THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

Faye P. Croft, Personally and as Trustees of the James A. Croft Trust; James A. Croft Trust; William A. Harbeson; Heyward G. Hutson; James Stephen Greene, Jr.; South Carolina Public Interest Foundation; Summerville Preservation Society; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated,

Petitioners

v.

Town of Summerville and Town of Summerville Board of Architectural Review,

Respondents

Appellate Case No. 2020-000334

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge

BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA PRESS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jay Bender
S.C. Bar No. 651
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Dr., Suite 400
Post Office Box 8057
Columbia, SC 29202
803.799.9091
jbender@brblegal.com
ATTORNEYS FOR *AMICUS CURIAE*

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STATEMENT OF FACTS

Amicus curiae South Carolina Press Association adopts the factual statement of the South Carolina Court of Appeals in the decision below, *Croft v. Town of Summerville,* 428 S.C. 576, 837 S.E.2d 219 (2019), relating to meetings between members of the Town of Summerville Board of Architectural Review (BOA), and a developer who was seeking approval of a project, meetings that on their face appear to conflict with the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10, *et seq.* (FOIA). The Court of Appeals identified these meetings as "workshops," and stated:

> In July 2014, the Developer held a series of "workshops" with members of the Board [of Architectural Review] to discuss the Project. In an email to the Board, a Town employee reminded members that two members would meet with the Developer at a time so there would be "no possibility of it looking like a quorum." In December 2014, the Developer held workshops with three Board members at a time. The Town employee again reminded Board members, "To avoid any possibility of a quorum (as this is not a public meeting), please stay within your agreed time frame."

Id., 428 S.C. at 592, 837 S.E.2d at 227.

STANDARD OF REVIEW

No South Carolina appellate decision has addressed the question of whether a conscious decision by members of a "public body," S.C. Code Ann. § 30-4-20(a), to divide into subgroups with fewer members than would constitute a quorum of the entire body in order to evade the "meeting" definition in the FOIA, S.C. Code Ann. § 30-4-20(d), results in the formation of committees of the public body which would themselves be public bodies. This appeal presents a novel question of statutory interpretation of a provision of the FOIA, and no deference need be given to the decisions below as this court explained in *Lambries v. Saluda County Council,* 409 S.C.1, 7, 760 S.E.2d 785, 788 (2014):

> "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs,* 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Id.* at 467, 636 S.E.2d at 605-06.

QUESTION PRESENTED

DID THE COURTS BELOW ERR IN CONCLUDING THAT A PUBLIC BODY WHICH DIVIDED ITSELF INTO SUBGROUPS, THE MEMBERSHIP OF EACH SUBGROUP BEING LESS THAN A QUORUM OF THE PUBLIC BODY AS A WHOLE, COULD THUS EVADE THE PUBLIC MEETING REQUIREMENTS OF THE FOIA?

ARGUMENT

The courts below erred in concluding that the BOA could divide itself into subgroups, the membership of each subgroup being less than a quorum of the BOA as a whole, and thus evade the public meeting requirements of the FOIA.

The BOA had under consideration a development project that would include "a conference center, parking deck, hotel, restaurant with rooftop bar, and condominiums." *Croft,* 837 S.E.2d at 221. The opinion of the Court of Appeals notes that the project was considered by the BOA at its meetings on October 6, 2014, November 3, 2014, January 5, 2015, January 12, 2015, April 6, 2015, May 11, 2015, and May 22, 2015. It is reasonable to conclude from this schedule that there were significant design issues with the project. None of these meetings is the subject of the appeal in this case. At issue in this appeal are a series of "workshops" held between members of the BOA and the developer in July and December 2014.

As noted in the facts relied upon by the Court of Appeals, an employee of the Town of Summerville transmitted an email to members of the BOA to explain that "two members would

meet with the Developer at a time" for the July 2014 meeting. 837 S.E.2d at 227. The same employee reminded board members for the December meeting that they were to meet with the developer in groups of three. The concern of the Town employee was that groups larger than two or three members of the BOA meeting with the developer would result in a quorum of the BOA present, and would defeat the plan to have a meeting open to the public. *Id.* The Town employee also reminded BOA members to "stay within your agreed time frame." *Croft, supra,* 837 S.E.2d at 227.

It is apparent on its face that the scheme of the BOA, facilitated by an employee of the Town, was to divide and hide. Divide the BOA into groups populated by less than a quorum of the BOA as a whole, and hide from public view. The division of the BOA into groups and the establishment of agreed upon "time frame[s]" reflects a conscious action by the BOA to form groups to meet at specific times with the developer. It seems beyond question that there was a secret decision-making process used to divide the BOA and schedule meetings with the developer. The commitment by the BOA to this course of action is itself likely to have been a violation of the FOIA, but the decision-making process is not the subject of this appeal. The subject of this appeal is the result of the decision-making process to divide the BOA into groups to meet with the developer. The Court of Appeals described the emails effectuating the division of the BOA and facilitating the secret meetings with the developer as "problematic," stating:

> We acknowledge the problematic nature of these emails and note that "workshops" should not be used to circumvent FOIA requirements.

Croft, supra, 837 S.E.2d at 228.

The error committed by the courts below was the focus on the number of person needing to be present to constitute a quorum of the BOA as a whole, and not on whether the subgroups created by the BOA in a deliberate attempt to avoid public scrutiny were committees of the

BOA. The Court of Appeals held that the "workshops" were not chance meetings utilized to circumvent the requirements of the FOIA as chance meetings to discuss or act on public business are specifically prohibited by law. S.C. Code Ann. § 30-4-70(f). There was nothing chance about the actions of the BOA. The actions of the BOA were deliberate, conscious steps taken to avoid the public scrutiny afforded by compliance with the FOIA.

In enacting the FOIA the General Assembly found that it is vital in a democratic society that public business be conducted in an open and public manner, and directed that the FOIA was to be construed to facilitate public access to meetings and records:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

At the root of the adoption of the FOIA is the sound public policy that our democratic society functions most effectively when citizens have trust and confidence in their governmental institutions, as this court articulated in detail in *Disabato v. S.C. Ass'n of School Adm'rs,* 404 S.C. 433, 451, 746 S.E.2d 329, 338 (2013):

> The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government. An informed electorate is essential to a healthy democracy because members of the public cannot meaningfully cast their votes if they are ignorant of what actions the government has taken and the rationale for those actions. *** Finally, regardless of whether governmental activity conducted in secrecy actually is nefarious or corrupt, the public cannot be expected to possess a high level of trust in that which is hidden from its view. The General Assembly specifically addressed these interests in the FOIA's findings....

> The interests giving rise to the FOIA, and recognition of their foundational role in our democracy, trace back to the earliest days of our nation. As James Madison wrote, "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. Knowledge will forever govern ignorance; And a people who mean to be their own governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in *The Complete Madison* 337 (S. Padover ed. 1953).

In the context of "problematic" emails revealing a scheme to evade public scrutiny of the governmental actions of the BOA, the courts below should have interpreted the definition of "meeting" in the FOIA so as to conclude as a matter of law that each of the subgroups of the BOA constituted a public body as a committee of the BOA. Under the definition of "public body" in the FOIA each committee itself would have been a public body subject to the open meeting requirements of the FOIA. *Quality Towing, Inc. v. City of Myrtle Beach,* 345 S.C. 156, 547 S.E.2d 862 (2001). As this court held in *Quality Towing*, a committee is a public body, stating:

> The plain language of the statute, as well as the purpose behind FOIA as set forth by the legislature, leads to the conclusion that the Committee is a "public body" subject to FOIA.

Id., 547 S.E.2d at 864.

The common definition of "committee" includes "A group of people delegated to perform a particular function or task." *Webster's II New College Dictionary* (Houghton Mifflin Co. 1995). It is obvious from the facts stated by the Court of Appeals that the BOA delegated to its members in groups of two or three the task of separately, serially, and secretly meeting on a prescribed schedule with a developer who had a controversial project pending approval. Each group of two or three members of the BOA constituted a separate committee of the BOA notwithstanding no public record demonstrating that the specific action taken by the BOA to

identify the members of each committee and set a schedule for meeting with the developer was accomplished in a public meeting. The division of the BOA, and the establishment of a time for meetings with the developer seems to have been accomplished in secret, and those steps would have been a violation of the FOIA because the BOA committed itself to a specific course of action in the absence of a decision made in a public meeting.

The courts below should have concluded as a matter of law that each of the groups of BOA members attending the "workshops" constituted a separate committee for which a separate quorum measurement was appropriate. The quorum measurement that should have applied was what number of members would establish the quorum of each group attending a "workshop." When a committee has two or three members, the quorum is always two members, and it was error for the courts below to consider the number needed for a quorum for each of the "workshops" to be the majority of the BOA as a whole. Each time two or three members of the BOA met on an established schedule with the developer, a quorum of that group was present, and the "workshop" was in fact and law a meeting under the FOIA.

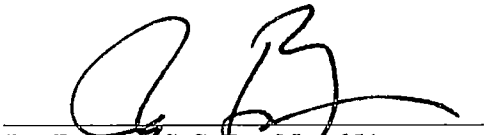
Each of these BOA groups was a committee, each committee was a public body, and required by the authority of *Quality Towing* to give notice of meetings, conduct the meetings in public and keep minutes of the meetings. S.C. Code Ann. §§ 30-4-60, 80 and 90. This court should review part II of the decision of the Court of Appeals for the error of law in the conclusion that these separate, secret gatherings were not meetings because a quorum of the entire BOA was not present at each "workshop." As this court noted in *Lambries, supra,* this court is free to make an interpretation of the law that is consistent with the language of the FOIA and the stated public policy favoring public access to the meetings and records of public bodies. S.C. Code Ann. § 30-4-15. If the Court of Appeals endorsement of the divide and hide strategy

utilized by the BOA is allowed to stand, the public meeting requirements of the FOIA will be eviscerated, and the stated policy of open and public government will be evaded too easily. The direction by the General Assembly that the FOIA must be construed to make it possible for citizens to learn of the activities of public officials leads to no conclusion other than that each of the workshops involving BOA members and the developer was a meeting of a public body subject to the full requirements of the FOIA.

CONCLUSION

This court should grant the petition for writ of certiorari to review the decision of the Court of Appeals that the conscious division of the BOA into groups to meet secretly on a predetermined schedule with a developer was not a violation of the FOIA because each of the groups did not constitute a quorum of the BOA as a whole, thus endorsing a blatant evasion of the open meeting requirements of the FOIA. The arithmetic utilized and interpretation of the FOIA applied by the courts below are inconsistent with the language of the FOIA, the public policy supporting the FOIA, and decisions of this court.

Respectfully submitted,



Columbia, South Carolina

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Jay Bender, S.C. Bar No. 651
BAKER, RAVENEL 7 BENDER, L.L.P.
3710 Landmark Dr., Suite 400
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PROOF OF SERVICE

I, Chrystal D. Carter of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on this 24th day of March, 2020, served counsel below with **Brief of *Amicus Curiae* South Carolina Press Association in Support of Petition for Writ of Certiorari** by mailing a copy of same via United States Mail, postage pre-paid, with the return address clearly indicated on the envelope, to counsel as shown below:

Attorneys for Petitioners:

W. Andrew Gowder, Jr.
Pratt-Thomas Walker, PA
PO Drawer 22247
Charleston, SC 29413-2247

Michael T. Rose
Mike Rose Law Firm, PC
409 Central Avenue
Summerville, SC 29483

Attorneys for Respondents:

Timothy A. Domin
Clawson and Staubes, LLC
126 Seven Farms Drive
Charleston, SC 29492

G.W. Parker
200 S. Main Street
Summerville, SC 29843

Chrystal D. Carter