STATE OF WISCONSIN
SUPREME COURT
NO. 2015AP231

State of Wisconsin ex rel. John Krueger,

Plaintiff-Appellant-Petitioner,

v.

Appleton Area School District Board of Education and
Communication Arts 1 Materials Review Committee,

Defendants-Respondents.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT III

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The State of Wisconsin, ex rel. John Krueger, respectfully petitions the Wisconsin Supreme Court for review of the June 28, 2016 decision of the Court of Appeals in this case, 2015AP231, pursuant to Wis. Stat. §§808.10 and 809.62.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether a formal committee, created by school district officials, pursuant to school district policies, in order to carry out school district functions, is a "governmental body" subject to the Open Meetings Act.

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. The Court of Appeals held that the committee was not a "governmental body."

Issue 2: Whether the Court of Appeals properly struck a portion of the Plaintiff-Appellant-Petitioner's Reply Brief.

Court of Appeals' Decision: The Defendants-Respondents (collectively, the "District") moved the Court of Appeals to strike portions of the Plaintiff-Appellant-Petitioner's ("Krueger") Reply Brief on the grounds that it was a newly-raised argument. Krueger argued that those

portions were not newly-raised and were merely a response to the District's arguments. The Court of Appeals concluded that the argument was newly-raised, and struck it.

Issue 3: Whether, if the committee is a "governmental body," it met in violation of the Open Meetings Act.

Court of Appeals' Decision: Because they concluded that the committee was not a "governmental body," neither the Circuit Court nor the Court of Appeals reached this issue.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

The Plaintiff-Appellant-Petitioner and Relator, John Krueger, is an Appleton Area School District ("AASD") taxpayer and the parent of a child who attended a school in AASD. The Defendant-Respondent, Appleton Area School District Board of Education (the "Board"), is the governing body of AASD. Wisconsin statutes place responsibility on the Board to, among other things, create and review curricula and adopt textbooks for AASD.

The Board has adopted a rule acknowledging that it has the legal responsibility for all educational materials used in the district. The Board's rule delegates some of the responsibility for the selection of educational

materials to AASD personnel while retaining final approval. The Board has also promulgated a handbook delineating the process to be followed to approve and adopt new educational materials. The process mandated by the Board's handbook starts with the appointment of a review committee made up of AASD staff and teachers and ends with Board approval based on the committee's recommendations.

In or around September 2011, AASD formed a committee to review the instructional materials for its ninth grade Communications Arts 1 course ("CA 1"). The committee, composed of 17 AASD employees, was named the Communications Arts 1 Review Materials Committee ("CAMRC"). CAMRC is a Defendant-Respondent in this case along with the Board. CAMRC met at a regular time and place, produced agendas and minutes, and took formal votes.

Krueger asked to attend the CAMRC meetings, but was informed that the CAMRC meetings were not open to the public. Notices of CAMRC's meetings were never published, and the public was denied access to those meetings. CAMRC recommended a set of books for CA 1 and that list was adopted by the Board without change.

The Open Meetings Act requires all meetings of "governmental bodies" to be held in open session and be preceded by adequate public notice. The Circuit Court and Court of Appeals below ruled that CAMRC was not a governmental body and therefore not subject to the Open Meetings Act. Those decisions were in error – CAMRC meets the definition of a governmental body because it was created by district administration pursuant to an official rule of the Board. The following criteria justify review by this Court:

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles under Wis. Stat. § 809.62(1r)(c)1. No binding doctrine currently exists on the interpretation of "rule or order." Despite its importance to "sunshine laws" in Wisconsin, there is a paucity of case law addressing the Open Meetings Act in general and the question of what "rule or order" is sufficient to create a "governmental body" under § 19.81(1) specifically. In fact, despite several Attorney General opinions on the topic, no published case opines on what "rule or order" is necessary in order to create a "governmental body."

2. The Court of Appeals' decision below conflicts with the Attorney General guidance, adopting a narrower interpretation of "rule or order," which could create confusion because it is unpublished and therefore non-precedential. The Attorney General has made clear that a "rule or order" need not directly create a government body and that a body called for by a "rule or order" does not become something else because it was convened by government workers. The Court of Appeals' formalistic and crabbed interpretation of the law unnecessarily complicates this simple and broad analysis, leading to confusion as to which bodies are subject to the Open Meetings Act. Government entities will not know whether they should follow the Attorney General guidance or this unpublished opinion. Citizens will be dissuaded from demanding the transparency that the law requires. A decision by this Court will therefore help develop and clarify the law under § 809.62(1r)(c).

