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.

Appeal from the December 23, 2014 Decision by the
Outagamie County Circuit Court, Case No. 2013CV868,
the Honorable Vicki L. Clussman Presiding

PLAINTIFF-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTIONS

ADMINISTRATIVE PROVISIONS

WISCONSIN ATTORNEY GENERAL WRITINGS

INTRODUCTION

In 2011, the Appleton Area School District ("AASD") created a committee – the Communication Arts 1 Materials Review Committee ("CAMRC") – that reviewed the curriculum and book selections for the Ninth Grade Communications Arts 1 class ("CA1"). The AASD officials who formed the Committee believed themselves to be acting pursuant to a Board rule and handbook that authorized them to, among other things, update the class reading list and align it with new Common Core standards. And that is precisely what CAMRC did. It formulated recommendations to the school board which adopted them without changes.

But CAMRC acted in secret. The Plaintiff-Appellant-Petitioner John Krueger asked to attend CAMRC's meetings but was told its meetings were not open to the public and he could not attend. Krueger filed a complaint under Wisconsin's Open Meetings Law. His complaint was dismissed, and the dismissal was upheld by the Court of Appeals, on the ground that CAMRC was not a "governmental body" under the Open Meetings Law.

The Wisconsin Legislature has stated that it is 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). Nevertheless, the Court of Appeals held that the public is not entitled to information regarding a school district's book-selection process because, according to the Court of Appeals, the committee given that responsibility was created by administration and not directly by the Board of Education.

This Court has stated that Wisconsin has a strong presumption of openness and that "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. The Court of Appeals' Decision, however, leaves Appleton taxpayers and parents in the dark.

Wisconsin's Open Meetings Law, Wis. Stat. §§ 19.81 – 19.89, *et seq.*, applies to all "governmental bodies," which must be "created by constitution, statute, ordinance, rule or order." § 19.82(1). This case presents a question of first impression: What sorts of "rules" or "orders" are

sufficient to create a governmental body? While the Wisconsin Attorney General has provided opinions and letters that address this issue, no court has done so until this case.

Following the Legislature's command that the Open Meetings Law be interpreted liberally, § 19.81(4), the Attorney General has given "rule or order" a broad reading, concluding that the term encompasses any directive, formal or informal, that creates a body and assigns it duties. The facts show that CAMRC was a formal committee, established by a directive and given specific duties.

This Court should adopt the Attorney General's reasoning and hold that CAMRC was a governmental body subject to the Open Meetings Law.

STATEMENT OF ISSUES

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 Law.

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 Krueger's Reply Brief.

Court of Appeals' Decision: The Defendants-Respondents (collectively, the "District") moved the Court of Appeals to strike portions of Krueger's 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 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 Law.

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.

STATEMENT ON ORAL ARGUMENT

The Court should hear oral argument in this case. Oral argument will be useful in fully developing a well-considered interpretation of "rule or order." The Court may wish to question the attorneys and probe the

extent of the differing positions advanced by the parties. Furthermore, as this is a case of first impression, oral argument will provide the Court the opportunity to ask questions not anticipated by the parties.

STATEMENT OF FACTS AND OF THE CASE

Krueger is an AASD taxpayer and the parent of a child who attended an AASD school. (R. 7:1-2.)

Defendant-Respondent Appleton Area School District Board of Education ("Board") is a governmental body within the meaning of § 19.82(1) and is subject to the Open Meetings Law, §§ 19.81 – 19.98. (R. 7:2; R. 8:2.) 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).

To accomplish these statutory duties, the Board has enacted Rule 361.1, titled "Educational Materials Selection." (R. 12:24, 31, 33, P. App. 170, 177, 179.) The Rule begins by acknowledging that the Board "is legally responsible for all educational materials utilized within the instructional program of the Appleton Area School District." (R. 12:31, P. App. 177.) It goes on to state that "[t]he selection of educational materials is delegated to the professionally trained and certified personnel employed

by the school system," namely the "Assessment, Curriculum, and Instruction (ACI) department." (*Id.*) The Rule also specifies the "Objective of, and Criteria for, the Selection of Educational Materials." (*Id.*) The Rule has detailed procedures for dealing with "Request[s] for Reconsideration of Educational Materials and Textbooks" and "Objections to Educational Materials and Textbooks." (R. 12:32-40, P. App. 178-80.) Those particular procedures are not at issue in this case. What is at issue, however, are the "Procedures for Selection of Educational Materials and Textbooks" set forth in a separate Handbook ("ACI Handbook"). The Rule provides:

> 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, P. App. 180 (emphasis added).) Pursuant to Rule 361.1, the Board formally adopted the ACI Handbook on January 13, 2003. (R. 12:27, P. App. 173; R. 12:54-55.) In other words, the Rule delegates the selection of educational materials to district employees and the Handbook sets the rules for how they are to do that job.

In July, 2011, Krueger requested the creation of an alternative ninth-grade Communication Arts 1 course ("CA1") that used books at the ninth-grade reading level, without obscenities, and without any sexualized content. (R. 12:6, 8, 13, 16-17, P. App. 152, 154, 159, 162-63; R. 12:42-43.) Krueger's request was not treated as an objection to course material or request to reconsider educational materials that would have fallen under Rule 361.1's own procedures. Instead, it was addressed "us[ing] the process that was in place through 361.1 in the Handbook in a modified process." (R. 12:16, P. App. 162.) AASD Superintendent Lee Allinger directed Kevin Steinhilber, AASD's Chief Academic Officer, and Nanette Bunnow, AASD's Director of Humanities, to address Krueger's request. (*Id.*)

Mr. Steinhilber held two positions or titles, one of which was the Assistant Superintendent-School Services, putting him only one step below the Superintendent. (R.19:2, 6-9.)[1] He has a "key position[] in the District's ACI Department as it relates to curriculum." (R. 19:2.) He "heads up a group of nine (9) curriculum directors and coordinators and is responsible for the curriculum development process." (*Id.*) His

[1] Mr. Steinhilber's other title was Curriculum, Instruction and Assessment Director, a position that appears to have been collapsed into his position as Assistant Superintendent. (R. 19:2, 6-7.)

responsibilities revolve heavily around the development of curriculum. (*See* D. Ct. App. Resp. Br. 10 (citing R. 19:2, 6-9).)

