IN THE SUPREME COURT OF THE STATE OF OREGON

ROB HANDY, Plaintiff-Appellant, Respondent on Review, v. LANE COUNTY, JAY BOZIEVICH, SID LEIKEN, and FAYE STEWART, Defendants-Respondents Petitioners on Review.	Lane County Circuit Court Case No. 161213685 CA A153507 SC S063725

PETITIONERS' ON REVIEW BRIEF ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from a judgment in the Circuit Court for Lane County, Honorable Richard L. Barron, Judge

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Author of Opinion: Garrett, Presiding Judge
Concurring Judge(s): Ortega, J., Devore, J.
Dissenting Judge(s): Devore, J.

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STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

The facts are accurately relayed in the decision by the Court of Appeals. *Handy* at 646-650. A brief summary of those facts follows.

In the run-up to the 2012 May election, plaintiff, a Lane County commissioner seeking re-election, personally solicited a three thousand dollar contribution from a constituent that plaintiff stated would be used to pay an outstanding debt plaintiff owed to the County as a result of prior litigation. The constituent's attorney subsequently notified the County of this solicitation by a letter in which the attorney alleged plaintiff's solicitation violated a number of laws. News media immediately made public records requests for the solicitation letter sent by plaintiff, and the letter from the constituent's attorney. Concerned about the County's potential legal liability based upon its acceptance of these funds, members of the Lane County Board of Commissioners called an emergency meeting and voted to release the letters as public records. Plaintiff filed suit alleging multiple violations of Oregon's Public Meetings Law.

The trial court granted the defendants' special motion to strike plaintiff's claims under Oregon's anti-SLAPP statute, ORS 31.150. Plaintiff then filed a motion for discovery, which the trial court denied. At a later hearing, the trial court awarded attorney fees and costs to defendants as required by the anti-SLAPP statute.

On appeal plaintiff assigned as error the trial court's dismissal of plaintiff's claims applying the anti-SLAPP statute, ORS 31.150. Plaintiff also assigned as error the trial court's denial of plaintiff's request to conduct discovery and award to defendants of their attorney fees. The Court of Appeals ruled that the trial court erred in granting the special motion to strike, denying the request for discovery and the award of attorney fees and costs.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Did the Court of Appeals commit reversible error when it concluded that aggregated multiple non-contemporaneous e-mails between three elected officials, including an e-mail containing a summarized conversation between a non-elected official and an elected official forwarded without the official's knowledge, resulted in a violation of the Oregon Public Meetings Law?

First Proposed Rule of Law

Only a contemporaneous gathering/meeting of a quorum of a governing body, either physically or via electronic means which makes a decision or deliberates toward a decision violates the Oregon Public Meetings Law. A quorum of a governing body may gather or meet to gather information.

Second Question Presented

Did the Court of Appeals err when it interpreted the legislative history of the Oregon Public Meetings Law as intending to apply different definitions to the words "meet" and "meeting" within the same statute?

Second Proposed Rule of Law

As used in the Oregon Public Meetings Law "meet" and "meeting" have the same meaning: a contemporaneous gathering/meeting of a quorum of a governing body, either physically or via electronic means which makes a decision or deliberates toward a decision.

Third Question Presented

Did the Court of Appeals sufficiently define "information gathering" as that term is applied in the Oregon Public Meetings Law so that Oregon public officials can comply with the law?

Third Proposed Rule of Law

No. "Information gathering" should be defined in an objective way so that Oregon public officials can easily comply with the Oregon Public Meetings Law. That definition should be: Obtaining information, in any manner from any source, regarding a matter within the subject matter jurisdiction of the governing body, so long as no decision is made, action taken or a concurrence or consensus is arrived at on an upcoming vote or decision in violation of the public meetings act.

Fourth Proposed Question

Did the Court of Appeals sufficiently define "deliberating toward a decision" and distinguish it from "information gathering" so that Oregon public officials can comply with the Oregon Public Meetings Law?

Fourth Proposed Rule of Law

No. The complex nature of the definitions of these terms and their application to modern government is a legislative, not a judicial, task. This Court should then define "deliberate" as: Taking action in the form of a vote, or expressing a final position, on any item of business that is within the subject matter jurisdiction of the governing body.

I. SUMMARY OF ARGUMENT

The Court of Appeals ("Court") incorrectly assigns different meanings to the terms "meet" and "meeting" as used in ORS 192.630(1) and (2). n reaching this result, the Court ignores the legislative history that lawmakers intended the two terms to have the same meaning. As Justice Devore succinctly stated in his dissent in this case: "There is no good reason to define differently when a quorum 'meets' and when a quorum has a 'meeting.' There is statutory context to explain the prohibition against a private meeting in ORS 192.630(2) consistently with ORS 192.630(1) and without duplication. There is meaningful legislative history on these provisions." *Handy v. Lane County* 274 Or App 644, 677 (2015).

The legislative history indicates that at the time of the adoption of the Oregon Public Meetings Law, legislators discussed and considered what types of meetings should be covered by the new law. The final version of the law inserted quorum into the prohibitions in ORS 192.630(2) to make it clear that there had to be a gathering of a quorum of public officials to violate the statute. *Handy* at 683.

The reasoning used by the majority to support its conclusion did not include an acknowledgement that redundancy in the use of terminology by the legislature does not mean the legislature intended different definitions. *Thomas Creek Lumber and Log Co., v. Dept. of Rev.*, 344 Or 131, 138 178 P3d 217 (2008). Application of that principle was essential to the majority conclusion.

Finally, the aggregation of various forms of communication among and between members of a public body to establish a quorum, absent clear and unambiguous statutory language and legislative history, is a policy decision for the legislative branch. In the alternative, this Court should establish an objective bright-line rule that can easily be applied by Oregon public officials.

The bifurcation of the word "meeting" by the Court of Appeals results in the erroneous conclusion that ORS 192.630(2) is violated when a series of non-contemporaneous communications of a quorum of elected officials is aggregated.