3. The question is novel and will have statewide impact under § 809.62(1r)(c)2. It is novel because it will create a new doctrine, and it will have statewide impact because government entities across the state utilize committees created by administrative officials pursuant to authority delegated from governing bodies such as school boards. Furthermore, even

the specific application to these facts will have statewide impact, as every school district in the state has an obligation to select course materials, and the public often has a keen interest in which materials are used to education the community's children.

4. Finally, this Petition does not ask the Supreme Court to resolve a factual dispute but rather settle a dispute of law that, as stated above, is likely to recur unless resolved by this Court, making it appropriate for review under § 809.62(1r)(c)3. The parties do not dispute the underlying facts, and any doctrine developed by this Court as to the meaning of "rule or order" will have broad application across many levels of government statewide.

STATEMENT OF FACTS AND OF THE CASE

John Krueger is an AASD taxpayer and the parent of a child who attended an AASD school. (R. 7:1-2, First Amended Compl., ¶1.)

The Board is a governmental body within the meaning of § 19.82(1) and is subject to the various requirements of the Wisconsin Open Meetings Act, §§ 19.81 – 19.98. (R. 7:2, First Amended Compl., ¶3; R. 8:2, Defs' Answer and Affirmative Defenses to Pl's First Amended Compl., ¶3.) State statutes place responsibility on the Board to: (1) create curricula, Wis.

Stat. § 121.02(1)(k); (2) adopt textbooks, § 118.03(1); and (3) annually evaluate the district's reading curriculum, § 118.015(4). The Board has acknowledged that it "is legally responsible for all educational materials utilized within the instructional program of the Appleton Area School District." (R. 12:31, Dep. Ex. 5 at p. 1 (AASD Rule 361.1) (P. App. 120).)

The Board has delegated some of the responsibility for the selection of education materials to the Assessment, Curriculum, and Instruction Department (the "ACI Department") of AASD. (*Id.*) The Board also adopted a handbook (the "ACI Handbook") that delineates the process for selecting educational materials. Pursuant to AASD Rule 361.1:

> Curriculum revision is an ongoing process as defined in the AASD Assessment, Curriculum, and Instruction Handbook. The Handbook is available on the AASD website and delineates the processes leading to Board approval for curriculum revision, adoption of new courses, and implementation of curriculum materials.

(R. 12:34, Dep. Ex. 5 at p. 4 (Rule 361.1) (P. App. 123) (emphasis added).) As Rule 361.1 reflects, contemplates and directs, the ACI Handbook was adopted by the Board on January 13, 2003. (R. 12:27, 54-55, Dep. Ex. 18; Barkmeier Dep., 45.)

When AASD formed CAMRC and used it to engage in the selection of education materials – a task at the heart of "curriculum revision,

adoption of new courses, and implementation of curriculum materials," (Rule 361.1 (P. App. 123)) – the employees who convened the committee thought they were acting pursuant to the Board's "rule" (Rule 361.1) and "order" (the ACI Handbook). Krueger took the deposition of three representatives of the District – Kevin Steinhilber (the Chief Academic Officer of AASD), Nanette Bunnow (the Humanities Director of AASD and one of the co-chairs of CAMRC), and Diane Barkmeier (a Board member). Bunnow made it clear that CAMRC's authority and mission – to review reading materials for CA 1 and make recommendations as to the appropriate educational materials for that course – came solely from the Board via Rule 361.1 and the ACI Handbook:

> Q: Are you aware of anything other than Rule 361.1 and the ACI Handbook that provides any power or authority to anybody to participate in the review process for education materials?
>
> A: I don't understand the last part of your question.
>
> Q: Sure. I'm trying to figure out how does anybody get the power to do what CAMRC did? **And it strikes me that it comes from Rule 361.1** –
>
> A: Uhm-hum.
>
> Q: **-- and from the ACI Handbook? Do you agree with that?**

A: **Yes. That I agree with.**

Q: **Does it come from anywhere else?**

A: **No.**

(R. 12:16, Bunnow Dep., 18 (emphasis added); *see also* R. 12:24-25, Barkmeier Dep., 17-18.) Bunnow also made it clear that CAMRC did its work under the provisions of Rule 361.1 and the ACI Handbook:

Q: So in the Board's rule it says **when you're doing curriculum review as you were doing in CAMRC, it's to be done – the process is delineated in the ACI Handbook, correct?**

A: **Yes.**

. . .

Q: . . . Rule 361.1 points out that the Board has the legal responsibility, but the Board delegates some of the work for that to others –

A: To the experts.

