

ORIGINAL

IN THE SUPREME COURT OF OHIO

ADAM J. WHITE,

Plaintiff-Appellant

vs.

DAVID E. KING, *et al.*,

Defendants-Appellees

: No. 2014-1796
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: On Appeal from the Delaware
: County Court of Appeals, Fifth
: Appellate District, App. Case No.
: 14CAE-02-0010
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Memorandum of amici curiae Ohio Coalition for Open Government, Common Cause Ohio, and the League of Women Voters of Ohio in support of jurisdiction

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Statement of Public or Great General Interest

The Appellees—four members of the Olentangy Local School District Board of Education—have asserted the authority and discretion to conceive, discuss, consent to, and undertake an official act of their public office without notifying or admitting the public, keeping minutes, or otherwise complying with Ohio's Sunshine Law, R.C.

121.22. But neither the Board nor the courts below have cited any Ohio statute granting to the Board the power to engage in concerted, purposeful e-mail communications among all but one Board member to shape Board policy.

The General Assembly's express grant of authority to public bodies to engage in deliberate communications to shape public policy rests only in Ohio's Sunshine Law, R.C. 121.22, which requires in-person assemblies open to the public, followed by advance notice to the public.

This Court has characterized the Sunshine Law as affording "crucial rights" to people in a democracy. State ex rel. Long v. Council of the Village of Cardington, 92 Ohio St.3d 54, 60-61, 748 N.E.2d 58 (2001). Applying the Sunshine Law, this Court has stated:

One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions are reached.

White v. Clinton Cty Bd. of Commrs., 76 Ohio St. 3d 416, 419, 420, 667 N.E.2d 1223, 1226-1227 (1996).

Indeed, “public scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable.” *Id.*

But the Sunshine Law’s democracy-sustaining purpose cannot survive if a quorum of a public body can retreat to their email inboxes to avoid both contemporaneous public scrutiny and contemporaneous scrutiny of their dissenting members when they engage in concerted communications to set or jointly explain public policy.

Here, the Fifth District Court of Appeals ruled that the Sunshine Law’s prohibition against any non-public “meeting” did not encompass a protracted email exchange between the defendant Board members. During that email exchange, the four Board members proposed, discussed, and ultimately implemented an official response to a *Columbus Dispatch* article criticizing one of the Board’s recently-enacted policies.

All public bodies can infer from the court’s ruling, and that of the trial court that, if the Sunshine Law doesn’t apply to these kinds of policy-shaping communications, then all public bodies are free to do what the Olentangy school board did here. That is the overwhelming signal from the judicial rulings below and from the Board’s own arguments—and this Court should address it and resolve that signal against them.

Public bodies, by design, are policy makers. If they can deliberate and decide issues via email, then later go through the sham exercise of “ratifying” those earlier decisions, then the Sunshine Law is, as a practical matter, a dead letter that exalts form over substance.

This Court addressed an analogous setting—where a city council set meetings to address the same topic, but limited attendance to fewer than a majority, so that the council could say that the Sunshine Law didn’t apply. Yet, they never identified any authority to shape or evaluate city policy that way. In rejecting that practice, this Court held: “To find that [this] game of ‘legislative musical chairs’ is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result.” State ex rel. Cincinnati Post v. City of Cincinnati, 76 Ohio St.3d 540, 544, 668 N.E.2d 903 (1996).

This Court should accept this case for review because the decisions below effectively advise all public bodies that they are free to shape public policy through concerted email discussion aimed at achieving a consensus—all without advance notice to the public, contemporaneous access by the public and the dissenting members—and, so, wholly outside the authority of the Sunshine Law.

Ohio law does not authorize public bodies to proceed toward collective decisions about public business in ways that fall outside the scope of the Sunshine Law. Such a

pronouncement by this Court would have the practical effect of establishing for all public bodies in this state that they can't shape public policy that way.

Statement of Interest of Amici Curiae

The Ohio Coalition for Open Government is a nonprofit corporation whose members include Ohio newspapers, Ohio broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public offices to make their records available for public inspection and copying. The coalition was formed by the Ohio Newspaper Foundation, a nonprofit corporation controlled by most of Ohio's daily and weekly newspapers.

The League of Women Voters of Ohio has an interest in this case because it also regularly advocates on behalf of all Ohio voters that Ohio Rev. Code § 121.22 should be applied as written. A primary mission of the League relevant to this matter is to encourage citizens to be active participants in their governments. This requires governmental bodies to protect the citizen's right to know by giving adequate notice of proposed actions, holding open meetings, and making public records accessible.

