Case No. 1033702

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

CITIZEN ACTION DEFENSE FUND, A WASHINGTON NONPROFIT,

Appellant,

v.

WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT IN THE OFFICE OF THE GOVERNOR, AN AGENCY OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF WASHINGTON POLICY CENTER, WASHINGTON BUSINESS PROPERTIES ASSOCIATION, AND MOUNTAIN STATES POLICY CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

This *amici* brief is submitted by the **Washington Policy Center** ("WPC"), **Washington Business Properties Association** ("WBPA"), and **Mountain States Policy Center** ("MSPC").

WPC is an independent, nonprofit think tank based in Washington State that promotes sound public policy based on free market solutions. WPC has researched, testified, and written extensively on government transparency in Washington State.

WBPA is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

MSPC is an independent think tank that believes in providing research and fact-based recommendations to lawmakers, the media, and the public. MSPC's staff collectively have decades of experience working on open government issues and understand that adopting policies favoring transparency at all levels of government is of utmost importance to the people's ability to hold their government officials accountable.

Amici have a strong interest in the outcome of this case because all three are committed to the disclosure of governmental proceedings, including contract negotiations, in order to prevent and stamp out corruption and to provide the voting public with a full accounting of official conduct. *Amici* write to dissuade potential concern that finding for Appellant will, going forward, unduly deprive officials of the flexibility to negotiate without fear of "the optics."

INTRODUCTION & SUMMARY OF ARGUMENT

On October 20, 2022, Appellant requested the state and unions' opening offers in negotiations for the statewide collective bargaining agreements for 2023-2025. CP 6, 13. The agency responded on October 26, 2022, refusing to disclose the

records. CP 13. OFM claimed they were exempt from disclosure under RCW 42.56.280, commonly referred to as the "deliberative process exemption." Thus, the core issue in this case is when, exactly, a record is no longer "predecisional," and therefore loses its §280 exemptive shield. Appellant has persuasively argued that the record of negotiations lost this inherently temporary protection when Governor Jay Inslee presented these "signed agreements" to the Legislature prior to Appellant's public-records request. That is, *at the moment the parties relinquished all powers to alter the contract*. *Amici* write to emphasize that this Court—indeed, no Washington court—need fear that restoring judgment in favor of Appellant will have a "chilling effect" on an official's willingness to negotiate openly and in full good faith, knowing that any and all positions they took during such proceedings will be subject to public scrutiny and political "spin." This presumption is fatally flawed in at least two respects. First, standing precedent—from which the ruling below departs—already strikes a fair balance between the public's right to disclosure and official maneuverability. Research into the PRA in practice confirms this. Second, the

decision of the Court of Appeals also runs counter to the rules and rulings governing public disclosure in other areas of public concern wherein lawmakers and jurists together have found a healthy balance. Simply put, the Court of Appeals' reversal of the Superior Court holding in favor of Appellant depends on flawed reasoning regarding how much protection from disclosure is necessary for government to operate organically.

ARGUMENT

I. WASHINGTON JURISDICTIONS' DISCLOSURE PRACTICES *ALREADY* ROBUSTLY PROTECTS OFFICIAL FLEXIBILITY WITHOUT COMPROMISING THE PUBLIC'S RIGHT TO ACCESS

Obviously, research into Washington jurisdictions' records-disclosure practices is not prodigious. But there is certainly more than enough evidence—attesting to the responsiveness, efficiency, and structural safeguards—that records production practices across Washington already, for the most part, operate as intended. Chapter 42.56 RCW, which governs public-records requests in Washington, is notably robust in its demands on government, both state and local. All agencies and localities must adopt its own public-records policy, which it must, arguably, then follow. RCW 42.56.100. They must publish

a list of exemptions, maintain an index of public records, and design a review process in the event a request is denied. Since 2005, "Washington's Local Governments Grant Program has given away millions to help cities and counties upgrade to record management software like GovQA." Daniel Walters, *Broken Records: Citizens Face Growing Obstacles to Public Records—And Legislators Are Making Them Worse*, INVESTIGATE WEST, July 2, 2024.[1] As the preceding citation's title illustrates, disclosure policies across Washington jurisdictions are far from perfect, but compared to those of most other states, Washington's policies are near to the gold standard. When data-aggregator Logikcull submitted hundreds of FOIA and state FOIA-equivalent requests to local governments across the country, many simply ignored the requests. Daniel Diana, *Evaluating State Open Records Request Compliance: The Best, the Worst, and Texas*, LOGIKCULL (2024). Per the report, "In 54 percent of the states, one of the two departments never got back to us, and

[1]https://www.invw.org/2024/07/02/broken-records-citizens-face-growing-obstacles-to-public-records-and-legislators-are-making-them-worse/.

even worse, 20 percent of the states ignored us altogether." *Id.* "Still more shocking is the handful of states whose agencies had never heard of eDiscovery and made it very clear that they would [not] want to hear more." *Id.* Among Washington state agencies and local jurisdictions, complacency[2] of this sort is almost unheard of. Or, where it happens, it will typically lead to litigation or other private legal action (*e.g.,* contacting the state's Open Government Ombudsman).

