In the
Supreme Court of Ohio

BRIAN M. AMES,	:	Case No. 2021-0706
	:	
Appellant,	:	On Appeal from the
	:	Portage County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
ROOTSTOWN TOWNSHIP	:	
BOARD OF TRUSTEES,	:	Court of Appeals
	:	Case No. 2020-P-0063
Appellee.		

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT BRIAN M. AMES

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INTRODUCTION

The Ohio government works for, and belongs to, the People of Ohio. As a result, Ohioans are entitled to know why their government does what it does. And so the Open Meetings Act requires all public bodies to "conduct all deliberations upon official business only in open meetings." R.C. 121.22(A). Put differently, the Act requires public bodies to publicly deliberate on public issues. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St. 3d 540, 544 (1996).

The Act punishes public bodies that violate the Act's requirements. Relevant here, it says a court, upon finding a violation, "shall issue an injunction to compel the members of the public body to comply with [the Act's] provisions." R.C. 121.22(I)(1). What is more, 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." R.C. 121.122(I)(2)(a). This case presents two questions. *First*, must courts issue a separate injunction for each violation? *Second*, must courts issue a separate $500 fine for each violation? The answer to the first question is "no." The answer to the second question is "yes." Because the Eleventh District held otherwise, *Ames v. Rootstown Twp. Bd. of Tr.*, 11th Dist. No. 2020-P-0063, 2021-Ohio-1369 ("App. Op."), this Court should reverse its judgment and remand so that the successful relator in this case may win a $500 award for every Open Meetings Act violation that he proved.

STATEMENT OF *AMICUS* INTEREST

The Attorney General "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. This case is of great interest to Ohio. It involves interpretation of an Ohio statute addressing the important subject of governmental transparency. As Ohio's chief law officer, the Attorney General has a duty to ensure the correct interpretation of the Open Meetings Act—an interpretation consistent with the policy choices the General Assembly has made.

STATEMENT OF THE CASE AND FACTS

Brian Ames filed this suit to stop the Rootstown Township Board of Trustees from violating the Open Meetings Act. He failed before the trial court. But he prevailed on appeal in the Eleventh Circuit. According to that court, Ames proved fourteen violations of the Open Meetings Act. App. Op. ¶3. The first six occurred in 2015, when "the Board entered into executive session to discuss matters with [its] attorney that [it] believed were covered by attorney-client privilege." *Id.* The Board also violated the Act "on eight dates in 2016 by entering into executive session to discuss economic development" without specifying "that the requirements of both subsections (a) and (b) of R.C. 121.22(G)(8) were met." *Id.*

After the Eleventh District found that the Board violated the Act, it remanded to the trial court. It instructed that court "to issue the injunction or injunctions," and to

award "the attorney's fees, court costs, and civil forfeitures, if any, to which Mr. Ames is entitled." App. Op. ¶4 (quoting *Ames v. Rootstown Twp. Bd. of Tr.*, 11th Dist. No. 2019-P-0019, 2019-Ohio-5412, ¶86). The Act says a court "*shall* issue an injunction to compel the members of the public body to comply with [the Act's] provisions," R.C. 121.22(I)(1) (emphasis added), and that it "*shall* order the public body that it enjoins to pay a civil forfeiture of five hundred dollars," R.C. 121.122(I)(2)(a) (emphasis added). Ames argued that these statutes entitled him to an injunction and a $500 award for each of the Board's fourteen violations. In other words, he claimed he was entitled to fourteen injunctions and to fourteen $500 awards totaling $7,000. The trial court rejected that argument. It issued a single injunction against future violations of R.C. 121.22(G)(8)(a), a single civil forfeiture of $500, and attorneys' fees. App. Op. ¶¶5, 17.

Ames appealed and the Eleventh District affirmed in relevant part. It held that, at least when a public body's violations are "technical" in nature, "the remedy is one injunction and one $500 civil forfeiture, not $500 per violation." App. Op. ¶35. This outcome, the court determined, was consistent "with the overarching purpose of the issuance of an injunction: 'to prevent a future injury, not to redress past wrongs.'" *Id.* (quotation omitted).

Ames asked this Court to review his case. The Court agreed to do so. *See 08/17/2021 Case Announcements*, 2021-Ohio-2742.

