11-1086

IN THE SUPREME COURT OF ARKANSAS

JOEY MCCUTCHEN — APPELLANT/CROSS-APPELLEE

v.

CITY OF FORT SMITH, ARKANSAS;
DENNIS KELLY; GARY CAMPBELL;
ANDRE' GOOD; and KEN PYLE — APPELLEES/CROSS-APPELLANTS

ON APPEAL FROM THE
CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
THE HONORABLE JAMES O. COX

**BRIEF *AMICI CURIAE* OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND
THE ARKANSAS PRESS ASSOCIATION
IN SUPPORT OF APPELLANT**

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ARGUMENT

The circuit court incorrectly ruled that certain provisions of the Arkansas Freedom of Information Act (the "FOIA") – namely, its open-meetings law, Ark. Code Ann. § 25-19-106, and its penalty provision, Ark. Code Ann. § 25-19-104 – are unconstitutional. The circuit court concluded that 1) the open-meetings law violates government officials' free-speech rights because it is a content-based regulation that fails to withstand strict-scrutiny review (Add. 142); 2) the open-meetings law is unconstitutionally overbroad, violating the First Amendment to the U.S. Constitution and Article 2, section 6, of the Arkansas Constitution (Add. 144-45); and 3) the open-meetings law is unconstitutionally vague, violating the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 2, section 8, of the Arkansas Constitution (Add. 144-45). This Court should reverse in all respects.

I. THE OPEN-MEETINGS LAW DOES NOT VIOLATE PUBLIC OFFICIALS' RIGHT TO FREE SPEECH.

A. The Open-Meetings Law Embodies Longstanding Presumptions Of Open Governance That Have Historically Not Conflicted With The First Amendment.

The open-meetings law, including the FOIA penalty provision, does not violate the First Amendment. To the contrary, it manifests this Nation's historical policy of opening up government proceedings to the public. Even before the Nation's founding, government leaders recognized the critical role citizens fulfill

in observing and scrutinizing the conduct of all public officials as those officials deliberate government business. The framers believed the First Amendment embraced the policies of government openness and accountability furthered by Arkansas's open-meetings law. The long history supporting the constitutionality of the law, coupled with the lack of successful challenges to other, similar open-meetings laws, discussed in Part I(C) below, demonstrates that such laws do not violate the First Amendment.

The U.S. Supreme Court has recognized that "a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *Nevada Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2347-48 (2011). The framers generally viewed government secrecy with disdain. Thomas Jefferson denounced the decision of the Constitution's drafters to meet in secret as "abominable": "Nothing can justify this example but the innocence of their intentions, and the ignorance of the value of public discussions." Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *reprinted in* 1 *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams* 196 (Lester Cappon ed., 1959). James Madison, considered the architect of the First Amendment, recognized that public knowledge of government activity was fundamental to sustaining a system of self-governance. *See, e.g.*, 4 *Debates in the Several State*

Conventions on the Adoption of the Federal Constitution 529 (J. Elliot ed., 1907) (describing "the right of freely examining public characters and measures, and of free communication among the people thereon," as "the only effectual guardian of every other right").

As the framers advocated for public access to government deliberations and decision-making, they did not contemplate any conflict between open-meetings legal mandates and the First Amendment. To the contrary, many perceived the First Amendment as granting the public the right to scrutinize public officials while they discussed government business to serve as a check against "the inherent tendency of government officials to abuse the power entrusted to them." *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521, 538 (1977). Jefferson viewed the First Amendment as furthering robust, public debates that would guard against self-interested representation and prevent private factions from controlling politics. *See* Cass R. Sunstein, *Government Control of Information*, 74 Cal. L. Rev. 889, 892 (1986). According to Jefferson, the First Amendment fostered public disclosure by government officials, thereby avoiding any negative consequences resulting from officials doing otherwise. *Id.* at 893. Jefferson's concerns about government secrecy are reflected in Arkansas's legitimate interest in government accountability and transparency as expressed in its open-meetings law.