Common Cause Ohio has an interest in this case because it regularly advocates on behalf of all Ohio voters that the Ohio Open Meetings Statute should be applied as written. Common Cause is a nonpartisan, nonprofit advocacy organization founded in 190 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Today,

Common Cause is one of the more active, effective and respected nonprofit organizations working for political change. Common Cause strives to strengthen democracy by empowering its members and the general public to be fully informed and to take action on critical policy issues such as the one in this case.

Common Cause Ohio, a state affiliate of Common Cause, has long been encouraging public participation at the Statehouse and local level. Public records and open meetings are essential to public information and engagement. Common Cause Ohio is a partner of the Ohio Campaign for Accountable Redistricting which released an important report, *The Elephant in the Room: Ohio Redistricting Transparency Report* based on public records exploring how legislative district lines were created. Emails and other electronic records were essential to this report and to understanding the background inner workings and negotiations that led to the new district lines. Samuel Gresham, Jr. is the chair of Common Cause Ohio's Governing Board.

All three amici write in support of Appellant Adam J. White, who is contesting a Fifth District Court of Appeals ruling that the Board members' email exchanges planning and implementing the Board's response to public criticism do not fall within the Sunshine Law's definition of "meeting." But the amici write separately to propose an alternative ground for reversal. Specifically, if the Board members' actions do not fall within the Sunshine Law's definition of "meeting," the Board lacks authority to engage in a concerted, purposeful email campaign to shape and implement Board

policy. Because the Board members acted outside the scope of their statutory authority, those acts were *ultra vires*, and invalid from the outset.

Statement of the Case and Facts

The amici incorporate the statement of the case and facts contained in Appellant White's memorandum in support of jurisdiction. (White Mem. at 3-5.)

Propositions and Law and Argument

Proposition of Law No. 1:

Ohio law does not authorize members of a public body to engage in concerted, purposeful communications – via e-mail or otherwise – to collectively shape policy except at a public meeting that complies with Ohio's Sunshine Law, R.C. 121.22.

Like all public bodies, school boards are creatures of statute. They have no more authority than that expressly granted by statute or narrowly implied by necessity from an express grant of authority. Hall v. Lakeview Local School Dist. Bd. of Edn., 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992); see State ex rel. Kuntz v. Zangerle, 130 Ohio St. 84, 89, 197 N.E. 112 (1935).

The courts below ruled that Ohio's open meetings law, R.C. 121.22, did not apply when all but one of the Olentangy School Board members engaged in concerted, purposeful e-mail discussions toward arriving at a consensus and informal decision about school board business, and to advise the public, effectively as the Board, about that matter. So all public bodies can infer from the courts' rulings that, if the open meetings law (often called the Sunshine Law) didn't inhibit the Board members'

deliberate efforts to reach consensus on Board business via e-mail, then all public bodies are free to proceed to resolve the public's business the same way.

Yet neither of the courts below nor the Board has identified *any* authority for the Board to do what it did. If, as the courts ruled and the Board argues, the open meetings law doesn't apply, then where does Ohio law authorize virtually all of the Board members to engage in purposeful e-mail communications aimed at reaching an informal decision to clarify to the public what the Board's policy is or means? The absence of any such authority—and they point to none—renders what they did *ultra vires*, void, and therefore the Board members can't lawfully proceed to engage in informal decision-making by e-mail. E.g., *In re Cattell*, 146 Ohio St. 112, 64 N.E.2d 416 (1945).

Ohio law authorizes only one way for the majority of the members of a public body to engage in deliberate discussion aimed at reaching even an informal decision of a public body. That is: by a public, in person "meeting" under Ohio's Sunshine Law. R.C. 121.22.

But the Board members have argued, and the courts below held, that the intentional effort to set Board policy by e-mail do not fit the within the Sunshine Law's definition of "meeting." So, if the Sunshine Law doesn't apply and no one can cite any authority that *does* allow the Board to do what it did (through all but one member), then what the Board members did was outside their authority.

When all but one Board member purposefully and concertedly proposed, discussed, revised, and adopted a plan to respond jointly to public criticism of a Board policy— all via seriatim emails— the Board members violated their authority. The General Assembly has not authorized a quorum of the Board to make informal decisions about Board policy as a unit *except* by a public “meeting” spelled out in the Sunshine Law. See State ex rel. Fairfield Leader v. Ricketts, 56 Ohio St. 3d 97, 99-100, 564 N.E.2d 486, 489 (1990).

