IN THE SUPREME COURT OF OHIO

State ex rel. CENTER FOR MEDIA AND DEMOCRACY, *et al.*,	:	CASE NO: 2023-0270
Appellees,	:	
vs.	:	
	:	On appeal from Franklin County
THE OFFICE OF ATTORNEY GENERAL DAVID YOST,	:	Court of Appeals, 10th Appellate District
	:	Court of Appeals Case No. 20AP-554
Appellant.	:	

BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF OHIO, THE MARSHALL PROJECT, AND OHIO NOW EDUCATION AND LEGAL FUND IN SUPPORT OF APPELLEES CENTER FOR MEDIA AND DEMOCRACY AND DAVID ARMIAK

Frederick M. Gittes* (0031444)
fgittes@gitteslaw.com
*Counsel of Record
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
The Gittes Law Group
723 Oak Street
Columbus, OH 43205
(614) 222-4735/Fax: (614) 221-9655

Counsel for Relators-Appellees

Dave Yost (0056290)
Ohio Attorney General
Benjamin M. Flowers* (0095284)
Solicitor General
*Counsel of Record
Michael J. Hendershot (0081842)
Chief Deputy Solicitor General
Julie Pfeiffer (0069762)
Section Chief- Constitutional Offices
Ann Yackshaw (0090623)
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: 614-466-8980
Fax: 614-466-5087
benjamin.flowers@OhioAGO.gov
michael.hendershot@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Ann.Yackshaw@OhioAGO.gov

Counsel for Defendant-Appellant

Madeline J. Rettig (0098816)*
(*mrettig@marshallforman.com*)
*Counsel of Record
John S. Marshall (0015160)
(jmarshall@marshallforman.com)
MARSHALL FORMAN & SCHLEIN LLC
250 Civic Center Dr., Suite 480
Columbus, Ohio 43215-5296
(614) 463-9790
Fax (614) 463-9780

OF COUNSEL:
Louis A. Jacobs (002101)
(*LAJOhio@aol.com*)
177 19th St., Apt. 9C Oakland, CA 94612
(614) 203-1255
Fax (614) 463-9780

Counsel for *Amici Curiae* League of Women Voters of Ohio, *et al.*

Melissa A. Holyoak
(PHV-26716-2023)
Utah Solicitor General
Christopher A. Bates
(PHV-26717-2023)
Deputy Solicitor General
Office of the Utah Attorney General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
Telephone: (801) 538-9600
Fax: (801) 538-1121
melissaholyoak@agutah.gov
chrisbates@agutah.gov

Counsel for *Amici Curiae* Utah, *et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. Statement of Interest of *Amici Curiae*

The League of Women Voters of Ohio ("LWVO") is the Ohio chapter of the League of Women Voters of the United States–a nonpartisan, statewide non-profit founded in May 1920, shortly before the ratification of the Nineteenth Amendment in August 1920 granting women's suffrage. LWVO currently has 3,438 members across the state, the vast majority of whom are registered Ohio voters. LWVO's members make up 34 local Leagues and at-large units that are dedicated to empowering citizens and ensuring an effective democracy. LWVO's mission is to help Ohioans exercise the right to vote, improve American democracy, and engage Ohioans in the decisions that most impact their lives. As part of its mission, LWVO aims to shape public policy, to educate the public about policy issues and the functioning of our democracy, and to protect and expand Ohioans' access to elections and their government. Access to public records informs and contributes to LWVO's mission and goals; thus LWVO is concerned about the potential for the far-reaching implications this Court's decision in this case could generate, such as severely limiting the public's ability to access necessary information to identify the nature of public records sought which have been improperly denied and impairment of civil litigants' access to routine discovery in other types of claims.

The Marshall Project is a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the United States criminal justice system. The Marshall Project's investigative journalism has been recognized with two Pulitzer Prizes, and many other journalism awards. In 2022, The Marshall Project launched its first local network operation, The Marshall Project - Cleveland, which focuses on criminal justice issues in Northeast Ohio. Many of The Marshall Project's reports are based on public records obtained through requests made under the Freedom of Information Act and state public records statutes. The Marshall Project has a strong

interest in ensuring that the Ohio Public Records Act remains a viable mechanism to obtain records related to policing, criminal justice, and corrections in Ohio. A decision in this appeal curtailing discovery in public records cases would limit the ability of The Marshall Project to use the Public Records Act in its reporting and would make it more difficult for The Marshall Project to inform the public about these critical issues.

