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 February 6, 2025 10:23 PM FILING ID: 7DEFE265EC167 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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REPLY BRIEF

Petitioner Erin O'Connell respectfully submits the following Reply 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 5,700 words (5,700 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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This Court should reject the Board's attempt to direct its attention away from the Questions Presented and toward a false narrative designed to smear O'Connell and impugn her motives.

INTRODUCTION

O'Connell makes both statutory construction, Opening Brief (OB) at Point I.A at 31-34 and case law based, OB at *id.* 34-36, arguments in support of the proposition that § 24-6-402(8)'s invitation to move forward after COML violations is prospective rather than retrospective. If the Board's response that § 24-6-402(8) "does not address one way or the other the effective date of a formal action later "cured" by retaking it at a compliant meeting," Answer at 25, is true, this Court must interpret COML "most favorably to protect the ultimate beneficiary, the public." *Cole v. State* 673 P.2d 345, 349 (Colo. 1983). The Board complains that "***without a retroactive effective date,[1] the concept and practical effect of curing a violation is eliminated.***" Answer at 25. This powerful language reveals the lack of

[1] The claim that "the concept and practical effect of curing a violation is eliminated" absent retroactivity is belied by the Board's action at the February 9 meeting, where it revoted on the MOU with a prospective effective date. EX:370:22-24. See n. 6.

alignment between it and the legislature's Declaration of Policy stated in §24-6-401. In the Board's view, the raison d'etre for a judicially created cure is to ensure a retroactive effective date to maximize the ability of boards to facilitate their work; to grease the wheels of board business to facilitate smooth rollout of their chosen policy goals – even post-COML violation. And while there is nothing wrong with that goal, it is not what motivated the passage of COML.

Forgotten in the Board's formulation is the legislature's declaration that it is 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." § 24-6-402. Section 24-6-402(8), in turn, provides a sanction for violation – invalidation – thus removing the incentive to disregard the rights COML seeks to protect.

This case is a textbook example of the potential of prospective effective dates to impact compliance. Had Brad Miller been working, rather than under *COHVC*'s judicially created cure, but under a bright line "Prospective Only" rule when he counseled the Board regarding Austin's powerful real time objection to the BOARD HOUSEKEEPING agenda item, we might not be here today. Instead of conjuring its parade of horribles now– in support of its attempt to escape accountability through retroactive ratification, the Board would have had to consider any such risks ***when it mattered -- as it considered the transparency***

issues in real time. Now, the Board conjures possibilities such as forcing students to repeat grades or the shuttering of the school it worked so hard to create. If members believed that those results could actually follow from MOU invalidation, clarification of the BOARD HOUSEKEEPING agenda item and postponement for 24 hours might have made more sense than risking those outcomes.

Boards across Colorado are populated by committed and passionate members, working, often as volunteers, to create policy to support their goals and dreams for their community. The Legislature harnessed this very passion to incentivize boards to weigh the potential costs of cutting corners on transparency. Affirmance in this case would eliminate this legislatively mandated tool to protect transparency.

I.The first Question Presented is:

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"

A.Although the Board relies on *COHVC* to justify retroactive ratification, it fails to address the flaws in *COHVC's* reasoning highlighted in the Opening Brief.

1. The Board expressly relies on the very passages from *COHVC* that demonstrate how *COHVC* got it wrong.

The Board quotes the following passage to support a retroactive cure:

"Because the focus of the OML is on the *process* of governmental decision making, not on the *substance* of the decisions themselves, it ***follows*** that the OML would permit ratification of a prior invalid action [at a compliant meeting that is not a rubber stamp.]*COHVC* at ¶ 31. Answer at 11.

The Board ignores O'Connell's reliance on this very passage to demonstrate *COVHC*'s flawed belief that "ratification is needed to address 'permanent[] condemn[ation],'" despite §24-6-402's invitation for boards to move forward. OB at 37.

The Board also cites the flawed syllogism used by *COHVC* to justify its implied cure, Answer at 13:

Van Alstyne and *Bagby* imply that a state or local public body may "cure" a prior violation of the OML by holding a subsequent complying meeting, provided the subsequent meeting is not a mere "rubber stamping" of [the prior decision.] That is, if, under *Van Alstyne* and *Bagby*, a state or local public body could violate the OML by merely "rubber stamping" an earlier decision made in violation of the OML, then it follows that a state or local public body would *not* violate the OML by holding a subsequent complying meeting that is not a mere "rubber stamping" of an earlier decision. *COHVC* at ¶ 28.

