Supreme Court of Ohio Clerk of Court - Filed July 31, 2018 - Case No. 2018-0440

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. MORE BRATENAHL, ET AL.,	:	On Appeal from the Court of Appeals for Cuyahoga County, Eighth Appellate District
Relator-Appellant,	:	
	:	Court of Appeals Case No. 105281
v.	:	
	:	Supreme Court Case No. 2018-0440
VILLAGE OF BRATENAHL, ET AL.,	:	
Respondents-Appellees.	:	

BRIEF OF AMICI CURIAE OHIO COALITION FOR OPEN GOVERNMENT, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND OHIO ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLANT

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I. Introduction and Statement of Facts

Local Ohio governments cannot be permitted to vote in secret. Doing so violates the Ohio Legislature's prohibition on secret meetings codified in Ohio's Open Meetings Act. R.C. 121.22 ("OMA"). Appellees (collectively, "Bratenahl") violated the OMA when they cast secret votes during a government meeting in January 2015. In the ruling at issue in this appeal, the Eighth District Court of Appeals allowed Bratenahl to vote by secret ballot without any statutory basis and in contradiction of the OMA.

If permitted to stand, the decision below will allow local governments to effectively operate in secret, impairing the public's ability to hold their elected representatives accountable. Ohio law affords Ohioans "crucial rights" to know how their government operates. *State ex rel. Long v. Council of the Village of Cardington*, 92 Ohio St.3d 54, 60-61, 748 N.E.2d 58 (2001). Essential to those "crucial rights" is the right to know *how* elected officials vote *when* they cast their vote. The Eighth District's decision undermines these basic principles and the OMA, and it should be reversed.

Amici curiae adopt the statement of the case and statement of facts as set forth in Appellant Patricia Meade's ("Meade") merits brief. (Appellant Br. at 1-4.) However, the unusual and illicit nature of the votes Bratenahl conducted and its belated and inadequate attempt to remedy those unlawful actions warrant emphasis.

On January 21, 2015, Meade attended a meeting of the Bratenahl village council ("Council") at which the Council was to select a president pro tempore. (Appellate Journal Entry and Opinion, *State ex rel. MORE Bratenahl v. Village of Bratenahl*, 8th Dist. Cuyahoga No. 105281, 2018-Ohio-497, ("App. Op."), at ¶ 16, Appendix ("Appx.") 11-12.) After two councilmembers were nominated to serve as president pro tempore, one member of Council expressed a desire to take the vote by secret ballot, declaring, "We've always done that."

(Amended Compl., ¶ 26, Appx. 41; Answer, ¶ 26, Appx. 24-25; Exh. A to Amended Compl., Official Record Transcript, at 16:19-20, Appx. 63.) At least one councilmember doubted that voting by secret ballot was legal. (Exh. A to Amended Compl., Official Record Transcript, at 16:21-24, Appx. 63.) Due to various issues, Council conducted the vote for president pro tempore by secret ballot not once, but three times. (App. Op. at ¶¶ 16-17, Appx. 11-12.) During each vote, members of Council wrote the name of a chosen candidate on slips of paper—anonymously—and the votes were tallied by the village solicitor. (*Id.*; *see also* Amended Compl., ¶ 30, Appx. 42; Answer, ¶ 30, Appx. 25.)

The individual councilmembers' votes—i.e., which candidate each councilmember voted for—was not disclosed during or immediately after the January 21, 2015 meeting; some of that information was produced only during discovery after Meade sued Bratenahl and its councilmembers for violating the OMA (the "Lawsuit"). (App. Op. at ¶ 20, n.4, Appx. 14; *see also* Exh. A and B to Appellant's Mot. for Reconsideration, Appx. 121-141, 142-162.) Meade did not request the slips of paper used by the Council to conduct its votes for president pro tempore during or after the January 21, 2015 meeting and did not make a public records request for the slips of paper. Meade obtained the "complete" record of Council's votes—slips of paper with names on them—only in the context of the Lawsuit. Even then, the "ballots" produced by Bratenahl do not identify every councilmember's vote. (Exh. B to Appellant's Mot. for Reconsideration, Appx. 142-162.) In fact, the ballots fail to identify one voter during each round of voting and identify a councilmember as having voted twice in the second round. (*Id.*) Thus, either some councilmembers failed to vote in the second round or Bratenahl made a serious error in its reconstruction of the votes after the fact and while the Lawsuit was pending.