As the framers believed permitting citizens to monitor their leaders' conduct constituted a fundamental element of self-governance, they instituted policies recognizing such a right, and those policies were enshrined in state constitutions. The Arkansas open-meetings law, as well as the open-meetings laws that exist in every state and the District of Columbia, seek to realize the goals of accountability and transparency the framers embraced. The Arkansas open-meetings law cannot infringe upon First Amendment rights when the framers advocated for the very openness that law requires.

Furthermore, the U.S. Supreme Court's decision in *Carrigan*, considered together with the history of government openness, establishes that the City of Fort Smith misinterprets the First Amendment's speech protections. The First Amendment is designed to protect the people from the government, not to protect the government from the people. *See, e.g.*, *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government"). The Arkansas open-meetings law furthers First Amendment rights rather than infringing upon them, and this Court should uphold its constitutionality.

B. The Open-Meetings Law Does Not Violate Any Free-Speech Rights Because It Is A Content-Neutral Regulation That Is Narrowly Tailored And It Establishes Alternative Channels For Communication.

Courts have long recognized that the government may impose reasonable time, place, and manner restrictions on speech. *See Buckley v. Valeo*, 424 U.S. 1, 18 (1976). The open-meetings law is a reasonable time, place, or manner regulation on when public officials may speak. Within a public meeting, government officials are free to speak on any topic and express any viewpoint. Time, place, and manner restrictions are valid if they 1) "are justified without reference to the content of the regulated speech," 2) "are narrowly tailored to serve a significant governmental interest," and 3) "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Arkansas open-meetings law satisfies all three requirements.

i. The Open-Meetings Law Is A Content-Neutral Regulation.

The circuit court erroneously characterized the open-meetings law as a content-based regulation of speech – and therefore subjected it to strict-scrutiny review – because "[t]he FOIA applies to discussions of governmental affairs, not to non-governmental affairs." Add. 140. This conclusion misses the mark: "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it

conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In this inquiry, "[t]he government's purpose is the controlling consideration," as "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* In *Ward*, for example, the U.S. Supreme Court held that a regulation requiring performers at a city park to use the city's sound system and sound technician was content-neutral because the government's justifications – controlling the noise level for the sake of local residents and monitoring the quality of sound – had "'nothing to do with content.'" *Id.* at 792 (quoting *Boos v. Barry*, 485 U.S. 312, 320 (1988)).

Here, too, the legislature's justifications for enacting the open-meetings law were unrelated to the content of any particular speech. Public officials may say whatever they want, on whatever topic, while they are in a public meeting. The policy statement prefacing the open-meetings law expresses these justifications:

> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.

Ark. Code Ann. § 25-19-102. The policy statement demonstrates that the open-meetings law serves purposes wholly unrelated to the content of public officials'

speech—that is, fostering democratic governance and transparency in government decision-making.

A determination of whether the open-meetings law has been violated may require a *pro forma* threshold examination of the substance of public officials' speech, but that does not mean that the open-meetings law is not content-neutral. In *Hill v. Colorado*, the U.S. Supreme Court held that a law prohibiting protestors from approaching people entering a health clinic "for the purpose of . . . engaging in oral protest, education, or counseling with such other person" was content-neutral, despite the Court's determination that assessing whether the law was violated required an initial examination of the substance of the speech. 530 U.S. 703, 707, 721-23 (2000). The Court noted that "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. The Court further observed that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose" and ruled that the need for a "cursory examination . . . to exclude casual conversation from the coverage of a regulation of picketing" did not render the law content-based. *Id.* at 721-22.

Indeed, the U.S. Supreme Court has held that laws that far more extensively restrict individuals' speech are content-neutral. *See, e.g.*, *Bartnicki v. Vopper*, 532

U.S. 514, 526 (2001) (wiretapping law making it illegal to tape private conversations without consent held to be content-neutral); *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (finding content-neutral a law prohibiting the targeted picketing of a particular residential home, even though the law was enacted in response to conduct by anti-abortion activists seeking to target the residence of a doctor who provided abortion services).

Likewise, as this Court has held, the open-meetings law requires only a "cursory examination" of private exchanges between public officials to distinguish permissible "casual conversation" from prohibited, private decision-making or deliberations. *See Harris v. City of Fort Smith*, 359 Ark. 355, 363, 197 S.W.3d 461, 466 (2004) (distinguishing "informal but unofficial group meetings for the discussion of governmental business" from "contacts by the individual members that occur in the daily lives of every public official"). Following *Hill*, this Court should conclude that the open-meetings law is a content-neutral regulation of officials' conduct.

