IN THE SUPREME COURT OF OHIO

MICHAEL J. SKINDELL, Plaintiff/Appellant, v. MARY LOUISE MADIGAN, et al., Defendants/Appellees.	)	CASE NO. 2017-0470 On Appeal from Cuyahoga County Court of Appeals Case No. CA-15-103976

APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is not of public or great general interest because what is at issue in this matter was already decided by this Court nearly 30 years ago in *Fox v. City of Lakewood*, 39 Ohio St.3d 19, 528 N.E.2d 1254 (1988), and in any event the Court of Appeals applied that case to a set of facts limited to whether this distinct case is moot. The holding of *Fox* – that a violation of the Sunshine Law is cured by a vote of the people – is as applicable today as it was 30 years ago. When the people have the ability to approve or reject an ordinance, an alleged violation of the Sunshine Laws is of no import because the people themselves participate in the deliberative process and render the underlying allegation moot. Whatever may have been hidden from the public by the legislative body is laid bare by the people's direct participation.

Notwithstanding the patriotic quotes set forth in Appellant's Memorandum, the position Appellant advocates would actually subvert the most democratic form of participation of the people in governing.

> "The referendum * * * is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'" *Eastlake v. Forest City Ents., Inc.* (1976), 426 U.S. 668, 673, 96 S.Ct. 2358, 49 L.Ed.2d 132, quoting *James v. Valtierra* (1971), 402 U.S. 137, 141, 91 S.Ct. 1331, 28 L.Ed.2d 678.

State ex. rel. LetOhioVote.Org v. Brunner, 123 Ohio St.3d 322, 2009-Ohio-4900, ¶18. Appellant's position would disenfranchise the voting public who approved the ordinance at issue.

That the people's vote can cure an alleged violation of the Sunshine Law is even more compelling in this case than it was in *Fox*. In *Fox*, this Court interpreted Lakewood's charter which at the time had a complete prohibition on any meeting outside of the public with no ability

to enter executive session. Despite this absolute prohibition, this Court found that the people cured the violation of that Sunshine Law in approving the legislation. In this matter, the alleged violation is of Ohio's Open Meetings Act, which permits executive sessions for a number of reasons and is not nearly as restrictive as Lakewood's former charter. If a vote of the people can cure a violation of the most restrictive of Sunshine Laws, it clearly can cure a violation of a less restrictive Sunshine Law.

Moreover, this matter does not involve a substantial constitutional question. In Ohio, the legislature makes the law, the courts interpret and apply the law, and the executive enforces the law. The Cuyahoga County Court of Appeals did not violate the separation of powers set forth in the Ohio Constitution when it interpreted Ohio's Open Meeting Act and applied controlling precedent in this matter. Rather, the Court of Appeals acted within its authority.

Finally, both the Ohio Constitution and Lakewood's charter provide the people the right of referendum to adopt or reject legislation. Ohio Constitution, Article II, §1 and Second Amended Charter of the City of Lakewood, Article XXI, §1. A group of Lakewood citizens who were opposed to Lakewood Hospital closing initiated the referendum on Ordinance 49-15. As both Ohio's Constitution and Lakewood's Charter permit the right of a referendum, it clearly was not a usurpation of either legislative or judicial power to permit the people to vote to approve or reject Ordinance 49-15.

Simply put, this case does not present an issue of public or great interest and does not involve a substantial constitutional question. As such, this Court should decline to accept jurisdiction over this matter.

ARGUMENT CONCERNING APPELLANT'S PROPOSITIONS OF LAW

I. Proposition of Law No. I: A violation of the Ohio Open Meetings Act cannot be cured by a public referendum as a violation can never be cured where the public body discussed matters in executive session that should have been discussed in public.

What is at issue in this matter – whether a controversy over open meetings is made moot by the voters' direct approval of the legislation in question – was already decided by this Court nearly 30 years ago in *Fox v. City of Lakewood*, 39 Ohio St.3d 19, 528 N.E.2d 1254 (1988). Appellant attempts to distinguish the instant case from *Fox* because *Fox* interpreted Lakewood's charter instead of Ohio's Open Meetings Act. Appellant, however, never addresses the obvious reason why *Fox* is controlling precedent in this matter. At the time *Fox* was decided, Lakewood's charter was significantly more restrictive than Ohio's Open Meetings Act and did not permit executive session for any reason. *Fox* at 21.[1] Despite Lakewood's charter's complete prohibition against meeting outside of the public, this Court held in *Fox* that the vote of Lakewood's citizens cured City Council's violation of that Sunshine Law. *Fox* at 22-23. If a popular vote can cure a violation of the most restrictive of Sunshine Laws, it clearly can also cure a violation of a less restrictive Sunshine Law like Ohio's Open Meetings Act. *Fox* absolutely applies in this matter.