II. Statement of Interest of Amici Curiae

Amicus curiae the Ohio Coalition for Open Government ("OCOG") is a nonprofit corporation whose members include Ohio newspapers, broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public bodies to hold public meetings and that obligate public offices to make their records available for public inspection and copying. OCOG's work encompasses the overall issue of access to government and transparency in all aspects of government. The coalition was formed by the Ohio News Media Foundation. OCOG is operated for charitable and educational purposes by conducting and supporting activities to benefit those who seek compliance with public access laws and open meeting laws. For 25 years, OCOG has worked to ensure that local governments in Ohio remain governments of the people, by the people, and for the people.

Amicus curiae the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amicus curiae the Ohio Association of Broadcasters ("OAB") is the trade association of local radio and television stations in Ohio. The association's members include more than 300 radio stations and 50 television stations delivering news programming in virtually all of Ohio's 88 counties, including the state's large metropolitan areas, smaller cities, and rural areas.

Amici curiae offer this brief in support of Appellant, who seeks to reverse the Eighth District's ruling allowing local governments to vote by secret ballot. This case presents important issues regarding open government, interpretation of the OMA's mandates, and

Ohioans' fundamental right to know how their local governments operate. As such, amici and their members will be directly and negatively affected by the Eighth District's ruling and seek to reverse it.

III. Argument

> **Sole Proposition of Law:** The Eighth District erred to the detriment of free and open government and the Ohio public in accepting Appellees' belated and incomplete corrections to their secret-ballot violations of the Open Meetings Act's mandate of public meetings.

The OMA provides that "[a]ll meetings of any public body are declared to be public meetings open to the public at all times." R.C. 121.22(C). A "public body" includes a "council" of a "township" and any committees or subcommittees thereof. R.C. 121.22(B)(1)(a)-(b). Bratenahl does not contest that its Council is a public body, or that the Council held meetings at the times pertinent to this lawsuit. (Amended Compl., ¶¶ 16, 48, Appx. 40, 46; Answer, ¶¶ 16, 48, Appx. 23-24, 27.) Thus, the sole issue here is whether the Eighth District improperly allowed Bratenahl to violate the OMA by voting by secret ballot.

Appellant Meade sought to remedy Bratenahl's violations of the OMA. In response, the Eighth District created a remarkable exception to the OMA. First, the decision below allows a public body to plainly violate the law and vote by secret ballot, so long as the public body later undertakes *some* effort to publicize its secret vote, even if those efforts are incomplete and take place during litigation over the alleged OMA violations. Second, the Eighth District's decision provides exceptions—non-existent in the statute—by which a public body may evade the OMA's plain mandate that all meetings of a *public* body are *public* meetings "at all times." As it stands, the Eighth District's decision permits secret votes in direct contravention of the OMA. Taken to its logical conclusion, the decision below will permit local governments to circumvent the OMA,

undermining the OMA's purpose to ensure transparent local governments. The Eighth District's ruling should be reversed.

A. The OMA's Plain Language and Underlying Policy Prohibit Secret Votes.

Because it permits secret balloting, the decision below restricts the public's right to know how government representatives vote in real time. A public meeting is not "public" in any sense of the word unless the electorate knows immediately how each member of the government entity holding the meeting voted on any issue presented. *See White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 419, 667 N.E.2d 1223 (1996) ("[P]ublic scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable."). Elected government officials, like Bratenahl's Council, are held accountable through the ballot box. Voters can hold their elected officials accountable only if they know how those officials perform their duties. Given that elected members of bodies like the Council perform their duties principally by voting, Ohioans must be able to track these votes contemporaneously and in public. The decision below undermines these fundamental principles and prevents Ohio citizens from observing the deliberations and decisions of local governments.