Pursuant to the syllogism:

- If formal action taken at a non-compliant meeting is invalidated under §24-6-402(8) and
- If a rubber stamp at a subsequent meeting is not sufficient to permit the board to move forward with the invalidated formal action,
- THEN a full and fair airing of the issues at a subsequent meeting ***can fix*** the invalidation.

The conclusion, however, does not follow from the premise. Further, the quoted language highlights *COHVC's* failure to understand that § 24-6-402(8) was controlling. [2]

Fundamentally, the Board fails to grapple with the key point that *COHVC's* solution [the retroactive cure], crafted to address a problem that did not exist, eliminated the invalidation mandated under § 24-6-402(8) in the process.

Finally, while the Board's Amicus, CASB nominally supports a retroactive cure, the goals it articulates and the hypotheticals it raises are addressed through §24-6-402(8)'s invitation for boards to move forward ***prospectively*** after violations. CASB worries, for example, about a case where a staff member who typically handles the COML agendas and notices is 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." CASB Brief at 12.

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[2] *COHVC*'s failure to understand the centrality of §24-6-402(8) further led it to rely on out-of-state cases embracing retroactive ratification of actions previously taken in violation of COML. None of these cases, however, addressed statutory language similar to that at issue here. *See e.g. Gronberg v. Teton County Housing Authority*, 2011WY13 at e.g. ¶ 18. (*Valley Realty & Dev., Inc. v. Town of Hartford,* 165 Vt. 463, 465 (1996)); *Alaska Comm. Coll. Fed. of Teachers v. Univ*, 677 P.2d 886 (Alaska 1984).

Because § 24-6-402(8), already facilitates the "fix" CASB seeks, no retroactive cure is needed. CASB also appears open to a "proactive," rather than a "retroactive" cure since it urges the Court to uphold a cure doctrine "allowing boards to ***proactively*** remedy any violations, thereby improving access to public discussion for citizens, and helping find productive solutions for violations." Brief of CASB at 4 (emphasis added). But allowing boards to ***proactively*** remedy violations is exactly what O'Connell seeks; she wishes only to prevent ***retroactive*** remedies which undermine COML. See also CASB Brief at 12 (noting that ***proactive*** solutions encourages productive solutions while still complying with the OML).

2. <u>The Board's non-*COHVC* based arguments also fail.</u>

The Board's reliance on out-of-state cases to justify rekindling of formal actions invalidated under COML fail, since none are relevant to the issues at bar.[3]

[3] *Dossett v. City of Kingsport*, 258 S.W.3d 139 (Tenn. Ct. App. 2007), Answer at 22-23, is inapt because it involved alleged discussion violations only; retroactive ratification was not at bar since only one vote took place. *Brightwell v. City of Shreveport*, 356 So. 3d 586, 594 (La. App. 2 Cir. 2023) and *Hutchison v. Shull,* 878 N.W.2d 221, 237–38 (Iowa 2016), Answer at 22, 26 address statutes that do not void actions taken in violation of the law.

Further, the Board's attempt to undermine the clear holding in *Van Alstyne v. Hous. Auth.*, 985 P.2d 97 (Colo. App. 1999)[4] fails. There, the court stated that actions invalidated under § 24-6-402(8) are null and void such that they:

> 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 (Colo.App.1976))(emphasis added).

The Board reads this language to ***permit*** the rekindling of such actions:

"*Van Alstyne* does not hold that formal actions can 'never be rekindled' but rather that a cure cannot be effective simply by rubberstamping a prior invalid decision." 985 P.2d at 101–02". Answer at 24-25 see n. 4.

Despite the Board's arguments, Answer at 17-18, the cases cited at OB, 35, demonstrate the long history of Colorado court's voiding actions taken in violation of COML.

Finally, relying on "common sense" the Board claims that because

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[4] *Van Alstyne* also held that § 24-6-402(9) precludes the mooting out of COML violations by subsequent retaking of the actions in a compliant meeting. An issue is moot when "the relief sought, if granted, would have no practical legal effect." *Educ. reEnvisioned BOCES v. Colo. Springs Sch. Dist. 11.*, 2024 CO 29, P26. By contrast, cure erases the original violations. *O'Connell* at ¶ 35.