Further, applying strict scrutiny to the open-meetings law would contravene U.S. Supreme Court precedent that has traditionally reserved the application of that test to laws that directly impact a speaker's ability to discuss a particular issue or express a particular viewpoint. *See, e.g.*, *Boos*, 485 U.S. at 315, 334 (holding that a city ordinance preventing people from carrying signs critical of foreign

governments within 500 feet of an embassy was an unconstitutional content-based regulation that failed strict scrutiny); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking down New York's "Son of Sam" statute, which regulated the income generated from a serial killer's story, as an unconstitutional content-based restriction subject to strict scrutiny); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 806, 826-27 (2000) (applying strict scrutiny to a law that required adult-oriented cable channels to limit or scramble programming during certain hours of the day, holding that it was a content-based restriction).

Finally, courts have uniformly declined to apply strict scrutiny to constitutional challenges of open-meetings laws. *See Asgeirsson v. Abbott*, 773 F.Supp.2d 684, 694-95 (W.D. Tex. 2011), *appeal filed*, No. 11-50441 (5th Cir. May 16, 2011). *See also, e.g., Cole v. State*, 673 P.2d 345, 350 (Colo. 1983); *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533-34, 646 P.2d 1091, 1099 (1982); *People ex rel. Difanis v. Barr*, 414 N.E.2d 731, 738-39 (1980). If members of a governing body conduct public business in a formal or informal meeting – the threshold for which has been established by this Court in *Harris* – without opening it to the public, a violation of the open-meetings law has occurred, regardless of the particular content of the discussions or the viewpoints expressed within the meeting. As the open-meetings law regulates only *when* officials can discuss the

public's business, rather than the particular *content* or *viewpoint* of their speech, it is a content-neutral regulation subject only to intermediate scrutiny. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723 (2010).

ii. The Open-Meetings Law Is Narrowly Tailored To Promote Important Governmental Interests.

The open-meetings law's time, place, and manner restrictions are narrowly tailored to further the government's legitimate interest in ensuring that "electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy." Ark. Code Ann. § 25-19-102. The purpose of the open-meetings law – as established by the General Assembly – is to "mak[e] it possible for [electors] or their representatives to learn and to report fully the activities of their public officials." *Id.* The open-meetings law seeks to stem any temptation by public officials to make decisions outside of public view, conduct sham public meetings, or otherwise exclude their constituents from the political process. All of these laudable goals are wholly unrelated to the content of officials' speech.

One need only look to the history of the open-meetings law to find evidence of the pressing need for one. Arkansas's first open-meetings statute was enacted following journalists' opposition to an improperly closed hearing of the Eclectic State Medical Board – a subsequently disbanded agency that licensed doctors who relied on folk remedies – in which the Board considered allegations that a doctor

had been performing unethical surgeries. John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 Ark. L. Rev. 268, 273 (1984). At that time, Arkansas had only a state constitutional provision requiring open sessions for both houses of the legislature and "committees of the whole," with a broad exceptions clause for "when the business is such as ought to be kept secret." *Id.*; *see* Ark. Const. art. 5, § 13. To enshrine the historic belief that "public business be performed in an open and public manner" and to "mak[e] it possible for [e]lectors or their representatives to learn and to report fully the activities of their public officials," the General Assembly enacted the open-meetings law in 1967. Ark. Code Ann. § 25-19-102. As Arkansas's public officials govern with the consent and under the supervision of their constituents, weakening the open-meetings law would decrease the government's legitimacy in the eyes of citizens and provide a vehicle for secret dealings and private decision-making. The corresponding state interest in the open-meetings law surpasses the required level of state interest for the law to constitute a reasonable time, place, and manner restriction.