The OMA's purpose is to assure accountability of elected officials by prohibiting secret deliberations on public issues. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 544, 668 N.E.2d 903 (1996). The OMA facilitates public understanding of government actions because, "[i]f the public can understand the rationale behind its government's decisions, it can challenge or criticize those decisions as it finds necessary," a fundamental ingredient to American democracy. *White*, 76 Ohio St.3d at 419, 667 N.E.2d 1223. Hence, "the entire [OMA] process . . . prevents important decisions from being made behind closed doors." *Id.* The OMA is to "be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings," unless specifically

exempted. R.C. 121.22(A). Here, Bratenahl satisfied neither the letter nor the spirit of the OMA, and the Eighth District's decision to the contrary should be reversed.

The Council conducted the vote for president pro tempore by secret ballot three times. (App. Op. at ¶¶ 16-17, Appx. 11-12.) During each vote, councilmembers wrote the name of a chosen candidate on slips of paper without identification, and the village solicitor tallied the votes. (*Id.*; *see also* Amended Compl., ¶ 30, Appx. 42; Answer, ¶ 30, Appx. 25.) Although the village solicitor announced the results of each vote—i.e., an incorrect vote, a tie, and the election of a candidate—the identity of the voters and which candidate each councilmember voted for was not disclosed during or immediately after the meeting and was produced only during the Lawsuit. (App. Op. at ¶ 20, n.4, Appx. 14; *see also* Exh. B to Appellant's Mot. for Reconsideration, Appx. 142-162.) The "ballots" produced by Bratenahl do not identify every councilmember's vote. (Exh. B to Appellant's Mot. for Reconsideration, Appx. 142-162.) In fact, the ballots fail to identify one voter during each round of voting and identify a councilmember as having voted twice in the second round. (*Id.*) Thus, either some councilmembers failed to vote in the second round or Bratenahl erred in reconstructing the votes based on councilmembers' "recollection." Either way, the public did not know then and still does not know how all Bratenahl councilmembers voted during the January 21, 2015 meeting. The Eighth District incorrectly accepted this procedure as compliant with the OMA.[1]

Bratenahl admits that it neither announced nor published the tally of the first and third secret ballots. (*See* Amended Compl., ¶¶ 39-40, Appx. 44; Answer, ¶¶ 39-40, Appx. 26.) Further, Bratenahl admits that it conducted the second vote by secret ballot and merely

[1] Bratenahl did not invoke R.C. 121.22(G), the OMA's executive session provision. Regardless, that provision permits only limited, private discussion, and no voting or official action may take place during an executive session. R.C. 121.22(H).

announced the result as a tie. (Amended Compl., ¶¶ 34-35, Appx. 43; Answer, ¶¶ 34-35, Appx. 25-26.) Finally, Bratenahl admits that the election was public business at an otherwise public meeting. (Amended Compl., ¶ 57, Appx. 47; Answer, ¶ 57, Appx. 28.) This should end the inquiry: Bratenahl held secret, non-public votes and prevented the public from knowing how every councilmember voted. This violates the plain language of the OMA. R.C. 121.22 ("All meetings of any public body are declared to be public meetings open to the public at all times.").

However, the Eighth District reasoned that, because the votes were "cast in open session" (by secret ballot) and were "made public record" (only during the Lawsuit), "the votes were not 'secret.'" (App. Op. at ¶ 20, Appx 14.) But Meade's Lawsuit and request for the voting records as part of that Lawsuit do not cure Bratenahl's underlying violation of the OMA. Further, Bratenahl's later production of the slips of paper used to vote, with the names of *most* of the voting councilmembers appended via post-it note, does not retroactively make the secret vote "public." This defies both logic and the definition of "open to the public," as the OMA uses that phrase and as Ohio courts interpreted it.[2]

Bratenahl's supposed later "cure" of its secret ballots, accepted by the Eighth District, is insufficient to inform citizens about Council's votes. That is, Bratenahl publicized the ballots only after being sued, but these public versions of the ballots remain incomplete. The court's *ex post* excusal of Bratenahl's OMA violations still does not guarantee that the public will receive access to complete or accurate records of supposedly public votes. The records provided to Meade failed to identify voting councilmembers and indicated that one member of council voted

