

ORIGINAL

IN THE SUPREME COURT OF OHIO

ADAM J. WHITE, : CASE NO. 14-1796  
 :  
 Plaintiff/Appellant, :  
 :  
 v. : On Appeal from the Delaware County  
 : Court of Appeals, 5<sup>th</sup> Appellate District  
 DAVID E. KING, et al., : Case No. 14 CAE 02-0010  
 :  
 Defendants/Appellees. :

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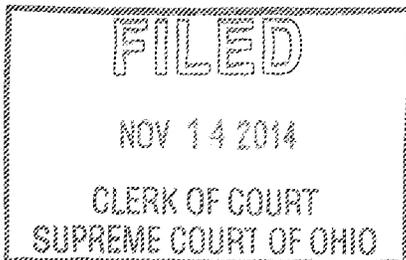
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**1. EXPLANATION AS TO WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

Contrary to any implication gleaned from the Memoranda of Appellant and amici curiae, Appellees absolutely respect, support, and have always followed Ohio's Sunshine Law, R.C. §121.22 and its legislative intent. The arguments of Appellant and amici curiae only have validity if it is first assumed that a "meeting" took place under the statute, that was "pre-arranged," for the purpose of "public business of the public body." Both Appellant and amici curiae, start with this inaccurate assumption in order to fabricate a factual basis for their legal arguments. It is only after they morph the facts into a contrived violation of Ohio's Sunshine Law can they follow with a superficial legal argument.

Even more importantly, Appellant and amici curiae's alarm and cry for help that this Court needs to clarify existing law and establish proper law for standards, or otherwise the public will be at the mercy of any public board's ill intent, is simply without basis in law or in fact.

Both the Trial Court and the Fifth District Court of Appeals properly interpreted the statute. Appellant and amici curiae's remedy is not with this Court, but is with the legislature, if they seek to change the language of the statute. As recognized by the Fifth District Court of Appeals herein, as well as the First Appellate District in *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 995 N.E.2d 862, 2005 - Ohio - 3489, the legislature has chosen not to address emails in the statutory definition of "meeting." Appellate Courts must ordinarily presume that the legislature means what it says. *State v. Link*, 155 Ohio App.3d 585, 2003 - Ohio - 6798, 802 N.E.2d 680, ¶ 17, citing *State v. Virasayachack* (2000), 138 Ohio App.3d 570, 741 N.E.2d 943.

As further proof that this matter appropriately belongs before the legislature, and not this Honorable Court, as R.C. §121.22 demonstrates in the legislative history, that this statute has been amended numerous times since its enactment, and the legislature had the opportunity to modify any

definitions, as well as include “emails” as being the equivalent of a “meeting.” The legislature has chosen not to so modify the statute, despite the fact that the *Haverkos* decision, *supra*, was issued in 2005.

Even more importantly, also attached is a copy of Senate Bill 93 which was introduced March 21, 2013. As set forth in the Bill summary, the Court will note that Senate Bill 93 proposes to delete the requirement for “deliberations” and replace it with “consideration or discussion.” In addition, Senate Bill 93 proposes to change the definition of “meeting” to delete the requirement for a “pre-arranged” discussion, and deletes the requirement that it be by “a majority of its members.” If Appellant and amici curiae wish to have “emails” included in the definition of “meeting,” or other changes to R.C. §121.22, they should address the legislature, not this Court. Both the Fifth Appellate District and First Appellate District ruled correctly, interpreting the language of the statute as written, and noting that this is a legislative issue, not a judicial one.

Contrary to the arguments of Appellant and amici curiae, no dangerous precedent has been set by the Fifth Appellate District herein. Indeed, the *Haverkos* decision, *supra* has been pending for almost nine (9) years, and has not resulted in the public being deprived of full transparency. Neither Appellant or amici curiae cite to this Court numerous examples, or cases, involving specific problems regarding public bodies, and emails, in violations of Ohio’s Sunshine Law. In fact, Appellant and amici curiae only cite one case dated 2006, after the *Haverkos* decision, all of the rest of the case law that is cited dates between 1935 and 2001. If this issue was of such important public or great general interest, certainly Appellant and amici curiae would be able to identify more recent cases which reflect their concern.