Ms. Bunnow served directly below Mr. Steinhilber and herself had substantial authority, holding a "key position" in the ACI Department. (R.19:2-3.) "Bunnow provides leadership in developing curriculum . . . and assisting with the curriculum development process through serving on or leading committees and planning groups." (R.19:2.) She had "responsibilit[y] for supervision, coordination, and direction of curriculum, instruction, and staff development," and [was] required to hold the Director of Instruction license pursuant to Wis. Admin. Code §§ PI 34.32(1) and (4). (D. Ct. App. Resp. Br. 10-11 (citing R.19:2, 10-11).)

Mr. Steinhilber and Ms. Bunnow addressed Krueger's request by creating Defendant-Respondent CAMRC under Rule 361.1 and the ACI Handbook. (R. 12:16, P. App. 162.) As well as considering (and rejecting) the idea of creating a new course, CAMRC also undertook the Board-mandated task of reviewing the existing reading materials for CA1 and recommending a new reading list to the Board. (R. 12:16-17, P. App. 162-63.) A full review was done because the materials for CA1 had not been reviewed for eight years (R. 12:7-8, 16-17, P. App. 153-54, 162-63; R.

12:41), and because the reading list needed to be updated to address the new common core requirements (R. 12:6, 8, 16-17, P. App. 152, 154, 162-63; R. 12:42-43).

CAMRC was a "review committee" created under Rule 361.1 and the ACI Handbook. (R. 12:4, 5, 16, 24, P. App. 150, 151, 152, 160.) Both Mr. Steinhilber and Ms. Bunnow testified that in creating CAMRC they were acting pursuant to Rule 361.1 and the ACI Handbook. Ms. Bunnow made it clear that CAMRC's authority and mission – to review reading materials for CA1 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, P. App. 162 (emphasis added).) Mr. Steinhilber agreed. (R. 12:5, P. App. 151.) Diane Barkmeier, a Board member, also agreed that CAMRC's authority came from Rule 361.1 or the ACI Handbook. (R. 12:24-25, P. App. 170-71.)

Ms. Bunnow also made it clear that CAMRC's work was performed 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, P. App. 161 (emphasis added).)

CAMRC performed nearly all of the functions that Rule 361.1 and the ACI Handbook empowered it to perform. Under step one of the Handbook's second phase of its "6 Year Curriculum Cycle (R. 12:29, P. App. 175), it was the review committee formed to review the existing curriculum. (R. 12:4-7, 16-17, P. App. 150-53, 162-63.) Under step two, it

reviewed possible materials to support the curriculum by reading and assessing the appropriateness of approximately 93 fiction books. (R.12:45.) Under step four, it obtained approval of a recommended list of 23 books from both the Board's Programs & Services Committee and the Board itself, without changes. (R. 12:19-21, 25, P. App. 165-67, 171; R. 12:42-50.) The only step it did not perform was step three: rewriting the curriculum. (R. 12:21, P. App. 167.)

CAMRC had all the formalities of a typical committee. It had 17 designated members consisting of AASD administrators, teachers, and staff. (R. 12:12-14, P. App. 158-60; R. 12:67.) It held nine meetings between October 3, 2011 and March 26, 2012. (R. 12:68.) Except for its last meeting, it always met on Mondays at 3:45 p.m. in the same location. (*Id.*) Ms. Bunnow, as co-chair, prepared the agendas for the meetings and took and distributed the meeting minutes. (R. 12:18, P. App. 164.) CAMRC made decisions on specific matters by one of two methods – either ordinary voting or a weighted voting system referred to as "consensus." (R. 12:22, P. App. 168.)

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 sent an email to AASD on November 17, 2011, stating:

> Another major concern is that the entire process [for book selection] 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; R. 12:52 (emphasis added).)

Krueger's email was forwarded to the Board on November 18, 2011 (R. 12:26, P. App. 172; R. 12:52, 70-71), but the Board did not open CAMRC's meetings to the public (R. 11:2). Public notices were not sent relating to CAMRC's meetings. (R. 12:69.) The public, in general, and Krueger in particular, were not allowed to attend CAMRC's meetings. (R. 12:70-71.)

Mr. Steinhilber testified that one reason they wanted CAMRC's meetings to be closed is that they did not want Krueger to attend and publicize statements made by CAMRC members about particular books. (R. 12:9-10, P. App. 155-56.) Krueger had previously publicized

statements made by teachers in a different review committee meeting. (R. 11:2; R. 12:8-9, P. App. 154-55.) The teachers on CAMRC did not want that to happen again. (R. 12:9-10, P. App. 155-56.)

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

All of the Outagamie County judges 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 District on December 23, 2014. (R. 24.) Krueger appealed on February 2, 2015. (R. 26.) On September 8, 2015, after briefing was completed, the District filed a motion to strike a portion of Krueger's Reply Brief, arguing that it raised a new argument. The Court of Appeals affirmed the Circuit Court in an unpublished opinion on June 28, 2016. (P. App. 101-05.) In its opinion, the Court of Appeals also granted the District's motion to strike. Krueger filed a timely petition for review on July 27, 2016, which this Court granted on October 11, 2016.

ARGUMENT

The Court of Appeals held that CAMRC did not meet the definition of a governmental body under Wis. Stat. § 19.82(1), based upon its conclusion that CAMRC was not "created" by "rule or order." According to the Court of Appeals, CAMRC was created by Mr. Steinhilber and Ms. Bunnow, and their decision to do so did not rise to the level of a rule or order under § 19.82(1). (Ct. App. Dec. ¶21, P. App. 116.) But the Court of Appeals was wrong for two separate reasons.

First, Ms. Bunnow and Mr. Steinhilber testified under oath that CAMRC's sole authority came from Rule 361.1 and the ACI Handbook and that the process followed by CAMRC was the process delineated in the

ACI Handbook. Mr. Steinhilber and Ms. Bunnow may have made the actual appointments of the members of CAMRC, but the committee existed and had power to act – to perform the functions the board had delegated to it – only because of Rule 361.1 and the ACI Handbook.

Second, even if Rule 361.1 and the ACI Handbook are not a "rule or order" sufficient to meet the definition of § 19.82(1), then Mr. Steinhilber and Ms. Bunnow's directive creating CAMRC may nevertheless qualify as a "rule or order." The Attorney General has opined that any directive from a high-ranking official creating a body and assigning it duties is a "rule or order" sufficient to satisfy § 19.82(1).

Because CAMRC was a "governmental body," it was subject to the Open Meetings Law. It is undisputed that CAMRC failed to follow the Open Meetings Law – it did not provide notice of its meetings or hold those meetings in open session. Therefore, this Court should declare that the District violated the Open Meetings Law.

