No. 90500-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
a Washington nonprofit corporation,

Petitioner,

v.

SAN JUAN COUNTY, a Washington municipal corporation, and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

On Petition for Review from Division I
of the Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. Pacific Legal Foundation has regularly participated before this Court in cases involving land use management and the GMA.

ISSUE ADDRESSED BY AMICUS

Whether a rule that the public access requirements of the Open Public Meetings Act (OPMA), Ch. 42.30 RCW, never applies to meetings with less than a majority of voting officers comports with the purpose of the Act.

STATEMENT OF THE CASE

In 2010, the San Juan County Council began the process of updating the county's highly controversial critical area ordinances pursuant to the Growth Management Act (GMA), Ch. 36.70C RCW. In early 2011, the Council formed a subcommittee to deliberate outside of the

public eye. The subcommittee included three of the Council's six members. This voting bloc, along with executive staff, met behind closed doors until April 2012, when the County's prosecuting attorney urged them to comply with the OPMA. Rather than expose their meetings to the public, the Council disbanded the subcommittee.

Earlier that year, Council members had reasoned that they preferred secret meetings because transparency would reduce candor. One council member opined that secrecy allows the Council to "get into the amount of detail that we will never get into in this setting of the open meetings act." *See* San Juan County Council Early Special Session at 9:17 (Jan. 31, 2012).[1] With the media present, "frank conversations" may never have occurred. *Id.* at 9:20. One council member called the press "part of the problem" because they are "on the hunt for hot-button issues." *Id.* at 9:21. Another council member thought the content of deliberations in subcommittee meetings were such that it "wouldn't have been appropriate at all to have the press in there." *Id.* at 9:29-30.

The Council adopted four critical areas ordinances eight months

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[1] *Available at* http://www.avcaptureall.com/Sessions.aspx#session.d4a706a5-ec7c-4a14-b4ca-8bdb094a917e.

after the secret meetings ceased. Citizens Alliance for Property Rights (CAPR) sued, claiming that the subcommittee's covert meetings violated the OPMA. The trial court granted summary judgment for the County.

The Court of Appeals affirmed, holding that the OPMA only applied to a meeting with a majority of the Council's members in attendance. *Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.*, 2014 WL 1711768 (Wash. App. Div. 1 2014), at *7. According to the court, meetings without a majority of voting power lack "actual or de facto decision-making authority" and are therefore not subject to the OPMA, because the officers meeting secretly cannot pass measures without the support of the broader elected body. *Id.* The court rejected CAPR's argument that a voting bloc of half the Council still could exercise substantial power by blocking the passage of any proposal. *Id.* at *4.

ARGUMENT

Both the OPMA and the GMA contain broad transparency requirements. A narrow interpretation limiting the OPMA to meetings with a voting majority defies the liberal transparency policies of the OPMA and the public participation policies envisioned by the GMA.

I

DEFERENCE TO DEMOCRATIC BODIES IS PREMISED ON TRANSPARENCY

The transparency mandated by the OPMA and the GMA is an essential predicate to a functioning democracy. James Madison wrote that "a popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy, or, perhaps, both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Complete Madison: His Basic Writings* 337 (Saul K. Padover ed. 1953). Government transparency stands among the few ideals that have captured a broad consensus among major political thinkers. *See* Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 895-96 (2006). This is because many of our core values, such as democracy and liberty, require sunlight to take root.

A. Voters Cannot Maintain Political Control Over Their Representatives Without Transparent Government

Democracy entails discretion. In republican government, elected officers enjoy leeway to enact a broad range of policy options. This deference to democratic decision making is an abiding characteristic of our government structure, and requires citizen oversight to function properly.

For example, courts often refrain from vigorous enforcement of constitutional protections out of deference to elected bodies. For better or worse, this judicial restraint has become a mainstay of American jurisprudence. In particular, courts often defer to elected officers in the area of land management. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928). A court will "not set aside the determination of public officers in [land use matters] unless it is clear that their action . . . is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare." *Nectow v. City of Cambridge*, 277 U.S. at 187-88 (quotation marks omitted).

The GMA exhibits a similar trend of deference to local elected bodies. The Act favors county and municipal discretion. *See* Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 905 (1993) ("GMA mandates are not definitive, allowing substantial local discretion."); *see also* RCW 36.70A.3201 (recognizing "the broad range of discretion that may be exercised by counties and cities consistent with the

requirements of [the GMA]"). The Growth Management Hearings Board that reviews local GMA ordinances must also apply substantial deference to these local decisions. *See* RCW 36.70A.3201.

Supporters of a deferential judiciary believe that "the democratic, majoritarian cast of legislation is a sufficient reason for judicial restraint." Matthew Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 760 (1997). This deference thus relies on the indispensable premise that elected bodies actually represent their constituencies. Voters, however, can only ensure that elected officials represent their interests if they have some means of political control. At a minimum, "electorates . . . control their political leaders . . . by refusing to reelect them." Joseph Schumpeter, *Capitalism, Socialism, and Democracy* 272 (3d ed. 1950). Yet only an *informed* public can exercise this kind of political control over their leaders. "A largely ignorant electorate will often be unable to impose majoritarian control over elected officials." Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 Iowa L. Rev. 1287, 1297 (2004).

Only broad access to information regarding the workings of

government can cure this fatal ignorance. As the Kansas Supreme Court stated:

> Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. . . . Their duty is to inform the electorate, not hide from it.

