Supreme Court of Ohio Clerk of Court - Filed June 22, 2015 - Case No. 2014-1796

IN THE SUPREME COURT OF OHIO

ADAM J. WHITE,	:	No. 2014-1796
	:	
Plaintiff-Appellant	:	
	:	On Appeal from the Delaware
	:	County Court of Appeals, Fifth
	:	Appellate District, App. Case No.
	:	14CAE-02-0010
vs.	:	
	:	
DAVID E. KING, *et al.*,	:	
	:	
Defendants-Appellees	:	

Brief of amici curiae Ohio Coalition for Open Government, Common Cause Ohio, and the League of Women Voters of Ohio in support of Appellant Adam J. White

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Statement of Identity and 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 email exchanges between members of the Olentangy Board of Education 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, even 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 Facts

The amici incorporate the statement of facts contained in Appellant Adam J. White's merit brief filed on June 19, 2015. (White Br. at 1-5.)

Introduction

Amici Curiae support appellant Adam J. White and urge this Court to reverse the decision of the Fifth District Court of Appeals and rule that public bodies cannot engage in purposeful, non-public e-mail communications to make policy decisions without complying with Ohio's Sunshine Law.

Ohio provides only one way for public bodies to decide questions of public policy: an open meeting that complies with Ohio's Sunshine Law. Yet here, appellees engaged in a concerted, non-public email campaign to decide how the public body would respond to a newspaper editorial criticizing its policies, all without the benefit of the contemporaneous public access and participation required by the Sunshine Law.

Thus, regardless of whether the Board's email communications qualify as a "meeting," the Board exceeded its authority by debating, deciding, and implementing public policy outside the public's view. The Sunshine Law requires decisions on public matters to be made in the open, not in secret. This Court should so rule, and should reverse the decision below.

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.

I. Ohio's Sunshine Law requires public officials to debate and shape policy in open meetings.

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. Thus, the General Assembly has directed courts to interpret the Sunshine Law "liberally . . . to require public officials to take official action and to conduct all deliberations upon official business only in open meetings." R.C. 121.22(A).

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 recognized that "[o]ne of the strengths of American government is the right of the public to know and understand the actions of their elected representatives." White v. Clinton Cnty. Bd. of Commrs., 76 Ohio St.3d 416, 419, 667 N.E.2d 1223 (1996).

That fundamental interest "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." 76 Ohio St.3d at 419.

Indeed, "public scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable." 76 Ohio St.3d at 420.

This democracy-sustaining purpose cannot survive if a quorum of a public body can avoid the contemporaneous public scrutiny demanded by the General Assembly by retreating to their email inboxes to establish or carry out public policy. But affirming the decision below would have exactly that effect.

Here, the Fifth District Court of Appeals ruled that the Sunshine Law's definition of "meeting" did not encompass a protracted email exchange between the defendant members of the Olentangy Board of Education. During that email exchange, the four board members proposed, discussed, and ultimately implemented an official response to a *Columbus Dispatch* article criticizing one of their recently enacted policies.

By ruling that the Sunshine Law's definition of a "meeting" does not apply to these policymaking emails, the Fifth District opened a loophole for public bodies to evade public scrutiny by deciding and implementing public policy entirely in secret, without the benefit of open meetings. And it did so without identifying any authority

for the Board to conduct public business in any way other than though a public meeting covered by the Sunshine Law.

Left untouched, every public body in Ohio can infer from the Fifth District's ruling that by shaping and implementing public policy outside the context of a "meeting," they will be exempt from the public-access requirements of Ohio's Sunshine Law. If public bodies can lawfully deliberate and decide issues via email—even if they must 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.

II. The Olentangy School Board has no authority to depart from the Sunshine Law in conducting public business.

Like all public bodies, "[s]chool boards are creations of statute and have no more authority than what has been conferred on them by statute or what is clearly implied" by that specific grant of authority. Wolf v. Cuyahoga Falls City Sch. Dist. Bd. of Educ., 52 Ohio St. 3d 222, 223, 556 N.E.2d 511, 513 (1990); Hall v. Lakeview Local School Dist. Bd. of Edn., 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992).

Both 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.

This leaves only one inference for other public bodies—namely, if the Sunshine Law doesn'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 government business without the public scrutiny demanded by the Sunshine Law.

Yet neither the courts below nor the Board has identified any authority for the Board to do what it did. If, as the courts below ruled, the Sunshine Law doesn't apply, then the Board needs another source of authority for its members to engage in purposeful e-mail communications to issue a public statement clarifying what the Board's policy is or means. The absence of any such authority—and neither the Board nor the courts below point to one—renders the Board's actions *ultra vires*. Thus, the Board members can't lawfully engage in informal decision-making by e-mail, which is what they did here. E.g., In re Cattell, 146 Ohio St. 112, 64 N.E.2d 416 (1945).

III. The Sunshine Law does not authorize public bodies to deliberate and decide issues of public policy except by open meetings.

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. 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 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 rejected a similar attempt to avoid the Sunshine Law in State ex rel. Cincinnati Post v. City of Cincinnati, 76 Ohio St.3d 540, 544, 668 N.E.2d 903 (1996). 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, without opening the sessions to the public.

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. Thus, 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 the city identified no authority for council's members collectively to shape and evaluate public policy in that round-robin fashion. And this Court recognized that council had no such authority, emphatically and unanimously rejecting 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 initial approval of the response 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. If they were simply issuing individual statements, they would have no cause to later ratify them on behalf of the school board.

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 supplant the public meeting requirement by engaging in concerted, purposeful e-

mail discussions to arrive at a decision by consensus about a matter of public 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.

Because Ohio's Sunshine Law contemplates only one mechanism for debating and deciding issues of public policy, 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, this would require the Board 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. See R.C. 122.21(C).

Here, having failed to hold an in-person public meeting or its functional equivalent, the Board acted unlawfully. Accordingly, this Court should reverse the decision below ratifying the Board's conduct.

Conclusion

Ohio's Sunshine Law protects the public's fundamental right to monitor the government and ensure that their representatives are working for the public benefit. To protect that democracy-sustaining principle, the Sunshine Law contemplates only one way of conducting public business: open meetings. Accordingly, this Court should reverse the decision below and bar public bodies from avoiding Ohio's open meetings law by shaping and implementing public policy through private electronic communications.

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Certificate Of Service

The undersigned attorney hereby certifies that a copy of this Brief of amici curiae Ohio Coalition for Open Government, Common Cause Ohio, and the League of Women Voters of Ohio in support of Appellant Adam J. White of was sent by ordinary U.S. mail to Counsel for Appellee David King, Julie Feasel, Stacy Dunbar, Kevin O'Brien, Olentangy Local School District Board of Education, John C. Albert, Esq., CRABBE, BROWN & JAMES, LLP, 500 S. Front Street, Ste. 1200, Columbus, OH 43215 on October 20, 2014 and to Counsel for Appellant Adam J. White, Phillip L. Harmon, 6649 N. High St., Suite 105 Worthington, OH 43085.

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