A. <u>The Court of Appeals incorrectly defined "meet" and "meeting" differently in ORS 192.630(1) and 192.630(2</u>

In light of the 2001 amendments to ORS 174.020, the appropriate methodology for interpreting a statute is as follows. *State v. Gaines*, 346 Or. 160, 171 (2009). The first step remains an examination of text and context. *Portland General Elec. Co. v. Bureau of Labor and Industries*, 317 Or. 606 at 610-11 (1993). Contrary to the pronouncement made in *PGE*, there is no longer a requirement that an ambiguity in the text of a statute be found to exist as a necessary predicate to the second step – consideration of pertinent legislative history that a party may proffer. *Gaines* at 171-172.

A party is free to offer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. *Gaines* at 172. The extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. *Ibid*.

The third, and final step, of the interpretative methodology is unchanged. *Ibid*. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Ibid*.

The *Handy* majority concedes that while the verb "meet" is not defined in the Oregon Public Meetings Law (OPML), the statute does provide a definition of

the noun "meeting." *Handy* at 657. The Court acknowledges the maxim of statutory construction that the use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. *Ibid.* at 657, *citing State v. Leslie*, 204 Or App 715, 721, *rev den* (2006). Instead of adopting a definition and applying it to similar terms throughout the statute that would "give effect to all," the *Handy* Court finds it necessary to apply separate definitions to the same word.

As the dissent in *Handy* points out, "[a]lthough "to meet" is not directly defined in statute; it is indirectly defined in the term "meeting" and in the context of related provisions. The terms "meet" and "meeting" are two forms – verb and noun – of the same word, and, unless their usage in context indicates otherwise, they should have the same meaning." *Handy* at 678.

In order to interpret the words of a statute enacted many years ago, a court may seek guidance from a dictionary that was in use at the time. *State v. Perry*, 336 Or. 49, 53 (2003). *See Vannatta v. Keisling*, 324 Or. 514, 530 (1997). The *Handy* Court looks to *Webster's Dictionary* and adopts one of several definitions of the word "meet": "to join (a person) in conversation, discussion, or social or business intercourse: enter into conference, argument, or personal dealings with." *Webster's Third New Int'l Dictionary* 1404 (unabridged ed 2002. The *Handy* Court's adoption of a different meaning for the word "meet" ignores the general

rule of statutory construction, that it is ordinarily assumed, when the same statute uses closely similar terms, the terms have a consistent meaning throughout. *PGE* at 611.

The definition of "meet" the Court chooses to apply is especially troubling when a more relevant definition is located just a few lines below: "to hold a session: convene for worship, business, or other purpose: ASSEMBLE, CONGREGATE [the city council will {*meet*} soon to deal with the issue]." *Webster's Third New Int'l Dictionary* 1404 (unabridged ed 2002). This definition complements *Webster's* definition of "meeting" found on the same page: "a gathering for business, social, or other purposes [a {meeting} of the board of directors] [a {meeting} of Congress]." *Ibid*.

Any examination of the text of the statute and its context should be performed applying the rule of construction that the court is not to insert what has been omitted, or to omit what has been inserted, and the court is to construe multiple provisions, if possible, in a manner that will give effect to all. *Bolt v. Influence, Inc.*, 333 Or 572, 581 (2002 (citing ORS 174.010). The *Handy* majority unnecessarily assigns separate meanings to different forms of the same word within the same statute, resulting in confusion and uncertainty as to how public officials will be able to effectively comply with the law.

B. The legislative history does not support the Court of Appeal's different definitions of the words "meet" and "meeting"

The legislative history does not support the Court's interpretation of the law that "meet" and "meeting" should have separate meanings. The threshold question for the Court in *Handy* is whether ORS 192.630(2) could be implicated by a series of conversations that involve a quorum only when they were considered as a whole or aggregated. *Handy* at 656. The majority acknowledges no Oregon appellate case has addressed whether the statute applies to such "serial" discussions, but states that, "[t]he goal of our methodology of statutory construction is 'to discern what the legislature that enacted the statute in question had in mind at the time the legislature enacted the statute at issue.'" *Handy* at 656; *see Arken v. City of Portland*, 351 Or 113, 133, *adh'd to on recons sub nom Robinson v. Public Employees Retirement Board*, 351 Or 404, (2011).

The majority believes the legislative history of ORS 192.630(2) supports its analytical approach that the terms "meet" and "meeting" be given separate definitions under the provisions of the statute. *Handy* at 660. In support of its analysis to assign different meanings to "meet" and "meeting," the Court points to discussions that occurred among legislators during committee hearings on the bill that created the OPML in 1973. *Ibid*.

The *Handy* Court points out that during committee hearings on the bill that would eventually become the OPML, in the Joint Special Committee on Professional Responsibility (JSCPR-"committee"), there was much discussion about how to define the word "meeting." *Ibid*. The committee ultimately settled on the current definition found in the OPML: "Meeting means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate towards a decision on any matter. Meeting does not include any on-site inspection of any project or program." ORS 192.610(5)

The *Handy* majority makes the argument that instead of taking the opportunity during the four months of committee meetings to carefully craft the language of each provision to reflect the legislature's intent, committee members simply chose to use a different form of the same word in order to communicate two separate meanings. The *Handy* Court states: "The members of the committee, however, were not fully satisfied with how that definition of the term meeting would work in conjunction with the operative section of the bill that required that 'all meetings… shall be open to the public.'" *Handy* at 660.

The Court ignores the fact that in earlier committee meetings, Senator Fred Heard, the principal sponsor of the bill, stated that the intent of the word "meeting" in the bill was to include informal as well as formal meetings. Tape Recording, JSCPR, SB 15, March 5, 1973, Tape 2, Side 1. The intent to include both formal

and informal meetings within the definition of the word "meeting" was expressed early on in the committee's drafting process, much earlier than the discussion of the committee referenced to by the majority in *Handy*. *Handy* at 660, *see* Tape Recording JSCPR,SB 15, Mar 19, 1973, Tape 3, Side 2.

