No. SC97781

IN THE SUPREME COURT OF MISSOURI

DAVID E. ROLAND,
Respondent/Cross-Appellant

v.

ST. LOUIS CITY BOARD OF ELECTION COMMISSIONERS, et al.,
Appellants/Cross-Respondents.

Appeal from the
St. Louis City Circuit Court, 22nd Judicial Circuit
Honorable Jason Sengheiser

SUBSTITUTE AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MISSOURI IN SUPPORT OF DAVID E. ROLAND

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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 1.2 million members nationwide. The ACLU of Missouri is the state affiliate of the national ACLU. The ACLU of Missouri has more than 19,000 members.

The ACLU of Missouri strives to make sure governmental entities are transparent, accountable to the public, and compliant with the Missouri Sunshine Law. The ACLU of Missouri not only makes dozens of Sunshine Law requests each year, it also litigates Sunshine Law cases on a regular basis throughout the State. A sampling of the Sunshine Law cases the ACLU of Missouri has litigated includes: *Strake v. Robinwood West Cmty. Improvement Dist.*, 473 S.W.3d 642 (Mo. banc 2015); *Malin v. Cole Cty. Prosecuting Attorney*, 565 S.W.3d 748 (Mo. App. W.D. 2019); *Bray v. Lombardi*, 516 S.W.3d 839 (Mo. App. W.D. 2017); *Reporters Comm. for Freedom of the Press v. Mo. Dep't of Corrs.*, 514 S.W.3d 24 (Mo. App. W.D. 2017); *Am. Civil Liberties Union of Mo. Found. v. Mo. Dep't of Corrs.*, 504 S.W.3d 150 (Mo. App. W.D. 2016); and *Chasnoff v. Mokwa*, 466 S.W.3d 571 (Mo. App. E.D. 2015).

The ACLU of Missouri files this brief in support of Appellant David Roland.

JURISDICTIONAL STATEMENT

Amicus adopts the jurisdictional statement as set forth in Respondent's brief, but adds the following analysis related to the issue of mootness.

The claims raised by the Board as to whether the trial court erred in ordering disclosure of the records in a partial judgment should be decided by this Court. "An appeal may be rendered moot if an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible." *In re Prye*, 169 S.W.3d 116, 120 (Mo. App. E.D. 2005). There are two narrow exceptions to the mootness doctrine. *Id.* "First, if a case becomes moot after argument and submission, dismissal is within [the appellate court's] discretion." *Id.* "The second exception applies if a case presents an issue that (1) is of general importance and public interest, (2) will recur, and (3) will elude appellate review in future live controversies." *Id.* The second exception applies in Sunshine Law cases.

Here, the issues presented are of general importance and public interest. Although it is true the requested records have already been produced and cannot, therefore, be "unproduced" regardless of the findings of this Court, if the Court declines to rule on the issue of openness for the sole reason that the records were already disclosed, the issue will certainly recur and is likely to continue to evade appellate review. This issue will continually recur, because of the nature of requests made to governmental entities that are required to comply with the Sunshine Law and the fact that the documents requested often relate to issues which are time-sensitive, as was the case here. This issue will recur any time a trial court enters an initial order directing a party to disclose records before

issuing a final judgment disposing of all issues and ruling on whether the nondisclosure was purposeful or knowing.

While entering a partial judgment related to one issue in a case (whether disclosure is required) and a final judgment relating to the remaining issue (whether nondisclosure was knowing or purposeful) may not be common in *most* types of cases, it is likely to recur in *Sunshine Law cases*. In some Sunshine Law cases, there is no dispute about the content of the records requested and the only disputes relate to (1) whether they are closed under the law and (2) whether nondisclosure was knowing or purposeful. Because of this, and due to the nature of requests that seek disclosure of time-sensitive information (e.g., related to elections), a court may find it necessary to enter an order directing a party to disclose the records but decide that more discovery or even a trial is necessary to determine if the violation was knowing or purposeful.

