

ORIGINAL

In the
Supreme Court of Ohio

STATE ex rel. LETOHIOVOTE.ORG, et al.,	:	Case No. 2009-1310
	:	
Relators,	:	Original Action in Mandamus
	:	
vs.	:	
	:	
OHIO SECRETARY OF STATE	:	
JENNIFER BRUNNER,	:	
	:	
Respondent.	:	

UNOPPOSED MOTION TO INTERVENE BY J. PARI SABETY, DIRECTOR, OFFICE OF BUDGET AND MANAGEMENT, AND MICHAEL A. DOLAN, DIRECTOR, OHIO LOTTERY COMMISSION

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Pursuant to Civ. R. 24(A) and (B), J. Pari Sabety, Director of the Office of Budget and Management, and Michael A. Dolan, Director of the Ohio Lottery Commission, hereby move to intervene as Respondents in this case. Attached is a Memorandum in Support and Proposed Answer in accordance with Civ. R. 24(C).

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MEMORANDUM IN SUPPORT

Governor Ted Strickland signed Am. Sub. H.B. 1, the 2010-2011 biennium budget, into law on July 17, 2009. His signature closed a difficult budget process that was made especially challenging by the State's worst economic crisis since the Great Depression. Declining tax revenues forced the General Assembly to make \$2.5 billion in spending cuts to worthwhile state programs and aid. In an effort to spare Ohioans from further cuts in services, Governor Strickland directed, consistent with the language in Am. Sub. H.B. 1, that the Director of the Ohio Lottery Commission oversee the installation of video lottery terminals ("VLTs") at Ohio's seven horse racetracks, in order to raise an estimated \$933 million in revenue for the State, which is appropriated to support education. In the text of Am. Sub. H.B. 1, the General Assembly explicitly acknowledged the Governor's authority to issue that directive and the Lottery Commission's authority to implement it.

Relators seek to upend the budget resolution through this mandamus action. They argue that the VLT provisions of Am. Sub. H.B. 1 cannot go into immediate effect under Sections 1c and 1d of Article II of the Ohio Constitution, but rather must await Relators' efforts to subject the new law to referendum on the November 2010 election ballot. That request directly affects the biennial budget, because any delay from the referendum process would hamper the ability of the Director of the Ohio Lottery Commission fully to effectuate the VLT Directive. That delay, in turn, could deprive the State of vital revenue that the Ohio Constitution and Ohio law automatically appropriate to education, forcing the General Assembly and the Governor to consider alternative (and painful) measures to maintain a balanced budget.

For the reasons explained more fully below, the proposed Intervenors have a direct stake in the outcome of this litigation. As the cabinet official who oversees the administration of the

budget and the flow of state revenue, the Director of the Office of Budget and Management (“OBM Director”) is directly affected by this controversy over a critical piece of the recently enacted budget. For his part, the Director of the Ohio Lottery Commission (“Lottery Director”) is obligated by the Governor’s Directive to implement VLTs at Ohio’s racetracks. This challenge to the VLT plan, then, goes to the heart of the Lottery Director’s authority to carry out those duties.

Relators do not object to the intervention. The Court should grant the proposed Intervenors’ motion.

LAW AND ARGUMENT

A. The OBM Director and the Lottery Director are entitled to intervene as of right under Civ. R. 24(A).

Both the OBM Director and the Lottery Director are entitled to intervene based on their direct stakes in this litigation. Civil Rule 24(A)(2) states that, upon timely application, anyone shall be permitted to intervene in an action: (1) when a state statute confers an unconditional right to intervene; or (2) when the person seeking to intervene claims an interest relating to the action and is so situated that the disposition of the action may impair that person’s ability to protect that interest, unless existing parties adequately represent the applicant’s interest. Because Relators’ suit challenges the actions and responsibilities of the OBM Director and the Lottery Director—obligations that are independent of the Secretary of State’s duties—intervention is necessary.

Moreover, the OBM Director, at the Governor’s direction, oversees the state budget and administers the state revenue. This Court has recognized the OBM Director’s authority to use “currently available devices for fiscal management.” *State ex rel. Ohio Funds Mgmt. Bd. v. Walker* (1990), 55 Ohio St.3d 1, 11. And as the director of an executive agency, the OBM

Director exercises executive powers delegated to her by both the Governor and the General Assembly. See *State ex. rel. AFSCME v. Taft* (3d Dist.), 156 Ohio App. 37, 49, 2004-Ohio-493, ¶ 36. Broadly speaking, the OBM Director is responsible for monitoring the budget and revenue and managing spending on an ongoing basis to ensure that the State is fulfilling its balanced-budget requirement. More specifically, she may, among other things, “exercise control over the financial transactions of state agencies, including approving, disapproving, voiding, or invalidating encumbrances or transactions” by those agencies. R.C. 126.08. She also must “[k]eep all necessary accounting records” and “maintain the accounting system”; “approv[e] and review[] payment vouchers”; “[r]econcile . . . totals so as to correspond in the aggregate with the total appropriation”; “prepare financial reports”; and “[i]ssue the official comprehensive annual financial report of the state.” R.C. 126.21(A). She provides the General Assembly with monthly reports on state revenues, R.C. 126.23, and she assists the Governor in discharging his statutory duty to “submit to the general assembly, not later than four weeks after its organization, a state budget containing a complete financial plan for the ensuing fiscal biennium.” R.C. 107.03. Finally, the OBM Director has the power to initiate litigation that affects the state revenue. This ability includes statutory authority to appeal determinations by the Tax Commissioner “if the revenues affected by such decision would accrue primarily to the state treasury,” R.C. 5717.02, and the power to initiate mandamus actions, see, e.g., *State ex rel. Shkurti v. Withrow* (1987) (per curiam), 32 Ohio St.3d 424, 424.