The Ohio NOW Education and Legal Fund is a nonprofit corporation originally founded in 1981 by the Trustees of the Ohio Chapter of the National Organization for Women. The Ohio NOW Education and Legal Fund provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning discrimination, civil rights, reproductive rights, domestic violence and other issues impacting women in Ohio. The Ohio NOW Education and Legal Fund and the Ohio NOW Chapter have participated as amici curiae in cases before the Supreme Court of Ohio and Ohio's Courts of Appeals. The Ohio NOW Education and Legal Fund files this amici brief in order to support the transparency and accountability of government agencies under the Ohio Public Records Act, including effective discovery and full enforcement of valid discovery orders in mandamus litigation against government agencies and officials.

II. Summary of Argument

The issues in this case – whether the records requested by Appellees-Relators under R.C. 149.43 seeking disclosure of all records of Appellant-Respondent Attorney General Yost's interactions with respect to two organizations, the Republican Attorneys General Association (RAGA) and the Rule of Law Defense Fund (RLDF), and all records of his participation in RAGA's 2020 winter meetings, constitute public records and whether they are entitled to certain discovery on factual disputes therein, including taking AG Yost's deposition – are readily resolved

using long-standing principles underlying the Ohio Public Records Act, mandamus actions generally, and the Ohio Rules of Civil Procedure.

At the outset, it is undisputed that a public record is "any document, device, or item" that "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office." R.C. 149.011(G). "The R.C. 149.011(G) definition of 'records' has been construed to encompass 'anything a governmental unit utilizes to carry out its duties and responsibilities.'" *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 63, 697 N.E.2d 640 (Ohio 1998) (citations omitted). Records may constitute public records "regardless of where they are physically located, or in whose possession they may be" and public records existing on private devices and accounts are not automatically excluded from disclosure. *State, ex Rel. Mazzaro, v. Ferguson*, 49 Ohio St. 37, 40, 550 N.E.2d 464 (Ohio 1990). Consequently, AG Yost's unilateral characterization that records for which he may be required to disclose under R.C. 149.43 only include "records of [his] office", (*see* R. 76, Yost Aff., ¶ 9), runs afoul of the law in this regard.

The key factual dispute in this case concerns whether the records withheld by Respondent in fact fall within the purview of the Ohio Public Records Act. While AG Yost claims there are no "records of [his] office" responsive to Relator's requests, (*id.*), the lower court, affirmed by the Tenth District Court of Appeals, properly concluded that a question remains as to whether potentially responsive records exist that may be subject to disclosure. (R. 93, Mag. Op.; R. 117, 10th Dist. Op.). Accordingly, the appellate court largely affirmed the magistrate's order allowing limited discovery into this subject to proceed, including the deposition of AG Yost. (*See id.*).

Ultimately, in a mandamus action for public records, the burden is on the requester to prove by clear and convincing evidence that the records it requests do exist and are maintained by that

office. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 5-10 (Ohio 2019). The office's assertion may be rebutted by evidence showing a genuine issue of fact, but a requester's mere belief based on inference and speculation does not constitute the evidence necessary to establish that a document exists as a record. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 22-26 (Ohio 2012). This important backdrop must not be forgotten: in order to properly dispute Respondent's characterizations of what documents constitute "records of [AG Yost's] office", (R. 76, Yost Aff., ¶ 9), versus "records" which may be subject to disclosure, Relators must identify evidence in support of their assertions that such records exist and are maintained by his office, which can also be established through AG Yost's possession of the records on his personal devices and accounts depending on the content and context of the records in question. In order to meet this burden, given that the lower court's *in camera* review of the small set of documents provided did little to resolve the dispute due to AG Yost's cagey statements on the existence of potential records in dispute, (*see* R. 93, Mag. Op.), Relators require information and documents that can only made available to them by virtue of discovery.