Subsequent to the March 19 committee meeting referenced by the *Handy* majority, the committee's administrative assistant began a work session by going through the bill as it had been amended at a previous committee meeting. Tape Recording, JSCPR, SB 15, April 2, 1973, Tape 4, Side 2. He suggested the committee consider a change to the wording in one of the provisions to keep the language of the bill consistent throughout. *Ibid*. The specific suggestion he made was to change the word "consideration" to "deliberation on" in order to maintain consistency and avoid any confusion as to the intent of the legislature. *Ibid*. The administrative assistant told committee members the suggested change came directly from Legislative Counsel. *Ibid*. This is only one example, of which there are others, of committee members being made aware of the significance of word choice when drafting the provisions of the OPML to ensure the appropriate legislative intent was communicated, and to avoid any potential confusion over which definition to apply.

Despite the statements of Senator Heard regarding the legislative intent behind the use of the word "meeting" in the bill, and the clear direction provided

by Legislative Counsel to maintain consistent language throughout the provisions of the bill, the Court incorrectly assigns different meanings to the terms "meet" and "meeting" as used in ORS 192.630(1) and (2). The members of the JSCPR made a clear decision to adopt the same language in each provision with the intent that both forms of the word "meeting" were to include both formal and informal meetings. This legislative history establishes that it was unnecessary for the *Handy* majority to assign separate meanings to the words in order to make a distinction between the official convening of a quorum of a public body and the informal gathering of a quorum.

C. The Court of Appeals' reliance on a subjective "purpose" test created by *Harris* to support the conclusion that a quorum may unknowingly violate the OPML is incorrect

The Court of Appeals refers to its earlier decision in *Harris v. Nordquist*, 96 Or App 19, 21 (1989) to support its conclusion that a separate definition of "meet" and "meeting" are necessary. *Handy* at 658-659. In *Harris*, the plaintiff alleged that individual members of a local school board, in sufficient numbers to constitute a quorum, met secretly in various restaurants to discuss and decide school district issues. *Harris* at 21. The defendant school board members asserted that the alleged private meetings were merely social gatherings which some of them attended from time to time, before and after, the board's regular meetings. *Ibid*.

The issue before the *Harris* Court was whether some of the board's members' private gatherings at restaurants before and after board meetings violated ORS 192.630(2): "No quorum of a governing body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690." *Harris* at 24.

The *Harris* Court concluded that the gathering of board members at a restaurant before or after an "official" meeting was not a "meeting" within the meaning of ORS 192.610(5), because it was "not 'the convening' of the body 'for which a quorum is required in order to make a decision or deliberate toward a decision,'" and therefore, no minutes were required because no formal meeting took place. *Ibid*. The Court went on to explain, however, that the informal gathering of the school board members could still be a violation of the OPML under ORS 192.630(2): "[I]f the private gathering of a quorum at the restaurant took place to decide or deliberate toward a decision, it would have been prohibited by ORS 192.630(2)." *Ibid*. In reaching this conclusion, the Court ignored the fact that the legislative intent behind the use of the word "meeting" was to include within its definition both formal and informal gatherings of a quorum.

The *Harris* Court considered whether or not the private gathering of a quorum of the school board at the restaurant took place to decide or deliberate toward a decision in violation of ORS 192.630(2) by assigning separate meanings

to different versions of the same word. *Ibid*. In other words, any *formal* convening of a quorum of a governing body of a public body, in order to make a decision or deliberate toward a decision, without being noticed and open to the public is a violation under ORS 192.630(1), but an informal gathering of that same quorum may be a violation under ORS 192.630(2) if the *purpose* of the gathering is to make a decision or deliberate towards a decision.

Unfortunately, the *Harris* Court created a second, unworkable subjective test to determine if an informal gathering of a quorum of a public body violated the OPML. As the dissent in *Handy* points out, "A public meetings law violation does not permit, require, or need proof of an offender's state of mind, intent or *mens rea*. It is a strict liability violation… intent or willfulness is not a factor in assuming whether a quorum has "met" or a violation has occurred." *Handy* at 690-691. The different subjective test was unnecessary because ORS 192.630(1) already prohibited an informal meeting of a quorum to make a decision or deliberate toward a decision.

The facts in *Harris* illustrate the problem with the different test for informal gatherings of a quorum. The evidence presented to the Court in *Harris* included admissions by defendants that a quorum of the school board had, in fact, met on multiple occasions (plaintiff estimated approximately 24 meetings) at various restaurants both before and after official school board meetings to "discuss what's

going on [at] the schools." Exhibit A, Appellant's Brief, p.17. Another defendant stated that on at least one occasion, the board members had discussed personnel issues which included the resignation of a high school principal. *Ibid*. The school superintendent testified that he was, "sure there are times when school subjects, school items, occurrences have been discussed" at the private meetings of the school board members. *Ibid*.

In addition, on various occasions there were "Joint Administrative Board" meetings, including both board members and administrators. *Ibid*. The school clerk and superintendent testified that these meetings had been held at local restaurants for the express purpose of encouraging a "freer exchange" among those in attendance. *Ibid*. One individual testified that the purpose of these meetings was to share the concerns of administrators and board members about school policies, and that the meetings were important in carrying out the role of a board member. *Ibid*. She went so far as to characterize the meetings as "Board work sessions." *Ibid*.

The *Harris* Court concluded, however, that there was no evidence that the school board members ever talked about "a matter to be decided by the board." *Harris* at 25. It noted that the only evidence in the record about the content of the conversations was that they discussed in general terms "what was going on at the schools." *Ibid*. And stated, "[i]nformation gathering is distinct from deliberating."

Ibid. *See Oregonian Publishing Co. v. Board of Parole*, 95 Or. App. 501 (1989). The *Harris* Court did not make a clear distinction between "information gathering" and "deliberating," but established a rule that crossing the fine line between the two is the difference between a violation of the prohibition outlined in ORS 192.630(2), or not.