Q: **-- through the ACI Handbook. And the ACI Handbook, according to the Board rule, delineates the process, correct?**

A: **Yes.**

(R. 12:15, Bunnow Dep., 14-17 (emphasis added).)

The ACI Handbook's first step of the second phase of its "6-Year Curriculum Cycle" is the creation of a review committee. (R. 12:4, 29,

Steinhilber Dep., 17, Dep. Ex. 3 ("Establish a representative committee of teachers, administrators and department staff . . . .").) After reviewing the existing curriculum, the committee's next step is to "review possible materials/resources to support the curriculum." (R. 12:29, Steinhilber Dep. Ex. 3 (capitalization omitted).) The final step is obtaining the Board's approval of the recommendations. (R. 12:30, Steinhilber Dep. Ex. 3.)

CAMRC was a review committee under the ACI Handbook. (R. 12:4, 5, Steinhilber Dep., 17, 27; R. 12:16, Bunnow Dep., 20-21; R. 12:24; Barkmeier Dep., 11.) The minutes of the Board's April 23, 2012 meeting state that "a Communication Arts 1 Materials Review Committee was formed to review instructional materials that meet the CA 1 curriculum including the current Board adopted CA 1 materials." (R. 12:47; Dep. Ex. 11 at p. 2.)

CAMRC had all the formalities of a typical committee. It had seventeen members consisting of AASD administrators, teachers, and staff. (R. 12:12-14, Bunnow Dep., 5-6, 9-10; R. 12:67, Defs' Resp. to Interr. No. 2.) It held nine meetings between October 3, 2011 and March 26, 2012. (R. 12:68, Defs' Resp. to Interr. No. 5.) Except for its last meeting, it always met on Mondays at 3:45 p.m. in the same location. (*Id.*) Bunnow,

as co-chair, prepared the agendas for the meetings and took and distributed the meeting minutes. (R. 12:18, Bunnow Dep., 29.) CAMRC made decisions on specific matters by one of two methods – either ordinary voting or using a weighted voting system referred to as "consensus." (R. 12:22, Bunnow Dep., 51.)

CAMRC was created in 2011 for three reasons. First, it was created in reaction to Krueger's request for a reading list for CA 1 that contained books at the ninth-grade reading level, without obscenities, and without any sexualized content. (R. 12:6, 8, Steinhilber Dep., 33, 38; R. 12:13, 16-17, Bunnow Dep., 7-8, 20, 21-22, 24; R. 12:42-43, Dep. Ex. 8.) Second, it was created in light of the new Common Core State Standards for English Language Arts. (R. 12:6, 8, Steinhilber Dep., 33-34, 38; R. 12:16-17, Bunnow Dep., 21-22, 24; R. 12:42-43, Dep. Ex. 8.) Third, the instructional materials being used in Communications Arts 1 were eight years old at that time except for one book that had been added in 2006. (R. 12:7-8, Steinhilber Dep., 37-38; R. 12:16-17, Bunnow Dep., 21-22, 24; R. 12:41, Dep. Ex. 7.)

CAMRC read approximately 93 fiction books, assessed their suitability to meet various curricular needs, and forwarded a recommended

list of 23 books to the Board's Programs & Services Committee. (R. 12: 19-20, Bunnow Dep., 33-34, 36-37; R. 12:42-47, Dep. Exs. 8, 10, 11.) During that process, Krueger asked to attend CAMRC's meetings but was told by district administrators that the meetings were not open to the public. (R. 11:1, Krueger Aff., ¶3.) Krueger sent an email to AASD's Superintendent on November 17, 2011, copying Bunnow and Steihhilber, stating:

> Another major concern is that the entire process is being conducted in behind closed doors. Unfortunately, it is this closed door process that produced the objectionable materials in the first place. In the interest of openness, fairness, and public service, this selection process must be opened to the public. **In fact, we believe this process is subject to Wisconsin Open Meetings Law and we request that they be conducted in accordance with that law from this point forward.**

(R. 11:2-4, Krueger Aff., ¶4, Ex. A; R. 12:52, Dep. Ex. 16 (emphasis added).)

Krueger's email was forwarded to the Board on November 18, 2011 (R. 12:70-71, Defs' Supp. Resp. to Interr. 13; R. 12:26, Barkmeier Dep., 32; R. 12:52, Dep. Ex. 16), but the Board did not open CAMRC's meetings to the public (R. 11:2, Krueger Aff., ¶5). Public notices were not sent relating to the CAMRC meetings. (R. 12:69, Defs' Supp. Resp. to Interr.