Standard of Review

This dispute involves the application of Wisconsin's Open Meetings Law, Wis. Stat. §§ 19.81 – 19.98, to undisputed facts.[2] The legal issue is whether CAMRC is a "governmental body" within the meaning of § 19.82(1). The proper interpretation of the Open Meetings Law is reviewed by appellate courts *de novo*. *State ex rel. Herro v. Vill. of McFarland*, 2007 WI App 172, ¶12, 303 Wis. 2d 749, 737 N.W.2d 55 (interpretation of the Open Meetings Law and application of that Law to undisputed facts are questions of law; case resolved on summary judgment and reviewed *de novo*).

I) CAMRC WAS CREATED PURSUANT TO RULE 361.1 AND THE ACI HANDBOOK, WHICH CONSTITUTE A "RULE OR ORDER" UNDER WIS. STAT. §19.82(1)

In promulgating the Open Meetings Law, 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**.

[2] As noted by the Circuit Court in its Decision and Order, "Both parties agree that there is no genuine issue as to any material facts and that the case can be decided on Summary Judgment." (R. 24:1, P. App. 101.)

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

The Wisconsin Supreme Court has described the purpose of the Open Meetings Law as fostering accountability, public trust, and confidence in government:

> 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).

The Open Meetings Law applies to "meetings" of "governmental bodies." Wis. Stat. § 19.83(1). A "governmental body" is defined to include "a . . . local . . . committee . . . created by . . . rule or order." §

19.82(1). The focal point of this case is whether CAMRC was created by "rule or order."

A) Rule 361.1 and the ACI Handbook Are a "Rule or Order"

1) A "rule or order" is any directive, formal or informal, creating a body and assigning it duties

No Wisconsin court has addressed what qualifies as a "rule or order" at any length. In 1976, this Court stated in passing that a "'constitution, statute, ordinance, rule or order'" must "confer[] collective power and defin[e] when [the body] exists" to create a "governmental body." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 681, 239 N.W.2d 313 (1976).[3] But in that case, the parties had already stipulated that a joint committee on finance was a "governmental body" and the question at issue in the case was whether the body had held a "meeting." *Id.* at 681-91. Although dicta, the statement is sensible and is in line with the Attorney General's writings on the subject.

The Attorney General has written numerous letters and opinions on the subject and devotes a section to the topic in the Department of Justice's

[3] The Legislature significantly revised the Open Meetings Law after *Conta*. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 93-94, 398 N.W.2d 154 (1997). The revisions broadened the definition of a "meeting" and required a liberal interpretation of the Law. *Id.* However, the definition of a "governmental body" did not change.

Wisconsin Open Meetings Law Compliance Guide. The Attorney General is given authority to provide advice on the Open Meetings Law, Wis. Stat. § 19.98, and his opinions are treated as persuasive by courts. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295.

The Attorney General has construed "rule or order" liberally (as required by statute) "to include any directive, formal or informal, creating a body and assigning it duties." Wisconsin Attorney General, Wisconsin Open Meetings Law Compliance Guide, November 2015 ("Compliance Guide") at 2, P. App. 122; *see also* 78 Op. Att'y Gen. 67, 69 (1989), P. App. 127 ("All that is required to create a governmental body is a directive creating the body and assigning it duties."); Tylka Correspondence, June 8, 2005, at 2, P. App. 145 ("The term 'rule or order' has been broadly construed by this office to include any directive, formal or informal, that creates a body and assigns it duties."). "If a formal order were required, the open meetings law might be evaded by the creation of 'informal' bodies." 78 Op. Att'y Gen. 67, 69, P. App. 127.

As the statute does not prescribe who must issue a rule or order, the Attorney General has concluded that such directives may come "from

governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department or division." Compliance Guide at 2, P. App. 122; *see also* 78 Op. Att'y Gen. 67, 69, P. App. 127 (concluding that committees created by DNR "department district directors, bureau directors and property managers are "governmental bodies"); Tylka Correspondence at 4, P. App. 147 ("When an individual government official, acting within the scope of properly delegated authority, creates an advisory body, that body is treated as if it had been created directly by the governmental body with authority over that official."). Thus, the Attorney General looks for a hierarchical, top-down creation of a group in order to qualify as a "governmental body." *See* 78 Op. Att'y Gen. 67, 69, P. App. 127 (citing to a dictionary definition of "order" as "an authoritative mandate usu[ally] from a superior to a subordinate).

That makes sense. If a committee is commissioned to advise a governing board (regardless of who appoints its members), the possibility exists that the real decision-making will happen at the committee meetings and be rubber-stamped by the governing board. That was the rationale

behind the court's decision in *Conta* to open so-called "negative" quorums to public attendance:

> When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. . . . The likelihood that the public . . . may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.

71 Wis. 2d at 685-86. The same logic – and the requirement of liberal construction – applies to opening the meetings of committees created to advise governmental bodies.

CAMRC satisfies the Attorney General's criteria. The authority to create CAMRC came through the Board pursuant to Rule 361.1 and the ACI Handbook and then through the authorized directives of Mr. Steinhilber and Ms. Bunnow, the district officials who appointed its members. *See* Section I.B, *infra*.

In contrast, the Attorney General has concluded that groups created organically or spontaneously, by their own members, are not governmental bodies even if they are subject to government regulation and receive public funding and support. Compliance Guide at 2, P. App. 122; *see also* Tylka Correspondence at 4, P. App. 147 (Open Meetings Law would not apply if

the members of a group decided on their own to meet and develop recommendations). Ad hoc, loosely-constituted gatherings of governmental employees are too amorphous to be a distinct "body." *See* Tylka Correspondence at 2-3, P. App. 145-46 ("The open meetings law does not apply, however, to meetings of groups of government officials and employees . . . that simply meet together on an *ad hoc* basis in the interest of governmental efficiency or good staff work."). Thus, the Attorney General has concluded that the Open Meetings Law does not apply to occasional meetings among staff or even between staff and non-governmental parties. Compliance Guide at 7, P. App. 125 (citing Godlewski Correspondence, Sept. 24, 1998 & Pepelnjak Correspondence, June 8, 1998).

CAMRC was not an ad hoc group. The members of CAMRC did not decide on their own to meet. The members of CAMRC were appointed by district officials. CAMRC was not a loosely-constituted body or amorphous. It was a structured committee, meeting at a pre-determined time and place, with agendas, minutes, and voting by the members.