State ex rel. Murray v. Palmgren, 231 Kan. 524, 646 P.2d 1091, 1099 (Kan. 1982). Open air fosters the key democratic link between voter and representative.

B. Voters Need Early and Continuous Access to Public Meetings To Obtain Needed Information

Public meetings late in the legislative or policy-making process cannot adequately substitute for the information lost during earlier closed-door deliberations. Here, the Council's public meetings that immediately preceded adoption of the critical area ordinances cannot undo the harm done to the democratic process by the long period of secret subcommittee meetings.

Information vital to an informed electorate can only be gained by early and on-going access to public meetings. If the electorate can only judge their officials by the ultimate output of their work or prepared

statements issued during token meetings held after the key decisions were made in secret, voters cannot assess each incumbent's motives, abilities, and viewpoints. Voters who gain information by access to the CAO subcommittee's meetings assert better control of their government. They need to know at least the basic facts about what happened with respect to a particular issue and who may have been responsible. The ability to watch council members at their work is essential to compare their viewpoints and assess their competence.

Early and on-going participation also allows the public to be part of the deliberative process. This involvement provides another layer of democratic accountability and control by steering deliberations in the direction of popular will. If voter involvement occurs only late in the policy-making process, officials may be more resistant to voter viewpoints because they are invested in the substantial work already done in secret. Plus, voters may not have time to become fully informed before a vote occurs if they do not have access to early meetings.

C. The Presence of the Public Will Not Harm the Deliberative Process

Concerns about transparency's effect on candor do not justify a retreat behind closed doors. The Council's excuses for secrecy described

in the statement of the case show a shocking lack of respect for public participation. One council member said that "frank conversations" may never have occurred if the public could listen in. San Juan County Council Early Special Session at 9:20. Another council member called the press "part of the problem" because they are "on the hunt for hot-button issues." *Id.* at 9:21. Because the Council felt a need to be free of the political constraints imposed by public involvement, it "wouldn't have been appropriate at all to have the press in there." *Id.* at 9:29-30.

The Council's reasoning ignores one of the core purposes of public involvement—to rein in elected officials and restrain them from pursuing unpopular agendas. Instead, the Council's argument assumes that if elected officials change their conduct when they are exposed to the public eye, then this change is inevitably for the worse.

In general, the electorate does not benefit when representatives pursue their own preferences, however genuinely held. A candid remark foregone due to public pressure is likely one less viewpoint against the public's interest. Free of public scrutiny, officers may pursue, candidly, views that do not represent the interests of constituents. If their views do represent the interests of constituents, then they should face no reluctance

to remain candid in the public's presence. Arguments that transparency reduces candor assume that political constraints should not operate on elected officials. Yet the presence of political constraints counterbalances the deference granted to legislative bodies and supports the essential premise that their decisions do in fact represent popular will.

When a County Council can develop policy in secret, the Council will face fewer political restraints. This undermines the premise of accountable government that undergirds the deference to local land use decisions applied by the GMA and the courts.

II

THE OPMA AND THE GMA DEMONSTRATE THE LEGISLATURE'S CONSISTENT COMMITMENT TO OPENNESS

The OPMA and the GMA represent the Legislature's recognition that political controls must play a role to guide and constrain public bodies in their decision making. Information is a vital prerequisite to popular control of elected bodies. As the OPMA states in its legislative declaration: "The people insist on remaining informed so that they may retain control over the instruments they have created." RCW 42.30.010.

The breadth of the OPMA demonstrates an unequivocal

commitment to open government. The OPMA's wide net demands that "*[a]ll meetings* of the governing body of a public agency shall be open and public." RCW 42.30.030 (emphasis added). The government bodies subject to this mandate include "all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies." RCW 42.30.010. In addition to the already broad reach of this language, the Legislature requires that the OPMA be "liberally construed" in favor of transparency. RCW 42.30.910.

The OPMA's exceptions serve to underscore the Act's broad coverage. Specifically, any concerns about candor have already been incorporated into the OPMA. The Legislature has recognized that some issues like national security or employee performance merit secrecy by allowing their discussion in executive session. *See* RCW 42.30.110. Thus, the language of the Open Public Meetings Act should not be artificially narrowed to account for a concern that the Legislature has already resolved.

While the issue before this Court involves interpretation of the OPMA, the GMA's public participation provisions provide another testament to the Legislature's commitment to broad transparency in

general and in the particular context of GMA planning. The GMA requires an "enhanced public participation process." *Lora Petso v. City of Edmonds*, CPSGMBH Case No. 09-3-0005, Final Decision and Order (Aug. 17, 2009), at 7. Indeed, public participation is the "bedrock of GMA planning." *Id.* Like the OPMA itself, "the GMA's public participation requirements are founded in a belief that the best decisions are made with full public knowledge and participation." *Better Brinnon Coalition v. Jefferson Cnty.*, WWGMBH Case No. 03-2-0007, Amended Final Decision and Order (Nov. 3, 2003), at 7; *see also* RCW 42.30.010.

The GMA's public participation scheme requires counties to formulate and publish a public participation program that ensures "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." RCW 36.70A.140. These plans must ensure broad publication of proposals, opportunity for written comments, open discussion, as well as public meetings and notice. *Id.* This early and continuous participation model reflects the Legislature's recognition that a lengthy period of secret policy deliberations cannot be fixed by public meetings that precede the adoption of the policy.

CONCLUSION

For the above reasons, Pacific Legal Foundation respectfully requests that this Court reverse the decision below.

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Respectfully submitted,

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