ARGUMENT

Proposition of Law:

> *If a plaintiff or relator proves that a public body violated the Open Meetings Act, courts need not issue a separate injunction for every violation, but they must issue a $500 forfeiture order for every violation.*

The "starting point" in every statutory interpretation case "is the statute's text." *Spencer v. Freight Handlers, Inc.*, 131 Ohio St. 3d 316, 2012-Ohio-880, ¶16. If that text is clear, the starting point is also the ending point. *Id*. So it is here. R.C. 121.22(I)(1) says that courts "shall" issue an injunction if they find a violation of the Open Meetings Act. And division (I)(2)(a) of the same statute provides: "If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, 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 and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees."

"Shall," in this context, means "must." *See Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, ¶13 (citations omitted); *see also State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶28; *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107 (1971). This means that courts have no discretion. Under R.C. 121.22(I)(1), courts *must* issue an injunction upon finding a violation. And under division (I)(2)(a), they *must* require the public body against which the injunction issued to pay a civil forfeiture of $500. *See generally Wilson*, 150 Ohio St.3d 368, ¶13.

That much is undisputed. The dispute here centers around a related issue: must courts issue a *separate* injunction and order a *separate* forfeiture for each violation? Ames argues that they must. The Attorney General agrees in part and disagrees in part. Ames is correct that the successful plaintiff or relator is entitled to one $500 award for every Open Meetings Act violation proved. But he is incorrect that lower courts must issue distinct injunctions for every violation. This brief will address those issues in turn.

A. Courts must issue a $500 forfeiture order for every Open Meetings Act violation the plaintiff or relator proves.

Consider first the question whether courts must issue a separate civil forfeiture for each violation. The statute says: "If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, 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 and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees." R.C. 121.22(I)(2)(a).

This language is best read to require a separate $500 award for each violation. That is the reading that best aligns with the punitive nature of the civil-forfeiture requirement. When a statute is susceptible of two readings, courts should choose a reading that ensures the law's "manifest purpose is furthered, not hindered." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* §4, p.63 (2012). Courts thus properly consult "the objective 'purpose' of a statute"—"the public good at which its provisions appear to be directed," as opposed to the subjective intentions of those who drafted it—

in determining what it means. *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (quotation omitted).

The purpose of the civil-forfeiture requirement in R.C. 121.22(I)(2)(a) is clear. The law is *not* designed to cover litigation costs; the provision governing court costs and attorney's fees does that. Nor is it purely prospective in nature; the requirement that courts issue an injunction ensures that the plaintiff wins forward-looking relief. Instead, the civil-forfeiture requirement serves two functions. *First*, it punishes, and thus deters, violations. *Second*, it gives would-be plaintiffs and relators incentive to bring suit. Both functions are best served by issuing a $500 penalty on a per-violation basis. To properly deter illegal conduct, it makes sense punish *each* illegal act. That is how the law normally works: the reckless driver gets a different ticket for every violation, the thief is punished for each theft, and so on. As the Fifth and Sixth Districts have long recognized, to "assess only one $500.00 civil forfeiture for repeated violations would do little to encourage compliance." *Specht v. Finnegan*, 149 Ohio App. 3d 201, 209 (6th Dist. 2002) (quoting *Manogg v. Stickle*, No. 98CA00102, 1999 WL 173275, at *2 (5th Dist., Mar. 15, 1999)). Reading the statute to require per-violation awards also accords with the law's second function—encouraging plaintiffs to sue to stop violations. After all, this reading allows for those who identify repeat violators to win a higher reward. And repeat violators are those most in need of being caught and stopped.

This interpretation finds further support in a different section of the Open Meetings Act. In particular, R.C. 121.22(A), which says that the Act "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." Here, the text can be read to require per-violation awards of $500. Indeed, when a statute says that violators must "pay a civil forfeiture of five hundred dollars," and is silent on what to do in cases involving multiple violations, it is more natural to interpret the statute as requiring a per-violation forfeiture. Imagine, for example, a criminal statute requiring courts impose "a sentence of up to ten years." Would anyone read this to mean that a defendant convicted of eighteen violations may receive just one sentence? No. The same logic applies here. And because the statute can be read to require a $500-per-violation forfeiture award, the liberal construction principle *requires* that it be read in that manner.

No court has given any plausible basis for any other reading. Below, for example, the Eleventh District explained that allowing a single $500 award comports with "the overarching purpose of the issuance of an injunction: to prevent a future injury, not to redress past wrongs." App. Op. ¶35 (quotation omitted). This makes little sense. Civil forfeiture is a legal remedy, not a form of injunctive relief, and so the purpose of injunctive relief sheds no light on the question whether the civil-forfeiture award applies on a per-violation or per-case basis.