[2] Bratenahl's internal rules or procedures related to this matter are of no consequence. Section 731.45 of the Ohio Revised Code authorizes a municipal corporation to "determine its own rules." However, the Ohio Constitution forbids a municipality from enacting regulations in conflict with Ohio's general laws. Ohio Constitution, Article XVIII, Section 3. Thus, R.C. 731.45 does not permit Bratenahl to make an end-run around the OMA.

twice during the second round. (Exh. B to Appellant's Mot. for Reconsideration, Appx. 142-162.) Thus, even as this litigation continues, the citizens of Bratenahl lack access to records of allegedly "public" votes by their elected council at "public" meetings. The defects in Bratenahl's post hoc approach, endorsed by the Eighth District, proves the prophylactic value of citizens knowing *how* elected representatives vote *when* they cast those votes. For this reason, the Eighth District's decision should be reversed.

B. The Issues of This Case Are Not Moot.

Bratenahl's argument that its after-the-fact disclosure of the ballots—during litigation—somehow moots this appeal is wrong. (Bratenahl's Mem. in Opp. to Jurisdiction ("Mem. in Opp.") at 1.) An issue is moot "when it has no practical significance and, instead, presents a hypothetical or academic question." *State ex rel. Ford v. Ruehlman*, 149 Ohio St.3d 34, 2016-Ohio-3529, 73 N.E.3d 396, ¶ 55 (2016). This appeal is not moot because Bratenahl has not cured its violations of the OMA: some information about the councilmembers' votes still has not been disclosed. (Exh. B to Appellant's Mot. for Reconsideration, Appx. 142-162.) Bratenahl's violations of the OMA also are not moot because if the Eighth District's (and trial court's) decision is overturned, an injunction *must* issue to compel Bratenahl to comply with the OMA prospectively. R.C. 121.22(I)(1) ("Upon proof of a violation . . . of this section . . . , the court of common pleas *shall* issue an injunction to compel the members of the public body to comply with its provisions."). (Emphasis added.)

Upon reversal of the Eighth District and after remand, an injunction could cover all prospective elections of presidents pro tempore in the village, or all future votes by Council. Moreover, if this court overturns the Eighth District's (and trial court's) rulings and an injunction issues, then the lower court must impose a civil forfeiture of $500 on Bratenahl and award

Meade costs and attorneys' fees. R.C. 121.22(I)(2)(a) ("If the court of common pleas issues an injunction . . . , the court *shall* order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction . . . all court costs and . . . reasonable attorney's fees"). (Emphasis added.) Bratenahl's later "remedial" but inadequate attempts to cure its violation of the OMA are irrelevant to this analysis.

Moreover, Meade's claims are subject to a mootness exception long recognized by this Court because they are "capable of repetition, yet evading review." *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 29 (2016) (citations omitted). This exception to the mootness doctrine applies where "(1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000). Bratenahl's violation of the OMA meets both prongs. First, because secret ballots can be disclosed by the public body that employed them—though such disclosure was incomplete here—litigation over a secret vote in violation of the OMA may not be complete until after the public body has chosen to (partially) disclose the identities of those who cast the ballots. Similarly, Bratenahl should not have the power to deliberately moot this appeal by releasing—or partially releasing—the ballots during litigation. Second, if the Eighth District's holding in violation of the OMA is permitted to stand, there is a reasonable likelihood that Bratenahl will continue to conduct secret votes and thus repeat this controversy. (Exh. A to Amended Compl., Official Record Transcript, at 16:19-20, Appx. 63) (member of Council noting that Bratenahl has "always" conducted votes by secret ballot). Accordingly, even if Bratenahl had mooted Meade's

claims, they are still justiciable and this Court should overturn the Eighth District's holding as contrary to law.

C. Citizens Should Not Be Forced to Compel Government Compliance with the OMA.

Bratenahl blames Meade for its violation of the law. In opposing jurisdiction in this case, Bratenahl argued that amicus OCOG "conveniently [left] out the pertinent fact that Appellant never requested copies of the ballots before filing this lawsuit." (Mem. in Opp. at 13.) Bratenahl also posited that the admitted ballot "*irregularities*" were not "questioned or challenged by Appellant," and that these "irregularities do not negate the fact that the votes were part of the record." (*Id.*) (Emphasis added.) In Bratenahl's view, the OMA permits a local government to piece together an "open" meeting from a variety of sources, whether such sources were once secret or now available, and whether they were contemporaneous or occurred later. Indeed, Bratenahl posited that its errors were rectified after the fact because "the contemporaneous ballots were handwritten in open session, read in open session and made part of the public record without any intent to conceal information from the public." (Mem. in Opp. at 14.)