The conclusion in *Harris* that there was no evidence of any private deliberations towards a decision by the defendants also ignored an existing interpretation of ORS 192.630(2) by the Attorney General presented in 38 Op Atty Gen 50, 51 (1976), which concluded that "deliberations" include "discussions, arguments, and even the pauses and intonations which add up to" the word "deliberation." Other pre-*Harris* Attorney General opinions opined that as used in ORS 192.630(2), "deliberation" included the sharing and gathering of information on a subject within the board's jurisdiction. 38 Op Atty Gen 1471, 1471-1474 (1977) and 40 Op Atty Gen 458, 459 (1980).

The majority in *Handy* believes "*Harris* stands for the proposition that a quorum of a governing body may violate ORS 192.630(2) by "deliberating" privately in an informal setting, but also that not every discussion among a quorum, even on matters of public concern, will violate the statute. Rather, the discussion must rise to the level of, *and* have the purpose of, 'deciding on or deliberating toward a decision.'" *Handy* at 661. *See Harris* at 25 ("Information

gathering is distinct from deliberating."). The *Handy* Court states that those authorities lead to the conclusion "that a violation of ORS 192.630(2) depends not on the method by which communications take place, but, rather, on the purpose and content of those communications." *Ibid.*

D. California's experience and application of the Brown Act is inconsistent with the Court of Appeals decision in *Handy*

The *Handy* Court supports its decision to inject an intent element into the public meetings analysis by citing to the California statute (Brown Act) which was the model for Oregon's Public Meetings Law and a line of California cases it believes provides helpful additional context for the discussions that occurred in the Oregon Legislature in 1973. *Handy* at 662.

The suppression of public information at the local government level in California was the subject of an investigation by an Assembly Interim Committee on Judiciary, which submitted its report at the 1953 legislative session. Progress Report to the Legislature, Assembly Interim Comm. On Judiciary (1953 Reg. Sess. pp. 13-62). The committee's recommendations included the proposed measure which later became the Brown Act. The report noted widespread evasion of existing open meeting statutes through unannounced "sneak" meetings and through indulgence in euphemisms such as "executive session", "conference", "caucus", "study" or "work session", and "meeting of the committee of the whole". *Ibid*., pp.

21-23. As the *Handy* Court points out, at the time that Oregon enacted its Public Meetings Law, California had a statutory section that was very similar to ORS 192.630(1). *Handy* at 662. The California statute provided:

> "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." Cal Gov't Code § 54953 (1953)

As outlined in the *Handy* opinion, in 1960, the California Court of Appeals issued an opinion that interpreted the term "meeting" very narrowly. *Handy* at 662. That case concluded that "the language of the Brown Act was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies." *Handy* at 662. *See Adler v. City Council of City of Culver City*, 184 Cal App 2d 763, 770 (1960). In 1961, the California legislature made several amendments to the Brown Act, among them a definition of the phrase "action taken" in section 54952.6:

> As used in this chapter, "action taken" means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance. Stats. 1961, Ch. 1671, § 3.

The *Handy* Court is correct when it states that at the time Oregon was expressly modeling its Public Meetings Law on California's Brown Act, the

Brown Act had been amended. *Handy* at 663. The Handy Court is incorrect, however, when it relies upon a California case decided in 1985 in order to provide "some helpful additional context for the discussions that occurred in the Oregon Legislature in 1973." *Handy* at 662.

The *Handy* Court chooses not to address a California Court of Appeals decision that was published shortly after the 1961 amendments to the Brown Act. *Sacramento Newspaper Guild v. Sacramento County Bd. Of Suprs.*, 263 Cal App 2d 41 (1968). The defendants in *Sacramento* relied upon the *Adler* decision which held the statute applicable only to formal meetings for the transaction of official business, and inapplicable to informal sessions. *Sacramento* at 46. The plaintiffs in *Sacramento* argued that the 1961 amendments of the Brown Act were intended to nullify the *Adler* decision. *Ibid*. at 47. In *Sacramento Newspaper Guild*, the California Court of Appeals held that the term "meeting" as used in public meeting law extends to informal sessions or conferences of county board members designed for discussion of public business. *Ibid*. at 46.

The *Sacramento* Court addressed the very issue at the heart of the *Harris* case: "[The Brown Act] is unequivocal in its central thrust upon official sessions for the transaction of official business, but somewhat ambiguous as it encounters peripheral gatherings or conversations among board members where public business is a topic…. Interpretation requires inquiry into the Brown Act's objective

and into the functional character of the gatherings or sessions to which the legislature intended it to apply." *Ibid*.

The *Sacramento* Court answered the question of whether or not information gathering is, in fact, separate and distinct from deliberation:

> "Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To 'deliberate' is to examine, weigh and reflect upon the reasons for or against the choice. Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." *Ibid*. at 47-48.

The *Sacramento* Court also stated that "[t]he act supplies additional internal evidence that deliberative gatherings are 'meetings,' however confined to investigation and discussion." *Ibid*. at 48. Additionally, "An informal conference or caucus permits crystallization of secret decisions to a point just short of

ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices…. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designed for the discussion of public business." *Ibid*. at 50-51.

It is unclear why both the *Harris* and *Handy* opinions avoid any discussion of the *Sacramento* case as it likely more helpful than a case decided in 1985 in providing additional context for the discussion that occurred in the Oregon Legislature in 1973. The *Sacramento* Court successfully avoided the adoption of a subjective intent element to determine what constitutes a meeting in its interpretation of the amended Brown Act, in contrast to the *Harris* and *Handy* decisions which concluded it is the purpose, or intent, of the gathering that is determinative.

According to the *Sacramento* Court, the gathering of facts (i.e., "information gathering") is just as important in the process of deliberating towards a decision as the act of decision-making itself. *Ibid.* at 47. Under *Sacramento*, the fact that a quorum of a school board met privately both before and after official school board meetings to discuss "what was going on at the schools" would be enough evidence

that a deliberative gathering had occurred with collective discussion by the members and an exchange of information in violation of the Brown Act.