Simply, the facts of this case did not involve a pre-arranged meeting, did not involve public business, did not involve deliberations, but merely involved a response to an editorial through a

Letter to the Editor, which is, as this Court is aware, a quite common occurrence, as done by public officials all the time, without first requiring deliberation at an open meeting by the public body. This lawsuit was motivated not by a concern for a violation of Ohio's Sunshine Law, but for political motivation and gain, and in an effort to damage the reputation of those involved. The Letter to the Editor signed by Dave King, dated October 27, 2012 is nothing more than an expression of opinion and was clearly not involving any pending Board business, resolution, or matter.

In summary, this case does not involve public or great general interest. It was filed by one Board member against his fellow Board members for political purpose and gain. There has been no evidence placed before this Court that an exchange of "emails" by public bodies in the State of Ohio have been any problem whatsoever, or have deprived the public of the transparency as required by Ohio's Sunshine Law. Furthermore, if Appellant and amici curiae wish to change the statute, their avenue is Ohio's legislature, not this Honorable Court. For all of these reasons, Appellees respectfully request that this Court deny jurisdiction.

## **2. ARGUMENT**

### **Response to Appellant's Proposition of Law I:**

**This case did not involve a pre-arranged meeting for the purpose of private deliberations concerning official business.**

Appellant's First Proposition of Law misrepresents what occurred herein, and attempts to inappropriately extend the meaning of R.C. §121.22. There is no dispute that R.C. §121.22(A) requires public officials to take official action and to conduct "all deliberations upon official business" only in open meetings. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 1996 - Ohio - 372. Herein, there were no deliberations upon official business.

First, there was no pre-arranged meeting in person. Pursuant to §121.22(C) "...A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting." In this case, there is no allegation that the four (4) Board members met "in person." In fact, Exhibits 3 - 1 through 3 - 36, attached to the Amended Complaint established that there were merely a series of emails exchanged in the drafting of an opinion letter in response to an editorial previously printed by The Columbus Dispatch. There was no pre-arranged meeting of a quorum of Board members, as required by §121.22(B)(2). Appellant's reliance upon *State ex rel. Cincinnati Post*, supra, is misplaced, as therein, there were actually closed door meetings in person wherein members of city council discussed the county's proposal to construct new facilities.

Almost directly on point is the decision from the First Appellate District in *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005 - Ohio - 3489 (1<sup>st</sup> Dist. 2005). In a strikingly similar case, the Court of Appeals of the First Appellate District, Hamilton County, Ohio specifically held that Ohio's Sunshine Law does not cover emails. See *Haverkos v. Northwest Local School Dist. Bd.*

*Of Edn.*, 2005 - Ohio - 3489 (1<sup>st</sup> Dist. 2005). In *Haverkos*, the plaintiff sued the Northwest School Board and four (4) of its members alleging violations of the Sunshine Law because an email was exchanged between three (3) Board members with regard to the publishing of a guest column in the Northwest Press. One Board member wrote the column, criticizing the past actions of the Board and asking residents to support the candidacy of two (2) non-incumbents in the next election. The remaining Board members exchanged an email, a telephone call, drafted a proposed response letter which was distributed to the other Board members all of which agreed to sign it. The Court of Appeals granted summary judgment for the Defendants, finding that there was no pre-arranged meeting, and at no time was there a meeting of the majority of the Board. “One-on-one conversations between individual Board members do not constitute a “meeting” under the Sunshine Law.” (*State ex rel. Floyd v. Rockhill Local Bd. of Edn.* (Feb. 10, 1998), 4<sup>th</sup> Dist. No. 1862.) (*Id.* at ¶ 7.) Next, the Court addressed the issue of whether or not an email can be considered a discussion under Ohio’s Sunshine Law. *Id.* at ¶ 9. The Court found that Ohio’s law makes no mention of electronic communication as being subject to the law and no Ohio case holds otherwise. Despite the statutory revisions in 2002, there was no language including electronic communications. The First District Court of Appeals held as a matter of law that Ohio’s Sunshine Law does not cover emails. *Id.* at ¶ 9.