For the issue of openness where a governmental entity is ordered to disclose the requested records *before* all issues in the case have been resolved evades review because the records were already disclosed (as ordered by a court of law) then government entities will become less likely, if likely at all, to disclose the records as ordered. Instead, even if ordered to disclose records by a trial court, the governmental entity will refuse to do so because, if they do, the holding related to that disclosure could evade any review by a higher court unless all issues in the case are decided in the same judgment. Failing to apply an exception to mootness here will discourage trial courts to make initial rulings on openness and encourage governmental entities to refuse to comply with any court order that makes such an initial finding. This creates a perverse incentive for the trial court to

err on the side of secrecy, contrary to the Sunshine Law's policy, because only then would the decision be reviewable on appeal.

Moreover, the exception to mootness should apply even when the finding that records are open is not bifurcated from the determination whether the closure of records was knowing or purposeful. The legislature intends for open records to be disclosed promptly, mandating requests for access to a public record must be "acted upon as soon as possible, but in no event later than the end of the third business day" after it is received. § 610.023. Applying mootness in appeals from findings that public records are open would require a custodian of records to continue to withhold open public records that have been determined to be open by a court of law to preserve the ability to secure review of that decision. Therefore, had the Board withheld the records here, despite the order requiring their disclosure, the evidence requiring the re-doing of two elections, resulting in a different candidate prevailing, would not have emerged. *See* Sarah Fenske, *St. Louis Board of Elections Goes Scot-Free for Stonewalling Absentee Request*, Riverfront Times News Blog (Oct. 17, 2017, 9:29 a.m.), https[]://www.riverfronttimes.com/newsblog/2017/10/17/st-louis-board-of-elections-goes-scot-free-for-stonewalling-absentee-request. In this instance, election results were on the line. If the Board had delayed compliance with the trial court order, the integrity of the democratic process would have been at stake.

The questions raised in any Sunshine Law case, and in this case in particular, are premised on a court order declaring records open and ordering their immediate disclosure. This is a situation that is likely to recur in the Sunshine Law context. While no

one may request the precise records Roland did, it is likely, especially considering the malfeasance Roland's request revealed, that the same type of records will be requested in the future from local election authorities. Absent the ability of appellate courts to review decisions of trial courts that find public records to be open and order their immediate disclosure under the law, precedent will not be established related to those findings of openness, leaving each local election authority without authoritative guidance when faced with a similar request for records. This further frustrates the intent of the Sunshine Law for public record to be made available to the public promptly upon request.

Because Sunshine Law cases present an issue of general importance and public interest that will recur and elude appellate review in future live controversies, review of the merits of trial court decisions that a public record is open should always be exempt from the mootness rule.

STATEMENT OF THE FACTS

Amicus adopts Respondent's statement of facts.

ARGUMENT

Costs cannot be assessed against a member of the public attempting to enforce the Sunshine Law in a non-frivolous case.

The trial court assessed costs against Roland, presumably concluding the Board was the prevailing party. Regardless of who is the prevailing party, costs cannot be assessed against Roland in this case. The plain language of Rule 77.01 and § 514.060—the general rules relating to the recovery of costs in civil actions—state that costs may be assessed only where no other law applies, and the Sunshine Law already has specific provisions addressing the assessment of costs. Moreover, applying the plain language of those statutes accords with the Sunshine Law's purpose: to promote the State's public policy in favor of open and transparent government.

Because "costs" are a concept created by statute rather than common law, "courts may only award those costs which may be granted by virtue of express statutory authority.'" *In re G.K.S. v. Staggs*, 452 S.W.3d 244, 247 (Mo. App. W.D. 2014) (quoting *Multidata Sys. Int'l Corp. v. Zhu*, 107 S.W.3d 334, 337 (Mo. App. E.D. 2003)). Under § 514.060, the statute governing the award of costs in civil actions in the absence of other authority, a prevailing party "shall recover his costs against the other party, *except in those cases in which a different provision is made by law*." RSMo. § 514.060 (emphasis added). Likewise, under Rule 77.01, the party prevailing "shall recover his costs against the other party, *unless otherwise provided by the rules or by law*." Mo. Sup. Ct. R. 77.01 (emphasis added).

