

NO. 1033702

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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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.

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**COMBINED ANSWER TO AMICUS CURIAE  
WASHINGTON COALITION FOR OPEN  
GOVERNMENT, WASHINGTON POLICY CENTER,  
WASHINGTON BUSINESS PROPERTIES  
ASSOCIATION, AND MOUNTAIN STATES POLICY  
CENTER'S MEMORANDA IN SUPPORT OF PETITION  
FOR REVIEW**

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ROBERT W. FERGUSON  
Attorney General

SARA L. WILMOT  
Assistant Attorney General  
WSBA No. 56898  
Office of the Attorney General  
1116 W Riverside Ave, Ste 100  
Spokane, WA 99201-1106  
(509) 456-3213

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## I. INTRODUCTION

Amici fail to show how the Court of Appeals' straightforward application of the deliberative process exemption meets any of the criteria for discretionary review.

While Amici are correct that exemptions to the Public Records Act must be construed narrowly, this Court reiterated its four-part test in *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) (plurality) (*PAWS*), to ensure narrow application of the deliberative process exemption consistent with its purpose. Under that test, and as is relevant to the only issue in dispute here, earlier drafts, recommendations, and opinions cease to be “pre-decisional,” once the government implements its decision. *PAWS*, 125 Wn.2d at 257. Here, state collective bargaining laws preclude implementation of negotiated collective bargaining agreements until after the Legislature approves (and funds) them. Thus, the Court of Appeals correctly concluded that the original bargaining proposals requested here—sought long before the negotiated

agreements were presented to and approved by the Legislature for funding—were exempt from disclosure at the time that Citizens Action Defense Fund (CADF) requested them.

Amici suggest that the lack of a Public Records exemption that explicitly addresses collective bargaining is somehow fatal to claiming the deliberative process exemption here. But, as CADF concedes, the plain language of the deliberative process exemption, which applies to any “[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended,” is already sufficient to cover collective bargaining materials like the original bargaining proposals at issue here. RCW 42.56.280.

Amici also misunderstand and unduly minimize the unique process controlling state collective bargaining by urging a determination of finality when the negotiating parties propose a tentative agreement to the Governor and the Legislature for approval and funding. Their position ignores the plain language

of RCW 41.80.010(3), which requires several more steps before an agreement may be implemented, namely, that (1) the Director of the Office of Financial Management (OFM) certify the proposed agreements as financially feasible for the State, (2) the Governor includes a request to fund the agreements in his proposed budget, and (3) the Legislature actually approves the agreements by funding them in its budget.

Finally, Amici raise issues not challenged by CADF in either its briefing to the Court of Appeals or in its petition for review. The superior court's determination that OFM satisfied three of the four *PAWS* factors has never been disputed by CADF and is conclusively established. *See generally* Petition for Review; Clerk's Papers (CP) 191-92. The only factor at issue in this appeal is whether the records at issue were still "pre-decisional" at the time of CADF's public records request.

The petition for review should be denied.

## II. ARGUMENT

### A. The Court of Appeals Narrowly Applied RCW 42.56.280 by Following *PAWS*

Amici claim that the deliberative process exemption was not “narrowly construed” to the facts of this case. But this Court’s precedent already compels a narrow interpretation of the deliberative process exemption by requiring that the party seeking to protect records satisfy four distinct and carefully developed factors. *PAWS* 125 Wn.2d at 251, 256. The only *PAWS* factor in dispute here is the first factor; specifically, the question of *when* these records ceased to be pre-decisional and therefore ceased being deliberative for purposes of the exemption.

*PAWS* clearly focuses on implementation—specifically funding—as the threshold for when deliberations have ceased. *PAWS*, 125 Wn.2d at 256-57. “Once the proposal becomes funded, it clearly becomes ‘implemented’ for purposes of this exemption.” *Id.* As the Court of Appeals properly concluded in light of binding collective bargaining law, implementation here

occurs only once “the legislature approves the request to fund the CBA.” *Citizen Action Def. Fund v. Washington State Off. of Fin. Mgmt.*, \_ Wn. App. 3d \_, 552 P.3d 341, 348 (2024).

Amici seem to argue that a “narrow construction” requires that the deliberative process ends when the state and union negotiators sign the tentative agreements because that is a shorter time period than waiting until the agreements are approved and funded by the Legislature. Memorandum of Washington Coalition for Open Government (WCOG) as Amici Supporting Respondent at 8. But Amici’s interpretation is not simply narrow. It is incorrect. It ignores *PAWS* and ignores state collective bargaining law. According to *PAWS*, deliberations end when a proposal (here a tentative agreement) can be implemented. That is the narrow analysis under the law that still gives meaning to the exemption. And the state’s collective bargaining law provides that when the state and union negotiators sign tentative agreements, they are a long way from being implemented. CP 100, 213. Negotiations are simply paused, while the Governor



and the Legislature execute the next required steps. RCW 41.80.010(3). If the legislature fails to fund the agreement, negotiations resume. CP 100, 213.

Moreover, while amici emphasize the Legislature's self-imposed limitation to "approve or reject the submission of the request for funds as a whole," this does not change (1) the Legislature's reserved entitlement to approve an agreement before it may be implemented, and (2) the Legislature's plenary power to change its process in future biennia. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142, 1150 (2007) ("Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power.").