COML does not expressly address the effective date of a cure, the "effective date must necessarily be retroactive." Answer at 25. This argument is belied by the fact that, when the Board retook action on the MOU at the February 9 meeting, it expressly adopted a prospective effective date.[5] Although the updated MOU reflecting the "different" effective date is not in the record, as reflected its discussion, the Board itself voted to approve an MOU effective prospectively from the date of the vote.

3. Could there be cases where invalidation under § 24-6-402(8) could lead to consequences that unwind a policy decision in a manner that disserves the public good?

Despite the flaws in the Board's arguments, their defense brings the case full circle back to the language that created the judicial "cure." Could there be cases

[5] Specifically, prior to reapproving the MOU at the February meeting, the following took place:
PRESIDENT RUSTERHOLTZ: And this is the exact same MOU, just different dates?
DR. NEAL: That is correct. EX: 370:22-24.
The minutes from the February meeting note only the re-approval, not the effective date. EX:64.

where the defendant could successfully argue that invalidation[6] would ultimately "do more disservice to the public good than the violation itself." *COHVC* at 32. Surely such a case could be imagined. But the goal of statutory interpretation is not to account for every hypothetical outlier case. Rather, the goal is to determine the generally applicable legislative intent, and when an outlier tests the boundaries, courts must determine how to square the legislative intent with the circumstances of that case. *See e.g. AviComm, Inc. v. Colo. Public Util.,* 955 P.2d 1023, 1031 (Colo. 1998)("In interpreting a statute, we must give effect to the intent of the lawmaking body . . .and there is a presumption that the General Assembly intends a just and reasonable result. (Colo. 1988)). *See also Schwankl v. Davis*, 85 P.3d 512, 516 (Colo.2004) (rejecting a strict interpretation of the statutorily prescribed remedy reflecting a judicial willingness to interpret statutory language flexibly to fulfill "the goals that the General Assembly embodied in th[e] statute"). This is not that case.

The hypothetical outlier case appears to be the primary concern of CASB, the Board's Amicus, when it notes that the public must never be made to suffer

[6] Whether labeled avoiding invalidation altogether or a retroactive ratification of the original act, the end result is the same in that the original act taken in violation of the law lives on.

more from invalidation than it does from the initial violation. CASB Brief at 5. CASB's concerns are addressed by an approach where a party seeking to avoid statutorily prescribed invalidation must first prove that an injury to the public would in fact result from invalidation, and that such injury will "render an "unjust and unreasonable" result, *AviComm*, supra, or "do more disservice to the public good than the [COML] violation itself." *COHVC, supra.*

COHVC did not err in recognizing the possibility of cases where invalidation might cause "more disservice to the public good than the violation itself." *COHVC* at 32. It erred in providing its retroactive cure absent any such showing.

Indeed, Petitioner is unaware of any such case, and neither the Board nor the Amici cite any. Perhaps the dearth of such cases is a testament to the balance struck by § 24-6-402(8), which combines an invitation for boards to freely move forward, with the sanction of invalidation for violations. The *COHVC/O'Connell* cure offers an automatic mulligan to every board that retakes the action in a compliant meeting on the grounds that, after the cure, no outstanding violations of the OML remain[]." Such erasure guts the enforcement mechanism adopted by the

Legislature in service of nothing. This court should reject the *COHVC/O'Connell* cure doctrine to return the analysis where it belongs, to the statute.

4. The Board's self-serving claim that this is the case *COHVC* feared-- where catastrophic consequences flow from invalidation -- is both unsupported by any record evidence and affirmatively rebutted by it.

According to the Board, unless this Court sanctions retroactive ratification of the January 26 MOU approval – approval arising from a meeting where the Board was found to have intentionally hid its intent act on Merit -- untold confusion and destruction could result. According to the Board:

"preventing the ratification of the Merit Academy MOU would create an absurd and . . .confusing result . . . [since] the MOU essentially stood in the place of an approved charter application. Should the school's facilities lease and charter contract be struck down—as Petitioner has argued—because they were predicated on the approval of the MOU? Should Merit Academy be required to refund District per pupil revenue? Should Merit Academy students be required to repeat grades since the school was not operating under an approved charter contract and thus not technically a District-authorized charter school? Should the school be immediately closed until further notice? Answer at 26-27.