In *Staggs*, the Western District Court of Appeals concluded that, because the

underlying claims of paternity, custody, and child support under the Uniform Parentage Act (UPA), a law that included a section related to the award of costs, the general rules relating to costs did not apply. 452 S.W.3d at 247–49. Like in *Staggs*, the general rules do not apply here because the Sunshine Law contains specific provisions related to awards of costs. Under certain circumstances, the remedies available under the Sunshine Law include provisions related to the payment of "costs and reasonable attorney fees" by the party who violates the law. § 610.027.3 & .4. When a public governmental body knowingly violates the law, a court may order it to pay costs to "any party successfully establishing a violation." § 610.027.3. When the violation is purposeful, the court is required to order the violating party to pay costs. § 610.027.4 ("the court shall order the payment by [a violator] of all costs and reasonable attorney fees to any party successfully establishing such a violation").

The Sunshine Law's silence about whether costs can be assessed against the party bringing the suit (or against a public governmental body that unknowingly violates the Sunshine Law) evidences the legislature's intent that costs should not be assessed in any situation *other than* against the governmental entity when there has been a knowing or purposeful violation. It is apparent the specific provisions in the Sunshine Law supplant the application of § 514.060 and Rule 77.01. Otherwise, the result would be nonsensical. For instance, the award of costs would be discretionary for a knowing violation of the law (pursuant to § 610.027.3), but the plaintiff would be *entitled* to costs (pursuant to § 514.060 and Rule 77.01) if she proved only an accidental violation of the law. This result is not what the legislature intended. *See City of Springfield v. Events Pub'g Co.*,

951 S.W.2d 366, 373–74 (Mo. App. S.D. 1997) (holding that a different provision relating to the financial burden of Sunshine Law litigation, § 610.027.5, must be "liberally interpret[ed] . . . to promote the policy of open government").

In some ways, the Sunshine Law's specific cost provisions already disadvantage those enforcing the law. Absent the ability to demonstrate a purposeful violation, it is possible the plaintiff will not recover costs even if she prevails on the underlying claim that a public governmental body wrongfully withheld access to an open public record. *See Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. banc 1998) ("No language in the statute allows for an assessment of the fine, costs, or attorney's fees against anyone else, let alone any member who has not 'purposely violated' the statute.").[1] In an ordinary case, a plaintiff need only prevail in order to be entitled to costs.

The heightened requirement before a public governmental body can be required to pay costs in a Sunshine Law case—that is, proof of at least a knowing violation—is equitable only when considered in light of the fact there is no provision allowing costs to be assessed against a Sunshine Law plaintiff, prevailing or otherwise. It is therefore

[1] *Spradlin* addressed an alleged purposeful violation of the Sunshine Law. The case predated the amendment to section 610.027 that added a remedy for knowing violations. *See* SB 869, 92d Gen. Assemb., 2d Reg. Sess. (Mo. 2004). Under the current law, a civil penalty is mandated for both knowing and purposeful violations of the Sunshine Law; however, an award of costs is discretionary when the violation is knowing and mandatory only when the violation is purposeful. § 610.027.3-.4.

clear that the legislature's omission of a provision allowing costs to be assessed against a records requester was not an oversight.