7.) The public, in general, and Krueger in particular, were not allowed to attend CAMRC's meetings. (R. 12:70-71, Defs' Supp. Resp. to Interr. 8.)

Steinhilber testified that one reason they wanted the CAMRC meetings to be closed to the public is that they did not want Krueger to attend and publicize the statements made by CAMRC members about particular books. (R. 12:9-10, Steinhilber Dep., 44-46.) Krueger was associated with a group called Valley School Watch and had previously publicized statements made by teachers in a review committee meeting. (R. 11:2, Krueger Aff., ¶6; R. 12:8-9, Steinhilber Dep., 41-43.) The teachers on CAMRC did not want that to happen again. (R. 12:9-10, Steinhilber Dep., 44-46.)

On April 12, 2012, the Programs & Services Committee of the Board adopted CAMRC's recommended reading list without any changes. (R. 12:20, Bunnow Dep. 37; R. 12:25, Barkmeier Dep., 18; R. 12:45, Dep. Ex. 10.) CAMRC then took its recommendations to the full Board, which adopted the recommendations without changes on April 23, 2012. (R. 12:20-21, Bunnow Dep. 37-38; R. 12:25, Barkmeier Dep., 18-19; R. 12:48-50, Dep. Ex. 11.)

On June 28, 2013, Krueger filed a verified complaint with the Attorney General of the State of Wisconsin and the District Attorney of Outagamie County, requesting the commencement of a timely action under Wis. Stat. § 19.97(1). (R. 7:6, First Amended Compl., ¶33.) The District Attorney of Outagamie County did not commence such an action within 20 days after receiving Krueger's verified Complaint. (*Id.*, ¶34.) Krueger then filed this complaint on July 29, 2013 in Outagamie County. (R. 2, Compl.) He asserts two causes of action, both related to Wisconsin's Open Meetings Act, Wis. Stat. § 19.83. The first claim is for failing to give public notice of CAMRC's meetings. (R 7:7, First Amended Compl.) The second claim is for failing to hold CAMRC's meetings in open session. (*Id.*, 7-8.)

All of the judges in Outagamie County recused themselves from the case and it was then assigned to Waupaca County Circuit Court Judge Vicki Clussman. (R. 23.) The parties filed cross motions for summary judgment. (R. 9; R. 13.) The Circuit Court heard oral argument on November 24, 2014. (R. 27.) The Circuit Court issued a Decision and Order granting summary judgment to the Defendants on December 23, 2014. (R. 24, P. App. 101-105.) Krueger appealed on February 2, 2015. (R. 26.) The Court of Appeals issued a decision on June 28, 2016,

affirming the Circuit Court in an unpublished opinion. In its opinion, the Court of Appeals also granted the District's motion to strike a portion of Krueger's Reply Brief.

ARGUMENT

This case presents an issue of first impression for Wisconsin courts – namely, what qualifies as a "rule or order" sufficient to create a "governmental body" under Wis. Stat. § 19.82(1). The fundamental principles underlying the case go much deeper, however, touching on Wisconsin's commitment to open, transparent government and the Legislature's command that the Open Meetings Act is to be liberally construed in order to provide the public with the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." § 19.81(1), (4).

The question here is one of delegation: May the government evade the Open Meetings Act by having administrators create committees instead of having superior governmental bodies create them directly? The common-sense answer – and the answer consistently reached by the Attorney General when asked to interpret the law – is no. The Open Meetings Act would be eviscerated if the decision to create a committee

can be intentionally delegated to a low enough level to not trigger the law. In this case, there was a rule and order directing that a certain task be delegated to district employees and performed by a committee. A committee was created and performed the delegated task. Yet the Court of Appeals placed it outside the scope of the Open Meetings Act. This type of narrow and confounded construction of the law is at odds with the Legislature's command that it be liberally construed. It also undercuts the Attorney General's guidance.

Krueger asks this Court to take this case and establish a rule that when a governing body delegates a task and mandates that it be performed by a committee and a committee performs that task, the Open Meetings Act applies.

I. THE COURT OF APPEALS APPLIED A STRICT, RATHER THAN LIBERAL, INTERPRETATION OF "RULE OR ORDER"

The Supreme Court should grant this Petition in order to reinforce the statutory command that the Open Meetings Act be interpreted "liberally" and establish a definition of "rule or order" that furthers the Legislature's goals in creating the Open Meetings Act.

In enacting the Open Meetings Act, the Wisconsin Legislature stated,

> In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, **it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government** as is compatible with the conduct of governmental business.