Under *Harris*, however, that same deliberate informal gathering of a quorum of the school board to discuss "what was going on at the schools" is subject to an intent analysis by the court. The *Harris* Court itself noted, "it would be pure speculation to draw from that statement an inference that the purpose when the quorum of the board met in private was to decide on or deliberate toward a decision, or that discussion of the goings on at the school involved, in any way, deliberations toward a matter to be decided by the board." *Harris* at 25. It would be just as easy for the Court to have stated it would be pure speculation to draw from that statement an inference that the purpose was *not* to decide on or deliberate toward a decision. The *Harris* decision provided no clarity to the application of its purpose test.

In addition, the *Harris* Court assumed it knew what "matters" the school board would be making decisions on in the future by stating that the discussions had not involved, "in any way, deliberations toward a matter to be decided by the board." *Ibid*. Perhaps they knew this because at one point in time they had served as school board members? Or perhaps they had attended a number of school board meetings as concerned parents and knew the scope of decision-making a school

board would face? The assumption by the Court that it knew what matters the board would be making decisions about in the future *was* pure speculation.

The subjective nature of the Court's analysis in *Harris* and *Handy* leads to the assumption that governing bodies of a public body may be treated differently under the intent analysis introduced in *Harris*. For example, if the facts of *Harris* had been different, would the result have been the same? If the quorum of the board meeting privately before and after official meetings on a regular basis to discuss "what was going on" as it related to the business of the board were members of a county commission and its administrator, would the determination still be "pure speculation" that there was an intent to decide or deliberate toward a decision, or that the discussions involved, in any way, deliberations toward a matter to be decided by the board?

It is the analysis of intent introduced in *Harris* to determine the purpose of a meeting that leads to inconsistent interpretations of the rule as illustrated in *Handy*. In *Handy*, the Court finds intent where there is none. The Court dissects the email and text communications between members of the agenda team and their efforts to determine if, when, and why an emergency meeting of the full board should occur in order to provide context for the intent it assigns to the communications as an aggregated whole.

The Court states that "[a] series of discussions may rise to the level of prohibited "deliberation" or "decision"; the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for which they discuss it." *Handy* at 664. The *Handy* Court is only able to reach the "sufficient number of officials" by introducing the concept of a third party intermediary to the analysis.

The *Handy* majority does not define "intermediary" as it is used in its analysis, but does contend that "[t]he legislative objective could be easily defeated if the statute rigidly applied only to contemporaneous gatherings of a quorum. For example, officials could be polled through an intermediary…." *Handy* at 662. The majority even goes so far as to identify the role of "Richardson as an intermediary" for the defendants' discussions. *Handy* at 667. According to the dictionary, an "intermediary" is a "go-between," "acting as a mediator." *Webster's Collegiate Dictionary* 10th ed. 2000. *Black's Law Dictionary* refers to an intermediary as "a broker; one who is employed to negotiate a matter between two parties, and who for that reason is considered as the mandatory (agent) of both." *Black's Law Online Legal Dictionary* 2nd Ed. There is no evidence that Richardson acted, or intended to act, as an intermediary for anything other than scheduling the emergency meeting.

The facts do not show that Richardson acted as a personal go-between to pass information or views from one board member to another. The facts show that Richardson communicated with individual commissioners at separate times over the course of two days. *Handy* at 647-649. The majority states the "[p]laintiff has produced evidence that three commissioners (Bozievich, Leiken, and Stewart) had discussions either with each other or with Richardson, the county administrator, about whether to release the Thayer letter." *Handy* at 666. At no point does the evidence indicate that more than two elected officials were involved at the same time in those communications.

Under the majority's opinion, it would be impossible for the board's agenda team (consisting of Leiken, Bozievich and Richardson) to discuss whether or not to have a meeting, and then share that decision with other members of the board. The communications between the agenda team were limited to the why, where and when of whether or not to call an emergency meeting. After receiving confirmation from the commissioners on the agenda team that they were both available for an early morning meeting, the other members of the board were informed of the agenda team's decision to hold an emergency meeting.

Richardson contacted Stewart personally to determine if he was available, and delegated to staff the duty of informing Handy and Sorenson of the time, place and reason for the emergency meeting. According to the Court, this

communication between Richardson and Stewart to determine his availability is enough to infer that a quorum of a governing body "met" via a third party intermediary. *Handy* at 667. This seems to suggest that all agenda team decisions and future meeting announcements must be conveyed to the remaining members of the board by an individual who is *not* on the agenda team, otherwise a quorum of the board will have met to deliberate toward a decision about having a meeting via a third party intermediary.

The *Handy* majority correctly states: "There is no evidence in the record that a quorum of the commission actually met privately at the same time and place to discuss the Thayer letter…" *Handy* at 655. The Court further admits it "know[s] little of the content of those discussions" that commissioners had either with each other or with Richardson, but states that the facts would "support an inference… that the three commissioners at least "deliberated," in a series of telephone calls and emails over the course of several hours, toward the final "decision" to release the Thayer letter, and perhaps even made that decision." *Handy* at 666-667.

This statement is inconsistent with the decision in *Harris* to assign no intent to the gathering of school board members even though a quorum of a public body physically met in private, on a regular basis, to discuss, what multiple defendants testified to, as being the board's business. The Court seems to assign a level of

sophistication to the board of commissioners in *Handy* that it does not assign to the school board members in *Harris*. This subjective weighing of whether or not the members of each board had a purpose, or intent, and to what degree they were complicit in that intent by their participation, only confuses the issue of compliance for future boards.

An additional cause for concern is the inconsistent application of the intent element introduced by the decision in *Harris*: "As *Harris* illustrates, a gathering of a quorum is lawful so long as it is social, even if members discuss matters of concern to their public body – but may instantly become unlawful if the discussion takes on a character that (with judicial hindsight) appears deliberative in 'purpose.'" *Handy* at 665. Would the defendants in *Handy* have been better off had they met at a local pizza parlor to discuss the board's business, admitted they discussed the board's business, but stated that the purpose of the gathering was purely social?