*PAWS* is not applied in a vacuum but rather with relevant legal and factual context. That context provides that only the Legislature and the Governor can bind the State through a collective bargaining agreement, and only then after the Director

of OFM has certified the tentative agreement as financially feasible for the state. RCW 41.80.010(3). The Governor's and the Legislature's process for deciding whether a tentative agreement should be funded necessarily "involves the exercise of ... discretion or judgment" regarding "allocation of limited state funds in order to achieve the statutorily required balanced budget." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 600, 229 P.3d 774 (2010). Thus, review and approval by the Governor and the Legislature are critical steps to determining the State's policies as reflected in its final collective bargaining agreements. The Court of Appeals correctly applied RCW 42.56.280 to the undisputed law and facts of this case.

**B. No Additional Specific Exemption Beyond the Deliberative Process Exemption is Required to Withhold the Bargaining Proposals Pending Legislative Approval of the Tentative Agreement**

Amici claim there is no specific statute that permitted OFM to withhold the records at the time of CADF's request. But the deliberative process exemption is already sufficient to govern the records at issue. There is no dispute that the opening offers

requested by CADF are the type of records that are exempt under the deliberative process exemption. Petition for Review (Pet.) at 11, 14. CADF submitted a public records request to OFM on October 20, 2022. CP 6, 13. However, as explained above, CADF's request was for state collective bargaining records that fell squarely within the deliberative process exemption under RCW 42.56.280. The records at issue met all four factors of *PAWS* allowing OFM to withhold the records until they were no longer pre-decisional. The records were produced when that threshold was met. There was no need for an exemption that more expressly applied to bargaining materials when the deliberative process exemption already covers such materials.

**C. The Petition for Review and the Proceedings Below Do Not Involve Any Other *PAWS* Factors as Amici Suggest**

Amici inappropriately raise alternative issues that are not within the scope of the petition for review. Memorandum of WCOG at 12. Amici argue that OFM failed to meet its burden under the second and third factors of the *PAWS* test: that

disclosure would be injurious to the deliberative or consultative function of the process; [and] that disclosure would inhibit the flow of recommendations, observations, and opinions. *PAWS*, 125 Wn.2d at 256.

But the petition for review does not raise an issue regarding the second and third factors of *PAWS*. In fact, the other three factors of *PAWS* have never been raised on appeal and this Court should not address them in response to an amicus brief. *See e.g., Ctr for Env't'l Law & Policy v. Dep't of Ecology*, 196 Wn.2d 17, 36 n.14, 468 P.3d 1064 (2020) (declining to consider issue raised by amicus where petitioner “did not seek review of that determination”); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash.2d 622, 631, 71 P.3d 644, 649 (2003) (Court “will not address arguments raised only by amicus”); RAP 2.4(a) (“The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal ”); RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”); RAP

13.7(b) (“If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the . . . petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition.”).

The sole focus of the petition (and all of the proceedings below) is when the records are no longer pre-decisional under the deliberative process exemption. Pet. at 9-10.

### **III. CONCLUSION**

The memoranda do not support granting CADF’s petition. Amici misunderstand or ignore the State’s unique collective bargaining system, and seek to raise issues not presented by the petition for review. This Court should deny CADF’s petition for review.

## **CERTIFICATE OF COMPLIANCE**

This document contains 1582 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of November, 2024.

ROBERT W. FERGUSON  
Attorney General

/s/ Sara L. Wilmot

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SARA L. WILMOT, WSBA No. 56898

Assistant Attorney General

sara.wilmot@atg.wa.gov

Attorneys for Respondent

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused the foregoing  
COMBINED ANSWER TO AMICUS CURIAE  
WASHINGTON COALITION FOR OPEN GOVERNMENT,  
WASHINGTON POLICY CENTER, WASHINGTON  
BUSINESS PROPERTIES ASSOCIATION, AND MOUNTAIN  
STATES POLICY CENTER'S MEMORANDA IN SUPPORT  
OF PETITION FOR REVIEW to be filed with the Clerk of the  
Court at [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov) and to be served on the  
following parties by e-mail (as per the Supreme Court Clerk's  
recorded instructions due to the Court's electronic filing system  
being inoperable):

Jackson Wilder Maynard, Jr.  
Citizen Action Defense Fund  
[jackson@citizenactiondefense.org](mailto:jackson@citizenactiondefense.org)  
[page@citizenactiondefense.org](mailto:page@citizenactiondefense.org)

Sam Spiegelman  
Citizen Action Defense Fund  
[sam@citizenactiondefense.org](mailto:sam@citizenactiondefense.org)

William John Crittenden  
Washington Coalition for Open Government  
bill@billcrittenden.com

Joel B. Ard  
Ard Law Group PLLC  
joel@ard.law  
Washington Policy Center  
Washington Business Properties Association  
Mountain State Policy Center

I certify under the laws of the state of Washington that the  
foregoing is true and correct.

DATED this 5th day of November, 2024, at Spokane,  
Washington.

/s/ Scott Kappes  
SCOTT KAPPES  
Paralegal  
scott.kappes@atg.wa.gov