The Board's presentation of questions, wonderings, can hardly substitute for evidence demonstrating that any of its doomsday hypotheticals is even conceivable. Make no mistake, if this court were to find that the April re-approval failed, talk of school closure will be replaced by reassurances that all will be well. And it will.

In addition to the absence of evidence supporting the doomsday hypotheticals, the record affirmatively demonstrates that invalidation poses no threat whatsoever to Merit. Merit and the Board are of one mind regarding the relationship, neither wants out. If discussion and action on the MOU, Contract and Lease all had to be retaken, all three would be "meaningless" Answer at p. 15, n. 2, in that there would be a foregone conclusion of re-approval. Likewise, the Board's own agenda items announcing an agenda item of "re-approval" proves that the result was a foregone conclusion. Any revote would, however, be meaningful in the sense of providing access, if not to the original discussion, then at least to retaking of the decisions.

II. The Second Question Presented

Question Presented
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.

A. Contrary to the Board's claim, affirmance in this case would be the death knell for fee shifting under § 24-6-402

The Board argues that:

"the *COHVC* holding does not automatically strip a plaintiff from ever receiving costs and attorney fees pursuant to C.R.S. § 24-6-402(9)(b). In appropriate

circumstances, plaintiffs may still recover fees. In the present case, the distinct court carefully reviewed the facts of the case, and the litigation as a whole, and correctly determined that Petitioner was not a prevailing party. Specifically, she was not successful in any aspect of the litigation and thus was not entitled to an award of fees." Answer at 9.

Likewise, Amicus CASB's claims that attorney fees "should be awarded to any citizen who successfully brings [a bona fide COML] case." CASB Brief at 20.

The lie is put to both claims by the *O'Connell* court's simple logic: once an action is retroactively cured "no outstanding violations of the OML remain[]." *Id* at 35. This Court's embrace of the judicially created cure doctrine would render fee shifting under § 24-6-402 dead letter.

Section 24-6-402(9)(b) states: "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[7] attorney fees." This language defines "prevailing" as used in

[7] CASB's "race to the courthouse" scenario, CASB Brief at 10-11 is already addressed by the statute's mandate of the award of "reasonable" attorney fees. In the scenario posed by CASB, any assessment of what fees were "reasonable" would take into consideration that the abusive plaintiff was suing for a problem already being addressed.

the statute. The Board's attempt to substitute the test articulated in §II.A, 38-41 of the Answer Brief must be rejected.[8]

Interpreting the trial court's November 7, 2022 Summary Judgment Order, *the O'Connell Court* made the implicit explicit:

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. . . Further, because O'Connell was not successful at summary judgment on any issues before the court, she was not the prevailing party. *O'Connell* at 35.

The COA's interpretation disproves the claim that "in appropriate circumstances, plaintiffs may still recover fees." Answer at 9. The Board's pleasantries and talk of case by case assessment cannot mask the truth: sanctioning of the *COHVC/O'Connell* cure will effectively eliminate of fee-shifting under §24-6-402(9)(b).

[8] For this reason, O'Connell's proposed *de novo* standard is the correct one, contrary to the Board's claim. Answer at 36.

"No, Thursday's out. How about never—is never good for you?"

New Yorker Magazine at https://www.newyorker.com/cartoons/bob-mankoff/the-story-of-how-about-never

The Board further argues that: "[s]hould this Court hold that the OML does not allow for curing prior violations, plaintiffs, like Petitioner here, will be incentivized to misuse the OML." Answer at 31. But how? Rather than providing a windfall, § 24-6-402(9)(b)'s award of attorney fees and costs only enables the plaintiff to bring the suit. Rather than "incentivizing" suits, it makes it possible for ordinary citizens to recover fees if and only if they prevail in demonstrating the violation. Further, it reflects the Legislature's desire to empower "private

attorneys general,[9] who, through the exercise of their public spirit and private resources, caused a public body to comply with the Open Meetings Law." *Van Alstyne, supra,* at 100. Rather than fostering abuse, fee shifting empowers plaintiffs, not without risk, to challenge COML violations, exactly as it was designed to do.