The open-meetings law and the FOIA penalty clause – which subjects public officials to misdemeanor liability for "negligently violat[ing]" the provisions – are narrowly tailored to achieve these ends. Ark. Code Ann. §§ 25-19-104, 5-4-401(b)(3). Applying the proper inquiry – examining whether the penal provision is

"substantially broader than necessary to achieve the government's interest" – can only result in a determination that the open-meetings law constitutes a reasonable time, place, and manner restriction. *Ward*, 491 U.S. at 800. In contrast, the circuit court below ruled that "[t]he fact that the open meetings laws of thirty-one states lack criminal provisions patently demonstrates that less restrictive means are available." Add. 142. At least one other court has rejected the same argument. *See Asgeirsson*, 773 F.Supp.2d at 704 (rejecting the same claim against the Texas Open Meetings Act because "narrow tailoring does not require uniformity in remedy"). The penalty clause is necessary to effectuate the goals of the open-meetings law, as evidenced by the wide prevalence of similar clauses in other states and its legislative history.

To paint Arkansas as an outlier with respect to its open-meetings enforcement provisions ignores the fact that 20 other jurisdictions also provide for criminal penalties in their open-meetings laws. *See* Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 Comm. L. & Pol'y 265, 290 n.184 (2010). Further, Arkansas is among 15 states that provide for jail time for violations of their open-meetings laws. While many of these states provide for up to six months or a year in jail, Arkansas allows only a maximum of 30 days. *Id.* at 293 n.204; Ark. Code Ann. § 5-4-401(b)(3). The General Assembly must have the

ability to enforce government transparency. The mere fact that one can imagine a lesser penalty does not mean that the lesser penalty would be effective or that the law is not narrowly tailored. Such a proposition would strip the legislature of any meaningful way to enforce government transparency.

The General Assembly recognized the need in 1987 to strengthen the open-meetings law. The penalty clause in the original 1967 law held criminally liable "[a]ny person who willfully and knowingly violates any of the provisions of this Act." 1967 Ark. Acts 212. In 1987, the General Assembly amended the penalty clause to replace the "knowing" and "willful" standard with the "negligence" standard. 1987 Ark. Acts 115. In an emergency clause accompanying the 1987 amendments to the FOIA, the General Assembly noted that it had determined that "additional enforcement mechanisms" were "necessary to implement" certain provisions of the FOIA. *Id.* This finding demonstrates the legislature's deliberate efforts to strengthen the penalty for violations of the FOIA, including the open-meetings law.

The General Assembly has further tailored the negligence standard by specifying that "[a] person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a *substantial* and *unjustifiable* risk that the attendant circumstances exist or the result will occur." Ark. Code Ann. § 5-2-202(4)(A) (emphasis added). The law requires that

the requisite risk "must be of such a nature and degree that the actor's failure to perceive the risk involves a *gross deviation* from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor." *Id.* at § 5-2-202(4)(B) (emphasis added). Requiring the State to prove beyond a reasonable doubt that a public official should have been aware of, and disregarded, "a substantial and unjustifiable risk" – one that "involves a gross deviation of care" – is sufficient tailoring to survive any First Amendment challenge. The statutory definition of the required "risk" also focuses the standard of care on "the nature and purpose of" the public official's conduct and "the circumstances known" to the official, further narrowing the statute and preventing any arguably broad application. *Contra.* 5 Ill. Comp. Stat. 120/4 ("Any person violating any of the provisions of this Act, except subsection (b) or (c) of Section 1.05, shall be guilty of a Class C misdemeanor"); Stewart, *supra*, at 297 (noting that Illinois's lack of an intent requirement may "signal strict liability for open government law violations").

This negligence standard is essential to meaningful encouragement of compliance with and enforcement of the open-meetings law. According to at least one open-meetings legal scholar, it is "ideal" to adopt a standard of "either strict liability or low levels of mental culpability such as 'negligently' or 'knowingly'"

in order to encourage the enforcement of criminal penalties for violations of open-government laws. Stewart, *supra,* at 297. Higher levels of culpability "can be extremely difficult to prove," thereby "mak[ing] it easier for an open government law violator, who should know the law . . ., to escape punishment in spite of his or her ignorance, deliberate or otherwise, regarding the law." *Id.*

For these reasons, the open-meetings law and its penalty clause are narrowly tailored to achieve the government's interest in democratic governance and transparency, compelling a finding that it remains a reasonable time, place, and manner restriction.

iii. The Open-Meetings Law Leaves Open Ample Alternative Channels Of Communication.

