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In the
Supreme Court of Ohio

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

EMERGENCY MOTION TO COMPEL OF INTERVENOR-RESPONDENTS J. PARI SABETY, DIRECTOR, OFFICE OF BUDGET AND MANAGEMENT, AND MICHAEL A. DOLAN, DIRECTOR, OHIO LOTTERY COMMISSION,

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At the eleventh hour before their merit brief and evidence were due on July 31, 2009, Relators moved to file an Amended Complaint. The Secretary of State and Intervenors Sabety and Dolan, in an effort to keep this litigation moving according to the schedule set by this Court, did not oppose Relators' motion to amend the complaint, indicated this to the Court on August 4, 2009, and simultaneously filed proposed Answers to the Amended Complaint in the event that the motion for leave to amend was granted—which it was on August 5, 2009. Also on August 4, 2009, Intervenor-Respodents served limited discovery requests on Relators, with a response deadline of today (August 6, 2009) at 3 p.m. See Exh. A to Response of Intervenor-Respondents to Motion for Leave to Amend. Intervenor-Respondents also noticed the depositions of the three named Relators for Friday, August 7.

Through a letter to Intervenor-Respondents' counsel transmitted this afternoon at 2:37 p.m.—23 minutes before their discovery responses were due—Relators' counsel indicated that they will not respond to any of the discovery requests, nor will any of the Relators appear for the scheduled depositions. (Letter of August 6, 2009, attached at Exh. 1.) Relators contend that they are not required to respond to the discovery requests for 28 days and that the deponents are unavailable on August 7, 2009.

Intervenor-Respondents are entitled to an order from this Court compelling Relators to respond to the discovery and depositions requested. This Court has made clear that Ohio Civil Rule 26(B) "has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding." *Ohio Consumers' Counsel v. PUC* (2006), 111 Ohio St.3d 300, 320. This Court has also confirmed, "[t]o be sure, discovery is generally permissible in mandamus actions," *State ex rel. Marchiano v. Sch. Employees Ret. Sys.* (2009), 121 Ohio St.3d 139, 144, and that "[i]ssues of fact raised by pleadings in mandamus

actions must be tried, and further proceedings thereon had, in the same manner as in civil actions." *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82, 85. Moreover, S.Ct.Prac.R. X, §7 explicitly provides for the presentation of evidence in mandamus actions including "affidavits, stipulations, depositions, and exhibits."

In Relators' Amended Complaint, as well as in their Merit Brief and Evidence, Relators make representations about the interests and purpose of Relator organization LetOhioVote.org, the interests of the other Relators, the financial status of LetOhioVote.org, and various steps that LetOhioVote.org has taken to place a referendum on the ballot. See, e.g., Am. Cmplt. ¶¶ 2-3, 23-24, 28-29; Relators' Br. 3-5; Relators' Evidence Ex. 4. These assertions are the basis for the narrow discovery requests and deposition notices propounded by the Intervenor-Respondents. Accordingly, there is no basis for Relators' claim that there is "no legitimate, litigation-related reason" for these requests. The requests are based squarely on facts pleaded by the Relators' in their Amended Complaint.

Relators also claim that their discovery responses cannot be due until 28 days from service of the discovery requests. That is an untenable and preposterous contention in this case. On July 20, 2009, *Relators themselves filed a motion to expedite this action.* On July 21, 2009, this Court granted Relators' motion and ordered that Relators' brief and evidence would be due on July 31; that Respondents' brief and evidence would be due 10 days later; and that Relators' reply brief would be due five days after Respondents' submissions. And just yesterday, on August 5, after granting Relators' motion for leave to amend the complaint, this Court reiterated that "[t]he submission of evidence and briefs will continue to proceed as ordered by this Court in the entry of July 21, 2009."

In short, it is entirely unreasonable for Relators to contend that they have 28 days to respond to discovery requests. Indeed, if that were the case, Respondents in most expedited mandamus actions would *never* be entitled to discovery, since—as is the case here—the lifespan of the case from complaint to the completion of merits briefing is shorter than 28 days. And, of course, in this case, the expedited schedule was imposed *because Relators requested it.*

Moreover, the information and documents requested are maintained in the ordinary course of business by LetOhioVote.org and Relator Gene Pierce. Pursuant to R.C. 3517.10, the ballot issue committee is required by law to submit a report to the Secretary of State "setting forth in detail the contributions and expenditures" relating to the ballot issue committee. See also R.C. 3517.12 (requiring committee to file statement regarding expenditures relating to petition circulation, including contributors to circulation efforts); Am. Cmplt. ¶ 29 (alleging that "Relators have incurred costs in excess of $10,000 to collect the signatures for the summary petitions"). In other words, the limited discovery sought by Intervenor-Respondents is maintained by the ballot issue committee and its treasurer in the ordinary course of business. When this information is filed with the Secretary of State, it will also become public record as a matter of law, refuting Relators' contention that these requests "are a politically motivated fishing expedition designed to intimidate Ohio citizens." They are nothing of the sort. These are simply requests for Relators to turn over information regarding facts that they have pled in their Amended Complaint and that they are required to maintain by law. Accordingly, there is nothing onerous or unreasonable about these requests.