At the core of Relators’ mandamus action is a challenge to a critical piece of Am. Sub. H.B. 1, the budget bill that passed with bipartisan support and that the Governor signed. If Relators succeed, millions of dollars in revenue from VLTs and consequent appropriations to education could be at risk, thereby jeopardizing the State’s ability to maintain a balanced budget.

As the official with executive responsibility for the State's budgetary and fiscal affairs—and specifically for monitoring the State's balanced-budget obligation—the OBM Director has a vital interest in the validity of the budget and in any actions that would interfere with the State's revenue.

The Lottery Director also has statutory duties and legal interests, separate and apart from the Secretary of State's, that require his intervention in this matter. The Lottery Director is the "executive officer" for the Ohio Lottery Commission ("Commission"). R.C. 3770.02(B)(2). He is responsible for "supervising and administering the state lottery in accordance with [R.C. Chapter 3370], and carrying out all commission rules." *Id.* Among the Commission rules that the statute obligates the Lottery Director to carry out are those that the Commission "shall promulgate . . . under which a statewide lottery may be conducted." R.C. 3370.03(A). These include the type of lottery to be conducted in the State; the price of the tickets; the number, nature, and value of prizes; the frequency of drawings; and the manner in which prizes are awarded to winning ticket holders. R.C. 3770.03(A). The Commission also determines the manner in which lottery sales revenues are collected, the amount of compensation paid to sales agents, and the criteria for licensing sales agents. R.C. 3770.03(B).

The Governor's Directive instructs the Lottery Director to "immediately take steps to implement VLTs" at seven licensed racetrack facilities. The Directive further orders the Lottery Director to issue licenses to operate VLTs, to conduct criminal and financial background checks on prospective licensees, and to perform other regulatory oversight regarding VLTs once they are implemented. Finally, the Governor's Directive recognizes that the State is "facing significant economic challenges," and observes that the revenues from VLT operation are "critical to our continued efforts to strengthen Ohio's education system," and that "the immediate

implementation of VLTs by the Ohio Lottery is projected to generate approximately \$933 million in net proceeds during the coming biennium.” As a result, the Lottery Director intends to implement the Governor’s Directive as quickly as possible.

Relators have challenged the Lottery Director’s authority to implement VLTs with the speed necessary to comply with the Governor’s Directive. They argue that the Governor’s legal authority to order the implementation of VLTs is predicated on Am. Sub. H.B. 1, see Compl. ¶ 12, and then assert that Am. Sub. H.B. 1 is not yet effective law under the Ohio Constitution because it “change[s] the permanent law of the state,” Compl. ¶ 28. Put simply, under Relators’ interpretation of Ohio law, the Lottery Director is prohibited from complying with the Governor’s Directive at the present time. The Lottery Director therefore seeks intervention in this litigation, thereby allowing him to defend his authority and obligation to implement the Governor’s Directive as rapidly as possible

It is also imperative for the OBM Director and Lottery Director to intervene because Secretary of State Brunner cannot “adequately represent” their interests. Civ. R. 24(A). Under Ohio law, the Secretary’s duties diverge from those of the proposed Intervenors. The Secretary does not have administrative responsibility for the State’s budget, nor does the Governor’s Directive charge her with implementing VLTs. To the contrary, as Relators admit, her “duties are merely ministerial” in this case. Compl. ¶ 6. When an appropriation statute is at issue, the parties who actually have interests—here, the Directors—should be allowed to intervene.

Finally, the motion to intervene is timely. This mandamus action was filed only four days ago. No responsive pleadings have been filed, and Relators’ merit brief is not due until July 31, 2009. Furthermore, the proposed Intervenors will comply with the briefing schedule previously set by this Court and agree that the case should be expedited. Put simply, no prejudice or delay

would result to any of the parties if the Directors intervene now. See *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St. 3d 501, 503. And, as noted above, Relators do not object to this motion.

Accordingly, the Court should grant the motion to intervene as of right.

B. The OBM Director and Lottery Director should be permitted to intervene under Civ. R. 24(B).

In the alternative, the OBM Director and Lottery Director should be permitted to intervene under Civ. R. 24(B). Civ. R. 24(B) provides that upon timely application, anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. The rule further states that, "[w]hen a party to an action relies for ground of claim or defense upon any statute or *executive order* administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action." *Id.* (emphasis added).

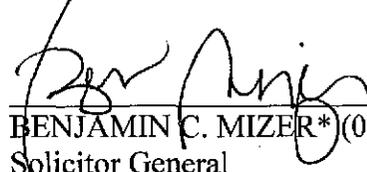
As explained above, Relators have signaled their intent to make the Governor's VLT Directive an issue. See Compl. ¶¶ 8-13, Ex. A. Therefore, the Lottery Director, who must follow the Directive, should be allowed to intervene. Also, as explained above, the OBM Director oversees the State's fiscal affairs. This mandamus action threatens the biennial budget and revenue that the OBM Director must administer for the State of Ohio.

CONCLUSION

For these reasons, the OBM Director and Lottery Director respectfully ask the Court to grant their unopposed motion to intervene as Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

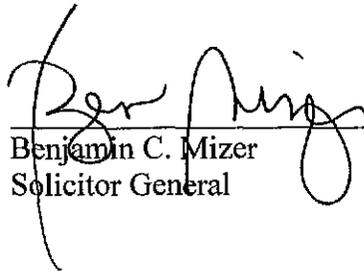
I certify that a copy of the foregoing Unopposed Motion to Intervene by J. Pari Sabety, Director, Office of Budget and Management, and Michael A. Dolan, Director, Ohio Lottery Commission, was served by electronic mail on this 24th day of July 2009 upon the following counsel:

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