The open-meetings law requires only that the public's business be conducted in public, thereby leaving a dedicated alternative for robust communication by public officials. Here, as in *Hill*, the statute "merely regulates the places where communications may occur." 530 U.S. at 731.

Additionally, public officials may speak freely to the press, their constituents, and even other public officials, so long as their communications do not violate or attempt to circumvent the open-meetings law. *See, e.g.*, *Mayor & City Council of El Dorado v. El Dorado Broad. Co.*, 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976) (noting that the law does not apply "to a chance meeting or even a planned meeting of any two members" of a governing body but only to

those where its members "meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken"); *Ark. Okla. Gas Corp. v. MacSteel Div. of Quanex*, 370 Ark. 481, 488, 262 S.W.3d 147, 153 (2007) (finding no informal meeting had occurred where a private corporation contacted individual quorum court members allegedly to lobby for its own interests, as there was no evidence that the corporation "acted in any capacity other than its own").

In the light of the multiple alternative channels that exist for public officials' communications, this Court should conclude that the open-meetings law constitutes a reasonable time, place, and manner restriction.

C. Open-Meetings Acts Across The Country Have Been Upheld In The Face Of First Amendment Challenges.

The Arkansas open-meetings law is similar to other open-meetings laws that appellate courts have upheld as reasonable restrictions on government speech. *See, e.g.*, *State ex rel. Murray*, 231 Kan. at 534, 646 P.2d at 1099 (the Kansas open-meetings law "places no constraints on purely private discussions by public officials," as "[i]t regulates only the conduct of public business"); *Cole*, 673 P.2d at 350 (holding that "the restraints on appellant's freedom of speech are reasonable and justified in view of the important governmental interest furthered by the Open Meetings Laws"); *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 7 (Minn. 1983) (holding the Minnesota open-meetings law did not violate the First Amendment right of free speech, as the right "protect[s] expression of ideas,

not the right to conduct public business in closed meetings"); *People ex rel. Difanis*, 414 N.E.2d at 739 (holding the state's open-meetings act was a reasonable time, place, and manner restriction that had "no chilling effect upon political discussion"). Courts have consistently found that any minor impediments placed on public officials' ability to speak were fully justified given the important purposes behind open-meetings acts. This Court should join other states' high courts and find that the Arkansas open-meetings law constitutes a narrowly tailored and reasonable time, place, and manner restriction.

II. THE OPEN-MEETINGS LAW IS NEITHER OVERBROAD NOR VAGUE ON ITS FACE.

A. The Open-Meetings Law Is Not Facially Overbroad Because Its Legitimate Applications Substantially Outweigh Any Purported Impact On Protected Speech.

A statute is unconstitutionally overbroad "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). The U.S. Supreme Court has cautioned that "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Id.* at 293 (quoting *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)). In assessing claims of overbreadth, the Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* at 292 (emphasis in original).

The sweep of the Arkansas open-meetings law has been constrained by the legislature to cover only certain meetings of governing bodies. While it applies to "all meetings, formal or informal, special or regular, of . . . governing bodies," Ark. Code Ann. § 25-19-106, the General Assembly has listed exemptions under which public officials may conduct executive sessions in private and a "catch-all" exemption for meetings that can be conducted in private pursuant to other laws. *See id.* at § 25-19-106(a, c).

Additionally, this Court has provided direct guidance as to the scope of the open-meetings law sufficient to minimize any claimed impact on protected speech. *Harris*, 359 Ark. at 363-65, 197 S.W.3d at 466-68. Even an otherwise overbroad law (not present here) may be saved where "a limiting construction . . . so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). As discussed above at I(B)(ii), this Court has interpreted and narrowed the scope of the open-meetings law, finding that it applies only where it is necessary to increase public awareness of government action. *See* Ark. Code Ann. § 25-19-102; *Harris*, 359 Ark. at 363-65, 197 S.W.3d at 466-68. This Court has consistently looked to the nature of meetings to determine whether they are subject to the open-meetings law, ruling that it is only when public officials conduct public business that they must conduct public

meetings. *See, e.g.*, *Ark. Gazette Co. v. Pickens*, 258 Ark. 69, 76-77, 522 S.W.2d 350, 354 (1975) (ruling that where a subgroup of a government body "meets for the transaction of business—this is a public meeting"). This Court's narrowing constructions of the open-meetings law ensure it does not criminalize public officials' protected expression or overly restrict the means by which they may conduct business. Contrary to the circuit court's decision, therefore, the open-meetings law properly reaches only that government speech to which the public should have access.