However, AG Yost now argues that the inquiry should end with his word that the requested records simply do not constitute "records of [his] office" and that Relators are not entitled to seek further discovery to test such a claim. (*See* R. 76 ,Yost Aff., ¶ 9; Appellant's Br., pp. 3; 24). Beyond that, AG Yost contends that application of the civil discovery rules in this case to elicit information and documents outside of the public records which Relators seek would be "unconstitutional." (Appellant's Br., p. 24). A blanket rule prohibiting discovery of any "documents not subject to the Public Records Act", as suggested by Respondent, (*id.*), would strip away any independent review of the content of the records in question, leaving the circumstances under which a record qualifies

as one that must be disclosed to the whims of the officials who keep, and may wish to conceal, such records. A rule prohibiting discovery of matters relevant to exposing the true nature of records withheld by officials using their own unfettered discretion as to what qualifies would frustrate the purpose underlying the Public Records Act and risk the system of checks and balances inherent in judicial review of such claims. More importantly, the Ohio legislature has already deemed it appropriate that mandamus actions track the same proceedings available in civil actions, which includes discovery procedures, R.C. 2371.09; *see* also R.C. 2317.48 (initiating actions for discovery), and supplanting this Court's judgment for matters decided by the legislature is inappropriate. The Court's overriding judgment is not necessary here given the safeguards already inherent in the civil discovery rules by use of judicial discretion and the availability of less intrusive procedures, such as *in camera* review of documents or appropriately limiting the discovery that may occur.

Moreover, should this Court adopt Respondent's argument that discovery in a mandamus action for public records should be limited to only the narrowest and unilateral view of public records, such a principle could extend to other civil actions, thereby inevitably causing absurd results and severely restricting the ability of any civil litigant to obtain necessary evidence of their claims simply because the statute under which the action arises does not specifically provide for its disclosure. *See, e.g.*, *In re Election Contest of Democratic Primary Held May 4, 1999 for Clerk, Youngstown Mun. Court*, 88 Ohio St.3d 258, 266, 725 N.E.2d 271, 278 (Ohio 2000), quoting *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 232, 685 N.E.2d 754, 760 (Ohio 1997) ("'We must construe statutes to avoid unreasonable or absurd results.'").

The General Assembly determined that access to public records should be pursued through the typical civil processes, and the bald declaration of an official that his activities were purely

personal should never be left unexamined. Particularly when the very name of the entities involved establish that they are involved with the law enforcement activities and policies of similar public officials, application of the factors established by *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, 883 N.E.2d 452, ¶ 4 (Ohio 2008), protect both the officials and the public right of access.

In the court below AG Yost argued that the "request had nothing to do with the function of the Attorney's General office" because it "relate[d] to independent, outside organizations" rather than his office or the way it functions. (R. 96). The experience of *amici* contradicts that argument. Government officials in Ohio and throughout the country interact with their counterparts, discuss policies and procedures, reach consensus about emerging issues, and adopt or develop the functions of their offices accordingly. Put simply, AG Yost's Office is not insulated from the information, positions, and approaches of the entities whose activities it now baldly characterizes as purely personal. Independent and outside organizations are routinely called upon to inform how a public official operates his or her office, and their influence can be significant.

The *Brunner* factors all favor taking his deposition. Little imagination is required to answer whether significant influence on public officials from outside groups involves a substantial case. Not only did AG Yost's direct involvement with the entities ensure information about that influence, but his knowledge appears to be the most probative source of first-hand knowledge. A short deposition will both suffice and lack any measurable impact on the operations of AG Yost's office. Less onerous discovery procedures have been tried and are inadequate to the task.

III. Statement of the Case and Facts

Amici adopt the Statement of the Case and Facts set forth in Appellee's Brief.

IV. Argument

First Proposition of Law: The public has a right of access to public records, regardless of where those records are physically located, or in whose possession they may be, as long as the record in question documents the organization, functions, policies, decisions, procedures, operations, or other activities of the public office.

This Court has long recognized that "[t]he public has a 'right of access to public records, regardless of where they are physically located, or in whose possession they may be.'" *Wengerd v. E. Wayne Fire Dist.*, 2017 Ohio 8951, 12-13, ¶ 22 (Ohio Ct. Cl. 2017) (quoting *State, ex Rel. Mazzaro, v. Ferguson*, 49 Ohio St. 37, 40, 550 N.E.2d 464 (Ohio 1990)). Importantly, it is a "fundamental" principle that "governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity." *State ex rel. ACLU v. Cuyahoga Cty. Bd. of Comm'rs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 52-54 (Ohio 2011); *see also State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 404, 678 N.E.2d 557, 561 (Ohio 1997). While this principle normally arises in matters where public offices have delegated duties to private companies, its reasoning readily applies to the matter at hand: even though many of the records requested by Relators are primarily located on Attorney General Yost's private email account and devices, such facts do not automatically preclude the records from being public records of his office. *See Glasgow v. Jones*, 119 Ohio St. 3d 391, 396 (Ohio 2008) (recognizing that R.C. 149.43 may extend to "e-mail messages created or received by [a state official] that document her work-related activities constitute records subject to disclosure under R.C. 149.43 regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages.").

