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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,

Petitioner,

v.

SAN JUAN COUNTY, et al.

Respondents.

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***AMICUS CURIAE BRIEF OF BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON  
IN SUPPORT OF PETITIONER***

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Washington State Supreme Court  
JAN 26 2015 *b/h*

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## I. INTRODUCTION

In Washington State, the Open Public Meetings Act of 1971 (hereinafter “OPMA”) and Public Disclosure Act are collectively referred to as the “Sunshine Laws.” These laws were part of a national movement starting in the late 1950s, whereby every state in the union gave the public more access to government processes. John F. O'Connor and Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 Geo. Mason L. Rev. 719 (2004).

From the perspective of *Amicus* Building Industry Association of Washington (hereinafter “BIAW”), there are two important practical rationales for such laws: to protect government from itself, and to allow for a free flow of information to and from the people and their government.

*Amicus* BIAW argues that the statutory burden of publishing notice of the Critical Areas Ordinance (hereinafter “CAO”) Subcommittee meetings under OPMA was minimal at best; nearly nonexistent when compared to the magnitude of harm that occurs when government acts behind closed doors.

BIAW, on behalf of its members, respectfully requests this Court reverse the Court of Appeals decision because it creates a dangerous

carve-out to the OPMA, encouraging government secrecy under circumstances where there is no benefit to society to do so.

**II. IDENTITY AND INTEREST OF *AMICUS CURIAE*  
BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON**

The Building Industry Association of Washington (“BIAW”) represents over 7,700 member companies who employ nearly 200,000 Washingtonians.

BIAW is made up of 14 affiliated local associations: the Building Industry Association of Clark County, the Central Washington Home Builders Association, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Home Builders Association of Kitsap County, the Lower Columbia Contractors Association, the North Peninsula Building Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Builders Association, the Skagit-Island Counties Builders Association, the Spokane Home Builders Association, the Home Builders Association of the Tri-Cities and the Building Industry Association of Whatcom County.

BIAW’s members are engaged in every aspect of the residential home building industry – from site development to remodeling. They are

the individuals who walk up to the permit counters of Washington's cities and counties to submit site plans and permit applications. They work together on a daily basis with city and county staff to ensure compliance with applicable laws and regulations. They are directly affected by any decisions affecting public access to government decision-making.

### **III. ISSUE OF CONCERN TO *AMICUS CURIAE***

This Court should reverse the Court of Appeals decision and hold that the OPMA applied to San Juan County's CAO subcommittee.

### **IV. STATEMENT OF THE CASE**

BIAW adopts the Statement of the Case presented in the Supplemental Brief of Appellant.

### **V. ARGUMENT**

*"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."*

-Louis D. Brandeis, "What Publicity Can Do," *Harper's Weekly*, Dec. 20, 1913, reprinted in Louis D. Brandeis, *Other People's Money and How The Bankers Use It*, 92 (1932).

*"The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings."*

-Pres. John F. Kennedy, 1961

**A. This case requires a classic weighing of the scales analysis.**

The scales of justice are presented clearly in this case: on one scale, the interests of “the public” to receive information and know and/or participate in the process of government; on the other scale, the government’s interest in expediting the deliberative and legislative process, which results in a lack of public notice and participation.

The Court of Appeals made a policy decision of the most fundamental and important kind, balancing two competing interests, when it comes to the basic operations of representative government. *Amicus BIAW* argues that the Court of Appeals got it wrong.

**1. The right of the public to have access to this type of government decision-making process is paramount to any competing interest.**

The right to receive information, or the right of the people to know, has been repeatedly recognized by the United States Supreme Court as a “fundamental tenet of the American political system.” See *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247 (1969); See also *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). “Freedom of speech without the corollary—freedom to receive—would seriously discount the intended purpose and effect of the first amendment.” *Fritz v. Gorton*, 83 Wn.2d at 297.

The OPMA also has the effect of directly addressing the historic reality of corruption in government. When it comes to the delegation of elected power, accountability, corruption, and transparency are oft-repeated concerns. *See Fritz v. Gorton*, 83 Wn.2d 275; *see also* Linda Greenhouse, *Court Question: Is Congress Forsaking Authority?*, N.Y. TIMES, May 14, 2000 at L28 (discussing non-delegation doctrine, stating “academics, lawyers. . . as well as the occasional judge [has] found a disturbing lack of political accountability. . .”).

The Court of Appeals has effectively forgotten that American representative democracy exists and operates on the basis of its delegated authority, that its power derives from the people, and that “an informed and active electorate is an essential ingredient, if not the Sine qua non in regard to a socially effective and desirable continuation of our democratic form of representative government.” *Fritz v. Gorton*, 83 Wn.2d at 283-284. In other words, despite the fact that for approximately two years, the CAO Subcommittee met in secret, the Court of Appeals held there was no issue of law or fact under a law coined a “Sunshine Law.”

While private actors have a right to avoid speaking publicly, and private associations have a right to associate, organize, and deliberate internally to formulate their messages without interference, governments

enjoy no such rights. “[I]t is axiomatic that the First Amendment protects only private speech from governmental interference. Thus, if an organization is in fact a governmental entity, or wholly a governmental instrumentality, it does not possess First Amendment rights.” *Disabato v. South Carolina Ass'n of School Adm'rs*, 746 S.E.2d 329, 404 S.C. 433 (S.C. 2013) (J. Pleicones, concurring in part).

As Chief Justice John Marshall cautioned, secrecy in governmental affairs should only be employed “when it would be fatal and pernicious to publish the schemes of government.” —3—Debates in the Several State Conventions on the Adoption of the Federal Constitution 233 (J. Elliot ed. 1901). Also cited to in *Disabato v. South Carolina Ass'n of School Adm'rs*, 746 S.E.2d 329. (discussing the constitutional origins of open public meeting statute).

