IN THE SUPREME COURT OF IOWA
No. 14-1649

PEG RICHARDSON, DAN JOHNSON, RUSS NICHOLS, SHAWN RIPPERGER, LEIGH ANN SWAIN, AND SHELLY VANDER TUIG,

Plaintiffs-Appellants,

v.

DOUGLAS SHULL, STEVE WILSON, DEAN YORDI, THE BOARD OF SUPERVISORS OF WARREN COUNTY, AND WARREN COUNTY, IOWA,

Defendants-Appellees.

On Appeal from the District Court for Warren County
The Honorable Mary Pat Gunderson

Brief of Amici Curiae Iowa Newspaper Association and Iowa Freedom of Information Council

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IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa Newspaper Association is an association of 300 daily and weekly newspapers that work together to inform Iowa's citizens and protect newspapers' rights. The Iowa Freedom of Information Council is a coalition of journalists, librarians, lawyers, educators and other Iowans devoted to open government; it is among the oldest statewide freedom-of-information organizations in the country.

The Iowa Newspaper Association and the Iowa FOI Council are staunch advocates for open government and believe, as Justice Hugo Black wrote, that "[t]he press was protected [in the Constitution] so that it could bare the secrets of the government and inform the people." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring). The Iowa Open Meetings Law is key to that mission. Indeed, Iowa newspapers and the Iowa FOI Council have been the driving force behind the

law and its amendments.[1] They have a significant interest in its application and interpretation.

ARGUMENT

THE OPEN MEETINGS LAW REFLECTS A BROAD PREFERENCE FOR OPEN GOVERNMENT AND SHOULD BE INTERPRETED TO ACCOMPLISH THAT GOAL.

If a majority of the members of a government body meet to deliberate, that meeting must be open to the public unless one of the few narrow exceptions applies. *See generally* Iowa Code Ch. 21. The logic of that requirement is simple enough: "Democracy depends on a well-informed electorate,"[2] and it is difficult (nigh impossible) for the electorate to be well informed if their elected officials—the ones ostensibly representing them—do their business in the shadows. So to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people," the people must be able to observe their government in action. Iowa Code § 21.1.

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[1] *See generally* Steve Stepanek, *The Logic of Experience: A Historical Study of the Iowa Open Meetings Law*, 60 DRAKE L. REV. 497 (2012).

[2] *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976).

In early 2014, the defendants in this case, Warren County Supervisors Douglas Shull, Steve Wilson, and Dean Yordi, took on the task of reorganizing county government. Their goal was to make the County more efficient, which means they wanted to do more (or the same) with less—including fewer employees. That, as one might expect, was controversial. Laying off long-term government workers is never an easy thing, and the supervisors decided that it would be best for everyone if they deliberated in private about who should go and what they should get on the way out.

The problem, of course, was the Open Meetings Law. There are three supervisors, so if two of them get together to discuss County business, they are "meeting" under Iowa Code Chapter 21. The supervisors thus faced a dilemma: Debate the issue in public and risk a few uncomfortable confrontations, or hash it out beforehand in violation of the Open Meetings Law.

The supervisors didn't like either option. This was not an issue suited for public discussion (or so the supervisors believed),

and to their credit, they didn't *want* to violate the law. So they came up with Option Three: get around it.

Viewing the Open Meetings Law as a regulatory nuisance instead of an ideal, the supervisors—who are "well-versed in the technical aspects of" Chapter 21—devised a "sophisticated methodology for communicating effectively with one another about County business without ever actually meeting as a group." Order 8. The scheme went like this: Supervisor Shull would meet with County Administrator Mary Furler about the potential reorganizational plan, and Furler would "then relay the essence of the conversation to each of the other Supervisors in a one-on-one meeting." Order 2. Using Furler as a "conduit," the supervisors were able to "flesh out" any issues between them *before* the public meeting so there would be "no need for public discussion or questions" (Order 8); the meeting would be a mere formality in which everyone would be spared those difficult conversations. *Id.* The supervisors' theory—which their attorney blessed—was that there was no "gathering" under Iowa Code section 21.2(2) because

none of them discussed the reorganization face-to-face. And no *gathering* means no *meeting*.