Therefore, when a record kept by public official documents the organization, functions, policies, decisions, procedures, operations, or other activities of the public office, it must be disclosed in response to a request under R.C. 149.43; the circumstances under which a public record must be disclosed are not subject to the public office's unfettered discretion. At bar, Relators

have sought records documenting the nature of AG Yost's, a public official's, activities within a donor-funded interest group that have directly influenced official policy decisions. This Court should not deviate from the principles espoused in its long line of precedent: a public record, as defined in R.C. 149.43, is still a public record regardless of the precise location in which it is stored or its custodian.

> **Second Proposition of Law:** The civil rules governing a party's discovery obligations are not cabined to the available remedies of the claims asserted in each case and no constitutional concerns arise in granting discovery beyond such remedies.

A. Application of the discovery rules enshrined in the Ohio Rules of Civil Procedure to mandamus actions for public records will not jeopardize any constitutional guarantees as to the separation of powers between the executive branch and the judiciary.

This matter involves factual disputes in which the parties are subject to the same discovery obligations triggered in a civil action. "To be sure, discovery is generally permissible in mandamus actions." *Marchiano v. School Emps. Retirement Sys*, 121 Ohio St. 3d 139, 143 (Ohio 2009) (citing *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 85, 661 N.E.2d 728 (Ohio 1996) (quoting R.C. 2731.09)). Respondent would have this Court deprive civil litigants of the right to seek discovery in mandamus actions for public records, which is contrary to Ohio statutory law and the Rules of Civil Procedure.

Assuming, *arguendo*, that Respondent's argument to limit discovery in a way that does not enhance substantive rights holds water, then it follows that abridging discovery in mandamus actions for public records could impair *individual rights* under R.C. 2731.09, which would be similarly unconstitutional. In relevant part, the statute provides that, in a mandamus action:

> The pleadings have the same effect, must be construed, may be amended, and issues of fact made by them must be tried, and further proceedings thereon had, in the same manner as in civil actions.

R.C. 2731.09. Indeed, the General Assembly codified a civil cause of action for discovery. R.C. 2317.48 ("When a person claiming to have a cause of action or a defense to an action commenced against him, without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery"). Consider, for example, this Court's definitions relied upon in *State ex Rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 432 (Ohio 1994) to determine the confines of an exempt "trial preparation record" under R.C. 149.43(A)(4):

> "Trial" is defined as "[a] judicial examination and determination of issues between parties to [an] action, whether they be issues of law or of fact, before a court that has jurisdiction." Black's Law Dictionary (6 Ed.Rev. 1990) 1504. For "action" the definition "includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court." *Id.* at 28. "Proceeding" is the "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." *Id.* at 1204.

Although *Steckman* itself dealt with the timing and circumstances under which criminal defendants can seek certain records under R.C. 149.43, *id.*, and was overruled in part on other grounds, *see State ex rel. Caster v. City of Columbus*, 151 Ohio St. 3d 425, 434 (Ohio 2016), which is not at issue here, the definitions noted above on "trial", "action", and "proceeding" are instructive for purposes of analyzing R.C. 2731.09. The legislature has already determined that parties in a mandamus action are entitled to have factual issues "tried" along with "further proceedings . . . in the same manner as in civil actions." Under the definitions above, R.C. 2731.09 necessarily entails that mandamus actions, as a matter of right, must include "all the formal proceedings" and "all possible steps" available in civil actions, such as discovery. Moreover, it is not the role of the judiciary to substitute its judgment on matters already determined by the legislature, which enacted R.C. 2731.09 to apply the same proceedings used in civil actions to

mandamus actions and specifically authorized mandamus relief under R.C. 149.43 to seek disclosure of public records.

However, this Court need not address whether a right to civil discovery exists in resolving the case at bar, as the issue of potential "enlargement" of substantive rights is not otherwise implicated by Civ.R. 26. Under the Ohio Public Records Act, this Court has held that, by its "'substantive right to inspect and copy public records[,]' . . . ***the act protects the general right of the people of Ohio to monitor the decisions of their own government*** through the more specific right to freely access public records." *Rhodes v. City of New Philadelphia*, 129 Ohio St. 3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 19 (Ohio 2011) (quoting *State ex rel. Beacon Journal Publishing Co. v. Waters*, 67 Ohio St.3d 321, 324, 1993 Ohio 77, 617 N.E.2d 1110 (Ohio 1993)) (emphasis added). If Relators were only limited to seeking discovery on only those documents that the state office unilaterally deems to be "public records", then the underlying purpose of the Act would be frustrated.