Wis. Stat. § 19.81(1) (emphasis added). Moreover, the Open Meetings Act "shall be liberally construed to achieve the purposes set forth in this section." § 19.81(4).

The Wisconsin Supreme Court has opined on why the Legislature created such a strong presumption of openness:

> We note, too, that § 19.81(1) states that the open meetings law is based on the premise that "representative government [depends] upon an informed electorate." We observe that government functions best when it is open and when people have information about its operations. It is not, however, merely a matter of enhancing the functions of government. Rather, the government must be accountable to the governed. It must be accountable to the people who underwrite government finances and provide its legitimacy. Having access to information about the workings of government undercuts arguments of subterfuge and ultimately promotes public trust and confidence.

State ex rel. Buswell v. Tomah Area Sch. Dist., 2007 WI 71, ¶26, 301 Wis. 2d 178, 732 N.W.2d 804 (alteration in original).

As relevant to this case, § 19.82(1) defines a "governmental body" as "a . . . local . . . committee . . . created by . . . rule or order." The Court of Appeals concluded that CAMRC was not created by "rule or order" for two reasons: (1) AASD's Board had not *directly* created it; and (2) the decisions to create CAMRC and have it undertake certain tasks (some of which were covered by Rule 361.1 and the ACI Handbook and some of which were not) were made by Steinhilber and Bunnow, district officials underneath the Superintendent. Both lines of reasoning stem from a narrow interpretation of "rule or order," namely that the "rule or order" must come from a parent body and must directly create the committee, rather than delegating the authority to create the committee to administrative officials. Both assume that the slightest variation from the charge of the rule and order can take the body out of our sunshine law.

A. The Court of Appeals' Opinion Undermines the Stated Purposes of the Open Meetings Act

The stated purpose of the Open Meetings Act is to provide the public with "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). The public is entitled to "'be exposed to the actual

controlling rationale of a government decision.'" *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 90, 398 N.W.2d 154 (1987), *quoting State ex rel. Lynch v. Conta*, 71 Wis. 2d 622, 685-86, 239 N.W.2d 313 (1976). When decisions are *fait accompli* before taken up by the final decision-making body, the public has been deprived of that exposure, evading the purpose of the Open Meetings Act. *See State ex rel. Badke v. Village Bd. of Greendale*, 173 Wis. 2d 553, 577, 494 N.W.2d 408 (1993) (holding that the attendance of a quorum of a parent body at a subsidiary body's meeting was a meeting of the parent body requiring notice for that reason); *Showers*, 135 Wis. 2d at 90-92, 102; *Conta*, 71 Wis. 2d at 685-87.

The Board was legally and factually responsible for adopting a reading list for CA 1. *See* Wis. Stat. §§ 121.02(1)(k), 118.03(1), 118.015(4); Rule 361.1 (R. 12:31, Dep. Ex. 5 at p. 1 (P. App. 120).) The Board delegated its responsibility to a review committee via Rule 361.1 and the ACI Handbook. CAMRC became that mandated committee and performed the delegated function. The Board then approved, without change, CAMRC's recommendations. (R. 12:25, Barkmeier Dep., 18-19; R. 12:48-50, Dep. Ex. 11.) But by having CAMRC do its work behind closed doors, the Board and CAMRC shielded the public from observing –

and potentially influencing – the process of a government committee at work.

The Court of Appeals concluded first that CAMRC was not "specifically created" under any provision of Rule 361.1 or the ACI Handbook. Ct. App. Op. ¶19 (P. App. 110). That rationale gives governments an easy out to evade the Open Meetings Act. All they need do is refrain from having a governing body (such as a school board, or city council) directly create a committee. Instead, the governing body can adopt a rule authorizing government officials to create a committee in certain circumstances, to undertake certain tasks. That delegation, under the Court of Appeals' rationale, is sufficient to remove the resulting committee from public scrutiny. Such an interpretation is too narrow to further the law's goals because it permits easy evasion of scrutiny.

The Court of Appeals also concluded that CAMRC was initially created for purposes not covered by Rule 361.1 or the Handbook, and the decision to extend its activities to covered purposes was made by Steinhilber and Bunnow (at the Superintendent's direction). Ct. App. Op. ¶¶20-21 (P. App. 111). The Court of Appeals analogized that situation to a hypothetical proposed in an Attorney General opinion where members of a

management team acted on their own initiative to develop recommendations to submit to a school board. *Id.* at ¶¶17, 21, *citing* Tylka Correspondence, June 8, 2005 (P. App. 109-111).