The Attorney General has described additional characteristics that distinguish governmental bodies from ad hoc groups. A governmental

body must have a numerically-definable membership, because whether a "meeting" takes place is determined in part by how many members are in attendance. Compliance Guide at 7, P. App. 125 (citing *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987)). Furthermore, to exercise the "collective power" conferred on it,[4] *see Conta*, 71 Wis. 2d at 662, a governmental body must have some method of making decisions as a group. Compliance Guide at 7, P. App. 125 (citing Godlewski Correspondence). CAMRC had both a numerically-defined membership (17 appointed members) and a method for reaching collective decisions.

The Attorney General has found the existence of a "governmental body" in numerous situations quite similar to CAMRC:

- A committee appointed by the school superintendent to consider school library materials.
- A citizen's advisory group appointed by the mayor.
- An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director or Property Manager of that department.

  . . .

[4] That collective power can be merely advisory. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979) ("The [Open Meetings Law] does not require or contemplate that committees must have such authority [to make final, binding decisions] before they are subject to the provisions of the Open Meeting Law."); 78 OAG 67, 68 (1989), P. App 127 ("The committee referred to in the [statutory] definition includes advisory committees as well as committees that have been delegated decision-making authority.").

- An industrial agency created by resolution of a county board under Wis. Stat. § 59.57(2).
- A deed restriction committee created by resolution of a common council.
- A school district's strategic-planning team whose creation was authorized and whose duties were assigned to it by the school board.
- A citizen's advisory committee appointed by a county executive.
- An already-existing numerically definable group of employees of a governmental entity, assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, when the group's meetings include the subject of the chief administrative officer's directive.

  . . .
- A joint advisory task force established by a resolution of a Wisconsin town board and a resolution of the legislature of a sovereign Indian tribe.

Compliance Guide at 3-4, P. App. 123-24 (citations omitted).

Contrary to repeated claims by the District throughout this litigation (*See, e.g.*, R 14:2-3, 14, 23-25; R 17:2-3, 26-27; D. Ct. App. Resp. Br. 1, 3, 24, 29, 30, 31; D. Resp. to Pet. for Rev. 19-20, 22, 23), Krueger is not trying to subject every meeting of two or more government employees to the Open Meetings Law. The rule Krueger proposes is simply this – a group that looks and acts like a formal committee; that draws its authority to act from a governmental body; and that has specified members appointed

by those with authority to do so, is a governmental body and subject to the Open Meetings Law.

2) Rule 361.1 and the ACI Handbook are a "rule or order"

Rule 361.1 was enacted by the District's Board of Education. As relevant to this case, it does three important things. First, it acknowledges that the Board has the ultimate responsibility for the selection of educational materials.[5] Second, it delegates that responsibility to its employees in general and more specifically to the Assessment, Curriculum, and Instruction Department. Third, it incorporates the ACI Handbook (which was separately approved by the Board) as a set of procedures for selecting educational materials. (R. 12:31, 34, P. App. 177, 180.)

The ACI Handbook requires the creation of a review committee as part of the process of selecting educational materials. The very first step of the second phase set forth in the ACI Handbook (the first phase is not relevant to this case) is to "[e]stablish a representative committee of teachers, administrators and department staff (include representation from special populations to the extent possible)." That committee is then tasked

[5] *See* Wis. Stat. §§118.015(4), 118.03(1), 121.02(1)(k).

with reviewing the existing curriculum, reviewing materials and resources to support the curriculum, revising the curriculum, and submitting its recommendations to the Board for approval. The directions are mandatory, not optional. (R. 12:29-30, P. App. 175-76.)

Together, Rule 361.1 and the ACI Handbook form a "rule or order." They represent a formal decision by the Board to utilize a committee to select educational materials using procedures incorporated in the ACI Handbook. They establish a formal directive that creates a body – requiring the creation of a committee – and assigns it duties – the specific steps laid out in the ACI Handbook. *See* Compliance Guide at 2, P. App. 122. To put it in terms of the dicta in *Conta*, together they confer a collective power on the committee – to review materials and make a recommendation to the Board – and define when the committee exists – when a group comes together to perform the functions delegated to it by the Board and formulate recommendations to the board. *See* 71 Wis. 2d at 662.

B) CAMRC Was Created Pursuant to Rule 361.1 and the ACI Handbook

The Court of Appeals concluded that CAMRC was not created under Rule 361.1 or the ACI Handbook, because, according to the Court of

Appeals, CAMRC was created solely to respond to Krueger's request for a CA1 class with an alternate reading list, and such a request was not covered by Rule 361.1 or the ACI Handbook. (Ct. App. Dec. ¶¶18, 20-21, P. App. 115-16.) According to the Court of Appeals, Krueger was unable to point to any evidence in the record to the contrary. (*Id.*, ¶18, P. App. 115.)

But the Court of Appeals was simply wrong about this. The undisputed facts from AASD's own witnesses and business records contradict the Court of Appeals' conclusion.

AASD's own evidence shows that CAMRC was created for three reasons. One of them was as a reaction to Krueger's request for a reading list that contained books without obscenities, and without any sexualized content. (R. 12:6, 8, 13, 16-17, P. App. 152, 154, 159, 162-63; R. 12:42-43.) But that did not define – or at least did not exhaust – the reasons for its formation or the functions that it performed. AASD produced a CAMRC document entitled "Item for Consideration." (R. 12:42-43.) Explaining what CAMRC was created to do, the document describes Krueger's request and then says "[i]n light of the new Common Core State Standards – English Language Arts and [Krueger's] request, a 17-member Communication Arts 1 Materials Review Committee was formed to review

instructional materials" for CA1. The document specifically refers to CAMRC as a "review committee" and provides two reasons for its creation: to respond to Krueger's request and to review the CA1 instructional materials in light of Common Core.

AASD also produced a copy of the minutes of the AASD Board's Programs and Services Committee's April 12, 2012 meeting. (R. 12:44-45.) The minutes describe Krueger's request but go on to state that CAMRC "was formed to review instructional materials that meet the CA1 curriculum." The minutes of the April 23, 2012 minutes of the full Board say the same thing. (R. 12:47.) Thus, the AASD Board affirmed that in addition to reviewing the CA1 curriculum in light of Common Core, and in addition to responding to Krueger's request, CAMRC was created for a third reason – to review the CA1 instructional materials to ensure that they meet the CA1 curriculum.