Beyond that, the government would be able to escape any level of scrutiny on its determinations of what documents it deems to be a "public record" simply by its own word that the records requested are "non-records". (*See* Appellant Br. at 24). A blanket rule prohibiting discovery of "documents not subject to the Public Records Act" as AG Yost proposes, (*id.*), necessarily deprives any independent review of the content of the records in question, which is generally required to resolve factual disputes over whether the record constitutes a public record subject to disclosure. *Cf. State ex rel. Ullmann v. Klein*, 160 Ohio St. 3d 457, 465 (Ohio 2020) (Kennedy, J., concurring and dissenting in part) (noting that Relator "would have to see the records to prove to this court that the material redacted was exempt from disclosure" and thereby the majority should have at least permitted an *in camera* inspection).

An automatic bar on a litigant's ability to seek discovery on any information or document that does not constitute a public record would unfairly deny the ability to test the government's categorizations, of which they would be become the sole arbiter of any such dispute. Such a result is again inconsistent with the Public Records Act's purpose and the judiciary's role in such matters. *See, e.g., Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 41, 734 N.E.2d 797, ¶ 30 (Ohio 2000) ("[I]t is the function of the courts to analyze the information to determine whether it is exempt from disclosure.").

Thus, permitting discovery on the "issues of fact" raised by Relator's action, including the critical facts necessary to determine whether the records requested in fact document official duties, does not "enlarge" any substantive rights because the legislature also granted Relators the right to seek such accountability and disclosure of public records through mandamus relief under R.C. 2731.09 "in the same manner as in civil actions." Just as discovery procedures in civil actions may be limited or modified through exercise of judicial discretion, the same principle applies in mandamus actions. Such safeguards should abate any concerns over the public's unfettered access to information that is not encompassed by the Act: "'[w]hen a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question.'" *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 22 (Ohio 2013) (quoting *State ex rel. Nat'l Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (Ohio 1988), paragraph four of the syllabus).

Here, the courts below found the circumstances in this case warranted such individualized scrutiny and, in the exercise of its discretion following an *in camera* review, found that additional discovery was necessary to resolve the dispute surrounding whether the records sought by Relators

are public records subject to disclosure. In doing so, rather than order the disclosure of any records at this stage, it permitted discovery to proceed in a limited way so as to enable Relators and the Court to deduce sufficient, credible evidence to determine the requested records' status as public versus non-public. (*See* App. Op. ¶ 34). However, the facts here are distinguished from the remedy urged by Justice Kennedy in his dissent in *State ex rel. Ullmann v. Klein*, that "[t]he only way to determine whether Klein properly redacted the documents is for this court to conduct an *in camera* review and resolve that dispute", 160 Ohio St. 3d at 465 (Kennedy, J., concurring and dissenting in part): at bar, the dispute over whether the records in question are public records could not be resolved by the *in camera* review alone because AG Yost's statements claiming there are no "records of [his] office" on his personal devices or accounts, (R. 76, Yost Aff., ¶ 9), thereby "evades" the inquiry on whether potentially relevant records exist. (*See* R. 93, Mag. Op., p. 9). Therefore, further discovery is appropriate and necessary to challenge the office's reasons for withholding, and, with the exercise of judicial discretion and other safeguards in the Civil Rules, no constitutional concerns are implicated.

Moreover, a reversal of the Tenth District's Order in this case on the grounds urged by Respondent could have unintended far-reaching consequences: civil litigants in all types of cases could be prohibited from seeking otherwise relevant discovery simply because such information could be deemed beyond the scope of the cause of action's express remedies. Such a result would be absurd; therefore, an order that risks prohibiting civil litigants from obtaining information in discovery beyond that to which they may be entitled in the cause of action itself, should be avoided.

B. Discovery in mandamus actions for public records must enable requesters to lay the foundation for disclosure, and a functional measure in the totality of the circumstances ensures appropriate discovery will be permitted.

Amici share a history of and commitment to accessing public records. The General Assembly chose to subject public officials to a duty of production. AG Yost and his supporters who have filed an amici brief cloak their constitutional arguments in the position that their public records are immune to mandatory disclosure whenever they deem those records private. That places the fox in charge of guarding the hen house. Yet the impetus for the legislation was that an informed public guarantees that public officials act properly and enabling the officials to foreclose limited deposition questioning about a bald assertion is the only way to avoid circumvention of the legislation. The function of discovery at bar is to confirm that no public records are being withheld.