Appellant also asserts that a conflict exists among the Courts of Appeal concerning the application of *Fox* in a futile attempt to bolster his jurisdictional arguments. Even a cursory

[1] Lakewood's charter has been amended since the *Fox* decision and the relevant provision, Article III, Section 5, now provides that "All meetings of the Council or committees thereof shall be open to the public, except that Executive Sessions may be held in accordance with the Ohio Revised Code."

review of the cases cited by Appellant quickly dispels this argument. Appellant cites to two cases that allegedly followed *Fox*: *Kuhlman v. Village of Leipsic*, 3rd Dist. Putnam No. 12-94-9, 1995 Ohio App. Lexis 1269, and *Carpenter v. Board of Allen County Commissioners*, 3rd Dist. Allen No. 1-81-44, 1982 Ohio App. Lexis 15269. *Carpenter* was actually decided six years before *Fox*. Moreover, neither *Kuhlman* nor *Carpenter* deals with a referendum vote curing an alleged violation of Ohio's Open Meetings Act by a legislative body. Rather, these cases hold that the legislative body's subsequent action in open session cured the alleged violation. See *Kuhlman* at *10 and *Carpenter* at *7-8.

Likewise, the cases Appellant cites that are purportedly in conflict with *Kuhlman* and *Carpenter* also deal with whether a legislative body can cure a violation of Ohio's Open Meetings Act by subsequent action taken in open meeting by the legislative body. They do not address whether a referendum vote by the public can cure an alleged violation committed by a public body. See *Gannett Satellite Information Network, Inc. v. Chillicothe City School District Bd. of Ed.*, 41 Ohio App. 3d 218, 221, 534 N.E.2d 1239 (4th Dist. 1988), which was decided six months before *Fox; The Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 147 Ohio App.3d 460, 2001-Ohio-8751, 2001-Ohio-8751, ¶90 (10th Dist. 2001); and *Keystone Committee v. The Switzerland of Ohio School District Bd. of Ed.*, 7th Dist. Monroe No. 15 MO 0011, 2016-Ohio-4663, 67 N.E.3d 1, ¶45,

Only one case cited by Appellant, *M.F. Waste Ventures, Inc. v. Board of Amanda Township Trustees*, 3rd Dist. Allen County No. 1-87-46, 1988 Ohio App. Lexis 493, even tangentially addresses whether a vote by the public can cure an alleged violation of Ohio's Open Meetings Act. In that case, two township zoning boards came together to draft a new zoning plan, but did so in private meetings. The boards approved the zoning plan in public meetings

and voted to have the zoning plans put on the ballot for approval by the electorate. The trial court enjoined the election. The Court of Appeals held that "the resolutions were invalid, and the fact that they were later adopted at public meetings did not cure their invalidity. Neither does the fact that the resolutions *were to be* subjected to a vote of the people cure their invalidity." *M.F. Waste Ventures* at *9-10 (emphasis added). The Court of Appeals modified the trial court's injunction to permit the vote, but ordered the results impounded awaiting its ruling. Because the Court of Appeals found the boards violated the Open Meetings Act, it ordered that the ballots be destroyed and not counted. As such, it was never known whether the vote of the citizens would have cured the boards' violation. This ruling was made by the Allen County Court of Appeals six months before this Court's decision in *Fox*. To the extent that *M.F. Waste Ventures* stands for the proposition that a referendum vote does not cure a violation of the Sunshine Law, it was effectively overruled by *Fox*.

The cases cited by Appellant quite plainly do not establish that a conflict exists among the Courts of Appeal concerning their interpretation of *Fox*. In fact, before the Cuyahoga County Court of Appeals relied upon *Fox* in the instant matter, no appellate court had applied *Fox*'s holding that a vote by the people cures an alleged violation of a Sunshine Law by a legislative body. Moreover, Appellant's failure to move the Cuyahoga County Court of Appeals to certify a conflict in this case pursuant to App.R. 25(A) is telling of the lack of an actual conflict.

