

ORIGINAL

IN THE SUPREME COURT  
OF THE STATE OF OHIO

The State of Ohio ex rel.	:	CASE NO. 2014-1141
Ohio Republican Party,	:	
	:	
Relator	:	ORIGINAL ACTION IN MANDAMUS
	:	
v.	:	
	:	
Edward FitzGerald, et al.,	:	
	:	
Respondents.	:	

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**RESPONDENTS' COMBINED MEMORANDUM IN OPPOSITION TO RELATOR'S  
[1] MOTION TO STRIKE AFFIDAVITS AND [2] MOTION TO EXPEDITE RULING  
ON RESPONDENTS' MOTION TO DISMISS AND TO FORTHWITH ISSUE  
ALTERNATIVE WRIT**

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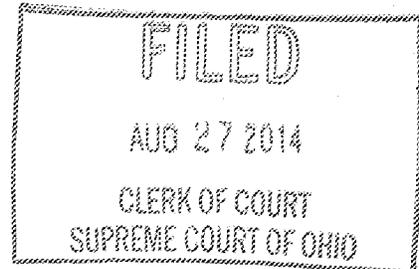
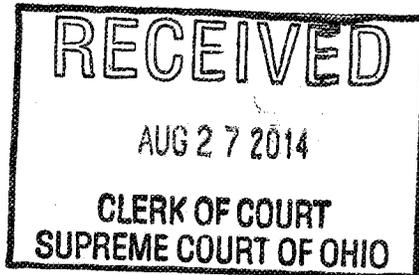
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IN THE SUPREME COURT  
OF THE STATE OF OHIO

The State of Ohio ex rel. Ohio Republican Party,	:	CASE NO. 2014-1141
	:	
Relator	:	<b>RESPONDENTS' COMBINED</b>
	:	<b>MEMORANDUM IN OPPOSITION TO</b>
v.	:	<b>RELATOR'S [1] MOTION TO STRIKE</b>
	:	<b>AFFIDAVITS AND [2] MOTION TO</b>
Edward FitzGerald, et al.,	:	<b>EXPEDITE RULING ON</b>
	:	<b>RESPONDENTS' MOTION TO DISMISS</b>
Respondents.	:	<b>AND TO FORTHWITH ISSUE</b>
	:	<b><u>ALTERNATIVE WRIT</u></b>

**INTRODUCTION**

On August 19, 2014, Relator filed a Motion to Expedite Ruling on Respondents' Motion to Dismiss ("Motion to Expedite") along with a Motion to Strike Affidavits Tendered with Respondents' Motion to Dismiss ("Motion to Strike"). With those filings, Relator chose not to seek leave to amend its Complaint to fix the fatal defects raised by Respondents in their Motion to Dismiss. Instead, it seeks to have the Court strike the affidavits submitted in support of the Motion to Dismiss and to expeditiously and summarily deny the Motion to Dismiss and to issue an alternative writ. By dismissing the affidavit requirement as a hyper technicality and asking the Court to accept verified complaints as a mechanism to file mandamus actions, Relator effectively seeks to have the Court amend its Rules of Practice through a ruling on a motion to dismiss. This is not the proper venue to amend the Court's Rules of Practice.

The Court should deny Relator's Motion to Expedite and Motion to Strike, properly vet the Motion to Dismiss and the precedential impact of denying it, and enter its decision accordingly.

**I. The Court may properly consider the affidavits in support of the Motion to Dismiss.**

The Court should deny Relators' Motion to Strike. The Court's ability to consider affidavits and other extrinsic evidence in ruling on a mootness argument has been established at least since the Court's landmark decision in 1910 in *Miner v. Witt* (1910), 82 Ohio St. 237.

In *Miner*, the Court explained:

The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. \*239 It necessarily follows that when, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, **may be proved by extrinsic evidence.** (Emphasis added).

*Miner*, 82 Ohio St at 238. In *State ex rel. Nelson v. Russo* (2000), 89 Ohio St.3d 227, 228, the

Court opined:

Nevertheless, this error was harmless because the court of appeals could have taken judicial notice of the mootness of Nelson's writ action without converting Judge Russo's dismissal motion to a motion for summary judgment. *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581, 669 N.E.2d 835, 837, citing *State ex rel. Neff v. Corrigan* (1996), 75 Ohio St.3d 12, 16, 661 N.E.2d 170, 174; see, also, *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471, 692 N.E.2d 198, 202. In fact, "an event that causes a case to be moot may be proved by extrinsic evidence outside the record." *Pewitt v. Lorain Correctional Inst.* (1992), 64 Ohio St.3d 470, 472, 597 N.E.2d 92, 94.

