. *Id.*

The same flexible approach was applied in *Town of Marble v. Darien*, where this Court again rejected a stringent interpretation of the notice requirement. 181 P.3d 1148, 1153 (Colo. 2008). The Court found that a notice need not list every potential item to be discussed, as this would hinder public bodies from taking action on related topics during meetings. *Id.* A notice with an agenda item called "Mill Site Committee Update" was sufficient, even though it did not explicitly state whether formal action would occur. *Id.*

Further reinforcing this flexible interpretation, this Court in *Bd. Of Cnty. Com'rs, Costilla Cnty. v. Costilla Cnty., Conservancy Dist.,* identified limits to the OML, stating that although it is "broad in application and should be construed to increase governmental transparency in appropriate situations," "there are limits to this principle." 88 P.3d 1188, 1189-1190 (Colo. 2004).

Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation (COHVC)'s analysis, particularly in regard to the prohibition

of "rubberstamping," echoes the important purposes of the OML, and also provides a flexible approach to requirements as consistent with other cases interpreting the OML. 292 P.3d at 1138. The appellate court issued a very detailed and thorough decision, in which it ultimately determined that a cure provision is possible due to analysis of existing Open Meetings Law cases. *Id.* at 1136. Consistent with other cases of this Court, COHVC explained that the purpose of the OML is to ensure that public business is conducted in the open, allowing citizens to be informed and participate in governmental decision-making processes. *Id.* In reaching the determination that a cure provision is appropriate, the appellate court analyzed *Van Alstyne v. Housing Authority* (in which the appellate court considered whether a public body reconsidered a decision or "rubber stamped it"), and *Bagby v. School District No. 1* (in which the Court implied that holding a subsequent meeting that was not merely a formality could remedy a violation). *Van Alstyne v. Hous. Auth. of City of Pueblo, Colo.*, 985 P.2d 97, 101 (Colo. App. 1999); *Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974). Combined, these cases imply a right to cure a violation, as long as the subsequent meeting was not a mere rubber stamping of prior decisions and provided a genuine opportunity for public participation and deliberation, consistent with the purpose of the Open Meetings Law. *Colorado Off-Highway Vehicle Coalition*, 292 P.3d at 1136.

COHVC also considered out-of-state cases in its analysis of a cure provision, such as *Gronberg v. Teton County Housing Authority*, where the Wyoming Supreme Court held that a public agency could cure a violation of its open meetings law by holding a new meeting that complied with the law and was not a mere ratification of a prior, flawed decision; and *Tolar v. School Board*, where the Florida Supreme Court held that a subsequent meeting that was not a ceremonial acceptance of secret actions cured a violation of Florida's open meetings law. *Colorado Off-Highway Vehicle Coalition*, 292 P.3d at 1137; *Gronberg v. Teton Cnty. Hous. Auth.*, 247 P.3d 35, 42 (Wyo. 2011); *Tolar v. Sch. Bd. of Liberty Cnty*., 398 So. 2d 427, 428–29 (Fla. 1981).

Not only wholly consistent with the purpose of the OML and its case law, curing violations is also appropriate practically as it provides a remedial and productive solution to potential Open Meetings Law violations. All parties benefit from a cure provision: the public bodies, by allowing them to identify mistakes and correct them, and the public, by promoting public participation in meetings and transparency in governmental proceedings, in which they undoubtedly have a stake.

In contrast, Petitioner's proposal for dealing with Open Meetings Laws violations is unworkable and unfair to public entities. Take the example of a school

board that posted a notice with the wrong time listed, due to a clerical error. A decision is made in the non-compliant meeting, therefore making the decision invalid and unenforceable under the OML. Months after the decision is made, the school board realizes that the notice did not comply with the Open Meetings Law, and therefore believes the decision is invalid. The next step would be to hold a properly-noticed meeting where the correct procedure is followed, and make a decision again after full discussion and engagement with the public. Once this is completed, despite the original violation, the purpose of the Open Meetings Law has been served. A full discussion has taken place in public, and the school board has taken accountability for the violation by remedying it.