While the circuit court thought that the open-meetings law is overbroad "[i]n the absence of clarification" by the legislature of what constitutes a meeting (Add. 144-45), courts elsewhere have interpreted open-meetings provisions that, like Arkansas's, do not address every possible application of the law and have similarly relied on the policy provisions guiding the law. *See, e.g.*, *Right to Know Comm. v. City Council, City and Cnty. of Honolulu*, 117 Hawai'i 1, 11, 175 P.3d 111, 121 (Haw. Ct. App. 2007) (ruling that, despite the absence of a provision addressing the applicability of an open-meetings law to serial contacts, such contacts were improper private meetings when considered in the light of the legislative policy to keep government transparent); *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 517-8 (Minn. 1983) (interpreting "meeting" in the Minnesota law as requiring a quorum and ruling that "serial meetings . . . of less than a quorum for the

purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case"); *State ex rel. Murray*, 231 Kan. at 533-34, 646 P.2d at 1099 (rejecting an overbreadth challenge to Kansas's definition of "meeting," as it "places no constraints on purely private discussions by public officials" and "regulates only the conduct of public business"). Likewise, this Court has restricted the scope of the Arkansas open-meetings law so that it affects only how public business is conducted, rather than public officials' protected speech. The open-meetings law's "plainly legitimate sweep" strongly outweighs any impact on protected speech, and this Court should hold that it is not unconstitutionally overbroad.

B. The Open-Meetings Law Is Not Facially Vague Because The Statutory Language And Judicial Interpretations Provide Clear Meaning As To Its Scope And Application.

Statutes are presumed to be constitutional. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, 12, ___ S.W.3d ___. A statute is unconstitutionally vague "if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement." *Landmark*, 2010 Ark. 40 at 7; *see also Williams*, 553 U.S. at 304 (holding that "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it

authorizes or encourages seriously discriminatory enforcement"). "'[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Williams*, 553 U.S. at 304 (quoting *Ward*, 491 U.S. at 794). A law is constitutional when "its language conveys sufficient warning when measured by common understanding and practice." *Landmark*, 2010 Ark. 40 at 7.

As the U.S. Supreme Court has said in the context of a vagueness challenge, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306. Likewise, this Court has held that "impossible standards of specificity are not constitutionally required, even in criminal statutes," and that "it is not necessary that all kinds of conduct falling within the reach of the statute be particularized and the statute will not be struck down as vague only because marginal cases could be put where doubts might arise." *State v. Torres*, 309 Ark. 422, 425, 831 S.W.2d 903, 905 (1992).

Any vagueness within the statute (which does not exist), moreover, is cured by this Court's rulings interpreting its scope. This Court has long held that "a statute is not void-for-vagueness where its terms may be adequately determined

through reference to judicial decisions construing it," as "any interpretation of a statute by this court subsequently becomes a part of the statute itself." *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 134, 984 S.W.2d 418, 421 (1999); *see also Burns v. Burns*, 312 Ark. 61, 65, 847 S.W.2d 23, 26 (1993) (holding that the Court's prior "interpretation of the statute has now become a part of the statute itself").