And what consideration should a court give to the third party "intermediary"? If a court is going to apply the intent element, it seems only logical to subject the third party intermediary to the same test. There is power in obtaining more inside information about the direction of a potential vote than the elected officials operating under the OPML. A sophisticated third party intermediary could certainly coordinate and orchestrate a series of individual,

separate meetings with a quorum of public officials for the purpose of deliberating or reaching a decision (a *prima facie* case for a violation of ORS 192.630(2) according to the majority in *Handy*). *Handy* at 666. By expanding the OPML to serial meetings that can be aggregated over an unspecified amount of time, public officials could unknowingly become participants in illegal meetings coordinated by third party intermediaries. This ambiguity in the law creates the potential for manipulation by lobbyists, staff and outside interests who wish to influence the voting and decision-making of elected officials.

According to the majority in *Handy*, the only way to know if a gathering of a quorum is unlawful is after the fact. *Handy* at 665. Eliminating the anxiety of knowing whether or not a violation has occurred is precisely what a well written rule should accomplish. Most elected officials are not interested in attempting to evade the public meetings law, most elected officials are interested in knowing with certainty that they are complying with the public meetings law (although no official poll has been conducted as this may be a violation of the public meetings law via a third party intermediary).

The subjective nature of the Court's test created in *Harris*, and extended in *Handy*, creates unlimited opportunities for a court to find intent where none existed, or to find no intent existed regardless of the evidence presented. A bright-line, objective test must be adopted in order to avoid the questions and confusion

that now exist as a result of the Court's application of the rule in *Handy*. The need for an objective rule is necessary for public officials to be able to simply and lawfully conduct the day to day business of a governing body without the fear of having unknowingly violated the OPML.

E. The Court of Appeals' reliance on *Stockton Newspapers* to support the conclusion that a non-contemporaneous meeting of a quorum violates the OPML is incorrect

The *Handy* majority relies on the California Court of Appeals decision in *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal App 3d 95, 101 (1985) to support its conclusion that the OPML applies to non-contemporaneous gatherings. *Handy* at 663. In *Stockton Newspapers*, the issue before the court was whether or not a series of nonpublic telephone conversations, each between a member of the governing body of a local agency and its attorney, for the commonly agreed purpose of obtaining a collective commitment or promise by a majority of that body concerning public business, constituted a "meeting" within the purview of the Brown Act. *Stockton Newspapers* at 98.

The *Handy* majority believes the decision in *Stockton Newspapers* along with the text, structure, context, purpose, and history of the OPML indicate that the prohibition in ORS 192.630(2) contemplates something more than just a contemporaneous gathering of a quorum. *Handy* at 664. The *Handy* majority

comes to the determination that "[a] series of discussions may rise to the level of prohibited "deliberation" or "decision"; the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for which they discuss it – not the time, place, or manner of their communications." *Ibid*. at 664-665.

What the *Handy* majority does not take into account, as the court did in *Stockton Newspapers*, is whether or not there was a *commonly agreed purpose* of obtaining a collective commitment or promise. *Stockton Newspapers* at 98 (emphasis added). The *Handy* majority is willing to assume a commonly agreed purpose exists based on its reading that the defendants' comments "permit an inference" that a decision had already been made. *Handy* at 667.

The *Handy* majority does not identify what evidence would be necessary to support a finding that serial communications among members who constitute a quorum were conducted for the "purpose" of deliberation or decision, but does say "it seems clear that a plaintiff will need to show some evidence of coordination, orchestration, or other indicia of a "purpose" by a quorum to deliberate or decide out of the public's eye." *Handy* at 666.

Based on the Court's decision in *Handy*, however, it seems a commonly agreed purpose may be inferred even if those participating in a "serial meeting" are unaware they are participating in a "serial meeting." The defendants in *Handy*

were not even aware their conversations were being shared. The evidence of a "serial meeting" occurring in *Handy* consists of "(1) the conversation between Richardson and Stewart, (2) the conversation between Richardson and Bozievich, and (3) the email exchange among Richardson, Bozievich, and Leiken in which the conversation between Richardson and Stewart is mentioned." *Handy* at 655.

There is no evidence the commissioners ever communicated as a quorum, in private, other than in their acting capacity as members of the agenda team, in order to discuss scheduling a meeting. *Ibid*. There is no evidence that, at any time, Stewart expressed an intention to have his conversation with Richardson shared with other commissioners, nor is there any evidence he was aware it was being shared at the time that it was shared. The majority even concedes, "no more than two of them [commissioners] were involved in any single communication." *Ibid*. As the dissent points out, "…the facts at hand do not suggest any particular "coordination" or "orchestration," or "purpose" other than the everyday happenstance of a series of conversations, phone calls, or emails." *Handy* dissent at 691.

Based on the evidence presented in *Handy*, "We should recognize that the distinctive feature of a meeting was lacking: Never did three commissioners have an opportunity for contemporaneous communication or simultaneous interaction. Comparing plaintiff's evidence of sequential communications at distinctly different

times with the terms of the Public Meetings Law, this court should have concluded that a quorum did not come together as a body in private within the meaning of ORS 192.630(2). This court should have concluded that plaintiff failed to offer substantial evidence of a *prima facie* case of a *de facto* meeting." *Handy* dissent at 684.

In conclusion, this Court should apply the same definition of "meeting" and "meet", the one the legislature intended, that there is no distinction between a formal or informal contemporaneous gathering of a quorum of commissioners, therefore was no violation of the OPML. The Court's rule, and analysis of its potential application, demonstrates that any other definition or interpretation of the rule to include "serial meetings" is a choice between competing public policies, government transparency and government efficiency, but a choice that should be made by the legislative and not judicial branch of government.