In addition, the *Haverkos* Court found that mere discussion of an issue of public concern does not mean that there were deliberations under the statute. *Id.* at ¶ 10. Thus, even if Appellant’s allegations are taken as true that his four fellow Board Members were discussing issues of public concern in their editorial response letter, the issuance of said letter does not constitute “deliberations.” As such there was no “pre-arranged” meeting.

Secondly, herein there was no discussion of public business by a public body. **Public**

**business was not discussed.** On this issue, the Trial Court stated “...When Defendants were exchanging the emails to develop the response letter, there was no pending rule or resolution before the Board. It was nearly six (6) months after the letter was published when the Board decided to ratify the letter. Accordingly, at the time the emails were exchanged there was no public business discussed.”

As the allegations in the Amended Complaint demonstrate, even if taken as true, there was no pending rule or resolution before the Board. In fact, as the Amended Complaint specifically alleges, in ¶¶ 23 - 25, the Board did not ratify the letter to the editor at issue until after Appellant filed his civil action in this case, which was six (6) months after the rebuttal letter was published in the Dispatch. Furthermore, Appellant himself was present at the April 25, 2013 regular meeting of the Board, and had the opportunity to vote on the ratification of the letter to the editor at issue, and chose to abstain. (*Id.*) As this Court is aware, it is not unusual for public officials, and members of boards and commissions, to submit opinion letters, and response letters to the editorial departments of newspapers throughout the State of Ohio. Just as in this case, such letters address various topics, including procedures, complaints of the public, and opinions. Appellant would have this Court conclude that such letters cannot be submitted to a newspaper unless an official board meeting has been previously held, and all board members have voted to allow such a letter to be sent, despite the fact that there is no pending rule or resolution or specific business on that issue before the Board. As can be seen from the October 27, 2007 letter to the editor at issue, there was no mention of any “pending rule or resolution before the Board.” Mere discussion of an issue of public concern does not mean there were deliberations. See *Haverkos*, *supra*, at ¶ 10.

As such, Appellant’s Amended Complaint, taken as true, failed to establish there was a pre-arranged discussion of the public business of the public body.

Third, there was no “meeting” under the statute. Appellant relies upon the case of *State of Ohio, ex rel Schuette v. Liberty Township Bd. of Trustees*, 2004 - Ohio - 4431 (5<sup>th</sup> Dist.). However, the *Schuette* case involved the scheduling of a meeting by the Board of Trustees through the issuance of letters to the public, certain residents, and business interests. The general public and press were excluded from the meeting. The meeting included some members of the public and business interests, and excluded others. In the case at bar, no such notice was sent, and no in-person meeting was held. There was simply an exchange of emails to draft a response to a Columbus Dispatch editorial, which did not involve any pending rule, resolution, or pending business before the Board.

Appellant relies upon the case of *State ex rel. Cincinnati Post*, supra, however, the facts therein did involve face-to-face meetings of city council members, and did not involve emails at all. As such, the *Cincinnati Post* case is distinguishable on its facts and has no applicability.

Likewise with regard to Appellant’s citation of *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990). The *Ricketts* holding has no applicability whatsoever as it involved actual face-to-face meetings in a dispute over whether or not minutes had been prepared for which the public would have access. Emails regarding opinion letters to an editor were not part of the facts, making the *Ricketts* case totally distinguishable herein. Likewise with regard to Appellant’s reliance upon *State ex rel. Plain Dealer Publishing Co. v. Barnes* (1988), 38 Ohio St.3d 165, 527 N.E.2d 807, which also involved a face-to-face meeting of substantially all of the members of council with members of the press and public being barred from the meeting. In fact, the *Barnes* case does not even mention R.C. §121.22, but involved an interpretation of the Charter of the City of Cleveland with regard to “meetings.” As such, it has no application whatsoever herein.