This was further explained by another CAMRC document (R. 12:41), talking points used by Ms. Bunnow at a September, 2011 Programs & Services Committee meeting where she proposed creating CAMRC. (R. 12:7, P. App. 153.) After describing Krueger's request, the document states that based upon Krueger's proposal, "the fact that the instructional

materials presently used in Comm. Arts 1 were adopted 8 years ago, . . . and the fact that there are many new books which have been published within recent years" it was time for the District to review all of the instructional materials for CA1. (R. 12:41.)

As noted earlier, this view of CAMRC's formation and purpose were confirmed by the testimony of the district officials who convened it. The undisputed facts are that CAMRC was created to review the instructional materials for compliance with Common Core, to make sure they matched the CA1 curriculum given that the reading list was 8 years old, and to address Krueger's request. Reviewing the instructional materials for Common Core compliance and updating them because there had been no review for 8 years fall directly within Rule 361.1 and the ACI Handbook.

It is undisputed: (1) that reviewing the instructional materials for all classes (including CA1) – whether to conform them to Common Core, update them, or even respond to the concerns raised by a member of the public – is the legal obligation of the Board; (2) that the Board fulfills this obligation by delegating responsibility through Rule 361.1 and the ACI Handbook; and (3) based upon the AASD documents and witnesses described above, CAMRC was created to fulfill this responsibility for CA1.

In finding otherwise, the Court of Appeals was simply and unambiguously wrong.

The Court of Appeals found that Mr. Steinhilber and Ms. Bunnow created CAMRC on their own initiative solely to respond to Krueger's request, and then also on their own initiative decided to go beyond that request and recommend a new CA1 reading list to the Board. (Ct. App. Dec. ¶21, P. App. 116.) Even if that were the case (and the AASD records show that it was not) it would not matter.

There are two ways to look at what CAMRC did. Either it started as something else and morphed into the ACI Handbook's review committee (the Court of Appeals' view) or it always was the ACI Handbook's review committee and it just took on one additional responsibility – considering Mr. Krueger's request for an alternative CA1 class (what the AASD documents show). Regardless of which is a more accurate description, it still fulfilled a legal obligation of the Board – the review of the CA1 instructional materials. Whether it was always intended to do so or morphed into that role does not matter.

To conclude otherwise elevates a particularly cramped view of form over substance and certainly does not "liberally construe" the Open

Meetings Law as the Legislature has commanded. The Attorney General has already concluded that when an already-existing group of government employees is given a specific task by a higher authority, that group's meetings become subject to the Open Meetings Law. Compliance Guide at 7, P. App. 125 (citing Tylka Correspondence). An existing group that becomes subject to a "rule or order" should be treated no differently than if it had been created by that "rule or order." What is important is whether it is performing a function that has been delegated to it. If the Board directs the review of educational materials to be undertaken by a committee, and that review is undertaken by a committee, that committee is a governmental body even if it does something else as well or does not do everything that it is supposed to do.

The Court of Appeals also erred in concluding this situation was similar to a hypothetical given in an Attorney General opinion. In the Tylka Correspondence, the person seeking advice claimed a school district's board of education had "directed the Superintendent to provide it with budget recommendations and the Superintendent, in turn, delegated that responsibility to the Management Team" (which had acted as a committee). Tylka Correspondence at 3, P. App. 146. However, the

Superintendent claimed there was no such directive, but rather "the initiative to develop the budget recommendations and submit them to the Board originated with the members of the Management Team themselves." *Id.* at 4, P. App. 147. The Attorney General could not resolve the factual dispute, but opined that the first situation would have created a "governmental body" but the second situation would not have. *Id.*

The Court of Appeals concluded the second situation was analogous to what had happened here. The Court described that situation and conclusion this way: "if the management team had developed recommendations on its own initiative to submit to the board, then the open-meetings law would not apply." (Ct. App. Dec. ¶17, P. App. 114-15.) But unlike that situation, the initiative to develop a recommendation to the Board did not originate with the 17 members of CAMRC. CAMRC was not created because its 17 members decided they should get together and develop a new reading list for CA1. To the contrary, it was the Board that authorized the creation of a committee like CAMRC and it was high-ranking District officials who formed it and appointed its members.

The Court of Appeals was wrong. CAMRC obtained its authority as an ACI Handbook review committee from Rule 361.1 and the Handbook

and performed the work laid out in the Handbook. We know that to be true for two reasons: first, because the District's own witnesses testified to that fact and because CAMRC did develop a set of recommendations it forwarded to the Board for approval.

1) CAMRC's authority came exclusively from Rule 361.1 and the ACI Handbook

CAMRC was operating under authority provided to it exclusively from Rule 361.1 and the ACI Handbook. It was aiding the Board's ultimate responsibility for the selection of educational materials, and the Board delegated that authority to the ACI Department (run by Mr. Steinhilber) via Rule 361.1 and the Handbook. The District's witnesses all testified that not only did CAMRC's authority come from Rule 361.1 and the Handbook, they testified that those were CAMRC's exclusive sources of authority.

When questioned, Mr. Steinhilber and Ms. Bunnow testified under oath that in creating CAMRC, they were acting pursuant to Rule 361.1 and the ACI Handbook. Ms. Bunnow made it clear that CAMRC's authority and mission – to review reading materials for CA1 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, P. App. 162 (emphasis added).) Mr. Steinhilber agreed. (R. 12:5, P. App. 151.) So did Diane Barkmeier, a member of the AASD Board. (R. 12:24-25, P. App. 170-71.)

The Court of Appeals ignored this testimony, and by doing so, came to the erroneous conclusion that CAMRC's authority did not come from Rule 361.1 and the ACI Handbook.

2) CAMRC acted as a review committee under the ACI Handbook

Not only did CAMRC's authority flow from Rule 361.1 and the ACI Handbook, it operated as the kind of review committee required by the Handbook.

The District's witnesses testified that CAMRC was the review committee required by the Handbook:

> Q: You would agree with me then that CAMRC was a Review Committee under the processes of the ACI Handbook?
> A: I would.

(R 12:4, P. App. 150.)

> Q: CAMRC was a Review Committee operating under the ACI Handbook. You agree with that, right?
> A: I do.

(R 12:5, P. App. 151.)

> A: We're splitting hairs here, I feel, but 361.1 and the ACI Handbook **is the process that we did follow** because Superintendent Allinger asked us to address the parent concerns.
> Q: So CAMRC was a review committee as described in the ACI Handbook, correct?
> A: Yes. We used it as a resource to modify the process, yes.
> Q: You had to use – You had to use it because the Board of Education told you you had to use it in Rule 361.1, correct?
> A: Yes.