In particular, the Court of Appeals said that CAMRC was formed to respond to Krueger's request that a section of CA 1 be created with an alternate reading list. Ct. App. Op. ¶6 (P. App. 103). For this reason, it concluded CAMRC could not be the committee that the ACI Handbook calls for to review citizen objections to specific educational materials. *Id.*, ¶¶20-21 (P. App. 111). Krueger, it reasoned, just wanted a new course. *Id.*, ¶20 (P. App. 111). For this reason, anything and everything that CAMRC ultimately did – including expanding its scope to function as the committee that the ACI Handbook requires to review and revise materials – could be closed to the public. *Id.*, ¶21 (P. App. 111).

This is problematic for a number of reasons. If CAMRC was in fact a committee formed to respond to Krueger's request for a new course because he objected to curricular materials, it was squarely within Rule 361.1, even if the requested remedy was a separate course. But putting that aside, once CAMRC became the committee charged with revising the reading list, it was functioning as the committee contemplated and

mandated by both Rule 361.1 and the ACI Handbook. Nothing in the Open Meetings Act or the Attorney General's guidance warrants a "mother may I approach" to the law in which a rule or order becomes superfluous because some employee other than the Superintendent undertook to comply with it.

Both problems are rooted in the Court of Appeals' requirement that the committee performing a Board-mandated function must nevertheless be "specifically created" by the Board in some formalistic and highly technical manner to be subject to the Open Meetings Act. As well as reading the phrase "rule or order" in the narrowest manner possible, the Court of Appeals ignored uncontroverted evidence that CAMRC's sole authority for the actions it took came from Rule 361.1 and the ACI Handbook. Bunnow and Barkmeier both testified that CAMRC existed under and obtained its authority exclusively from those sources. (R. 12:15-16, Bunnow Dep., 14-18; R. 12:24-25, Barkmeier Dep., 17-18.) Not only Bunnow and Barkmeier, but also Steinhilber testified that CAMRC was a review committee called for in the ACI Handbook. (R. 12:4-5, Steinhilber Dep., 17, 27; R. 12:16, Bunnow Dep., 20-21; R. 12:24, Barkmeier Dep., 11.) While their views may not be binding legal conclusions, they are dispositive as to what the District intended to do. These AASD officials

were not acting spontaneously in a vacuum, they were acting in response to directives from the Superintendent pursuant to authority delegated from the Board.

Furthermore, the situation here is not analogous to the hypothetical from the Attorney General's Tylka Correspondence. (P. App. 149-53.) In the Tylka Correspondence, the Attorney General was presented with conflicting facts. As the Court of Appeals noted, he concluded that if "the initiative to develop the budget recommendations and submit them to the Board originated with the members of the Management Team themselves . . . [the meetings] were not subject to the open meetings law." Tylka Correspondence at 4. (P. App. 152.) But the initiative to create CAMRC, develop reading list recommendations, and submit them to the Board did not originate with CAMRC's 17 members. CAMRC was not created organically from the bottom up. It was created hierarchically, from the top down – first by directives of the Board and then through directives by high-ranking AASD officials: Superintendent Lee Allinger, Chief Academic Officer Kevin Steinhilber, and Humanities Director Nanette Bunnow. Whether CAMRC was responding to Krueger's complaint or revising the CA 1 reading list, it was not simply an ad hoc gathering of people with a

common purpose. It was a formal group created under direction by the Board, exercising authority delegated from the Board.

Finally, government entities cannot evade the Open Meetings Act by shoehorning a covered activity into the operations of an otherwise non-covered body. For example, imagine the ninth grade English teachers in a school district met once a month over lunch to discuss baseball. If a high-level administrator co-opted that group by giving it a name and committee structure and tasking it with a duty the school board had called to be performed, it would become subject to the Open Meetings Act (at least when holding a "meeting," as that term is defined in §19.82(2), to exercise its governmental power). To hold otherwise would permit easy evasion of the Open Meetings Act, contrary to the Act's purpose.

This Court should use this opportunity to establish a clear distinction between bodies created bottom-up, organically, and bodies created top-down, hierarchically. To use a hypothetical discussed in the Circuit Court, if a group of teachers themselves decide to meet on a regular basis to discuss their classrooms and teaching techniques, they would not be subject to the Open Meetings Act. (*See* R. 20:2-4, Pl's Br. in Opp. to Defs' Motion for Summary Judgment.) But if school board policy required

administrators to create committees of teachers and assigned those committees specific tasks to do (assuming the other requirements of being a collective body[1] are met), they would be subject to the law. Such a distinction furthers the purpose of the Open Meetings Act without interfering with ordinary, day-to-day governmental activities. The District's fears of "any meeting of employees" being subject to the Open Meetings Act (R. 14:23, Defs' Memo. of Law in Support of Motion for Summary Judgment) are groundless.