Appellant cites not one case directly on point in support of the interpretation he urges this Court to apply to R.C. §121.22. As such, the Court is respectfully urged to reject Appellant’s

Proposition of Law I. in all respects.

**Response to Appellant's Proposition of Law II:**

**A prior vote to ratify an opinion letter to the editor occurring six (6) months previously does not convert the content of the letter to the editor to public business.**

The Letter to the Editor from Dave King dated October 27, 2012 was not ratified by the Board until six (6) months later, on April 25, 2013 after the Board was placed on notice that Appellant had sued the Board earlier that day, filed on April 25, 2013 at 1:28 p.m. The Board's action to ratify the Letter to the Editor did not "magically" convert the content of the opinion Letter to the Editor into "public business." Appellant has not cited one case directly on point or applicable to support his argument. Appellant cites *Covert v. Ohio Auditor of State*, 2006 - Ohio - 2896, 2006 WL 1570598 (4<sup>th</sup> Dist.) which has no applicability whatsoever. First, it does not even involve Ohio's Sunshine Law. Secondly, this case involved the Court's interpretation of R.C. §340.04 with regard to whether or not the executive board was required to give prior approval for the termination of an employee. The Court found that the director had authority to hire and fire employees as the need arises, and as such, the termination was effective when done. The fact that the board met later to approve the director's decision was not inappropriate. This case has no relevance whatsoever to the case at bar.

Appellant argues that the distinguishing fact is that the Board actually later voted to ratify the published letter to the Dispatch, treating it as official school business. However, that allegation does not further Appellant's cause. The Amended Complaint indicates, specifically ¶¶ 24, 25 and 26, that Appellant himself was present at the April 25, 2013 regular Board meeting. He had the opportunity to participate and vote with regard to the alleged ratification of the letter to the Editor. Appellant chose to abstain from that vote. This occurred in an open, regularly scheduled public Board meeting,

and as such cannot constitute any violation of Ohio's Sunshine Law. As such, Appellant had an opportunity to participate in any discussions concerning the ratification of the letter to the Editor at issue, and to vote, and chose not to do so. Appellant was present, and had the opportunity to participate. There can exist no violation of Ohio's Sunshine Law at that point. Until that time, there was no "in person" meeting as required by the statute, at that time Appellant was present and had the opportunity to participate. However, that vote, taken on the same day Appellant filed this lawsuit, did not retroactively convert the Letter to the Editor or the emails from six (6) months earlier, into an open public meeting which violated the Sunshine Law.

**Response to amici curiae Proposition of Law No. 1:**

**The October 27, 2012 opinion Letter to the Editor did not involve public business and was not an attempt to collectively shape policy.**

Amici curiae distorts the facts in order to improperly expand the importance and effect of the Fifth District Court of Appeals ruling. The October 27, 2012 Letter to the Editor signed by Dave King did not involve public business. It was not intended, nor did it, collectively shape policy. It was merely an opinion rebuttal to an editorial previously published by The Columbus Dispatch. There was no "concerted, purposeful email discussions toward arriving at a consensus and informal decision about School Board business" as amici curiae alleges. In support, the case of *In re: Cattell*, 146 Ohio St. 112, 64 N.E.2d 416 (1945) is cited. The citation of this case exposes the baseless position of amici curiae. The *Cattell* case involved an individual being found in contempt in a *habeas corpus* proceeding and had nothing whatsoever to do with Ohio's Sunshine Law, or emails, which did not even exist in 1945. It is based upon this *Cattell* case, that amici curiae claims the Board's actions herein constituted *ultra vires* acts. The *Cattell* case has no applicability whatsoever.