Pretty creative. Thankfully, though, the law has long been ahead of such creativity. Since the time of Sir Edward Coke—or as Justice Oliver Wendell Holmes put it, "as far back as it is worth while to follow it"[3]—the law has worked under the maxim *qui facit per alium facit per se*—he who acts through another, acts himself. That maxim forms the foundation for modern-day agency law (and its twists and turns), but the maxim itself, which rests not on any "fiction of law" but "upon natural reason and elementary principles," simply means what it says: "[H]e who commands or procures another to commit a specific act on his behalf is to be held as having himself committed the act." Francis Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 690 (1930).

That maxim resolves this case. When Furler relayed Shull's thoughts to the other supervisors (at Shull's behest), Shull was meeting with the other supervisors, legally speaking. The same is

[3] Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 347 (1891).

true when Furler relayed Yordi's and Wilson's comments to each other and to Shull. Each time, two or three supervisors were gathering to deliberate (the "two or three" depending on how many messages Furler was carrying.) And thus each time the supervisors were violating the Open Meetings Act.

It's that simple. Or to quote Justice William O. Douglas, "[t]hat seems to us to be the common sense of the matter; and common sense often makes good law." *Peak v. United States*, 353 U.S. 43, 46 (1957). And there is every reason to believe that the legislature intended Chapter 21 to come with all the common sense that the law allows. When the open-meetings laws were taking shape in the mid-20th Century, the point was not to punish wrongdoing, but to tell politicians what was wrong—to be something of an ethical code for the well-meaning public official. As the Harvard Law Review put it in its seminal note on open-meetings statutes, "open meeting legislation is considered desirable for its educational effect, rather than its effect as a legal weapon. The statutes are viewed primarily as serving to exemplify a public attitude, to tell the politicians that the moral sentiments

of the people are for open meetings." Note, *Open Meeting Statutes: The Press Fights for the "Right to Know*," 75 HARV. L. REV. 1199, 1216 (1962) (internal quotation omitted).

That purpose—to educate, not punish—is logical but easy to miss. If government officials want to meet in private in violation of the law, then they will do so—and they probably won't get caught, since it's virtually impossible to monitor private conversations. So if the open meetings laws are to serve a purpose, it is to speak to the vast majority of officials who want to obey the law and do the right thing. It's to provide a backstop against the natural inclination to hash things out in private.

The facts of this case, as found by the district court, suggest that supervisors Shull, Yordi, and Wilson are the type of officials who *want* to obey the law, which is what makes this case so important. They could have discussed the reorganization plan over Thursday-night beer in one of their basements, and no one would be the wiser. They didn't. Instead, they created a "sophisticated" scheme in hopes of getting around the Open Meetings Law, and they believed this scheme satisfied their legal

and moral obligation. They were wrong legally, as their scheme was too clever by half (or at least not as clever as the law). But it's their attitude towards the Open Meetings Law that is so troubling.

The very first section of the Iowa Open Meetings Law makes clear that it's an ideal that public officials should strive to achieve; it's not something to be "gotten around." The law's purpose is to "*assure*" that "the basis and rationale of governmental decisions" are "easily accessible to the people," and to do so it demands that any "[a]mbiguity in the construction or application of [Chapter 21] should be resolved in favor of openness." Iowa Code § 21.1 (emphasis added). That message is pretty blunt. But in case it is lost on any government official, we'll rephrase it: If you're taking actions that are designed to hide "the basis and rationale of governmental decisions," and there is no stated exception in Chapter 21 for doing so, you're probably violating the law.

That's not a legal test, to be sure. But it's one that would have saved the supervisors a lot of trouble and served the interest of the people of Warren County who deserved an open and public

discussion of the county government's budget. And it's one that we should expect every government official to follow.

CONCLUSION

The district court's ruling should be reversed, for the simple reason that the supervisors cannot avoid a "meeting" by sending a subordinate to be their deliberative mouthpiece. But we also respectfully ask that the Court take this opportunity to educate government officials across the State on the purpose behind the Open Meetings Law and its importance to our democracy.

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/s/ Ryan G. Koopmans

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I hereby certify that on January 9, 2015, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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