(R. 12:16, P. App. 162 (emphasis added).)

> Q: So CAMRC made the recommendation first to the Programs and Services Committee, which approved it, then to the full Board, which also approved it?
> A: Right. That second step is necessary for us to move forward.
> Q: **And that's all part of what's required in Rule 361.1 and the ACI Handbook, correct?**
> A: **It's in one or the other. I'm not sure which, but yes, that's the process we follow.**

(R. 12:21, P. App. 167 (emphasis added).)

The ACI Handbook assigned CAMRC four steps to do in furtherance of its ultimate goal of developing a recommended reading list: reviewing the existing curriculum, reviewing materials to support the curriculum, revising the curriculum, and presenting a recommendation for Board approval. (R. 12:29-30, P. App. 175-76.) CAMRC performed three of those steps,[6] and accomplished its ultimate goal.

CAMRC reviewed the existing curriculum (step one). (R. 12:21, P. App. 167.) CAMRC reviewed materials to support that curriculum (step two). (R. 12:19, P. App. 165; R. 12:45.) CAMRC presented a list of recommended books to the Board's Programs & Services Committee and

[6] As discussed more fully below, *see infra*, Section I.D., CAMRC's deviation from its procedures does not remove it from the Open Meetings Law's purview.

then to the Board itself for approval (step four). (R. 12:20-21, P. App. 166-67.)

The Court of Appeals ignored all of this evidence, and erroneously concluded that CAMRC did not perform the task of a review committee under Rule 361.1 and the ACI Handbook.

This situation is analogous to that considered by the Attorney General in the Sherrod Correspondence. There, a school board created a committee with the purpose of appointing a "Strategic Planning Team" and developing a process for the Strategic Planning Team to follow. Sherrod Correspondence, Oct. 17, 1991 at 1, P. App. 139. The Strategic Planning Team was charged with "developing strategic goals and specific plans for attaining those goals" as well as "present[ing] its entire plan to the school board for approval." *Id.* at 2, P. App. 140. The Attorney General concluded that under those facts, the school board had authorized the creation of the Strategic Planning Team and assigned it duties, making it a "governmental body." *Id.*

Similarly here, the Board adopted Rule 361.1 and the ACI Handbook, which authorized the creation of a committee like CAMRC and assigned it duties. CAMRC obtained its authority from Rule 361.1 and the

ACI Handbook and operated as the review committee required by the Handbook. Even if its members were appointed by Mr. Steinhilber and Ms. Bunnow, it was created by "rule or order" and is subject to the Open Meetings Law.

C) Which Officials Carried out the "Rule or Order" Is Immaterial

The Court of Appeals believed it relevant that Rule 361.1 and the ACI Handbook were not self-executing. In other words, a review committee was not created at the moment either one was adopted, but rather it took further action by administrative officials to form CAMRC and schedule its meetings and tasks. (Ct. App. Dec. ¶18 & n. 10, P. App. 115.)

But which government officials – or even mere employees – carry out a "rule or order" is immaterial. It must be immaterial or the Open Meetings Law could be easily evaded. A governing body could merely delegate its authority by directing lower administrative officials to create a committee, and the committee would not be a "governmental body."

The Attorney General has rejected arguments that such delegation can evade the Open Meetings Law. *See* Paulus Correspondence, June 8, 2001 at 4, P. App. 135 (noting that if courts looked only to the actions of

governing bodies, "any governmental body could avoid the strictures of the open meetings law by the simple expedient of having one of its employees create a committee"). The Attorney General has also addressed the question of whether a governing body can avoid the Law by authorizing, rather than directing, the creation of a committee. He concluded that such evasion did not work: "[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." Sherrod Correspondence at 1, P. App. 139 (citing 78 Op. Att'y Gen. 67).

That is exactly what happened here. It is true that Rule 361.1 and the Handbook are not self-executing. But they direct, or at the very least authorize, the creation of review committees. That was what CAMRC was.

D) That CAMRC Modified the Process and Considered a Matter Not Covered by the ACI Handbook Is Immaterial

The Court of Appeals also considered it highly relevant that part of the impetus for CAMRC's creation was Krueger's request for an entirely new course, something not contemplated by Rule 361.1 or the ACI Handbook. The Court of Appeals felt that this fact was conclusive proof

that CAMRC was not a "review committee" under the Handbook. (Ct. App. Dec. ¶¶20-21, P. App. 115.)

But the Court of Appeals takes that fact too far. If all CAMRC had done was make a yes-or-no recommendation to the Board on whether to create a new CA1 course, the Court might be correct. But CAMRC did much more than that. As well as deciding to not recommend creating a new course, it performed the cyclical duty of reviewing the curriculum and recommending an updated reading list. In order to accomplish that task, it performed all but one of the four major steps laid out in the ACI Handbook.

The District will argue that CAMRC actually modified the ACI Handbook process, but one of the District's own witnesses testified that even the modified process "was authorized through the – 361.1 and the ACI Handbook." (R. 12:21, P. App. 167.) Another witness testified that CAMRC served as a review committee under both the original ACI Handbook and the modified process:

> Q: And under the normal process in Exhibit 3 [the ACI Handbook], or the modified process in Exhibit 4, the first step was to establish a committee; is that correct?
> A: Correct.
> Q: And was CAMRC the committee that was established for this purpose?
> A: Correct.

(R. 12:4, P. App. 150 (emphasis added).) Moreover, CAMRC's failure to comply fully with the ACI Handbook process as written would not exclude it from being a governmental body. Construing the Open Meetings Law liberally does not permit excusing bodies from following the Law when they fail to follow their own rules.

II) EVEN IF RULE 361.1 AND THE ACI HANDBOOK DO NOT CONSTITUTE A "RULE OR ORDER," THE DECISION BY AASD ADMINISTRATORS TO CREATE CAMRC AND ASSIGN IT DUTIES CONSTITUTES A "RULE OR ORDER"

If this Court agrees with the Court of Appeals that CAMRC was not created under Rule 361.1 and the ACI Handbook but rather was created by Mr. Steinhilber and Ms. Bunnow independently, this Court should still conclude CAMRC is a "governmental body." The Attorney General has opined that decisions made by officials like Mr. Steinhilber and Ms. Bunnow, as high-ranking District officials, to create a committee constitute a "rule or order" under § 19.82(1).