The decision of the Court of Appeals threatens Washington's well-earned place towards the top of the disclosure rankings, and all to *temporarily* protect from disclosure documents that all the parties agree are ultimately subject to public view. Thus while *this* disclosure dispute is not among the most controversial from a factual standpoint, the ruling below cuts through layers of doctrinal safeguards against reliance on the government's interpretation of what qualifies as a "decision" which clears the documents for disclosure.

[2] Complacency *at best*; "misfeasance" may be more accurate.

II. THE RULING BELOW CANNOT BE RECONCILED WITH STATUTORY AND DOCTRINAL RULES GOVERNING DISCLOSURE IN OTHER AREAS OF PUBLIC CONCERN

Records in other areas of governance—from internal discussion of the state's accounting practices to the deliberations of a local zoning board—typically are exempt from disclosure so long as disclosure itself threatens future official decision-making. Here, drawing the decisional line at the point where the parties to the signed agreements *can no longer negotiate new terms* makes eminent sense in light of analogous lines Washington courts have drawn in other policy fields. Appellant highlights a number of these in their Petition for Review.

The contents of an ongoing police investigation, for example, are generally exempt from public disclosure until its findings are delivered to prosecutors, at which point it is fully subject to the PRA. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 478 (1999). Thereafter, new evidence might come to light that alter the investigation's findings. Yet courts are satisfied that once these documents are out of the hands of those for whom disclosure threatens future decision-making, their content becomes discoverable by default. That is, disclosure

is permissible once "the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists." *Id.* at 477–78. Likewise, drawing the decisional line at transmittal to the Legislature cannot, necessarily, "risk" the danger that state negotiators will tailor the process to public opinion instead of public need. If the Legislature *rejects* the signed agreements, then the parties—like investigators after new evidence emerges—return to the drawing board, assured that all new negotiations will remain under seal until the parties once again relinquish control. Under this (correct) disclosure rubric, officials can rest assured that nothing they say or offer during negotiations will ever see daylight *before* they conclude.

But even if officials were *not* so assured, Washington courts still find grounds for disclosure. In *West v. Port of Olympia*, 146 Wn. App. 108 (2008), the Court of Appeals held that pre-decisional protection evaporates once a public-private lease is executed—*i.e.*, the moment it reaches beyond the control of the negotiators. *Id.* at 118. The timing on disclosure of private-public bidding provides another pertinent example: "Once [a

state] agency has chosen the recipient of the contract (the Apparent Successful Vendor), it will announce its decision and make all received bids available for public viewing." John Delaney, Comment, *Safeguarding Washington's Trade Secrets: Protecting Businesses from Public Records Requests*, 92 WASH. L. REV. 1905, 1924 (2017). As with the pre-decisional exemption, the seal on public access to what vendors the government has hired only lasts until the decision is *out of the hands* of the official or agency that made it and is subject to up-or-down legislative (or administrative) approval.

All of these and other exemptions demonstrate the logic in drawing the decisional line at the point where the parties whose actions would have been impacted by disclosure are no longer empowered to act *at all*. Namely, "to safeguard the free exchange of ideas, recommendations, and opinions *prior to decision*." *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 133 (1978). Waiting until a decision is made—but no later—ensures this. But, as discussed above, doctrinal support for a pro-disclosure bent is only as useful as the capacity of real-world actors to put such principles into practice. Washington jurisdictions largely

succeed in the respect, thus further undermining any argument in favor of *more* stringent disclosure rules—which the ruling below clearly portends. Especially in view of *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) ("*PAWS*"), which noted that timeliness is an integral part of good disclosure practice and can only be used so long as necessary to "protect the give and take of deliberations necessary to formulation of agency policy." *Id.* at 256.

CONCLUSION

For the foregoing reasons and those set forth in Appellant's briefing, this Court should reverse the Court of Appeals and find for Appellant.

DATE: October 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of RAP 18.17(6) because it consists of **1,662** words.

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CERTIFICATE OF SERVICE

I certify that on October 15, 2024, I electronically filed the foregoing document with the Clerk of the Court of the Supreme Court of the State of Washington by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATE: October 15, 2024

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