The circuit court held that the open-meetings law is unconstitutional in that it lacks a long list of distinctions within the definition of "meeting." *See* Add. 144-45. This Court, however, has found that a statute is not unconstitutionally vague when the term at issue is defined in the statute. *See Landmark*, 2010 Ark. 40 at 8 (holding that a statute was constitutional when "suspicious transaction" was defined in the statute). The term "public meetings" is clearly defined as "meetings of any bureau, commission, or agency of . . . any political subdivision of the state, including municipalities and counties, boards of education, and all other boards . . . in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds." Ark. Code Ann. § 25-19-103(4). The General Assembly underscored this definition by including it again in the section devoted to open public meetings. Ark. Code Ann. § 25-19-106(a). Furthermore, the term "meeting" has been extensively defined by this Court in a way that provides a person of "ordinary intelligence fair notice of what is prohibited," despite the fact

that the legislature has not provided for all of the possible scenarios that may constitute "meetings" for purposes of the open-meetings law. Public officials have been given adequate notice of prohibited conduct. *See, e.g.*, *Harris*, 359 Ark. at 365, 197 S.W.3d at 467 (holding that it is the purpose of the meeting, rather than the number of people present, that is the dispositive factor in determining whether an informal meeting has occurred); *Ark. Okla. Gas Corp.*, 370 Ark. at 488, 262 S.W.3d at 153 (ruling that private parties' lobbying of members of a governmental body – if done in their personal capacity – does not result in an impermissible "informal meeting" of the body).

The specificity required by the circuit court is not necessary as a matter of constitutional law. *Ark. Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). In *Pickens*, this Court held that committee meetings fit within the definition of "public meetings," even though the FOIA does not use the word "committee" in the definition of "public meetings." 258 Ark. at 74, 522 S.W.2d at 353. Likewise, the open-meetings law is not unconstitutionally vague simply because it does not explicitly address straw men, telephone polling, or electronic communications. Other courts called upon to interpret open-meetings laws that lack such precise and exhaustive statutory distinctions have rejected vagueness challenges. *See, e.g., St. Cloud Newspapers*, 332 N.W.2d at 7-8 (upholding the

Minnesota act, pointing to the court's and attorney general's prior interpretations of the scope of "meetings" in the statute).

This Court has not defined "informal meetings" in a way that is inconsistent with the definition understood by an "ordinary person." The phrase is, contrary to the circuit court's ruling, easily distinguishable from the impermissible vagueness the U.S. Supreme Court has found in far more undefined terms. In *Holder*, the Court ruled that a federal statute that prohibited the provision of "material support" to foreign terrorist organizations, defined in part using the terms "personnel" and "training," did not fail to "provide a person of ordinary intelligence fair notice of what is prohibited." 130 S.Ct. at 2720. The Court noted that the terms "personnel" and "training" were "quite different" from terms it had previously found to be vague, such as "'annoying' or 'indecent' – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" *Id.* (quoting *Williams*, 553 U.S. at 306). *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 162 (1972) (ordinance struck down as vague where it punished "vagrants," which was defined as including "rogues and vagabonds" and "common night walkers").

The Court in *Holder* ruled that applying terms such as "'training,' 'expert advice or assistance,' 'service,' and 'personnel' . . . does not require similarly untethered, subjective judgments." 130 S.Ct. at 2720. "Informal meeting" is more

akin to terms such as "training" and "service" than to terms that require that "wholly subjective judgments" be made, such as "annoying" or "indecent." Rather, the meaning of "meeting" is readily ascertained from the statute itself, especially when properly read in accordance with the FOIA's policy statement and this Court's jurisprudence.

Furthermore, the open-meetings law's criminal-penalty provision is not unconstitutionally vague, as it contains a detailed scienter requirement. *See* above at (I)(B)(iii)(1); Ark. Code Ann. § 5-2-202(4). As the U.S. Supreme Court has observed, while "it may be difficult in some cases to determine whether these clear requirements have been met, ... courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *Williams*, 553 U.S. at 306. Here, Arkansas courts and juries may, as with any other criminal statute's culpability standard, determine whether an official negligently violated the open-meetings law, guided by the plain language of the statute and its judicial interpretations.

III. THE OPEN-MEETINGS LAW IS NEITHER OVERBROAD NOR VAGUE AS APPLIED.

A. The Open-Meetings Law Is Not Overbroad As Applied Because It Does Not Unconstitutionally Threaten Protected Expression.