A) The Open Meetings Law Applies to Bodies Created by High-Ranking Officials

As noted previously,[7] the Open Meetings Law does not specify who must issue a "rule or order" that creates a committee. The Attorney General has concluded the Law applies even when committees are created by government officials instead of other governmental bodies. "When an individual government official, acting within the scope of properly delegated authority, creates an advisory body, that body is treated as if it had been created directly by the governmental body with authority over that official." Tylka Correspondence at 4, P. App. 147.

The Attorney General has "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." Pepelnjak Correspondence at 1, P. App. 137 (citing 78 Op. Att'y Gen. 67). In another opinion, the Attorney General listed "heads of a state or local agency, department or division" as such high-ranking officials. Paulus Correspondence at 3, P. App. 134. A formal Attorney General opinion on the topic concludes that a DNR advisory committee created by a "department district director, bureau director or property manager" would

[7] *See supra*, Section I.A.1.

be subject to the Open Meetings Law. 78 Op. Att'y Gen. 67, 69-70, P. App. 127-28.

Such a rule makes sense. As a practical and legal matter, governing bodies of public entities, such as boards of education, cannot make every decision; they must delegate their authority downward. In order to exercise those delegated powers, government officials may choose to create a committee to gather information, make a recommendation, or even make a decision. When an official does so, such committees should be subject to the Open Meetings Law, or it will be laughably easy for governments to avoid the law simply by delegating downward. *See* Paulus Correspondence at 4, P. App. 135 (noting that without such a rule, "any governmental body could avoid the strictures of the open meetings law by the simple expedient of having one of its employees create a committee").

If CAMRC was created by administrative officials with requisite executive authority – even if Rule 361.1 and the ACI Handbook were not involved – CAMRC was subject to the Open Meetings Law.

B) CAMRC Was Created by Mr. Steinhilber and Ms. Bunnow, High-Ranking District Officials

The District argued to the Court of Appeals that CAMRC was not created by Rule 361.1 and the ACI Handbook but rather it was created by Mr. Steinhilber and Ms. Bunnow, acting independently. (*See, e.g.*, D. Ct. App. Resp. Br. 16, 32, 39; R. 16:2.) Krueger has contested that argument from the outset, but even if it is accepted by this Court as a matter of fact, it does not dispose of the case. Directives by Mr. Steinhilber and Ms. Bunnow, as "high-ranking" officials, would trigger the Open Meetings Law.

Mr. Steinhilber was a high-ranking district official, operating only one step below the Superintendent. He was an "Assistant Superintendent" as well as a departmental "Director." He was responsible for the curriculum development process and led a team of nine curriculum directors and coordinators. Ms. Bunnow was a high-ranking district official, operating only one step below Mr. Steinhilber in the ACI Department. She was one of his nine directors: the Director of Humanities. She supervised, coordinated, and directed curriculum, instruction, and staff development.

Mr. Steinhilber was therefore the "head" of a "local department" and Ms. Bunnow was the "head" of a "local division" of that department. *See* Paulus Correspondence at 3, P. App. 134. Similarly, they could both also be considered "directors" under 78 Op. Att'y Gen. 67, P. App. 126-28.

As the Attorney General recognized, this is important. Informal meetings of government employees or spontaneous groups formed by low or mid-level employees should not be subject to the Open Meetings Law. But when high ranking officials form committees with a defined composition that meet regularly to perform a delegated function and make recommendations to the governing body, it is very possible that much, if not all, of the actual decision-making will occur within that committee. The public should be able to see those decisions being made.

Mr. Steinhilber and Ms. Bunnow were acting under delegated authority, even if that authority did not flow from Rule 361.1 and the ACI Handbook. They were performing a governmental function by creating CAMRC. Public officials are presumed to act within the law and within their authority. *Herro v. DNR*, 67 Wis. 2d 407, 426, 227 N.W.2d 456 (1975); *Ferguson v. Kenosha*, 5 Wis. 2d 556, 568, 93 N.W.2d 460 (1958). Therefore, "it must be presumed that [directors and managers] act within

the scope of delegated authority when they create committees and appoint committee members." 78 Op. Att'y Gen. 67, 69, P. App. 127.

Thus, even if CAMRC was exercising authority that did not stem solely from Rule 361.1 or the Handbook, it was still a "governmental body" because it was created by high-ranking District administrators and given a governmental task. The District cannot evade the Open Meetings Law by having administrators create committees.

C) The Court of Appeals Erred in Striking this Argument from Krueger's Reply Brief in the Court of Appeals

After briefing in the Court of Appeals was completed, the District filed a motion to strike portions of Krueger's Reply Brief that argued that Mr. Steinhilber and Ms. 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 Law. The District argued that Krueger had unfairly raised the argument for the first time in his Reply Brief and the Court of Appeals granted the District's motion. (Ct. App. Dec. ¶¶25-26, P. App. 118.) But the Court of Appeals erred in rejecting Krueger's argument.

Arguments not raised in the trial court, or not raised until a reply brief, are generally treated as waived and not considered by a court on appeal. *See In re Bilsie's Estate*, 100 Wis. 2d 342, 346, n. 2, 302 N.W.2d 508 (Ct. App. 1981). The doctrine exists in large part because it is unfair to the other party and to the court to present a brand new issue the other party does not get a chance to address. *See Verex Assur., Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 734, n. 1, 436 N.W.2d 876 (Ct. App. 1989).

But that is not what happened here. Krueger first raised this issue in his complaint, alleging as follows:

- "CAMRC . . . was created either by the Board or by a District official delegated authority by the Board to create such a committee." (R. 2:2.)
- "The Board has delegated that authority [to select educational material] . . . to the professional trained and certified personnel employed by the school system." (R. 2:3.)
- "The Attorney General has already concluded that 'a committee appointed by the school superintendent to consider school library materials' is a 'governmental body.'" (R. 2:4.)

Krueger's Brief in Support of Motion for Summary Judgment raised the issue as well. The brief cited to the Attorney General's conclusion that any directive could create a "governmental body." (R. 10:9.) Analogizing this case to the Staples Correspondence, February 10, 1981, where a committee created by a superintendent was concluded to be a

"governmental body," Krueger argued that CAMRC was a committee whose members were "appointed by a high-ranking district administrator." (R. 10:11-12.)

Krueger continued to make reference to that argument in his Brief in Opposition to Defendants' Motion for Summary Judgment, pointing out that the Open Meetings Law still applies when "the administrative officers of that governmental body do in fact create such a committee." (R. 20:3.) He mentioned again that CAMRC had been "created from the top down, by high-ranking District administrators." (R. 20:5.) He spent three pages arguing that CAMRC was similar to groups found to be "governmental bodies" by the Attorney General specifically because those groups, like CAMRC, had been created by administrative officials. (R. 20:10-13.)