Appellant further contends that the Cuyahoga County Court of Appeals judicially created an exception to Ohio's Open Meetings Act and, in so doing, violated the separation of powers between the courts and the legislature. This case does not involve a violation of the separation of powers and certainly does not present a significant constitutional question. First, Appellant fails

to recognize that a cure is different than an exception. An exception would permit another instance in which a public body could meet in executive session that would not violate the Open Meetings Act. A cure alleviates the harm caused by a potential violation of a legislative body by the subsequent vote of the people.

Moreover, Appellant's argument ignores the traditional roles of the legislature and the courts. In *State of Ohio v. West*, 66 Ohio St.3d 508, 513, 1993-Ohio-201, then Chief Justice Moyer, in a concurring opinion, observed that "This follows from our system of separated powers: the legislature makes the law, the courts interpret and apply the law, and the executive enforces the law." While Appellant strenuously attempts to create a constitutional issue, the fact of the matter is that Appellant is simply unhappy with the Cuyahoga County Court of Appeals' interpretation of Ohio's Open Meetings Act and its conclusion that *Fox* and the Lakewood citizens' vote combined to make this controversy moot – both of which are well within the Court's power.

Furthermore, Appellant's assertion that the Court of Appeals' decision divests both the judiciary and the legislature of their power is patently absurd. It cannot be said that the judiciary limits its own power in exercising its power to interpret legislation. Moreover, the legislative branch is subject to a referendum under the Ohio Constitution and Lakewood's Charter. Ohio Constitution, Article II, §1 and Second Amended Charter of the City of Lakewood, Article XXI, §1. Most importantly, "All political power is inherent in the people." Ohio Constitution, Article I, §2. In an instance such as this, where the people's direct participation in governing cures a violation, it can never be considered a usurpation of either legislative or judicial power because such power is derived from the people.

Finally, the Court of Appeals decided this matter rightly. In *Fox*, this Court interpreted Lakewood's charter to permit the public to cure a violation of the Sunshine Law by voting to approve City Council's action because the ends of the Sunshine Law were clearly achieved by the people participating in the most democratic form of public participation in governing. Likewise, the Court of Appeals held the people's vote cured any potential violation in this matter and the Court of Appeals had more reason to so hold than this Court in *Fox* because Ohio's Open Meetings Act is not nearly as restrictive as Lakewood's charter provisions in effect at the time of the *Fox* decision.

II. Proposition of Law No. II: Even if a violation of R.C. 121.22(G) can be cured through a public referendum, the referendum's ballot language must sufficiently lay the otherwise unlawful secret deliberations before the public eye.

An open deliberative process is inherent in a vote by the public. Legislative deliberations are always laid before the public eye in a referendum vote because the public actually participates in the deliberative process in voting for or against legislation.

It is beyond dispute that the people of Lakewood knew what they were voting for in the referendum. The voters could 1. vote to approve Ordinance 49-15, which authorized the execution and delivery of an agreement between the city, Lakewood Hospital Association, and the Cleveland Clinic or 2. vote against Ordinance 49-15 and the agreement the city entered into with the Lakewood Hospital Association and the Cleveland Clinic. (Affidavit of Mary T. Hagan and Hagan Exhibit 1, which were attached to Appellees' reply in support of their motion to dismiss.) The referendum language, which was created by the Cuyahoga County Board of Elections and approved by the Secretary of State, is sufficiently clear to permit the voters to understand what they were voting for.

Furthermore, it is difficult to imagine an instance in which an electorate is better educated on a referendum vote than in this matter. The future of healthcare in Lakewood and whether or not to close Lakewood Hospital has consumed the City of Lakewood for the last two years. In 2015, City Council conducted extensive fact-finding and analyzed the viability of Lakewood Hospital and the future of healthcare in Lakewood in a yearlong process, which was not only fully open to the public, but also shaped by extensive public comment, ultimately leading to the passage of Ordinance 49-15 on December 21, 2015. In 2016, the public discussion about the future of healthcare in Lakewood continued at just about every single City Council meeting in addition to the many public meetings that were held leading up to the referendum vote on Ordinance 49-15 on November 8, 2016.