Relator's efforts to strike the affidavits as being outside of the four corners of the Complaint, therefore, are without any merit and should be rejected by the Court. The Court's consideration of extrinsic evidence in ruling on a mootness issue is well established and no

different than when a court relies on affidavits and other extrinsic evidence in ruling on a motion to dismiss based on jurisdiction. As the Court recognized in *Russo*, the Court can even *sua sponte* take judicial notice of extrinsic evidence on a mootness issue.

The crux of Relator's Complaint is that Respondents outright ignored its requests and failed to respond to them. Even if such an argument were to somehow be true when—prior to institution of the Complaint—Respondents had actually responded to Relator, acknowledged the receipt of the requests, and informed Relator that they were working on responding to the requests as explained in the Affidavit of Koula Celebrezze, any such argument is moot by Respondents' July 11, 2014 response. (*See* Makhoulouf Affidavit attached to Motion to Dismiss.)

Instead of seeking leave to amend its Complaint to deal with the mootness issues, Relator chose to file a motion to have the affidavits stricken. The Court should reject these arguments.

**II. The Court should reject Relator's attempt to have it hastily rule on the Motion to Dismiss and to promptly issue an alternative writ.**

Instead of seeking leave to amend its Complaint to include a proper affidavit, Relator seeks to have the Court expeditiously deny the Motion to Dismiss, brushing aside the precedential impact of such a decision. Even if the Court were to contemplate the idea of allowing verified complaints as a mechanism for filing mandamus actions, a ruling on a motion to dismiss is not the proper venue to amend the Court's Rules of Practice, which expressly require an affidavit. The Court should properly vet the Motion to Dismiss and the precedential impact of its denial—i.e., effectively amending the Court's Rules of Practice to allow verified complaints as a mechanism to file original actions in the Supreme Court—and deny Relator's Motion to Expedite.

Unlike affidavits, verified complaints often contain statements made upon information and belief, which are not admissible in evidence. Relator's verification, for instance, fails to even

designate the specific paragraphs in the Complaint to which it applies. It simply leaves it to the Court and Respondents to guess [1] which paragraphs in the Complaint constitute factual statements based on personal knowledge, [2] which paragraphs constitute factual statements made upon belief without personal knowledge, and [3] which paragraphs in the Complaint constitute legal statements (and [4] if they are factually correct or not.) This is precisely the fatal failure on which the Supreme Court dismissed the Complaint in *State ex rel. Committee for the Charter Amendment for an Elected Law Director et al. v. City of Bay Village* (2007), 115 Ohio St.3d 400, 875 N.E.2d 574, 2007-Ohio-5380, at ¶ 13 (“it is not clear which allegations are based on personal knowledge and which allegations are based simply on information”).

The Court's express mandate in its Rules of Practice for an affidavit based on personal knowledge—as opposed to a verified complaint—is a reasoned requirement. Had the Court intended to allow original actions to be filed through either verified complaints or affidavits, it knew how to do so. *See, e.g.*, Civil Rule 65(A). The Court should reject the urge to rush its ruling on a motion without thoroughly vetting the precedential impact of effectively amending its Rules of Practice to allow verified complaints as a mechanism to file original actions in the Supreme Court.

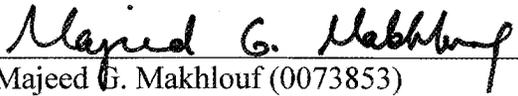
The Court, therefore, should deny Relator's Motion to Expedite. Should the Complaint survive the Motion to Dismiss, the Court can then enter an alternative writ.

### **CONCLUSION**

For the foregoing reasons, the Court should deny Relator's Motion to Strike the Affidavits submitted in support of the Motion to Dismiss and its efforts to rush a decision on the Motion to Dismiss without properly vetting the precedential impact of such a decision.

Respectfully submitted,

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[Representation pursuant to August 27, 2013  
Agreement governing the division of  
duties between the Cuyahoga  
County Prosecutor's Office and  
Department of Law]

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on all parties of record by regular U.S.

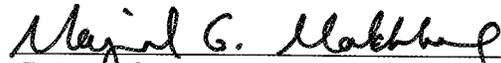
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