However, in this hypothetical, the public body has just directly or subtly informed the public of the original violation, which is still considered an Open Meetings Law violation under the Petitioner's analysis. The school board could then be sued for the original violation, despite the fact that the purposes of the Open Meetings Law have already been fulfilled. A suit like this wastes taxpayer resources and time. The public does not suffer because there was full engagement and there is nothing to enforce.

If the Open Meetings Law is intended to provide public access to meetings and to promote government accountability, the cure doctrine addressed in COHVC

is an ideal mechanism. Allowing a public entity to "cure" a violation by holding a properly noticed meeting with full discussion allows the public access to a meeting, engagement with the public body, and full information on how the board is considering their final decision. Additionally, it promotes government accountability; as the government must act proactively to remedy any mistakes, minor or major, and fulfill the original intent of the Open Meetings Law.

Removing the already-established cure doctrine would be detrimental for all school districts; but particularly the most under-resourced, rural districts. 146 of Colorado's 179 school districts are considered rural or small rural, amounting to 81.6% of the total. Colorado State Education Snapshot, COLORADO DEPARTMENT OF EDUCATION, https://www.cde.state.co.us/schoolview/explore/statesnapshot. In a state where all public schools are underfunded, rural schools are particularly disadvantaged by the lack of resources, which can result in understaffing and minimal time for training. With these hurdles, rural districts are more susceptible to minor mistakes. A staff member who typically handles the COML notice could be absent or out sick, leading to a potential inadvertent mistake on the notice. Without a cure doctrine, a board would be unable to move forward. However, a cure doctrine allows them to resubmit the notice, reconsider any action taken, and get work done for their community.

The cure doctrine is also beneficial from a policy standpoint because it promotes public participation in meetings and handles violations constructively without hamstringing public bodies or wasting resources. It is a bridge between the two parties and is a "win-win" situation entirely consistent with COML's purpose of government transparency. It is also consistent with other states' laws that allow cure provisions because they too have recognized it as a productive remedial tool.

II. A cure doctrine should be permitted regardless of the nature of the violation, as the COML and interpretations of the law do not differentiate between inadvertent and willful violations.

The primary goal of the COML is to ensure open and transparent access to government decision-making, and penalties are imposed regardless of whether a violation is intentional or unintentional, minor or major. Prohibiting a cure provision for intentional violations would not prevent such violations, as a public entity would still need to admit to any intentional violation when re-considering the matter. It strains credulity that a public body would purposely violate the law, and then hold a subsequent complying meeting in which they expose their violation. It's more likely that an unintentional or unrealized violation would occur, and upon realizing the error, the public body would correct it in the interest of transparency.

Additionally, if the legislature wanted to include a distinction between types of violations, they would have done so. Although there is not significant case law discussing why there is no distinction between unintentional and intentional violations in the Open Meetings Law, CASB believes that such a distinction would be impractical. Proving intent is inherently difficult, if not impossible, in many cases, and would complicate the litigation process because boards typical consist of multiple members. In this case, different board members had different levels of knowledge of the situation; and each had their own opinions with different, and arguable, intentions. The Open Meetings Law does not differentiate between a minor mistake (such as stating the wrong subsection when entering executive session), or a major intentional violation. A ruling that intent is a consideration within the Open Meetings Law does not have any support from the statute itself or caselaw interpreting it over the last fifty years, in contrast to the cure provision which is supported through the purpose of the OML and longstanding precedent that address remedying violations.

COML's purpose reflects the fundamental principle that violations should not occur under any circumstances, so as to encourage public participation in decision making. However, recognizing that violations—ranging from minor oversights to more serious breaches—will still happen, the most effective remedy

is generally to invalidate any decisions made at a meeting that violated the OML, regardless of alleged intent – until the board proactively corrects the mistake. This approach serves two purposes: it ensures that no action taken in violation of the law stands, and it guarantees that the issue must be re-addressed in a properly noticed and public forum. Finally, it encourages the board to bring mistakes to light; rather than encouraging dishonesty – as the Petitioner's proposed analysis does.