F. California's response to 21st Century government

Petitioners do not disagree with the *Handy* majority that when the technological advances of year 2016, and a judicial opinion written more than 20 years after the drafting of the law are applied to the text of a 1973 provision, it is likely "the prohibition in ORS 192.630(2) contemplates something more than just a contemporaneous gathering of a quorum." *Handy* at 664. But a statute drafted by the 1973 Oregon legislature cannot be read and interpreted through the lens of

1985 case law, and 2016 technology, in order to reach a desired conclusion. However, as the ensuing discussion will demonstrate, making rules to respond to changing technology and the way modern government operates is a task better suited to the legislative, not judicial, branch of government.

Without amending the statute or adopting a rule to provide clear direction as to when a violation actually occurs, the members of this state's public bodies will be left to guess at what constitutes a violation under OPML. As the dissent in *Handy* indicates, "If a public meetings case could be tried to a jury, it would be hard to imagine how anyone could write an instruction in plain terms to tell a jury when a series of separate conversations should be aggregated after the fact, in hindsight, so as to conclude that a quorum has met and the law has been violated." *Handy* at 691.

Petitioners believe there is much to be learned from the changes that have been adopted by the California legislature over the years to amend the provisions of its public meetings law. The California public meetings code has been amended a number of times in order to address many of the same issues before this Court today. Since its adoption in 1953, the California legislature has passed multiple amendments to its public meetings law for purposes of clarification, and to ensure consistency in the application of the law. Cal. Gov. Code, § 54950-54963.

The first amendment to the California public meetings law occurred in 1961 as a result of the decision in *Adler v. City Council of Culver City*, 184 Cal App 2d 763 (1960). In *Adler*, the California Court of Appeals held the Brown Act applicable only to formal meetings for the transaction of official business, and inapplicable to informal sessions. *Sacramento Newspaper Guild* at 770-774. In the wake of the *Adler* decision, the California legislature responded by amending the Brown Act to make clear the provisions within the act were not necessarily limited to action taken at a formal meeting. Stats. 1961, ch. 1671, § 3.

The California legislature adopted other significant changes to its statute over the years, but perhaps the most significant for the purposes of this Court are the amendments clarifying what constitutes a meeting, the types of communications between members of a public body that are prohibited, and the types of communications between members of a public body that are allowed under the law. Those changes are found in Section 54952.2 and are as follows (emphasis added):

> (a) As used in this chapter, "meeting" means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss,

deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.

(b)(1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

(c) Nothing in this section shall impose the requirements of this chapter upon any of the following:

> (1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b). Cal. Gov. Code, § 54952.2, Amended by Stats. Ch. 63, Sec. 3. Effective January 1, 2009.

The definition of "meeting" within the California statute encompasses *any* congregation or gathering of a majority of the members of a legislative body *at the same time and location*. (emphasis added) *Ibid*. The definition, therefore, encompasses both formal and informal contemporaneous gatherings, eliminating the need to bifurcate the word "meeting" into two separate meanings as the *Handy* Court has done.

The California statute includes words such as "hear," "discuss," "deliberate," and "take action" in order to express the breadth of the law and its intent to reach not just the "deliberation" or "decision-making" of the majority, but the "information gathering" process as well. *Ibid*. The decision to broaden the scope of the law codifies the opinion of the *Sacramento* Court that, "[d]eliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." *Sacramento* at 47-48. This expansion of the law helps eliminate the argument that "information gathering" is somehow distinct from "deliberating" as the Court determined in *Harris*. *Harris* at 25. The legislature's expansion of the scope of the law is

tempered, however, by the inclusion of the phrase "within the subject matter jurisdiction of the legislative body" which has a narrowing effect on how the term "meeting" may be applied, as opposed to the Oregon statute which applies to "any matter." ORS 192.610(5).

Subsection (a) of the California statute lists the elements of a contemporaneous "meeting" which include having the members of a legislative body in the same location at the same time. Cal. Gov. Code, § 54952.2. Subsection (b) of the statute prohibits any non-contemporaneous meeting by a majority of the members of a legislative body through the use of "a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." Cal. Gov. Code, § 54952.2.

The California legislature adopted the above serial meetings language in 2008. The enacted reforms, sponsored by the California Newspaper Publishers Association, attempted to resolve a confusing 2006 state appeals court ruling related to open meetings. Specifically, the reforms aimed to altogether ban serial meetings by ensuring that a majority of an entity's members cannot communicate via any means outside a noticed meeting to discuss, deliberate or take action on a matter under their jurisdiction. While the amendments resolved the ambiguity created by the 2006 court ruling, they have also created surprising consequences.

For 10 months, the Little Hoover Commission (an independent California state oversight agency created in 1962 with its creation, membership, purpose and duties enumerated in statute, Cal. Gov. Code, §8501-8508) examined the unexpected impacts of reforming the Brown Act in 2008. Exhibit B, *Conversations for Workable Government*, Report #227, June 2015. The Commission found that constraints on internal discussions by appointees and elected officials had driven more decision-making downward to the staff level and out of sight of the public. *Ibid*. at 4. Many participants in the Commission's study said staffers who are not accountable to the public in elections or through the appointment process are gathering more consensus and making decisions internally for leaders to ratify in public meetings. *Ibid*.

The Commission also examined the everyday use of private conversations in the executive branch between government officials and the interests they regulate. *Ibid*. at 5. These so-called "ex parte communications" have become a significant concern, driven by allegations that some public officials have had unreported and illegal private conversations with representatives of the interests they regulate. *Ibid*. The Commission concluded that these private conversations are, in most cases, a necessary and effective tool of information gathering and governing. *Ibid*.

Nearly 300 local elected officials participated in the Commission's study and while all professed support for open government, many participants said the

changes to the open meeting acts and their attorneys' interpretations of those changes have significantly hindered their information-gathering ability and greatly complicated decision-making processes. *Ibid*. at 9. Ironically, many officials on the front lines of state and local governing told the Commission that the changes have produced less government transparency instead of more. *Ibid*.