Bratenahl's view falls far short of the OMA's mandates. The OMA places the onus of conducting public meetings on the public body subject to the law. R.C. 121.22(A) and (C). The law does not require private citizens to *request* a public meeting and it does not require some sort of threshold determination as to whether business at the meeting should be conducted in secret. Other than its executive session provision, which does not permit voting during an executive session, the OMA also does not grant discretion to public bodies as to when to conduct meetings, let alone votes, in public. R.C. 121.22(H).[3] Rather, the OMA requires that "[a]ll meetings of

[3] Indeed, a resolution or formal action is invalid unless adopted at a public meeting. *See* R.C. 121.22(H) ("A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.").

any public body" be "public meetings open to the public at all times." R.C. 121.22(C). Thus, that Meade "never requested copies of the ballots" before filing suit is irrelevant. It was *Bratenahl's* duty to conduct the meeting and any votes in public, not *Meade's* duty as a private citizen to request or compel information about the vote after that vote was taken.

Simply because the (anonymous) ballots were later "available for public inspection" does not mean that Council's vote was public or took place at a "public meeting," as required by the OMA. (*See* Mem. in Opp. at 6). As this Court has previously noted, public bodies subject to the OMA should not be permitted to subvert the intent of the OMA through surreptitious communications. *White v. King*, 147 Ohio St.3d 74, 2016-Ohio-2770, 60 N.E.3d 1234, ¶ 18 (2016) ("Allowing public bodies to avoid the requirements of the Open Meetings Act by discussing public business via serial electronic communications subverts the purpose of the [OMA]."). That the ballots were "maintained" by Bratenahl is of no consequence. (Mem. in Opp. at 6.) The secret balloting at issue here is the type of surreptitious communication this Court forbade in *King* and undermines the intent of the OMA. By voting in secret, Bratenahl prevented its citizens from knowing how the Council was operating at the January 21, 2015 meeting. Bratenahl's later actions, inadequate as they are, are immaterial to the blatant violation of the OMA it committed.

Further, Ohio's public records law, R.C. 149.43, has nothing to do with the OMA. The OMA does not reference or otherwise incorporate the public records statute. *See generally* R.C. 121.22. Nor does the public records law reference the OMA. R.C. 149.43. Thus, although they serve equally critical functions related to government transparency, the two statutes are entirely separate. Consequently, Bratenahl's argument that Meade should have made a request for the ballots at issue before filing suit has no basis in law.

Bratenahl's arguments that Meade should have requested the ballots before suing and that Bratenahl "maintained" copies of the ballots after the vote also fail for two practical reasons. First, even if Meade had requested the ballots immediately after the vote or meeting in January 2015, she would not have known which members of Council voted for which candidate because the names of the voters were not appended to each ballot until the Lawsuit began and the parties conducted discovery. (*See* Exh. A and B to Appellant's Mot. for Reconsideration, Appx. 121-141, 142-162; *see also* Mem. in Opp. at 6-7.) Second, Bratenahl never "maintained" the ballots in any useful manner that would permit a member of the public to know how each councilmember voted. Bratenahl essentially conflates its belated attempt to *correct* its violation of the OMA with actual *compliance* with the OMA. However, by later having councilmembers add their names to the ballots, Bratenahl cannot shift the burden of compliance with OMA to Meade or the public, since the identity of the voters and their chosen candidate was not known during or after the January 2015 meeting and, in fact, was only (mostly) revealed *after this litigation began*.

In short, Bratenahl's later (partial) disclosure of the ballots cannot rectify Bratenahl's violation of the OMA. This is particularly true because the councilmembers' votes at the 2015 meeting were later identified only "to the best of their recollection." (Mem. in Opp. at 7.) Moreover, it is still not apparent from the record in this case if the ballots have ever been "made part of the public record." Although the ballots were produced in discovery, Bratenahl has not identified any way in which the ballots have been made part of the village's official records. (Mem. in Opp. at 2.)