This Court should take the opportunity to fashion a rule that when a governing body delegates duties to an advisory body and an advisory body performs that function, the Open Meetings Act applies. This should be the result even if the body performs other tasks or may have been initially formed for another function. Liberal construction of the Open Meetings Act requires this type of functional approach and not the hyper-formal and unforgiving parsing undertaken by the Court of Appeals.

This functional approach is critical because, as this Court recognized in *Buswell* and *Showers*, when a governing body delegates functions –

[1] The Attorney General has opined that a "governmental body" must be a "collective body," characterized as having "definable membership" and "exercise[ing] power or provid[ing] advice through some "mechanism of collective decision making." Tylka Correspondence at 2 (P. App. 150.)

when it says, as it did here, that it wants a committee of district employees to review educational materials and make recommendations – the actual decision-making is likely to take place before the body to which the function has been delegated. *Buswell*, 2007 WI 71, ¶26; *Showers*, 135 Wis. 2d at 90-92. The Open Meetings Act, as this Court and the Attorney General have repeatedly recognized, mandates transparency at this critical stage.

B. The Court of Appeals' Opinion Contradicts Attorney General Opinions

The improper narrowness of the Court of Appeals' analysis stands in stark contrast to the broad interpretation of "rule or order" given by several Attorney General opinions. This Court should grant the Petition in order to resolve the conflict and provide clear guidance to government entities on their responsibilities under the Open Meetings Act.

"Our supreme court instructs that [courts] should give substantial weight to the attorney general's opinions in the area of the Open Meetings Law and Open Records Law." *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2014 WI App 67, ¶8, n. 3, 453 Wis. 2d 591, 849

N.W.2d 888, *rev'd on other grounds*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563.

The Attorney General has said that the words "rule and order" contained in the statute should be broadly construed to include any directive, formal or informal, that creates a body and assigns it duties. Tylka Correspondence at 2, *citing* 78 Op. Att'y Gen. 67, 68-69 (1989) (P. App. 150).

Contrary to the Court of Appeals' conclusion, the Attorney General has opined that a "rule or order" from a parent body need not directly create a committee for it to be subject to the Open Meetings Act; the authorization of the creation of a committee is sufficient. Sherrod Correspondence, October 17, 1991, at 1, *citing* 78 Op. Att'y Gen. 67 (1989) ("[T]his office has interpreted 'order,' as used in section 19.82(1), to include any directive from an existing governmental body, *that authorizes the creation of another body and assigns duties to that body*.") (R. 12:64) (emphasis added) (P. App. 144).

Also contrary to the Court of Appeals' conclusion, the Attorney General has specifically opined that governments cannot avoid the Open Meetings Act by having administrative officials – rather than the governing

entity itself – direct the creation of a committee. In a formal opinion, the Attorney General concluded that committees created not only by the Secretary of the Department of Revenue, but also committees created by "department district directors, bureau directors and property managers," were "governmental bodies," because the authority to create the committees had been delegated to those officials. 78 Op. Att'y Gen. 67, 69-70 (1989) (P. App. 133-36). Such advisory committees were "treated the same as if they were created by the board or the secretary and are subject to the open meetings law." *Id.* at 70; *see also* Staples Correspondence, Feb. 10, 1981 (a book review committee appointed by the superintendent concluded to be a "governmental body") (P. App. 147-48); Tylka Correspondence (management team created by the superintendent would be a "governmental body") (P. App. 149-53); Pepelnjak Correspondence, June 8, 1998, at 1 (noting the Attorney General had "interpreted the phrase 'rule or order' to mean a formal or informal directive from a high-ranking government official, creating a body and assigning it duties") (P. App. 142); Paulus Correspondence, June 8, 2001, at 3 (stating that the Open Meetings Act applies to committees created by "certain governmental officials, such as county executives mayors or heads of a state or local agency, department or

division" and noting that the downward delegation of the authority to create committees does not evade the Open Meetings Act) (P. App. 139).

The Court of Appeals' opinion and the Attorney General guidance are irreconcilable. The Court of Appeals chose not to publish its opinion, creating no binding precedent. That leaves government entities around the state in the unfortunate position of having to decide whether to follow the non-binding Court of Appeals opinion or the non-binding Attorney General guidance. Lower courts as well will have to decide which persuasive, but not binding, position to follow. This Court should grant this Petition in order to resolve that conflict.