Amici curiae relies upon the *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564

N.E.2d 486 (1990). For the same reasons set forth at page 7 above, the *Ricketts* case likewise is inapplicable.

Amici curiae, like Appellant, does not provide any citation or authority that holds exchanging a few emails and responding to a Letter to the Editor constituted a “meeting” or “public business” under the Sunshine Law. Instead, amici curiae “skips” over that requirement, starts with the assumption that a “meeting” and “public business” occurred, then chastises the Board for so doing. The case of *Cincinnati Bell Tel. Co. v. Pub. Utils. Comm’n. of Ohio*, 12 Ohio St.3d 280, 466 N.E.2d 848 (1984) is cited however, again, it did not involve Ohio’s Sunshine Law, nor emails, nor any facts relevant to the case herein. This *Cincinnati Bell* case involved whether or not the Public Utilities Commission was required to abide by an FCC order, and is totally irrelevant and inapplicable. Likewise, amici curiae cite the case of *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996), just as did Appellant, which is inapplicable as well for the same reasons as set forth at page 7 above. Amici curiae ignores the fact that on October 27, 2012 there was no pending rule or resolution or specific business on any related issue before the Board. Any public business had previously been addressed in an open public meeting where the Board voted to reaffirm its eight (8) year old policy. The October 27, 2012 Dave King letter to The Dispatch was merely opinion and did not involve the formulation of policy or any pending rule or resolution before the Board. Simply, there was not one issue or proposal pending to be voted on by the Board. Amici curiae ignores this undisputed fact.

In summary, amici curiae, as does Appellant, skips any meaningful discussion of whether or not a “meeting” and “public business” occurred as required by the statute, instead assuming they occurred, then setting forth their argument based upon that unsupported assumption.

**Response to amici curiae Proposition of Law No. 2:**

**The remedy sought by amici curiae falls under the jurisdiction of the legislature, not this Court.**

In its Second Proposition of Law, amici curiae seem to be suggesting to this Court that it, through this attempted appeal, should expand R.C. §121.22 to require “real time” publication and availability of emails exchanged by public officials with regard to any topics being discussed, whether or not they involve an actual “meeting” or “public business.” Such an expansion of R.C. §121.22 would be clearly outside any language found therein, and would fall solely under the authority of the legislature. This Proposition of Law No. 2 is again, based upon the incorrect assumption that the October 27, 2012 Letter to the Editor was an attempt to “shape policy” or involve “public business.” Proposition of Law No. 2 is far fetched, without any support in the language of R.C. §121.22, or expressed intent of the legislature, and should be rejected by this Court without further analysis.

### **3. CONCLUSION.**

Based upon the foregoing, it is clear this case is not one of public or great general interest. The arguments of Appellant and amici curiae are based upon a distortion of the facts, and the purpose and intent of the October 27, 2012 Dave King letter to the Editor, which did not involve any pending resolution or rule of the Board, did not involve any pending public business, but only constituted an expression of opinion, which is done similarly by public officials throughout the State of Ohio on a frequent basis.

When this lawsuit was initially filed, it was motivated by political gain. If it is now the intent of Appellant and amici curiae to require that Ohio Sunshine's Law specifically address an exchange of emails, the proper venue is the Ohio Legislature, not this Court. This Court is respectfully urged to deny the request for jurisdiction.

Respectfully submitted,



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#### 4. CERTIFICATE OF SERVICE.

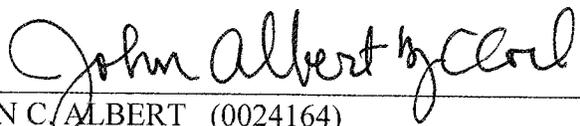
I hereby certify that on this 14<sup>th</sup> day of November, 2014, a copy of the foregoing **APPELLEES' MEMORANDUM CONTRA JURISDICTION** was duly served, via U.S. Regular Mail, postage prepaid, upon the following:

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