Accordingly, the Eighth District's interpretation of the OMA places an undue burden on citizens. The decision below is not based on any willing public disclosure of the secret ballots.

Rather, it effectively requires citizens to sue public bodies to obtain access to something that should have been done in public in the first place. Under the Eighth District's scheme, a citizen must: attend a council meeting, observe a secret vote, request the ballots used in the secret vote, hope for the public body's revelation of at least some information related to the vote, and then, if the information is still not complete, file a lawsuit and at best receive a partial, modified, and reconstructed record of the allegedly public action. This negates the OMA's purpose and forces private citizens to engage in costly litigation to obtain partial records of votes that should have occurred in public in the first place.

D. The Decision Below Contradicts Established Ohio Authority.

As this Court has recognized, "[o]ne 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*, 76 Ohio St.3d at 419, 667 N.E.2d 1223. Under this principle, two Ohio authorities have disagreed with the Eighth District's approach and affirmed Ohioans' right to know how a public body votes and deliberates in real time.

First, the Eighth District's decision conflicts with a 1997 decision from the Fifth District Court of Appeals. The Fifth District held that members of a local public body cannot conduct public proceedings inaudibly and that doing so violates the OMA because "whispered" proceedings withdraw the body's deliberations from the public eye. *Manogg v. Stickle*, 5th Dist. Licking No. 97 CA 104, 1998 WL 516311 (Apr. 8, 1998), *aff'd after remand*, 5th Dist. Licking No. 98CA00102, 1999 WL 173275 (Mar. 15, 1999). Second, nearly seven years ago, the Attorney General announced that public bodies "may not vote in an open meeting by secret ballot." 2011 Ohio Atty.Gen.Ops. No. 2011-038, *8 ("2011 Opinion"). The decision below conflicts with *Manogg*'s holding and the Attorney General's 2011 Opinion. The weight of

pertinent Ohio authority on this issue demonstrates that the Eighth District did not correctly interpret the law.

1. The Fifth District Has Held Contrary to the Ruling Below.

The Fifth District Court of Appeals held that a lack of audible votes violates the OMA. *Manogg*, 1998 WL 516311. In that case, the appellate court affirmed that the "failure to make audible votes" meant a meeting was not "open to the public" because the members of the public body, "by their actions of whispering and passing documents among themselves, circumvented the intent of R.C. 121.22." *Id.* at *2. The court explained that the meeting "was open to the public," insofar as the public could sit in the same room where the meeting was conducted, but "the meeting was not open to the public" because "the public could not hear the business being transacted . . . ." *Id.* at *4.

The same is true here: by writing their ballots on slips of paper and passing them to the village solicitor, Bratenahl circumvented the intent of R.C. 121.22 because the vote was only "public" in the sense that the public could sit in the room while the vote was taken. The meeting was not truly public because citizens could not determine how each councilmember voted as he or she voted. In short, the whispered proceedings from *Manogg* are no different from the secret votes at issue here. Just as in *Manogg*, during Bratenahl's secret votes, Meade and others were permitted to sit in the same room as Council, but "the public could not [observe] the business being transacted," i.e., how each councilmember voted. The Eighth District's opinion failed to distinguish *Manogg* or address its sound reasoning.

Bratenahl unsuccessfully attempts to distinguish *Manogg* by arguing that "there is no conflict" between *Manogg* and this case "because the 'whispered proceedings' in *Mahogg* [sic] were never made part of the record and the trustees clearly intended to conceal information from

the public." (Mem. in Opp. at 14.) Bratenahl's argument fails for two reasons. First, that *Manogg*'s secret votes were "never made part of the record" or that the ballots here—incomplete as they are—were made part of the "record" in the Lawsuit is irrelevant. The issue in this appeal is public access to a public meeting, not a public records request. Bratenahl essentially seeks to create an unwritten exception in *Manogg*, whereby the public body in that case could have corrected its violation of the OMA through a later announcement—during litigation—of how each member voted. But this is not what the OMA allows and not what *Manogg* held. Rather, the violation of the OMA is complete when the public body prevents the public from knowing its activities, just as occurred in *Manogg* and in this case. In both *Manogg* and this case, a public body conducted a secret vote at a public meeting and prevented the public from observing the business of the public body. In both cases, the public body prevented members of the public from knowing how their government was functioning in real time. In both, post hoc efforts to record the activities of the body could not correct the wrong that had already occurred, i.e., depriving the public of the ability to know, monitor, and participate in the body's activities. Thus, *Manogg*'s reasoning concerning public access to public meetings is on point, compelling, and underscores the Eighth District's error in this case.