Therefore, a "cure" doctrine that allows public entities to discuss any matter that potentially violated the OML in a properly noticed meeting, thus allowing them to move forward despite a previous mistake, is completely in line with COML case law. Allowing boards to cure violations, regardless of intent, reinforces the requirement that public bodies must deliberate in the open, where transparency and accountability can be upheld. It prevents negative consequences for minor mistakes such as referencing the wrong subsection, and also encourages public entities to take accountability for more major failures. By curing violations in this manner, the public's right to access and participate in government is fully preserved, and the purpose of the OML is furthered. It is also consistent with Colorado case law, such as *Benson* and *Town of Marble*, that discuss needing to balance the public's rights and the ability of public entities to act. *Benson v.*

McCormick, 578 P.2d at 652; *Town of Marble v. Darien*, 181 P.3d at1149 (Colo. 2008). Ultimately, it is not productive to permanently condemn a school board and prevent them from moving forward after making a mistake. School boards should be encouraged to proactively "cure" violations if they are uncovered, without having to worry about being brought to court for the original violation.

III. Permitting retroactive reinstatement of decisions after they are cured serves the public interest and the purpose of the OML, promoting consistency of decisions and preventing the public from suffering if a decision is retroactively invalidated.

CASB echoes the legal arguments regarding prevailing party attorneys' fees made in the Respondents' Opening Brief and its analysis of the Open Meetings Law, and wishes to provide perspective to the issue of retroactivity as it impacts school districts.

As the Court of Appeals decision thoughtfully considered, requiring a board to re-start an action can end up "more detrimental than productive for the decision-making process." *Erin O'Connell v. Woodland Park School District,* 22CA2054, Colo. App., ¶ 21. Boards may make decisions that are relied upon for months before an Open Meetings Law violation is realized. The Petitioner's argument is that a decision made in violation of the law should be made invalid as of the date of the mistake – without taking into account situations like these. This interpretation of the law is simply not practical and would be extremely

detrimental to the public. To provide an example, look to some of the most common actions boards take, such as approving a charter application, a contract for remodeling a new school building, or purchasing new instructional materials. Petitioner's argument would lead to impractical and frankly destructive consequences for districts in these common situations if an Open Meetings Law violation is uncovered after the fact. A charter school that has already opened cannot be undone; the larger community and students already enrolled would suffer. A contract that has already gone into place cannot be invalidated; performance could have already started, and failure to comply with a contract could lead to breach-of-contract claims. And invalidating a decision can be impossible; such as a decision to issue textbooks that students have already started reading. Ultimately, invalidating decisions that have been relied on would be impossible in most cases, impractical in some, and frustrating for students, parents, and the community.

Additionally, because the OML's purpose is to provide transparency to the public, it follows that public entities should be encouraged to bring mistakes to light. Prohibiting retroactive cures would discourage the public body from being transparent and would invalidate decisions arbitrarily – despite the fact that compliance with the Open Meetings Law was met by a subsequent meeting.

There is support from many other states across the nation for COHVC's proposition that mechanistically vacating decisions does disservice to the community, can lead to gridlock, and ultimately is not consistent with the purposes of transparency laws for public bodies. *Colorado Off-Highway Vehicle Coalition* 292 P.3d at 1137; *See Alaska Community Colleges' Fedn. of Teachers, Loc. No. 2404 v. U. of Alaska* 677 P.2d 886, 888 (Alaska 1984). Other states have rejected Petitioner's analysis of the Open Meetings Law and have permitted cures retroactive to the original violation, even without explicit guidance from the statute. The Alaska Supreme Court permitted retroactive cures in *Alaska Community Colleges' Fedn. of Teachers, Loc. No. 2404 v. U. of Alaska,* whose analysis was helpful for the trial court in the present case. 677 P.2d 886, 888 (Alaska 1984). Similarly, the Supreme Court of Montana ruled that a successful remedy of a meeting in violation of the open meetings law generally cures the previous violation, thereby rendering moot any potential controversies about the illegality. *Zunski v. Frenchtown Rural Fire Dept. Bd. Of Trustees*, 371 Mont. 552 (Montana 2013). The Wyoming Supreme Court also ruled that a void action may be cured by conducting a new and substantial reconsideration of the action in a manner that complies with the act, citing that the purpose of Wyoming's law is to "require open decision making, not to permanently condemn a decision or vote in