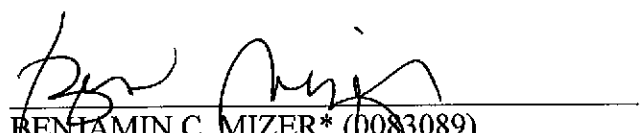
Intervenor-Respondents also intend to depose the three named Relators—Thomas E. Brinkman, Jr., David Hansen, and Gene Pierce—on these limited subjects. Supreme Court Practice Rule X explicitly provides for the presentation of evidence, including depositions, and

there is nothing controversial about seeking to depose the named Relators in an original action, particularly where, as here, the scope of the depositions will be narrow. Relators sought to place this action on an expedited schedule, and therefore, the burden is on them to ensure that their schedules accommodate the possibility of depositions within the time frame set by this Court. If Relators are not available for depositions in Columbus, they should make themselves available for depositions telephonically, and counsel for Intervenors offered that possibility to counsel for Relators at 4:19 p.m. today, after receiving their letter. It is routine, to say the least, for a plaintiff in a lawsuit to sit for a deposition explaining his allegations.

For the foregoing reasons, this Court should promptly compel Relators (1) to respond to the discovery requests and (2) to make the named Relators available for depositions at the earliest possible time before Monday, August 9, 2009.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Ohio Attorney General



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CERTIFICATE OF SERVICE

I certify that a copy of the above Emergency Motion to Compel of Intervenor-Respondents J. Pari Sabety, Director, Office of Budget and Management, and Michael A. Dolan, Director, Ohio Lottery Commission, was served by electronic mail on this 6th day of August 2009 upon the following counsel:

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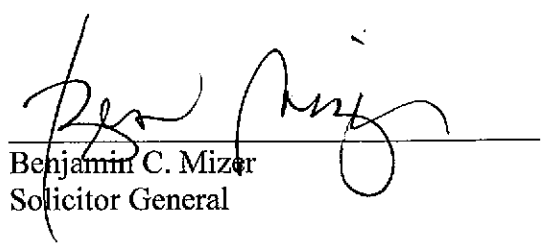

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EXHIBIT 1

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August 6, 2009

VIA E-MAIL

Benjamin C. Mizer
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Re: *State ex rel. LetOhioVote.org v. Hon. Jennifer Brunner*

Dear Ben:

We have received the interrogatories, request for production of documents, and notices of deposition served by your clients, Intervenors J. Pari Sabety, Director Office of Budget and Management, and Michael A. Dolan, Director, Ohio Lottery Commission, on August 4, 2009. Intervenors request that Relators comply with the written discovery by August 6, 2009, and that Relators sit for deposition the following day, August 7, 2009.

We have both procedural and substantive objections to your discovery requests.

As a procedural matter, your demand for near-immediate responses to these discovery requests is unjustified. Under Rules 33 and 34 of the Ohio Rules of Civil Procedure, we are not required to respond to your interrogatories and requests for documents for 28 days. Similarly, Rule 30 requires that you provide "reasonable notice" for a deposition. As evidenced by your interrogatories and document requests, the information you seek to obtain seemingly concerns only standing and financial allegations, all of which were included in Relators' *original* complaint, yet you waited 11 days from the date the Court granted your motion to intervene to notice the depositions. Plainly, under these circumstances, three days does not constitute reasonable notice for a deposition.

Moreover, as a practical matter, the deponents are unavailable on August 7 due to family and professional obligations as well as international travel. This should not come as a surprise given the lack of proper notice.

Substantively, it is difficult to understand the basis for Intervenors' requests. The stated purpose for your discovery is "to probe Relators' standing and the financial allegations asserted in Relators' Amended Complaint." Yet the interrogatories and document requests do not seek any information concerning Relators' standing, but are focused primarily, if not entirely, upon discovering the identity of donors to LetOhioVote.org. Of course, the source of the committee's

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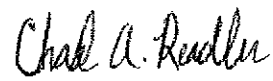
funding is utterly irrelevant to this lawsuit, and your attempt to force the committee to prematurely disclose this information is inconsistent with the deadlines established in Ohio campaign finance laws. Since we can discern no legitimate, litigation-related reason for your clients' extraordinary requests, we must conclude that the requests are a politically motivated fishing expedition designed to intimidate Ohio citizens in their efforts to exercise their constitutional right of referendum.

For these reasons, Relators do not intend to respond to your interrogatories and document requests today, nor do they intend to appear for the noticed depositions tomorrow.

Very truly yours,



Chad A. Readler

cc: Other Counsel of Record