Second, Bratenahl misinterprets *Manogg*, which did not hold that a public body must "intend to conceal" its actions. Indeed, the court in *Manogg* did not so hold because such an "intent" requirement is not part of the text of the OMA. The *Manogg* court noted that, in that case, the public body had "intentionally prevented the audience from hearing or knowing what business was being conducted at the meeting." *Manogg*, 5th Dist. Licking No. 97 CA 104, 1998 WL 516311, at *2. However, the court did *not* hold that a finding of intent was necessary to support a violation of the OMA. *Id.*

Even if *Manogg* stood for the existence of an unwritten intent requirement in the OMA, then under *Manogg*, preventing the public from knowing a public body's business demonstrates intent to conceal the information from the public. Bratenahl met that standard by choosing to vote with secret ballots. Indeed, Bratenahl admits that the purpose of the secret votes was to "prevent potential influence and public pressure." (Mem. in Opp. at 2, 6.) But the OMA seeks precisely to protect the ability of citizens to learn of their government's actions and to exert "public pressure" to hold government officials accountable in real time. *White*, 76 Ohio St.3d at 419 ("[P]ublic scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable."). Bratenahl's specious assertions demonstrate precisely why the OMA exists and why Council's conduct was contrary to law.

2. The Ohio Attorney General Has Issued an Opinion Contrary to the Eighth District's Opinion in this Case.

In 2011, the Ohio Attorney General determined that the State Board of Education, a public body under the OMA, "may not vote in an open meeting by secret ballot." 2011 Ohio Atty.Gen.Ops. No. 2011-038, at *1. The Attorney General so determined because "a meeting is not 'open' to the public where members of a public body vote by way of secret ballot," i.e., "a process of voting by slips of paper on which the voter indicates his vote." *Id.* at *4. The Eighth District acknowledged this opinion but held that Bratenahl's votes were not "secret" because they were written during an open session.[4] (App. Op. at ¶ 20, Appx. 14.)

Bratenahl voted by "secret ballot," just as the Attorney General defined the term. The Attorney General's opinion plainly states that a vote by secret ballot in "open session" does not cure the ballot's violation of the OMA. But, as with its interpretation of *Manogg*, the Eighth

[4] Although not binding on the judiciary, Ohio courts give persuasive weight to Ohio Attorney General opinions. *State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 57 (2012).

District read into the OMA and Attorney General's opinion a nonexistent intent requirement, hinging its excusal of Bratenahl's actions on the Council's lack of "attempt to conceal" information from the public. (*Id.*) This is factually wrong because Bratenahl did conceal, during and after the meeting, which councilmembers voted for which candidate. Further, the OMA does not direct local governments to "attempt" to hold public meetings or fault them for an "intent" to conceal information. Rather, the OMA mandates that *all* meetings of a public body *must* be open to the public, unless exempted under a narrow class of exceptions. R.C. 121.22(A), (C); *see also State ex rel. Randles v. Hill*, 66 Ohio St.3d 32, 35, 607 N.E.2d 458 (1993) (holding that there are "only two defenses to claims of noncompliance" with the OMA: (1) that an action was excepted from the open-meetings requirement, or (2) that public access was provided). As the Attorney General has determined, writing on slips of paper in open session, just as Bratenahl did, does not meet the OMA's public meeting requirement.