The City of Lakewood's website has had a page dedicated to the city's investigation into the future of healthcare since early 2015 on which the various studies and other investigative documents have been posted. Once the Master Agreement between the city, the Cleveland Clinic, and Lakewood Hospital Association was finalized, the execution of which was authorized by Ordinance 49-15, it has been available on Lakewood's website – from mid-December, 2015 through the present – for the public to review.[2]

Moreover, both the closure of Lakewood Hospital to inpatient care on February 6, 2016 and the demolition of the hospital's garage beginning on October 15, 2016 served as highly visible signs of the agreement entered into by the city with the Cleveland Clinic and Lakewood Hospital Association to close Lakewood Hospital. Given the facts surrounding the very-publicized process by which Lakewood Hospital was closed, it is difficult to imagine a

[2] http://www.onelakewood.com/wp-content/uploads/2016/02/15-Master-Agreement-City-of-Lakewood-Lakewood-Hospital-Association-Cleveland-Clinic-fully-executed-12212015.pdf

referendum in which the voters could have a better understanding of what they were voting for than Lakewood's voters in this referendum.

Finally, Appellant incredibly posits that an alleged violation of Ohio's Open Meetings Act must be included in the referendum language itself and that the ballot language must state that it absolves the city of an Open Meetings Act violation (pgs. 12-13), even though the trial court *found no violation* and dismissed Appellant's case. Even still, while Appellant's assertion is absurd, Appellant did not raise this argument below and, therefore, cannot raise it now. See *Jones v. Action Coupling & Equipment, Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, ¶12 and *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 2000-Ohio-301.

III. Proposition of Law No. III: Even if a violation of R.C. 121.22(G) can be cured through a public referendum, the remedy provisions of R.C. 121.22 are mandatory.

The injunctive relief actually sought by Appellant was rendered moot by the referendum vote and cannot, under any circumstances, be granted. Appellant sought to have "City Council be immediately enjoined and restrained from formally acting on Ordinance 49-15 and the agreement to close Lakewood Hospital or any similar ordinance or agreement." Complaint, ¶ 127. After the trial of this matter, a number of events transpired to foreclose the possibility of awarding Appellant's sought after relief.[3] Lakewood City Council passed Ordinance 49-15, which authorized the mayor to enter into the Master Agreement with the Cleveland Clinic and Lakewood Hospital Association. Lakewood Hospital closed to in-patient care on February 6, 2016. The hospital's contracts with Medicare, Medicaid, and insurance companies were canceled. Lakewood Hospital lost its accreditation from The Joint Commission. Lakewood Hospital's garage and professional office building were demolished. Finally, the people of

[3] These events were fully described in Appellees' motion to dismiss and reply in support and the affidavits attached thereto.

Lakewood themselves approved the closing of Lakewood Hospital and the Master Agreement when they ratified City Council's adoption of Ordinance 49-15 in the referendum held on November 8, 2016. In short, the injunctive relief sought by Appellant cannot be awarded, rendering this case moot.

The Cuyahoga County Court of Appeals' opinion cogently explained why the injunctive and other relief sought by Appellant cannot be awarded in this matter:

> Under *Fox*, the adoption of Lakewood [Ordinance] 49-15 by the electorate via the referendum precludes the injunctive relief sought by appellant under R.C. 121.22(I) and renders moot the declarations sought by appellant under R.C. 121.22(H). Furthermore, because appellant's claims for civil forfeiture, court costs and attorney fees under R.C. 121.22(I)(2)(a) are predicated upon the issuance of the unavailable injunctive relief by a trial court, such claims are also precluded.

Opinion, ¶5.

While the injunctive relief sought by Appellant in the complaint cannot be granted, Appellant now seeks to enjoin City Council from violating the Open Meetings Act in the future. Appellant ignores the fact that the trial court entered judgment in favor of the city finding that there were no violations of the Open Meetings Act in this matter. The cases cited by Appellant, therefore, are inapplicable because in each of those cases the courts found a violation. In this instance, there is simply no impermissible behavior to enjoin. The only thing that should be enjoined is Appellant's pursuit of this meritless litigation.

CONCLUSION

For all the foregoing reasons, Appellees respectfully request that the Court refuse to accept jurisdiction over this matter because it does not present an issue of public or great interest and does not involve a substantial constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, the foregoing Appellees' Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction was served via e-mail on the following:

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