Application of the open-meetings law to the City Administrator's and Board of Directors' specific conduct in this case does not unconstitutionally threaten their protected expression, as previously established by this Court. *See Harris*, 359 Ark. at 358, 197 S.W.3d at 463. The City Administrator's and Board of Directors' conduct in this case nearly replicates conduct this Court previously held violated the open-meetings law. *See id.*

In *Harris*, this Court held that the Fort Smith City Administrator's one-on-one contacts with the Board of Directors for the purpose of obtaining approval of a bid amount for land to be sold at auction constituted an informal Board meeting subject to the open-meetings law. *Id.* There, the plaintiff argued that, even though a public meeting was later held, "the minds of the Board members were already made up" because of the one-on-one contacts. *Id.* at 364, 197 S.W.3d at 467. This Court, noting that "the FOIA is . . . to be liberally interpreted most favorably to the public interest of having public business performed in an open and public manner," held that an informal meeting had occurred, as "[t]he purpose of the one-on-one meetings was to obtain a decision of the Board as a whole." *Id.* at 360, 197 S.W.3d at 464. When city officials "meet for the purpose of discussing . . . any

matter on which foreseeable action will be taken by the city council," a public meeting has taken place. *Mayor & City Council of El Dorado*, 260 Ark. at 824, 544 S.W.2d at 208. In contrast, a public meeting has not taken place when a city official contacts other city officials to clarify a procedural matter. *Ark. Okla. Gas Corp.*, 370 Ark. 481, 488, 262 S.W.3d 147, 153 (2007) (finding no violation of the open-meetings law when a city judge contacted members of the quorum court to ask only if they had questions about the agenda items).

As in *Harris*, the City Administrator contacted five of the seven members of the city Board of Directors one-by-one to deliver a memorandum and proposed legislation that would give him the authority to hire and fire certain department heads. Add. 106. According to established city procedures, information packets containing the agenda for Board meetings – including public study sessions – are compiled by the city administration and delivered by a police cadet to the Board members. Add. 108-09. After delivery to the Board is complete, the information packets are, as public documents, made available to anyone who requests them, as well as on the city website. Add. 109. However, the City Administrator, deviating from these procedures – which ensure that the public receives the same information as the Board, and with the same advance notice of agenda items – personally delivered the materials to the Board members before a public study session, receiving at the time of delivery several expressions of support for or

disfavor with the proposal. Add. 106-07. Also as in *Harris*, this conduct was likely intended to obtain preliminary Board approval before a public meeting – thereby circumventing the open-meetings law – and, consequently, at the time of the public study session, some of the Board members' minds had already been made up, as they had earlier expressed their approval or disapproval to the City Administrator. Add. 107. Even if the City Administrator did not intend to obtain preliminary Board approval, his presentation of the memorandum and conversation with the individual Board members constituted discussions of a matter on which there would be foreseeable Board action. Therefore, this Court should conclude that the open-meetings law is constitutional as applied.

B. The Arkansas Open-Meetings Law Is Not Vague As Applied, As This Court's Prior Rulings Placed Public Officials On Notice That The Conduct Here Was Clearly Proscribed.

The statute is not unconstitutionally vague as applied because the conduct is clearly proscribed under the text of the statute, as well as this Court's prior rulings.

In *Jordan v. De George*, the U.S. Supreme Court rejected a vagueness challenge to a statute because several courts had previously construed the allegedly vague phrase. 341 U.S. 223, 227-30 (1951). Likewise, "meeting" here is not vague, as the statutory definition and this Court's ruling in *Harris* sufficiently placed appellees on notice that, when a city administrator privately contacts members of a city board of directors for the purpose of disseminating, and

receiving preliminary responses for, a proposal – rather than following the public-disclosure procedures – the action constitutes an informal meeting in violation of the open-meetings law. *See Harris*, 359 Ark. at 365, 197 S.W.3d at 467. This Court's earlier interpretation of such action in *Harris* would put a person of ordinary intelligence (particularly those officials within the City of Fort Smith) on notice that the open-meetings law prohibits such conduct. Therefore, this Court should hold that the open-meetings law is not vague as applied to appellees, as they had adequate notice that their conduct was proscribed.

CONCLUSION

For the reasons discussed, *amici* respectfully urge this Court to hold that the Arkansas open-meetings law, as well as the penalty clause, are constitutional and reverse the decision of the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of February, 2012, a copy of the foregoing was served by United States mail, postage prepaid, upon the following:

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