Participants of the study also described the ease of unintentionally violating the Brown Act, the ever-present fear of Brown Act lawsuits and the hundreds of thousands of dollars in public funds paid to litigants. *Ibid*. at 12. When asked by the Commission why local government attorneys interpret the 2008 Brown Act changes so conservatively and restrictively, City of Indian Wells Mayor Pro Tem Dana Reed answered, "Because they keep losing in court." *Ibid*.

Another parliamentary tactic that stems from the rules limiting internal communications and the simultaneous need for a council or commission vote to put items on its agenda is "to grab a third party and ask them to bring up a matter obtusely. These workarounds usually involve third parties, which in the spirit of the Brown Act, is a gross violation." *Ibid*. at 15.

Many local and state government attorneys maintain that due to the statutes' inclusion of two words, "to discuss," elected and appointed officials of local government and state boards and commissions can no longer have informal

conversations with their colleagues outside public meetings about issues pending before them – or even have general policy discussions. *Ibid*.

The California legislature, through its 2008 amendments, significantly broadened the prohibitions on informal discussions making it difficult to conduct day to day business. This broadening of the restrictions in current law gave rise to many of the local and state level concerns reviewed by the Commission in 2014 and 2015. *Ibid.* at 18. In its report to the California state legislature, the Commission recommended that the legislature adopt new language to clarify that local elected officials and their appointees to local and regional government bodies can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Brown Act. *Ibid*. at 7.

The test proposed by the Commission suggests that it is the purpose of the meeting, whether or not the discussions are used to develop concurrence or consensus on an upcoming vote or decision that would determine a violation of the Brown Act. The recommendation to remedy the statute's overly broad prohibitions on communication leads back to the element of intent raised by the *Harris* court and the danger of inconsistent application of such a rule as illustrated in *Harris* and *Handy*.

The current OPML does not prohibit non-contemporaneous meetings. The interpretation of the public meetings statute by the Court of Appeals in *Handy* indicates that the issue of non-contemporaneous meetings must be addressed. In order to properly address the issue of non-contemporaneous meetings, the Oregon legislature needs to amend its statute to define what constitutes a non-contemporaneous meeting, and to create a bright line rule to clarify when these types of informal internal discussions are a violation of the public meetings law.

In addition, the legislature needs to adopt language that makes it clear the test to determine a violation under of the public meetings law is an objective strict liability analysis, not a subjective test to determine the defendant's intent, or *mens rea*. The purpose test adopted by the *Harris* court has introduced an intent element into what should be a strict liability analysis of the law which has only led to inconsistent and confusing applications of the rule. Courts will continue to struggle with the *Harris* purpose test without clear direction from either this Court or the Oregon legislature.

G. <u>Proposed rule and definitions</u>

In the alternative, this Court should interpret ORS 192.630(1) and (2) to prohibit the following: Any contemporaneous gathering/meeting of a quorum of a governing body, either physically or via electronic means, to make a decision or

deliberating toward a decision. A quorum of a governing body, however, may gather or meet for the purpose of gathering information.

This Court should then define information gathering as: Obtaining information, in any manner, from any source, regarding a matter within the subject matter jurisdiction of the governing body, so long as no decision is made, action taken or a concurrence or consensus is arrived at on an upcoming vote or decision in violation of the public meetings act.

This Court should then define deliberate as: Taking action in the form of a vote, or expressing a final position, on any item of business that is within the subject matter jurisdiction of the governing body.

These proposed rules solve the problems created by the majority decision in Handy and are true to the intent of the 1973 Oregon Legislature that created the OPML. The proposed rules are objective, bright line and easily understood and can just as easily be followed by any public official.

The proposed definition of meeting by the Petitioners has several advantages over the somewhat convoluted definitions created by the Court of Appeals. The first advantage is that it is one rule instead of two; a separate analysis is not required depending on whether the meeting is “formal” or “informal”. The second advantage is that the rule is objective, not subjective in its application and does not require that a court divine the intent of a public official. Most importantly, the rule

allows the public official to receive information from a variety of sources, including constituents and fellow public officials, thereby providing the public official with the best opportunity to make excellent decisions on behalf of their citizens.

The proposed definition of information gathering has the same benefits as the proposed definition of meeting. First, it creates a bright line rule so that any public official can know, with confidence, where the line between permitted information gathering and prohibited decision-making exists. The proposed rule also preserves the important public policy supporting the OPML law that decisions and the decision-making process remain in public view and participation. In addition, the proposed rule does not have the chilling effect on the administration of local government business that has been the result of the 2008 amendments to the Brown Act.

Finally, the proposed definition of deliberate also has the benefit of creating a clear, objective standard that makes it clear for public officials to act in a lawful manner. The primary advantage is that the proposed rule eliminates the subjective intent element of the existing Harris/Handy test: a vote and the expression of a final position on any item of business are easily determined. Both a vote and an expression of a final position are not just easily determined at the time they occur, but also if subjected to 20/20 judicial hindsight.

II. CONCLUSION

While the focus on government tends to be on highly visible professional politicians, it is important to remember they are only a small minority of citizens serving their fellow citizens. There are a much larger number of volunteer citizens serving in less high-profile boards and commissions, small water and soil districts, school boards and other special districts. In those positions they have been entrusted with making important decisions on behalf of their fellow citizens.

The decisions made by our public officials should be based upon the best information available. The people those decision makers represent should have ready access to them and the ability to convey concerns and solutions to those concerns. All elected officials ae entitled to have clear unambiguous rules to follow that can be obeyed-not rules that subject them to potential liability by Monday morning quarterbacking by individuals that disagree with their decisions.

The rule of the Handy majority creates the potential that well intended public officials could unknowingly and unwittingly violate the OPML. When something as serious as the government ethics of a public official are at stake, there should be no doubt where the line between following the law and breaking the law falls.

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DATED this 31st day of March 2016.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10, 187 words.

Type size

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioners' on Review Brief on the Merits to be filed by ECF with the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301, on March 31, 2016.

I further certify that I served a true and complete copy of PETITIONERS' ON REVIEW BRIEF ON THE MERITS on March 31, 2016, on the parties hereto by electronic filing:

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