In Krueger's Reply Brief in Support of Motion for Summary Judgment, just as he did in his Reply Brief to the Court of Appeals, Krueger responded to the District's argument that CAMRC had been created by administrative officials. (*See* R. 17:20-24.) He cited several Attorney General opinions in support of his argument "that governments cannot avoid the Open Meetings Act by having administrative officials – rather

than the governing entity itself – direct the creation of a committee." (R. 21:3.)

Krueger continued that argument in his first brief to the Court of Appeals, arguing that it does not matter if CAMRC was created and its members appointed by the Board itself or by school district officials. (P. Ct. App. Br. 23, 25-26.) The District then argued in its response brief to the Court of Appeals that it did in fact matter, and that because Mr. Steinhilber and Ms. Bunnow were not the Superintendent, CAMRC had not been created by "rule or order." (Def. Resp. Ct. App. Resp. Br. 16-18, 32-33, 39-40, 46.)

Krueger replied to this argument (using the same evidence cited by the District) in his Reply Brief, but the Court of Appeals refused to hear him on this point. Rather, the Court of Appeals simply accepted the District's argument and held that :

> 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. Dec., ¶21, P. App. 116.) 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 Mr. Steinhilber and Ms. Bunnow were not sufficiently high-ranking, and Krueger was not allowed to reply. The Court of Appeals' action deprived Krueger of a fair opportunity to argue his case, and this Court should correct the Court of Appeals' error by considering this argument.

But even if this Court concludes that the Court of Appeals' decision on the motion to strike was correct, this Court should exercise its discretion to now consider the argument anyway. Appellate courts have the discretion to consider arguments newly-raised. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶¶10-13, 249 Wis. 2d 142, 638 N.W.2d 355. Waiver is a rule of judicial administration and does not affect a court's power to consider an issue. *Id.*, ¶10. Courts review waived arguments in three situations: (1) "where a waived issue is of statewide importance or interest"; (2) "when a question of law is presented that is not dependent on the facts as presented below"; and (3) "where the parties have fully briefed the issue . . . and where there are no factual disputes." *Id.* ¶¶11-13. The first and third reasons are applicable here.

This Court should consider this argument primarily because it would be a wasted opportunity to ignore it. Despite being a foundational rule of government operations, the Open Meetings Law is rarely litigated. Extremely few open meetings cases are brought, fewer still of those make it to the court of appeals, and a vanishingly small number reach this Court. This is the first appellate case to consider what qualifies as a "rule or order." Government entities around the state need guidance on this issue, and this Court should not turn down the opportunity to establish a binding rule as to what actions suffice as a "rule or order" to create a "governmental body." This Court should not leave that question half-unanswered.

Furthermore, the equities at this point are not the same as they were in the Court of Appeals. If the argument truly was new in the Court of Appeals, then the District was deprived of an opportunity to respond to it. Here, however, Krueger has fully presented the argument and the District will have an opportunity to respond to it. The issue will therefore be fully briefed and there are no factual disputes.

Therefore, if the Court concludes that Rule 361.1 and the ACI Handbook are not a "rule or order," it should consider Krueger's argument that Mr. Steinhilber and Ms. Bunnow's decision to create CAMRC and

appoint its members was a "rule or order," making CAMRC subject to the Open Meetings Law.

III) CAMRC VIOLATED THE OPEN MEETINGS LAW

CAMRC met in violation of the Open Meetings Law by holding "meetings" without giving proper notice or holding the meetings in open session.

The Circuit Court and the Court of Appeals did not reach the question of whether CAMRC met in violation of the Open Meetings Law because they concluded CAMRC was not a "governmental body" and was therefore not subject to the Open Meetings Law. (R. 24:4, P. App. 104; Ct. App. Dec. ¶21, P. App. 116.) If this Court concludes that CAMRC was a governmental body, it should also address the question of whether CAMRC violated the Open Meetings Law and conclude it did, because that is purely a question of law. That issue was raised below in Krueger's motion for summary judgment, which was denied by the Circuit Court. (R.10:13-15; R. 24:4, P. App. 104.) The issue is purely a question of law based on undisputed facts. *See Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140, (1980) (When the issues raised are legal questions, briefed by the parties and of public interest, the issues merit decision by the appellate court).

Under the Open Meetings Law, all meetings of governmental bodies must be preceded by adequate public notice. Wis. Stat. §§ 19.83(1), 19.84. Such notice must "set forth the time, date, place and subject matter of the meeting," § 19.84(2), must be provided to the public, to the news media who request such notices, and to the officially-designated newspaper, § 19.84(1)(b), and must be provided at least 24 hours in advance of the meeting, § 19.84(3). Furthermore, all meetings of governmental bodies must be held in open session, § 19.83(1), which is defined as being "held in a place reasonably accessible to members of the public and open to all citizens at all times," § 19.82(3).

The undisputed facts show that CAMRC violated both of those requirements. From approximately October, 2011, through March, 2012, CAMRC held multiple meetings as that term is defined by § 19.82(2), for the purpose of exercising the responsibilities, authority, power, and duties it had been assigned to review reading materials and make a recommendation. (R. 12:68.)

None of CAMRC's meetings were preceded by public notice as required by § 19.83. (R. 12:69.) None of these meetings were held in open session as required by § 19.83. (R. 12: 69-70.) These are both violations of

the Open Meetings Law, and the District offers no defense for them other than its argument that the Open Meetings Law should not apply to CAMRC.

CONCLUSION

"In most cases, it is readily apparent whether a particular body fits within the definition [of a 'governmental body']. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements." Compliance Guide at 6 (emphasis added). Krueger respectfully requests that this Court reverse the Court of Appeals and conclude that CAMRC violated the Open Meetings Law.

Dated this 10th day of November, 2016.

Respectfully submitted,
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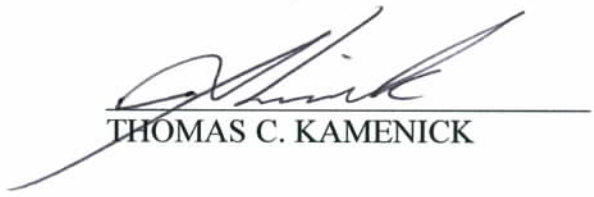
FORM AND LENGTH CERTIFICATION

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 10,786 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: November 10, 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: November 10, 2016

THOMAS C. KAMENICK