The plain language of § 514.060 and Rule 77.01 stating that they apply only when there is no other applicable law, together with the existence of that other applicable law (the Sunshine Law's specific provisions addressing the assessment of costs), dictate the conclusion that the trial court lacked authority to tax costs against Roland. This conclusion is consistent with the public policy Missouri has effectuated by its Sunshine Law. Indeed, the Sunshine Law establishes Missouri's "public policy . . . that meetings [and] records . . . of public governmental bodies [are] open to the public unless otherwise provided by law." § 610.011.1. "Chapter 610 embodies Missouri's commitment to open government and is to be construed liberally in favor of open government." *State ex rel. Mo. Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996) (citing *Mo. Prot. & Advocacy Servs. v. Allan*, 787 S.W.2d 291, 295 (Mo. App. W.D. 1990)). "The provisions of the Sunshine Law are to be liberally construed to promote this public policy." *Stewart v. Williams Commc'n, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002) (citing § 610.011.1; *News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576, 578 (Mo. App. W.D. 1998)).

To construe the Sunshine Law to allow courts to tax costs against members of the public who request public records would fly in the face of the State's commitment to open government and its statutory directive to promote that public policy. "When the Sunshine Law was adopted in 1973, it had no 'teeth.'" *Laut v. City of Arnold*, 491 S.W.3d 191, 202 (Mo. banc 2016) (Fisher, J., dissenting); *accord Kansas City Star Co.*

v. Shields, 771 S.W.2d 101, 104 (Mo. App. W.D. 1989). "[Cost-shifting] remedies were added to beef up and to deter violation of the already stated public policy of the law, as spoken loudly and clearly in the General Assembly, to open the business of the government to the people." *Kansas City Star Co.*, 771 S.W.2d at 104. In other words, the General Assembly adopted penal remedies "to ensure meaningful enforcement of the law." *Laut*, 491 S.W.3d at 202 (Fisher, J., dissenting).

When the legislature has authorized the assessment of costs in a Sunshine Law case, it has done so to further the state's policy of open government. This important interest would not be served by allowing those enforcing the law to be sacked with costs of litigation if they are incorrect in their honest and non-frivolous belief that a record is open. To the contrary, a person seeking an open record will be loath to challenge a denial in court knowing they could be assessed costs as Roland was in this case if their interpretation of the law is not one that the court presently agrees with.[2] The legislature's decision not to allow costs of suit to be shifted to those enforcing the Sunshine Law recognizes that such suits are necessarily commenced with incomplete information

[2] At first glance, it might seem like the taxation of costs against a requester who is *unsuccessful* will not have a deterrent effect: requesters will simply file suit only when the record they seek is open. However, even putting aside close cases, a member of the public is always at a disadvantage when seeking a public record because only the government knows precisely what is contained in the record sought—and governmental bodies' characterizations of those contents are not always accurate. *See, e.g.*, *Laut*, 491 S.W.3d at 195 (recognizing that after *in camera* review, trial court had found government's description of record "wholly inaccurate"); *Chasnoff v. Mokwa*, No. 1722-CC07278, 2010 WL 3073736, at *4–5 (Mo. Cir. Ct. Apr. 12, 2010) (concluding that government's characterization of record was inaccurate).

because the government's shielding of the key information that can result in a court determination that a record is open or closed under the law is often what is at issue in the suit. It is "beyond doubt" that the Sunshine Law must "be construed liberally in favor of open government," in order to effectuate the State's public policy of transparency in conducting the public's business. *MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo. App. W.D. 1984). Awarding more than $1000 in costs against a records requester who instituted a non-frivolous suit—indeed, one that the court initially agreed was meritorious and resulted in the effective oversight of the public business, including the calling of a special election—will deter others from requesting public records and thereby seriously undermine the purpose of the Sunshine Law.

CONCLUSION

Because Sunshine Law cases present an issue of general importance and public interest that will recur and elude appellate review in future live controversies, the Board's appeal should be considered on the merits. Further, because the Sunshine Law contains specific provisions governing the assessment of costs that supplant Rule 77.01 and § 514.060 and do not contemplate the taxation of costs against a member of the public who brings a non-frivolous suit under the Sunshine Law, the trial court erred in taxing costs against Roland. Regardless of who is the prevailing party, the taxation of costs should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on July 16, 2019, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3,004 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert