No. SC98619

In the Supreme Court of Missouri

ELAD GROSS,

Appellant,

v.

MICHAEL PARSON, *et al.*,

Respondents.

Appeal from Circuit Court of Cole County
Nineteenth Judicial Circuit
The Honorable Patricia S. Joyce, Judge

BRIEF OF AMICI CURIAE

MISSOURI MUNICIPAL LEAGUE, MISSOURI SCHOOL DISTRICT ASSOCIATION, MISSOURI ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL ATTORNEYS ASSOCIATION

(Brief is being filed with the consent of the parties to this matter)

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INTEREST OF AMICI CURIAE

This Brief is being filed with the consent of both of the parties.

Represented in this Amicus are four not-for-profit organizations focused on assisting public governmental bodies. As can be seen from their respective missions, all have a real interest in the outcome of this litigation.

The Missouri Municipal League was organized in 1934 as an independent, statewide, not-for-profit association. Since its organization, its aim has been "to develop an agency for the cooperation of Missouri cities, towns and villages and to promote the interest, welfare and closer relations among them to improve municipal government and administration in the state." The League currently has 645 member municipalities. The League is a leader in the State in providing education to local officials and staff in compliance with the Sunshine Law and other records laws.

The Missouri School Boards's Association (MSBA) is a membership association governed by Missouri school board members to provide information, advocacy, and support to Missouri public school districts. Currently, 389 school boards belong to MSBA. School board members are the largest group of elected officials in Missouri with over 3,600 citizens serving in that capacity. School boards and school districts are subject to the Missouri Open Meetings and Records Act (Sunshine Law) and school districts receive many requests for records. School board members are volunteers that strive to comply with all laws, but they are not attorneys. MSBA's membership has a vested interest in a clear, consistent, and logical interpretation of the Sunshine Law so that school boards and

the school administrators that operate Missouri's public schools can consistently comply with the law without spending public funds intended for education on attorney's fees when a district receives a request for records

The Missouri Association of Counties is a non-profit organization made up of Missouri's counties which strives to assist its member counties and serve the best interests of local taxpayers in many ways, including by collecting, studying, and disseminating information and materials which will encourage improved government and by providing training and educational resources to Missouri's county officials and employees.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

These bodies, together with the Missouri Attorney General's Office do almost all of the education and training for Missouri citizens and officials on complying with the Sunshine Law and deal with most of the requests for records made. In that respect, they can provide the Court with a unique and practical perspective that the Appellant and the Amici supporting him cannot.

JURISDICTIONAL STATEMENT

The Amici Curiae hereby adopt the Jurisdictional Statement submitted by the Respondents in this matter.

STATEMENT OF FACTS

The Amici Curiae hereby adopt the statement of facts submitted by the Respondents in this matter.

POINT RELIED ON

I. The Trial Court correctly applied the law in allowing the Governor's Office to charge for time spent by staff to search for electronic records and for the Governor's attorneys to review the records in that the provisions of RSMo. Subsection s 610.026.1(1) and (2) must be *in pari materia* with each other and with the rest of the chapter.

- *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194
- *Hemeyer v. KRCG-TV*, 6 S.W.3d 880
- RSMo. Section 610.010(6)

ARGUMENT

I. The Trial Court correctly applied the law in allowing the Governor's Office to charge for time spent by staff to search for electronic records and for the Governor's attorneys to review the records in that the provisions of RSMo. Subsection s 610.026.1(1) and (2) must be *in pari materia* with each other and with the rest of the chapter.

This matter arose following a request for records from the Appellant to the office of the Governor of Missouri. The records to be produced were both physical documents and electronic documents. The Trial Court allowed the Governor's Office to charge for research time and attorney's fees on both types of records, citing Subsection 610.026.1(1). However, on appeal, the Appellate Court ruled that physical records and electronic records are to be treated differently and that therefore research and attorneys fees can only be charged for the production of physical records.

By failing to treat the Sunshine Law as a single comprehensive statutory scheme and refusing to read RSMo. Subsection 610.026.1(1) *in para materia* with RSMo. Subsection 610.026.1(2) and the rest of the Sunshine Law, the Court of Appeals invites an absurd, unrealistic, and ultimately harmful operation of the Sunshine Law.

It is well established that when interpreting statutes, the Courts must look first to the plain and ordinary meaning of the words used by the legislature (*Delta Air Lines, Inc. v. Dir. of Revenue, State of Mo.*, 908 S.W.2d 353, 356 (Mo. 1995).). However, when literal interpretation leads to an illogical result, the Courts must look deeper than the plain and ordinary meaning (*State v. Daniel*, 103 S.W.3d 822, 826 (Mo.App. W.D.2003).). In this

case, the Court of Appeals treated RSMo. subsection 610.026.1(1) and RSMo. subsection 610.026.1(2) as independent, unrelated clauses, with physical records, treated one way and electronic records in a completely different manner. The Amici supporting the appellant urge this Court to adopt that view. But this interpretation is not only wrong, but leads to absurd, unrealistic, and harmful results.

That the lower Court's interpretation leads to illogical results is easily illustrated. Suppose for example that records responsive to a request exist only in electronic form. Some clerks may have software able to parse responsive, relevant portions of electronic records; others, however, would print the responsive portions only to scan them back into electronic form, such as a PDF file, for delivery. It appears that this may have happened with at least some records in this case. As this Court has pointed out, the question of whether the public body intends to create a record is irrelevant (*Hemeyer v. KRCG-TV*, 6 S.W.3d 880 (Mo. 1999); *see also Mo. Prot. & Advocacy Servs. v. Allan*, 787 S.W.2d 291, 293 (Mo. App. 1990).). The *Heymeyer* case holds that a record is a public record if it exists and is in the possession of the body. In our example then, two copies of the exact same record now exist and are in possession of the governmental body. For the paper version, RSMo. Subsection 610.026.1(1) applies, and the body can charge for the research time and attorney review; however, RSMo. Subsection 610.026.1(2) applies to the electronic version of the same record, and the body cannot charge for producing the same record.

The Court of Appeals' decision ignores the common reality that public records are often kept in both physical and electronic forms. For example, in municipalities, it is common for ordinances, resolutions, and reports to be retained in their original paper form

and also scanned and kept electronically, for convenience, fiscal, and safety (backup) reasons. Which subparagraph of RSMo. Subsection 610.026.1 prevails when a request is for "any and all records relating to" such minutes? Can the municipality collect fees to cover the costs for research and attorney fees because the responsive original paper copy is retained in a physical form? Or, is the municipality barred from recouping its costs because the ordinance is also kept in electronic form? How is the municipality supposed to allocate its time for research and attorney review for a record that retained in both physical and electronic form, since that time would be largely duplicative for both the paper and digital copies? The Court of Appeals' insistence on treating RSMo. Subsection 610.026.1(1) and (2) as independent clauses begs these questions. The answers, however, are not found in the text of the Sunshine Law leaving the answers to future litigation using authority existing outside the four corners of the statutory text. This Court can avoid these questions by reading the Sunshine Law's provisions *in para materia* and honoring the clear statutory intent to allow public governmental bodies to recoup their reasonably incurred costs in responding to records requests. This Court has said, "All consistent statutes relating to the same subject are in pari materia and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals." (*State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991).). The Court of Appeals made no attempt to reconcile RSMo. Subsections 610.026.1(1) and (2) with each other, nor with RSMo. Subsection 610.010(6). Instead, it treated them as wholly independent sections creating a conflict between them where none exists.

The Court of Appeals viewed records as being either exclusively electronic or exclusively physical when it held, "RSMo. Subsection (1) governs his request for documents maintained as paper records, even if those records are capable of being transmitted electronically, and RSMo. Subsection (2) governs his request for electronically stored records." (*Gross v. Parson*, No. WD83061, at 12 (App. May 26, 2020).). As indicated above, records are not necessarily one or the other. Any document which you can view on your screen can be printed, that is to say, the electronic can be transformed into the physical. In fact, the vast majority of documents produced today–including the briefs of the parties in this case and likely the Court's own ruling–are composed, created, and stored electronically, even if later printed for ease of reading, signature, or other use.

In its amicus brief, the ACLU appears to recognize this problem. It argues that even if the records are printed out for a brief period of time, they somehow remain electronic records ("The only thing that matters is that the Governor's Office planned to produce the records on a disk" Brief of Amicus American Civil Liberties Union, page 10). Through a process that can only be described as reverse transubstantiation, the intent of the clerk to discard the printed copies, and the desire of the requestor for an electronic response, combine to magically allow records to retain only their electronic essence, despite their transient, physical manifestation in paper form. The paradigm created by the Court of Appeals and advocated by the Appellant only works if we believe the impossible, that a single record can change from physical to electronic and back, without actually changing because we wish it to be so. In this way, the Appellant and Amici artfully dodge the clear holding of *Heymeyer*. To quote Lewis Carroll:

> "Alice laughed: "There's no use trying," she said; "one can't believe impossible things." "I daresay you haven't had much practice," said the Queen. "When I was younger, I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast." Lewis Carroll, *Through the Looking Glass.*

Many records exist in both the physical form, such as printed copies and in electronic form. Take the minutes of a board meeting for example. For most public bodies there is an electronic version that is kept. There is also usually a physical copy, or copies, which are filed or passed out at meetings for approval. For which is the clerk to charge? In the present case, the Appellant requested "any and all records." If, as in this case, the request is for "any and all records" must the clerk in our example search for, review, and find both the electronic and paper version of the same record, sending them each to the requestor, but charging for one version of a record and not for another? Or can the clerk choose which version to send, thereby cherry-picking the version sent and thus whether to charge certain requestors but not others based on the version sent? Alternatively, following Amici's reasoning, if the request is for the records to be produced only in electronic format then all responsive records become electronic before being sent, regardless of the cost to the governmental unit in time and research necessary to compile and collate the responsive records. This scenario would make the requestor, not the statutes, the one who determines what fees can be charged, as they can avoid recoupment by requesting only an electronic reply.

As the law was understood before the Court of Appeals decision, these metaphysical questions were not at issue. As the Trial Court stated, the plain language of RSMo. Subsection 610.026.1(1) states that a governmental body may charge for research time.

The Court of Appeals inserted the words "for physical records" to the end of that sentence. The Trial Court correctly read the two sections harmoniously, the second section merely excluding copying charges for records that were not physically copied. Which version of a record that was produced (electronic or physical) made little difference in the cost to the agency in researching and compiling the response; rather only the copying fees would change based upon the mode of delivery; the requestor was not charged for copy fees when no copies of the identified responsive documents were made.

This Court has always recognized the need to read a statute as a whole, rather than parsing it into absurdity, "In determining the intent and meaning of statutory language, "the words must be considered in context and sections of the statutes in *pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." (*State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. 2008).). In this case, the Trial Court was correct to read RSMo Subsections 610.026.1(1) and (2) together.

Section 610.026.1(1) uses the term "public records." In doing so it does not distinguish between physical and electronic records. It also uses the word 'documents' that in context can be interpreted as 'records.' Records are defined at RSMo. Subsection 610.010(6) as "any record, whether written or electronically stored." When a term is specially defined by statute that definition must be given effect (*St. Louis Country Club v. Admin. Hearing Comm'n of Missouri*, 657 S.W.2d 614, 617 (Mo. 1983).). Thus, when RSMo. Subsection 610.026.1(1) states "Prior to producing copies of the requested records, the person requesting the records may request the public governmental body to provide an

estimate of the cost to the person requesting the records." this refers to all records requests, not just requests for paper copies. Likewise, when the statute says "Documents may be furnished without charge" this refers to all documents, paper and electronic. Otherwise, there would be no provision in the statute for waiving charges on electronic copies. Again, by reading RSMo. Subsection 610.026.1(1) *in para materia* with the rest of the statute, it makes perfect sense. If one attempts to interpret it standing alone, it does not and creates ambiguity where the legislature intended clarity. Section 610.026.1(1) is thus meant to apply generally to all records.

RSMo. subsection 610.026.1(2) therefore should be read as modifying the immediately preceding Subsection (1) of the same Section, not as a stand-alone provision. Subsection (1) applies to all records, electronic and physical; subsection (2) adds additional provisions that apply only to certain records but does not negate the general provision made in the section preceding. The Court of Appeals made much of the fact that Subsection (2) does not mention research time "[w]hile specifically allowing the public governmental body to charge for "research time" under RSMo. Subsection (1), and specifically limiting the charges for the staff time making the copies under RSMo. Subsection (2) in the same legislation" (*Gross at 19*). The legislature did not need to do so since it had already said that "Research time required for fulfilling records requests may be charged" in Subsection one and using the term "records" which the legislature had already defined to include electronic records. A clearer reading of section two would be that it modifies the first sentence of section one, but not the remaining sentences of section one, which are generally applicable. As a result, section one says that research time can be

charged for all records and section two does not contradict this. Both sentences specifically deal with copying charges.

The opinion of the Court of Appeals also creates practical problems for governmental bodies. Finding a particular record, whether it is stored electronically or physically, requires the expenditure of time by the governmental staff. The Trial Court and the Court of Appeals both acknowledge that review by attorneys may sometimes be required, regardless of the format of the record. No one can deny that replying to records requests costs money. This burden has been placed on public bodies, including local governments, with the understanding that they would be able to recover their costs. Thus, the current interpretation of RSMo. Subsection 610.026.1, amended in 1998, avoids any conflict with Article X Section 21 of the Constitution, passed in 1980 because the new duties imposed are paid for by the fees provided. But if local governments cannot recoup their costs, the interpretation advocated by the Court of Appeals raises the issue of whether this is an unconstitutional, unfunded mandate. Statutes should not be interpreted in such a way as to render them unconstitutional if at all possible (*State ex rel. Union Elec. Co. v. PSC*, 399 S.W.3d 467, 481 (Mo. App. 2013).).

The costs for governmental bodies are high. When the Sunshine Law was written in the 1970s, most records were on paper. The Sunshine Law often envisions citizens coming into a record office and literally looking at the books. Now, the majority of records are electronic, even if some are also kept in physical form as well. Most requests, as in this case, are emailed in and request records to be sent somewhere else. Most requests today are broadly phrased with language similar to this case of "any and all." That means that

the body must search not to just find a record, but to search the entirety of the records held by the body to see if any other records might satisfy the criteria. Of course, allowing such a broad scope of inquiry is simply good government.

Compounding this trend is the fact that the creation of electronic records has exploded the total number of records available. One estimate is that the number of records has increased ten thousand times (*Information Inflation: Can The Legal System Adapt?* Paul, George and Baron, Jason, Richmond Journal of Law and Technology, Vol. 13, Iss. 3 (2007).). For example, hundreds of conversations that would have taken place by phone or in-person when the sunshine law was written, are now by email; and thus records. When the sunshine law was written, information was stored on huge mainframe computers, thus the references in the law to "programing" to retrieve data. By 1995 when the sections in dispute here were added, 3 ½ inch floppy discs were still the state of the art in data storage. But today, nearly every government employee has a computer on her desk and a smartphone in his pocket. The sheer volume of records that must be searched is enormous. While searching is now easier, the size of the data that must be searched has expanded as well.

But, when the requestor does not pay for the unavoidable costs of the request, the taxpayers do. The Appellant and the Amici supporting him, in offer this Court a fantasy; if the government can't charge the requestor to recoup the cost there will be no cost. The reality is that there is always a cost. The General Assembly adopted a good policy and appropriate balance by allowing the governmental body to recoup its actual costs and protecting the public by putting caps on those costs. The Trial Court enforced that policy.

But the Appellant, the Court of Appeals, and the Amici seek to create a new policy, where there are no (or very few) costs recoverable at all and the record-gathering efforts of a few are subsidized by the general taxpayers. While admirable from their point of view, it is a policy that is unsustainable and which will, inevitably, lead to less access rather than more.

The Missouri Press Association, for example, in their public statements have called for more records to be electronic and online. But, in the Amicus Brief before this Court, they advocate a policy where governmental bodies will have a financial incentive to keep records on paper.

In addition to creating an unnecessary and perverse financial incentive for governmental bodies to keep their records on paper, the view contained in the Court of Appeals' decision and espoused by the Appellant unfairly favors those better-resourced individuals and organizations who have the technology and sophistication necessary to request, receive, and review documents in a purely electronic format. Despite ongoing efforts, the digital divide continues to be a reality, especially for lower-income Americans. A May 2019 report by the Pew Research Center found:

> Roughly three-in-ten adults with household incomes below $30,000 a year (29%) don't own a smartphone. More than four-in-ten don't have home broadband services (44%) or a traditional computer (46%). And a majority of lower-income Americans are not tablet owners. By comparison, each of these technologies is nearly ubiquitous among adults in households earning $100,000 or more a year. M. Anderson & M. Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption,* Pew Center Center, May 7, 2019, https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

By creating a hierarchy in which records requested to be provided electronically are subject to no or minimal fees while records that are requested to be provided on paper are subject to significantly greater fees, already disadvantaged populations are further disadvantaged. Such populations may not have access to electronic devices to read electronic records, or may simply be uncomfortable with doing so. By placing a higher cost on 'old fashioned' requests, the Court of Appeals increases the degree of difficulty in accessing public records for those people as compared to the more fortunate who have the necessary resources to navigate the government in a purely digital format. The *Amici* represented by this Brief believe that fair access to public records is an important tenet of good government and the gap-widening created by the Court of Appeals' failure to reasonably read RSMo. Subsection 610.026.1(1) *in para materia* with RSMo. Subsection 610.026.1(2) with the rest of the Sunshine Law results in an unnecessary and inequitable consequence for people who remain on the leeward, analog side of the digital divide.

CONCLUSION

The Court of Appeals decision creates an absurd and unconstitutional interpretation of the Sunshine Law. However, none of the extreme or dire consequences created by the Court of Appeal's misreading of the subsections are necessary. This Court, by reading the plain language of the legislation, in the context of the chapter as a whole, can preserve the wise policies the Legislature adopted. We therefore strongly urge this Court to uphold the judgment of the Trial Court.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on the 12th day of January 2021, the foregoing Brief of Amicus Curiae was filed and served electronically via Missouri's Case.net system on all counsel of record. I further certify that the foregoing complies with the requirements contained in Rule 84.06(b) and the limitations contained in Special Rule 360 in that the brief contains 4319 words.

/s/ Nathan M. Nickolaus
Nathan M.Nickolaus
Attorney at Law

CERTIFICATE OF ORIGINAL SIGNATURE

I hereby certify that on the 12th day of January 2021, the original of the foregoing document was signed by the attorney of record.

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