B. Defendant's claims impugning O'Connell's motives are false, unfounded, improper, and designed to distract this Court's attention from the Questions Presented.

1. All claims impugning O'Connell's motives must stop.

The Board's repeated false claims regarding O'Connell's motives are improper in that they are unsupported in the record and baselessly discredit O'Connell. For example, the Board claims:

While this case is—on the surface at least—about . . .transparency in the conduct of public business, the reality is that Petitioner has used the OML as a vehicle to interfere with the District's priority to charter Merit Academy. . . [O'Connell's] requested remedies . . . have had little to do with ensuring transparency related to

[9] In this case, representing its client CSI, the Colorado Attorney General's Office takes the astonishing position that:
"when a public board (1) takes an action without complying with the OML and (2) later reconsiders that action while complying with the OML, [the board does ***not*** remain] subject to suit and to an award of attorney fees based on the initial violation. . . . as [*O'Connell*] properly held." CSI Amicus Brief at 1-2.
It is no exaggeration to say that this advocates eradicating COML litigation in the state, and would permit government bodies to violate the law with impunity. In this context, the private attorneys general empowered pursuant to §24-6-402(9) may well be the only source of COML enforcement.

the discussion of the Merit Academy MOU but instead have ***focused on halting the school's progress*** (i.e., start the chartering process over) void all subsequent agreements between the District and Merit Academy ***prohibit Merit Academy from sharing space at the middle school***, etc.)." Answer at 28.

To the contrary, this case has everything to do with ensuring transparency. *See e.g.* Complaint CF:3 ("This suit does not address the substance of the policy of agreeing to an MOU. Instead, it is exclusively regarding the process by which important public policies—directly affecting some 2,000 students enrolled in Woodland Park Schools, and their families—is made"); 9/16/22 Order re: Plaintiff's Motion for Contempt CF:650 ("Plaintiff admits that [re-noticing the Feasibility Study regarding space sharing] may not change anything, but the Board must comply with the law.") Despite the Board's efforts to misrepresent the record, O'Connell ***never*** sought to halt the school's progress or "prohibit" space sharing. She sought only to enforce the guarantee set forth in § 24-6-401 that "the formation of public policy is public business and may not be conducted in secret."

Continuing with its baseless claims, the Board states:

[Citing to Petitioner's participation at meetings hosted by the Board] "While Petitioner is without question entitled to disagree with the direction of the Board in this regard, the OML should not be used as a weapon to reshape public policy.

The Board had no basis to accuse O'Connell -- especially in a case where the court found it to have made a "conscious decision to hide a controversial issue regarding Merit, the MOU and intent to charter" CF:671 -- of using COML as a weapon.

Further misleading this Court about the remedies requested by O'Connell, the Board states that her:

"requested penalty . . . has been to eliminate all decisions and agreements related to Merit Academy and . . . ***essentially suspend the school as a District charter*** by making it start from 'square one.'" Answer at 13-14. (emphasis added).

O'Connell ***never*** requested to suspend Merit, or asked for anything other than the invalidation prescribed in § 24-6-402(8). Her requests for relief were not only legitimate, but necessary to protect the public from a Board moving forward on Merit in secret despite a recent preliminary injunction attempting to control its lawlessness.

Continuing, the Board contends that:

[a]ll of Petitioner's arguments come down to two main objectives: (1) using the OML to punish the Board and obstruct the chartering of Merit Academy, and (2) recover attorney's fees for her efforts. Answer at 7.

Further, the Board claims:

"the record is in fact replete with examples of how Petitioner has attempted to use the OML to obstruct Merit Academy from operating as a District charter school . . . [a remedy which would result in] incredible injury to the community and the

hundreds of students and families who have chosen Merit Academy. Answer at 14-15

And:

Despite Petitioner's attempt to sanitize her previous arguments aimed at punishing the District and obstructing Merit Academy, she cannot escape the fact that her efforts throughout this litigation would "do more disservice to the public good than the violation itself." *COHVC*, 292 P.3d at 1137. Answer at 16.
And finally:

"[O'Connell's] objective was never to simply witness the Board discuss the Merit Academy MOU in compliance with the OML. Instead, she attempted to punish the Board for its mistake and obstruct the chartering of Merit Academy. The OML was not designed to reward her for her effort." Answer at 43.

In support of these scurrilous claims, the Board cites nothing but O'Connell's legitimate requests for invalidation pursuant to 24-6-402(8) and her participation as a citizen in public meetings hosted by the Board. Answer at n. 4. Because the Board has failed to direct this Court to any record evidence supporting these assertions, they are not properly before this Court. *Anderson v. Senthilnathan*, 2023 COA 88 at ¶51. This attempt to discredit O'Connell based on nothing but her willingness, through "the exercise of [] public spirit and private resources, " *Van Alstyne,* at 100, to seek to hold the Board accountable for complying with COML must stop. The Board's unrelenting attacks on O'Connell should be disregarded by this Court, and, should oral argument be granted, the Board should not be

permitted to impugn O'Connell's motives for filing a COML lawsuit or to speak to her objectives in bringing suit against the Board. *Cf. Colo. R. Prof.Cond.3.4(e)* "Fairness to Opposing Party. . ." (A lawyer shall not **. . .** in trial, allude to any matter . . . that will not be supported by admissible evidence, or state a personal opinion as to the justness of a cause. . .)

What remedies did O'Connell seek and when did she seek them?

While the Board is happy to note that O'Connell's remedy requests shifted over the course of the litigation,[10] it fails to note that both the specific requests it challenges and O'Connell's more general call for the district to "start from square one," resulted directly from the Board's aggressive and lawless spate of actions, ***after having been found to have intentionally manipulated its agenda in violation of COML and being enjoined to scrupulously notice any agenda items relating to Merit.***

A TIMELINE is attached hereto as Appendix A. As the Timeline demonstrates, the Board engaged in three independent acts ***after the issuance of***

[10] The Board's claim that O'Connell "has now reversed course on the argument that invalidation of the MOU would have no impact on Merit Academy," Answer at 14, misrepresents the record. O'Connell consistently requested invalidation pursuant to §24-6-402(8) and the public airing required by law.

the 4/29/22 PI Order, designed to hide from the public critical facts and planned actions relating to Merit:

1) On or before May 1, 2022, the Board misrepresented the contents of the 4/29/22 PI Order in its press release claiming that it had "prevailed legally on the key issues in the lawsuit;

2) Between April 28 and May 4, 2022, the Board illegally denied O'Connell's CORA request for access to the Feasibility Study, *see* CF:654 (court finds the Board "wrongly chose to keep the Feasibility Study from the public.")

3) In violation of the Order issued less than a week prior, the Board noticed a planned discussion of co-locating Merit within WPMS under the item "Feasibility Study Presentation," without reference to Merit. The Court found that, although the Board members "had knowledge of the [4/29 PI] Order prior to the May 4th Board meeting," the Board "chose not to follow the suggestion of listing Merit Academy Charter School Application or future school Board meeting agenda items to comply with the Order" and that the "Board was not completely forthright and transparent with their Agenda posting". CF:653-654.

It was only after the Board doubled down – after the PI had issued -- on its commitment to transact Merit-related business in private that O'Connell sought invalidation beyond the MOU.

And what should O'Connell have requested in June, 2022, when, on the basis of a vote on a MOU ***never***[11] retaken at a compliant meeting, planning for

[11] It is O'Connell's position that the MOU has never been approved at a compliant meeting. See Opening Brief at n. 14. Since the court found at the 4/29 hearing that

Merit was moving forward with the plan of opening in August 2022? In light of the Board's ongoing obfuscation, with the situation unclear and evolving, O'Connell's requests for invalidation of the contract and the Lease were absolutely appropriate. That was the moment when the sunshine O'Connell sought had the best chance of impacting the decision, ***before*** Merit had welcomed its first students and families as a District charter. *Alaska Comm. Coll., supra* at 891 (open meetings laws envision that "non-conforming procedures be righted as near to the point of derailment as possible, and that the governmental process be allowed to resume from there"); *id.* ("by ensuring that issues are decided publicly, [open meetings laws] attempt to insure that better substantive decisions are made through public scrutiny and adequate information.")