The Second District, for its part, has said that courts *can* issue multiple $500 forfeiture awards, but that they can also "group[] some violations by type and assess[] a $500 forfeiture for each type of violation." *Maddox v. Greene Cnty. Child. Servs. Bd. of Dirs.*, 12 N.E.3d 476, 2014-Ohio-2312, ¶46 (2d Dist. 2014). The Second District, however, did not explain its reasoning; it simply deemed this result "reasonabl[e]" "[u]nder the circumstances." *Id*. Perhaps that reasonableness assessment is right. Perhaps it is wrong. Either way, it has nothing to do with the statutory text. And any discretion-conferring reading is quite difficult to square with the text. Again, a court "*shall* order the public body that it enjoins to pay a civil forfeiture of five hundred dollars." R.C. 121.22(I)(2)(a) (emphasis added). If the obligation "to pay a civil forfeiture of five hundred dollars" applies on a per-violation basis—and all indications say it does—then courts *shall* order payment on a per-violation basis. Alternatively, if the requirement "to pay a civil forfeiture of five hundred dollars" applies on a per-case basis, courts *shall* order just one $500 forfeiture. There is no room for discretion either way.

B. Courts need not issue a separate injunction for every single Open Meetings Act violation.

Now turn to the question whether courts must enter a separate injunction for each Open Meetings Act violation. Again, the Open Meetings Act states: "Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1). All parties agree that courts

must award *some* injunctive relief. The question is whether they must enter a separate injunction for each violation. And the answer to that question is "no."

As an initial matter, the debate here may be largely semantic. There is no doubt that the Act requires courts, upon finding a violation of the Open Meetings Act, to enjoin the public body from committing the violations it was found to have committed. But this does not mean that courts must issue the same number of injunctions as there are violations. Instead, courts have discretion to frame injunctive relief as they see fit. This follows for a few reasons.

First, by the time the General Assembly enacted the Open Meetings Act, it had long been settled that courts of equity had significant discretion to craft the terms of their injunctions. *See State ex rel. City of Cleveland v. Ct. of Appeals for Eighth Dist.*, 104 Ohio St. 96, 107–08 (1922). That matters, because the General Assembly is presumed to know the state of the common law when it enacts legislation. *Stiner v. Amazon.com, Inc.*, 162 Ohio St. 3d 128, 2020-Ohio-4632, ¶27; *In re Bruce S.*, 134 Ohio St. 3d 477, 2012-Ohio-5696, ¶11. Thus, when it incorporates common-law concepts, it is generally presumed to incorporate them in full. Here, the General Assembly empowered the courts to issue injunctions. Had it meant to limit the courts' power to craft those injunctions, it presumably would have said so clearly. *Carrel v. Allied Prods. Corp.*, 78 Ohio St. 3d 284, 287 (1997), *superseded by statute on other grounds*. And indeed, it did limit the courts' discretion in one key respect: it mandated that courts "shall" issue an injunction, taking away

their discretion to do so. Its failure to similarly limit the courts' power to craft the terms of injunctive relief suggests it imposed no such limits. Just as the General Assembly is "presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another," it should be presumed to act intentionally and purposely when it limits the courts' power in one respect but not another. *NACCO Indus., Inc. v. Tracy*, 79 Ohio St. 3d 314, 316 (1997).

Another clue regarding statutory meaning is that Ames's proposed rule would produce odd results. Under his reading, a public body that commits the same violation nine times must also be enjoined nine times. And all nine injunctions would presumably say the same thing. Statutes should not be read to bring about such strange results if it is fairly possible to read them differently. *See* R.C. §1.47(C); *State ex rel. Clay v. Cuyahoga Cnty. Med. Exam'rs Off.*, 152 Ohio St.3d 163, 2017-Ohio-8714, ¶¶22–24.

Finally, this reading fully accords with the Open Meetings Act's "manifest purpose." Scalia & Garner, *Reading Law* §4 at p.63. The injunction provision's objective purpose is to prevent future violations of the Open Meetings Act. Provided a court's injunction does that, it makes no difference whether it does so in a single injunction or in multiple injunctions.

CONCLUSION

For the foregoing reasons, the Court should reverse in part the Eleventh District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant Brian M. Ames was served this 13th day of September, 2021, by e-mail on the following:

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