In Fairfield Leader, a majority of the members of a village council convened a prearranged, private gathering with officials from other political subdivisions in a hotel conference room on a Saturday morning. Although the village’s ordinances required “all regular and special meetings of Council” to be “open to the public,” the village argued that the contested gathering was neither a regular meeting or a special meeting, and thus need not comply with the open meeting provisions. 56 Ohio St. 3d at 99, 564 N.E.2d at 489. The Ohio Supreme Court rejected that argument. The Court ruled:

[W]e fail to see how the charter allows any meeting of council that is not either regular or special. . . . The council either meets in a regular session or it does not, and any session that is not regular is special. Thus, we agree with The Leader’s argument that regular and special meetings are the only alternatives under the charter for a majority of the council to assemble to discuss public business, and we reject the theory that the January 28 meeting was neither of these.

Fairfield Leader, 56 Ohio St. 3d at 99-100, 564 N.E.2d at 489.

Similarly here, the Board here has no authority to conduct public business by any means other than a public “meeting” under the Sunshine Law. So if, as the Board members insist, their private emails do not qualify as a “meeting,” the Board is nevertheless prohibited from conducting business in that manner, and the Board members’ decision to respond to public criticism by publishing a letter to the editor was therefore *ultra vires*, and invalid. See Cincinnati Bell Tel. Co. v. Pub. Utils. Comm’n of Ohio, 12 Ohio St.3d 280, 284, 466 N.E.2d 848 (1984).

This Court reached a similar conclusion in Cincinnati Post. There, a city manager scheduled back-to-back private sessions with fewer than a majority of the city’s nine-member council, providing essentially the same information to each group.

The City argued that the Sunshine Law didn’t apply because there was no “meeting” under that law, which applies only to an in-person gathering of a “majority” of the Cincinnati city council’s members. Therefore, the city argued, it need not comply with the Sunshine Law’s requirements of advance notice to the public, opening the discussions to the public, and the like.

But, as here, Cincinnati identified no authority for council’s members collectively to shape and evaluate public policy in that round-robin fashion. This Court, however, recognized that council had no such authority. The Court emphatically and unanimously rejected the notion that council could proceed as it did.

The Court ruled: “To find that [this] game of ‘legislative musical chairs’ is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose”—namely, “to prevent just the sort of activity that went on in this case—elected officials meeting secretly to deliberate on public issues without accountability to the public.” Cincinnati Post, 76 Ohio St.3d at 544.

No one can plausibly identify what the Olentangy school board members did here—collectively—as unrelated to the Board’s business. As the trial court ruled, “the Defendants were taking action to issue a public statement by the Board to defend their revised board policy which cannot be said to be outside the scope of their authority as Board members.” (Tr. Op. at 4.)

The Board’s later “ratification” of the response letter—which occurred a full six months after the Board published the letter in the *Dispatch*—underscores this point. Indeed, the Board’s ratification of the response letter occurred a full six months after the Board actually published the letter in the *Dispatch*, and not coincidentally, on the same day that Appellant White announced his lawsuit against the other Board members.

By hastily ratifying the six-month-old response letter, the Board essentially admitted that its conduct in approving the letter was *ultra vires* and thus invalid when it occurred—and that they should have followed the Sunshine Law. Also by ratifying the letter, the Board effectively admitted that four Board members had been acting on

behalf of the public body in conceiving and implementing the response to public criticism of its policies.

Amici do *not* argue that—absent specific statutory authority—public officials are prohibited from communicating through email in administering their public offices. That is the sort of necessity in our world that is implied in their express powers to administer their offices.

But no necessity justifies allowing the majority of the members of a public body to engage in concerted, purposeful e-mail discussions to arrive at a decision by consensus about a matter of that public body's business. The Sunshine Law itself evidences no such necessity since it mandates that the majority of a public body's members proceed only through open meetings that the public can witness in real time after receiving public notice.

Proposition of Law No. 2:

If members of a public body are authorized to engage in concerted, purposeful electronic communications collectively to shape policy under the Sunshine Law, R.C. 121.22, they would have to engage in a close facsimile of a "meeting"—namely, allowing contemporaneous public access that allows the public to witness the electronic communications as they happen, in real time, followed by public notice that complies with R.C. 121.22.

The only lawful way that the Board members could continue to conduct public business through concerted electronic communications is to bring their conduct within the Sunshine Law. To do so using electronic means, the Board would need to create the functional equivalent of a public meeting. At a minimum, the Board would have to give

the public advance notice that the communications were going to happen, and the Board would have to allow the public and all members of the body contemporaneous, real-time access to witness the Board's electronic communications as they happen. Here, the Board skipped those vital steps, and so proceeded unlawfully.

Conclusion

This Court should accept jurisdiction over this case and reverse the ruling of the courts below because those rulings effectively authorize the Board and other public bodies to proceed to shape public policy through *ultra vires* conduct.

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