**2. Any “interest” the government may have in keeping these meetings private is not compelling.**

Under the OPMA, there is a negligible burden that would have been placed on the County in terms of procedural requirements: First, the date and time of regular meetings must be established by ordinance, resolution, order, or rule, as may be required for the particular governing body; second, if the regular meeting date falls on a holiday, the meeting must be held on the next business day; and third, the meeting agenda must be made

available online at least 24 hours in advance of the regular meeting. RCW 42.30.070.

Consequently, it is practically impossible for the CAO Subcommittee to argue that the notice requirements under the Open Public Meetings Act—for any meeting—were anything but the most minimal of burdens. In so much as the record demonstrates that the County found it burdensome to comply with the Open Public Meetings Act – and did not do so because having some meetings out of the public view was more efficient to the process of law making – this argument has little, if any, merit; the government does not have a right to secret meetings absent some compelling interest. This case does not involve executive-session worthy activity, or deliberations regarding sensitive information such as wages and discipline. Why keep the public out?

**B. Amicus BIAW members are uniquely affected by all types of government decision-making.**

The individuals who run BIAW member companies are, generally speaking, “joiners,” that is, they are the small business owners and managers who take time to engage in their communities, from fundraising for their local scholarship programs, to providing testimony to local and state government bodies.

BIAW members are uniquely affected by government process and government decision-making. In order for builders to engage in their livelihoods, they rely directly on government action, whether that action come in the form of a permit counter decision, a public hearing on a zoning decision, or a task force that is in the process of making a recommendation to a County Commission. This case is not just about a “public interest” in BIAW’s perspective – it affects the very survival of those who deal with government on a daily basis.

Government, at all levels, has grown complex. For many jurisdictions in Washington state, the “citizen advisory committee,” the “technical advisory board,” and the “technical working group” (among others) are common terms. There is simply not time for the elected decision makers to pour through endless data and policy guidance on various subjects, and so, others are tasked with the process. Those “others” are typically the individuals with time for meetings. BIAW has firsthand knowledge of this phenomenon because its staff, and the staff of its local associations, have increasingly tried to gain appointments and access to these groups. The meetings of these groups are where the decisions are (unofficially) reached.

All of this modern “process” – secret or not – serves to discourage the busy small contractor from participating in their government. And when the process occurs behind closed doors, what results is more “public dissatisfaction and/or disenchantment with the functioning or responsiveness of government institutions.” *Fritz v. Gorton*, 83 Wn.2d at 280 (1974).

**C. The Court of Appeals decision creates a dangerous “carve out” in a critical area of public policy.**

On Sunday, January 16, 1972, *The Seattle Times* reported on the Washington Legislature’s recent steps to open its committee meetings to the press and public, following the passage of the OPMA. The story quotes State Senator Sam Guess, a Spokane Republican and staunch opponent: “Guess said closed committee meetings are where elected representatives of the people make their decisions. He said he objected to pressures which could come from ‘rabble’.” Senator Guess went on to explain further to the reporter: “ ‘Representative government is the placing of trust in legally elected representatives’, Guess said. ‘It does not mean that the elected person wants to make decisions with. . . uninformed people looking over his shoulder and watching his every move’.” Richard W. Larson, *Open Meetings: House ‘Goes Public,’ but will Senate?*, *The Seattle Times*, January 16, 1972, at C1.

Forty years of legislation and jurisprudence drown out Senator Guess's perspective. But in this case, interpreting the Open Public Meetings Act in Respondents' favor would result in a significant step back – an absurd result in an especially progressive state, one that is proud of its “sunshine” – a result that would further “today's accelerated distrust of public officials and government.” *Fritz v. Gorton*, 83 Wn.2d at 283; *see also State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444 (2003) (“A kind of stopgap principle is that, in construing a statute, a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.”); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) (“We will not interpret a statute in a manner that leads to an absurd result.”); *Miller v. City of Tacoma*, 138 Wash.2d 318, 324, 979 P.2d 429 (1999) (en banc) (explaining the liberal rule of construction with respect to the general rule of openness implies a concomitant intent that its exceptions be narrowly confined).

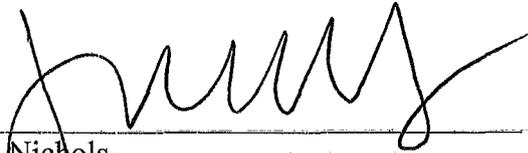
Public policy in this case disfavors the unintended consequence of creating a significant “carve out” for certain activities of government when no compelling reason exists.

## VI. CONCLUSION

Based on the foregoing, Amicus BIAW encourages the Court to see the forest through the trees and reverse the Court of Appeals, whose decision frustrates the very purpose of the OPMA.

Given the magnitude of potential harm – practical, societal, political, statutory, and/or constitutional – to citizens’ rights to receive information and participate in governance, as well as the potential negative impact to governmental institutions, the reasonable policy conclusion in this case is that the formative meetings that took place in San Juan County should fall within the Open Public Meetings Act.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2015.



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JAN - 9 2015

DECLARATION OF SERVICE

Ronald R. Carpenter  
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I, SHELLY SMITH, hereby declare under penalty of perjury under the laws of the State of Washington that on the date indicated below, true and correct copies of the foregoing documents entitled **MOTION TO FILE AMICUS CURIAE BRIEF** and **AMICUS CURIAE BRIEF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON** were served to the parties and/or their counsel of record listed below, via the method indicated:

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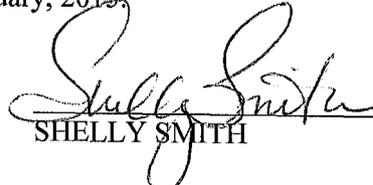
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