After proclaiming that reconsideration of Merit, years into its work, would now be "meaningless," Answer at n. 2, the Board simultaneously seeks to blame

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"An ordinary member of the community could not have understood or known what "BOARD HOUSEKEEPING" or Re-Approval of MOU with Merit Academy meant" CF:671, and since that agenda item was used to notice both the 2/9 and the 4/13 meetings, O'Connell had, at the very least, a good faith belief, when she sought invalidations in June, 2022, that the MOU had never been approved in a compliant meeting.

O'Connell for seeking real reconsideration back in June of 2022, when it was still possible. The Board can't have it both ways.

Finally, on appeal, O'Connell has never sought relief in excess of invalidation of the MOU. As O'Connell recognizes, the appropriate remedy in June, 22, when Merit was a summer away from receiving its first students as a District charter, is not the same as the appropriate remedy with regard to an almost three year veteran school. *See Alaska Comm. Coll., supra,* at 890 ("The gap between the "ideal" remedy under the OMA (a return to the exact setting of the original decision) and a practicable remedy widens with the passage of time.") Indeed, the Board's own position has migrated, as it expressly re-approved the Merit MOU p***rospectively*** at the February 9 meeting, while stating in this court that "[w]ithout a retroactive effective date, the concept and practical effect of curing a violation is eliminated**.** Answer at 25. The Board's attempt to discredit O'Connell for requesting the remedy to meet the circumstances fails.

III. The question of the intentionality of COML violations is irrelevant in the context of the pathway forward created by the Legislature in § 24-6-402(8). By contrast, embrace by this Court of the *COVIC/O'Connell* cure would hand bad faith boards a tool permitting it to form public policy in secret in contravention of § 24-6-4-1.

The Third Question Presented is:

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.

Finally, on the third Question Presented, it has always been O'Connell's position that the invitation to move forward prospectively after COML violations is open to all boards, good and bad faith alike. Opening Brief at 47. This case demonstrates the types of abuses that will ensue if the prospective cure favored by the Legislature is replaced by the *COHVC/O'Connell* retroactive cure.

According to the Board and Charter Schools Institute, the requirement that the Board retake the formal action at a compliant meeting that avoids rubber stamping is sufficient to serve § 24-6-402's mandate that "the formation of public policy is public business and may not be conducted in secret." E.g. CSI Amicus Brief at 14 (once a board has retaken the action at a compliant meeting, "there are no harms remaining to be redressed, no sanctions remaining to be imposed, and indeed no rights remaining to be vindicated. See also Answer at 8 (arguing that once the decision is retaken pursunt to COHVC, "good faith compliance with the law and full public transparency" have been achieved."

According to Merriam Webster, "formation," is defined as "an act of giving form or shape to something or of taking form," or, "the manner in which a thing is formed." https://www.merriam-webster.com/dictionary/formation

Thus, the gold standard sought to be protected by COML is public access to "the formation" of public policy, ie: access to ***pre-decisional*** discussion and debate which actually informs members as they decide whether to support or oppose a proposal; the points in the process where hearts and minds are actually won and lost.

CONCLUSION

For the reasons stated herein, this Court should find the agendas of "BOARD HOUSEKEEPING", "Re-Approval of MOU with Merit Academy" and "Reconsideration of Re-Approval of MOU with Merit Academy" used by the Board at its 1/26/22, 2/9/22, and 4/13/22 meetings, respectively, failed to provide full notice required by § 24-6-402(2)(c)(1), C.R.S., because they could not be understood by an ordinary member of the community. This Court should find that the lack of full notice is in violation of the COML at § 24-6-402(2)(c)(1) and (8), C.R.S. This Court should further find that the lack of full notice caused the decision of the Board (approval of the MOU with Merit Academy) at its 1/26/22

meeting to be invalid under § 24-6-402(8), and that, as a result of the lack of full notice at the 2/9/22 and 4/13/22 meetings, the decisions there could not be the source of any cure and were also invalid. This Court should award reasonable attorneys' fees to Petitioner under § 24-6-402(9), C.R.S. and C.A.R. 39.1, and should remand to the trial court for further proceedings to determine reasonable attorneys' fees and costs on appeal, at the court of appeals and at the supreme court, and to award Petitioner her reasonable attorneys' fees and costs associated with the preparation, initiation, and maintenance of this action at the trial court.

Respectfully submitted on this 6th day of February, 2025,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the Reply Brief this 6th day of February, 2025, 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