

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. WILLIAM D. MASON, :
 Cuyahoga County Prosecuting Attorney :
 :
 Relator, : **Case No. 2012-1128**
 :
 v. : Original Action in Prohibition
 :
 NANCY MARGARET RUSSO, :
 Judge, Cuyahoga County Common Pleas Court :
 :
 Respondent. :

**MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM IN
 OPPOSITION TO RESPONDENT'S MOTION TO DISMISS RELATOR'S
 PETITION FOR IMMEDIATE ALTERNATIVE WRIT AND MEMORANDUM IN
 SUPPORT**

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On July 3, 2012, Relator, Cuyahoga County Prosecuting Attorney William D. Mason, filed a Petition and Complaint for Writ of Prohibition and Application for Immediate Alternative Writ against Cuyahoga County Court of Common Pleas Judge Nancy Margaret Russo. In his Petition, Relator alleges that Judge Nancy Margaret Russo violated the separation of powers doctrine when she issued injunctive relief “that interferes with Relator’s prosecutorial discretion to bring criminal charges.” (Complaint, ¶ 1). On July 12, 2012, Respondent filed a Motion to Dismiss Relator’s Petition for Immediate Alternative Writ and Memorandum in Support.

While “an amicus curiae may file a merit brief in an original action without leave of court,” the amicus curiae must first seek leave “to file a memorandum before an alternative writ is granted.” *State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court of Common Pleas*, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶11 (internal citations omitted). Ohio Attorney General Mike DeWine seeks leave to file a Memorandum in Opposition to

Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support because Respondent violated the doctrine of separation of powers.

The Attorney General should be granted leave because he is the "chief law officer for the state and all of its departments," which bestows upon him, the power to "appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St. 3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶33 (quoting R.C. 109.02). The state has a direct interest in ensuring that common pleas judges do not overstep the confines of their powers conferred by Section 4, Article IV of the Ohio Constitution, such that they run afoul of the separation of powers doctrine. As the chief law officer, it is incumbent upon Ohio Attorney General Mike DeWine to involve himself in civil cases to protect the constitutional separation of powers wherever possible. Based on the events that took place in Cuyahoga County Common Pleas Case Nos. 12-CV-785188 and 12-CV-784234, the Attorney General hereby exercises his power as the chief law officer and seeks leave to file a Memorandum in Opposition to Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support in order to protect the integrity of the tripartite government structure ensured by the separation of powers doctrine.

Moreover, in *State ex rel. Duke Energy Ohio, Inc.*, this Court granted a motion for leave to file an amicus curiae memorandum before the alternative writ was granted because the amici was a party to the underlying Hamilton County action. Similarly, the Attorney General was named as a Defendant in *AMA Ventures Inc., et al. v. Mason, et al.*, Case No. 12-CV-785188,

one of the two cases pending before Judge Russo.¹ In fact, Ohio Attorney General Mike DeWine is also subject to the temporary restraining orders issued by Judge Nancy Margaret Russo.

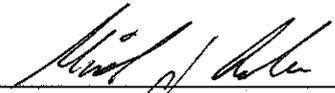
It is likely that Respondent will oppose Ohio Attorney General Mike DeWine's Motion for Leave to File Amicus Curiae Memorandum in Opposition to Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support ("Leave to File Memo Opp"), just as they opposed the Ohio Attorney General's Motion for Leave to ("Leave to File Memo in Support of Alternative Writ"). In their opposition to the Ohio Attorney General's Leave to File Memo in Support of Alternative Writ, Respondent only argued that leave should be denied because the underlying state court action, which is the impetus for this original action, is currently stayed. (Respondent Memo. Opp. Mot. Leave, p. 1). This does not, however, provide final resolution of the constitutional legal issues, in which the Attorney General has an interest in protecting.

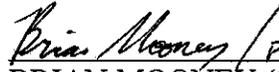
For these reasons, Ohio Attorney General Mike DeWine respectfully requests that he be granted Leave to file a Memorandum in Opposition to Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support, a copy of which is attached to this Motion. A proposed Order is also attached to this Motion for the convenience of this Court.