II. THE COURT OF APPEALS ERRONEOUSLY STRUCK POTIONS OF KRUEGER'S REPLY BRIEF

The second issue presented for review is whether the Court of Appeals erred in striking portions of Krueger's Reply Brief. This issue presents an opportunity for this Court to clarify the proper test for determining whether an argument is truly "new" and in what circumstances a court of appeals can allow an argument by a respondent to go unanswered.

On September 8, 2015, the District filed a motion to strike portions of Krueger's Reply Brief that argued that Steinhilber and Bunnow were "high-ranking" officers under Attorney General opinions, such that their actions in creating CAMRC brought the committee under the scope of the Open Meetings Act. The District argued Krueger had raised the argument for the first time in his Reply Brief. Krueger responded with a memorandum in opposition to the motion on September 18, 2015. The Court of Appeals granted the District's motion. Ct. App. Op. ¶¶25-26 (P. App. 113-14). But the Court of Appeals erred in concluding Krueger had not previously argued that Steinhilber's and Bunnow's involvement was sufficient to trigger the Open Meetings Act.

Krueger has argued from the very beginning that it was irrelevant that administrative officials, instead of the Board itself, had created CAMRC. (R. 2:2, 3-5, Compl., ¶¶5, 15, 20-22; R. 10:3, 9, 11, Pl's Br. in Support of Motion for Summary Judgment; R. 20:3, 5, 10-13, Pl's Br. in Opp. to Defs' Motion for Summary Judgment; R. 21:3, Pl's Reply Brief in Support of Motion for Summary Judgment.) Krueger continued that argument in his first brief to the Court of Appeals. (Br. and App. of Plaintiff-Appellant, John Krueger, 20, 23, 25-26 (specifically mentioning

department and bureau managers).) The term high-ranking officials was even used before the Reply Brief. (R. 20:5, Pl's Br. in Opp. to Defs' Motion for Summary Judgment.)

Furthermore, the Court of Appeals' ruling deprived Krueger of the opportunity to respond to the District's argument that CAMRC was not a "governmental body" because it had been created and directed by Steinhilber and Bunnow. The District argued that because Steinhilber and Bunnow were not the Superintendent, CAMRC had not been created by "rule or order." (Brief of Defendants-Respondents, 16-18, 32-33, 39-40, 46.) The impetus for the creation and operation of CAMRC, they argued, came from below, as in the hypothetical considered in the Tylka Correspondence.

The Court of Appeals accepted that argument:

> On their own initiative, Steinhilber and Bunnow decided to create the Review Committee . . . . Also on their own initiative, Steinhilber and Bunnow broadened the scope of the Review Committee's work . . . . That set of events is similar to the second set of facts addressed in the Tylka letter, at 4, wherein the attorney general's office opined the open-meetings law would not apply. We agree that such facts do not constitute creation of a committee by "rule or order" under Wis. Stat. § 19.82(1) . . . .

Ct. App. Op., ¶21 (P. App. 111.) So the Court of Appeals accepted and relied on an argument that it denied Krueger a chance to respond to. The District was allowed to argue that Steinhilber and Bunnow were not sufficiently high-ranking, and Krueger was not allowed to respond. The Court of Appeals' action deprived Krueger of a fair opportunity to argue his case, and this Court should grant the Petition to correct that error.

III. IF CAMRC IS A "GOVERNMENTAL BODY," IT VIOLATED THE OPEN MEETINGS ACT

Neither the Circuit Court nor the Court of Appeals reached the question of whether CAMRC's actions violated the Open Meetings Act, because they both concluded that CAMRC was not subject to the Act. If this Court grants this Petition and concludes that CAMRC is a "governmental body," it can very easily determine that CAMRC violated the Open Meetings Act. It is undisputed that CAMRC did not provide notice of its meetings under Wis. Stat. § 19.84 and did not hold its meetings in open session under § 19.83.

CONCLUSION

The Court of Appeals opinion' does not give the required liberal interpretation to the Open Meetings Act and will cause confusion due to its

conflict with Attorney General opinions. No published court opinions interpret the statutory phrase "rule or order" in the Open Meetings Act. For these reasons, Krueger respectfully requests that this Court grant his Petition for Review.

Dated this 27th day of July, 2016.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. Is 6,504 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: July 27, 2016

THOMAS C. KAMENICK

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief and appendix which comply with the requirements of sections 809.19(12) and 809.19(13). I further certify that this electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date. A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated: July 27, 2016

THOMAS C. KAMENICK