violation." *Gronberg,* 247 P.3d at 42. *See also McCrea v. Flaherty,* 885 N.E.2d 836, 840 (Mass. App. 2008); *Picone v. Bangor Area Sch. Dist.*, 936 A.2d 556, 563 (Pa. Cmmw. 2007); *Anderson v. City of St. Pete Beach,* 161 So.3d 548 (2014). (permitting a reinstatement of a violative decision as long as it was not a perfunctory ratification).

In the Wyoming and Alaska cases, both courts reached their conclusion that cures are appropriate by considering the purposes of the open meetings law, because their respective statutes did not provide specific guidance. *Gronberg*, 247 P.3d 35, 41; *Alaska Community Colleges' Fedn. Of Teachers, Loc. No. 2404*, 677 P.2d at 891-892. For example, in *Gronberg*, the court considered that Wyoming's Open Meetings Law statute did not address cures, but reasoned that "the void act itself is not offensive to the law, but the closed process is offensive. Public ratification cures that problem." 247 P.3d at 41.

By arguing that cures should not apply retroactively, Petitioner purports that any time there is a violation, the offender should be punished. This perspective is completely out-of-line with the purpose of the COML: the law is about promoting transparency, not punishing public entities. The law permits injunctions, which can be ordered to serve the interests of the OML, but it does not include strict fines or other punishments for alleged misbehavior. Although all boards strive to comply

with the OML, allowing attorney fees awards despite the board already curing the violation would encourage litigation, creating a sort of "race-to-the-courtroom" to punish school boards as soon as any error is uncovered, regardless of whether the school board has worked to remedy the error. This is not consistent with the COML's purpose and would shift the focus from transparency to combative litigation.

Finally, permitting retroactive cures would minimize aggressive and unnecessary litigation and ensure that courts only consider Open Meetings Law cases when there is a genuine dispute regarding whether a violation occurred. If a board cures a violation; they have already impliedly or directly confirmed that a violation did occur. What is the point in continuing litigation for months and spending taxpayer dollars for the board's defense, when the board has already admitted fault and remedied the situation? Who does this serve – other than the litigant who may receive attorney fees? Granted, if there is a genuine disagreement regarding whether (1) the board violated the OML, or (2) the cure provision was sufficient to rectify the error, litigation can and should occur, and attorney fees should be awarded to any citizen who successfully brings the case. However, in a situation where a board is proactive about fixing errors, continuing the lawsuit does more harm than good and does not serve the interests of the OML. The court

system should not be tasked with considering a case and awarding attorney fees when the board has already admitted fault and remedied the initial violation.

CONCLUSION

CASB respectfully requests that this honorable Court echo the reasoning of the Colorado Court of Appeals, uphold *Colorado Off-Highway Vehicle Coalition*, and clarify that a prior Open Meetings Law violation can be cured through a subsequent complying meeting so long as the earlier action is not merely rubber stamped.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2025 a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE BY COLORADO ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF RESPONDENTS** was served electronically on the following parties:

Eric Maxfield, #29485
Eric Maxfield Law LLC
3223 Arapahoe Avenue, Suite 300
Boulder, Colorado 80303
(303) 502-7849
Eric@ericmaxfieldlaw.com
Attorney for Petitioner

Miller Farmer Carlson Law, LLC
Bryce Carlson
5665 Vessey Rd
Colorado Springs, CO 80908
Tel: (970) 744-0247
Email: bryce@millerfarmercarlson.com
Attorney for Respondents

/s/ Rachel Amspoker
Attorney for Colorado Association of School Boards