¹ On July 5, 2012, AMA Ventures, Inc. dba Internet Galaxy, a plaintiff in the underlying state court action captioned Cuyahoga County Case No. 12-CV785188, filed a notice of voluntary dismissal of defendant, Ohio Attorney General Mike DeWine, pursuant to Ohio Civ.R. 41(a). However, J&C Marketing, LLC, also a Plaintiff in the 12-CV-785188 case, has yet to dismiss the Ohio Attorney General from that action. As such, the Attorney General is still a party to the action and is subject to the TRO issued by Respondent Judge Russo.

Respectfully Submitted,

MIKE DeWINE
Ohio Attorney General


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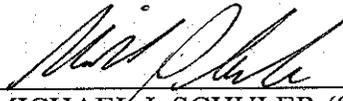
“[T]he Supreme Court Rules of Practice governing original actions . . . permit our disposition of such actions without the necessity of filing an answer,” whereby “the alternative writ now functions as a court-ordered evidence and briefing schedule, which manifests the expectation that the relator’s claim for the writ ‘may have merit.’” *State ex rel. Morley v. Lordi*, 72 Ohio St. 3d 510, 513-514, 651 N.E.2d 937 (1995), citing Staff and Committee Notes to S.Ct.Prac.R. X(5) and X(6). Thus, the issuance of an alternative writ, although it functions as a stay in the context of a writ of prohibition, *see* S.Ct.Prac.R. X(6), also serves as a preliminary review of the case and a determination by this Court that the action has merit.

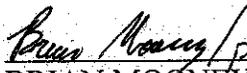
Respondent’s July 9, 2012 Order “maintain[s] the status quo with all plaintiffs, including those who are mentioned in this specific entry, pending the final decision of the Supreme Court of Ohio on the pending writ.” This Order was previously provided to this Court as State’s Exhibit 19, which was attached to Relator’s Notice of Subsequent Court Action filed on July 11, 2012. By the language of the Order, if this Court does not grant the Alternative Writ, the stay in the underlying actions will be lifted allowing Respondent to continue exercising judicial power in violation of the Separation of Powers doctrine. Thus, only through this Court issuing an Alternative Writ, and permitting merit briefs on the constitutional issues, will the Relator’s executive powers be protected. Even if this Court does not find a stay to be necessary, the alternative writ should be granted, because Relator’s Petition is meritorious and requires briefing.

For these reasons, Amicus Curiae, Ohio Attorney General Mike DeWine, respectfully submits that this Court should deny Respondent’s Motion to Dismiss and grant Relator’s Request for an Immediate Alternative Writ staying the proceedings in Cuyahoga County Common Pleas Case Nos. 12-CV-784234 and 12-CV-785188, which are currently pending before Respondent Judge Russo, and/or issuing a briefing schedule.

Respectfully Submitted,

MIKE DeWINE
Ohio Attorney General


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Ohio Attorney General Mike DeWine*

CERTIFICATE OF SERVICE

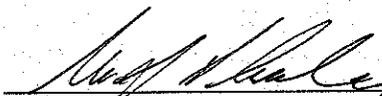
I hereby certify that a copy of the foregoing *Amicus Curiae's Memorandum in Opposition to Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support* was served by US Mail, postage prepaid, on this 13th day of July, 2012, upon the following:

Matthew E. Meyer
Assistant Prosecuting Attorney
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Counsel for Relator
William D. Mason,
Cuyahoga County Prosecuting Attorney

Robert P. Ducatman
JONES DAY
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Counsel for Respondent
Judge Nancy Margaret Russo
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ORDER AND ENTRY

Upon consideration and good cause shown, Ohio Attorney General Mike DeWine's Motion for Leave to File Memorandum in Opposition to Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support is hereby GRANTED.

ENTERED BY ORDER OF THE COURT

Kristina D. Frost, Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Leave to Amicus Curiae Memorandum in Opposition to Respondent's Motion to Dismiss Relator's Petition for Immediate Alternative Writ and Memorandum in Support* and accompanying attachments were served by US Mail, postage prepaid, on this 13th day of July, 2012, upon the following:

Matthew E. Meyer
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Counsel for Relator
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