Bratenahl argues that the Ohio Attorney General's 2011 Opinion applies only to the Ohio Board of Education. (Mem. in Opp. at 7.) Thus, Bratenahl posits, the Eighth District "properly differentiated" the Attorney General's 2011 Opinion from this case. (*Id.* at 2.) But this is incorrect. In fact, the 2011 Opinion explicitly noted its broader application:

> Voting by secret ballot is at variance with the purpose of the open meetings law and only denies the people their right to view and evaluate the workings **of their government**. Accordingly, **a public body that is subject to the requirements of the Ohio open meetings law may not vote in an open meeting by secret ballot.**

2011 Ohio Atty.Gen.Ops. No. 2011-038 at *8 (emphasis added). Thus, although the 2011 Opinion was in response to the State Board of Education's request and obviously applied to the State Board of Education, it was intended as broader guidance on the application of the OMA, which the Attorney General interpreted to prohibit public bodies from voting by secret ballot.

Moreover, the Eighth District failed to "distinguish" the 2011 Opinion from the present case. The 2011 Opinion plainly stated: "Voting by secret ballot is a process of voting by slips of paper on which the voter indicates his vote." *Id.* at *2. The 2011 Opinion prohibited public bodies from voting by secret ballot. *Id*. at *8. The Eighth District noted that each member of Council voted by writing the name of their chosen president pro tempore candidate on a slip of paper, without more, and that Bratenahl's solicitor then tallied the votes without identifying who had voted for which candidate. (App. Op. at ¶¶ 16-17, Appx. 11-12.) Nonetheless, the court held that, "[b]ecause the votes were cast in open session and were made public record, the votes were not 'secret' like the votes in the Attorney General's opinion." (App. Op. at ¶ 20, Appx. 14.) Thus, the Eighth District's opinion not only failed to "distinguish" the 2011 Opinion, but it recited the 2011 Opinion's precise reasoning and simply refused to apply it to nearly identical facts.

Finally, in overruling a 1980 Ohio Attorney General Opinion that had permitted secret balloting in some instances, the 2011 Opinion specifically noted that, since 1980, "Ohio courts, including the Ohio Supreme Court, repeatedly have endorsed a liberal reading of the open meetings law's requirements in the interest of ensuring that the purpose of the law is upheld and preventing public bodies from evading that purpose." 2011 Ohio Atty.Gen.Ops. No. 2011-038, at *8. Thus, contrary to Bratenahl's arguments, the 2011 Opinion endorsed the liberal reading of the OMA required by the Ohio Legislature in R.C. 121.22(A) and consistently interpreted and applied by this Court. Accordingly, the weight of apposite Ohio authority demonstrates the error of the Eighth District's holding, which should be reversed.

E. The Ohio Public's Right to Know How Government Conducts Business Mandates Reversal of the Eighth District's Decision.

"When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir.2002). Bratenahl's desire to control the flow of information from Council votes constitutes misinformation because the record of votes provided to Meade remains incomplete and inaccurate, and she and the public had a well-established right under the OMA to know how councilmembers voted at the time they voted.

Moreover, appending councilmembers' names to the slips of paper on which they voted—after the fact and during litigation—has no guarantee of trustworthiness. Bratenahl asks Meade, other citizens, and this Court to trust what it did with the ballots after the meeting and during discovery. As the United States Supreme Court noted, this country's Founders "did not trust any government to separate the true from the false for us." *Kleindienst v. Mandel*, 408 U.S. 753, 773, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (quoting *Thomas v. Collins*, 323 U.S. 516, 545, 65 S.Ct. 315, 89 L.Ed. 430 (Jackson, J., concurring)). Bratenahl should not be permitted to rest on its own assurances that it has properly informed the public about each councilmember's vote.

The Eighth District's decision sets a dangerous precedent. If not reversed, the ruling will permit local governments to vote by secret ballot on *any* matter, as long as they later produce *some* evidence of the vote in litigation. Moreover, the public, when confronted by a local body voting by secret ballot, will be required to sue to learn how each elected official voted. In this way, the Eighth District's ruling misinterprets the OMA and effectively closes meetings to the public. The ruling should be overturned.

IV. Conclusion

The free and public exchange of information is crucial to the continued vitality not just of government in general, but also local Ohio governments. As other courts have recognized, because "[d]emocracies die behind closed doors," the public's right to access information about their government must be protected. *Detroit Free Press*, 303 F.3d at 683. The Ohio Legislature chose to do so explicitly through the OMA. Thus, for all the foregoing reasons, Amici Curiae respectfully request reversal of the Eighth District's decision.

Respectfully submitted,

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