Importantly, AG Yost's reliance on *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), which considered the presidential communications privilege, for the proposition that Relators cannot seek disclosure of information beyond that which they would be entitled should they prevail on the merits, is misplaced. (*See* Appellant Br. at 22). As explained in *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53, 107 n.38 (D.D.C. 2008), *Cheney*'s holding does not stand for the proposition that executive officials can evade discovery requests or that discovery is improper even if specific and targeted requests are issued:

> Relying on *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), the Executive insists that invocation of executive privilege on a question-by-question basis is insufficient protection for its institutional interests. The Executive, however, misreads *Cheney*. There, the issue was whether "the assertion of executive privilege is a necessary precondition to [entertaining] the Government's separation-of-powers objections" to civil subpoenas that were unacceptably overbroad. *See* 542 U.S. at 391. Because the assertion of executive privilege sets "coequal branches of the Government . . . on a collision course," *id.* at 389, the Court explained that a district court may entertain separation of powers objections to overly broad document requests prior to the formal invocation of executive privilege, id. Here, however, the Executive attempts to utilize absolute immunity, the basis of which is rooted in notions of executive privilege. The "collision course" that the Supreme Court feared in *Cheney*, then, has already been set in motion by the Executive. ***In any event, the Court indicated only that "the***

> ***Executive Branch [does not] bear the onus of critiquing . . . unacceptable discovery requests line by line."*** *Id.* at 388. Indeed, the D.C. Circuit had already determined that the "discovery requests [were] anything but appropriate." *Id.* In *Cheney*, the Supreme Court focused on the heavy burden imposed by the wide breadth of the request for information. ***There is no similar burden created by Ms. Miers invoking executive privilege in response to specific, targeted questions. Here, the Executive does not claim that the Committee's questions will be overly broad; instead, it asserts that Ms. Miers need not provide any response whatsoever. That contention finds no support in Cheney.***

(emphasis added). That a public official self-servingly declares that no public records are being withheld when the circumstances obviously indicate the significant influence of an entity should not prevent that discovery. Relators have issued permissible specific, targeted requests for information and have already "explore[d] other avenues", *Cheney*, at 390, to obtain it without success and have made "a preliminary showing of need demonstrating 'that the evidence sought [is] directly relevant to issues that are expected to be central to the trial' and 'is not available with due diligence elsewhere.'" *See Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019) (noting the heightened standard in this context "does not require Plaintiffs to pinpoint with precision what materials they are seeking."). Of course, this case does not involve the presidential communications privilege, which imposes a higher standard than applicable here, but Relators' demonstrated efforts to obtain the information central to their claims, i.e., whether the records in AG Yost's possession serve to document his official functions and activities, elsewhere before seeking to depose AG Yost thus far would meet it nonetheless.

V. Conclusion

For the reasons explained above, *Amici Curiae* League of Women Voters of Ohio, The Marshall Project and Ohio NOW Education and Legal Fund respectfully urge this Court to affirm the decision of the Tenth District Court of Appeals.

Respectfully submitted:

By: /s/ Madeline J. Rettig

Madeline J. Rettig (0098816)
(*mrettig@marshallforman.com*)
John S. Marshall (0015160)
(jmarshall@marshallforman.com)
MARSHALL FORMAN & SCHLEIN LLC
250 Civic Center Dr., Suite 480
Columbus, Ohio 43215-5296
(614) 463-9790
Fax (614) 463-9780

OF COUNSEL:
Louis A. Jacobs (002101)
(*LAJOhio@aol.com*)
177 19th St., Apt. 9C
Oakland, CA 94612
(614) 203-1255
Fax (614) 463-9780

Counsel for *Amici Curiae* League of Women Voters of Ohio, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2023, a copy of the Brief of *Amici Curiae* League of Women Voters of Ohio, The Marshall Project and Ohio NOW Education and Legal Fund in Support of Appellee was served by email upon the following:

Frederick M. Gittes* (0031444)
fgittes@gitteslaw.com
*Counsel of Record
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
The Gittes Law Group

Counsel for Relators-Appellees

Benjamin M. Flowers* (0095284)
Solicitor General
*Counsel of Record
Michael J. Hendershot (0081842)
Chief Deputy Solicitor General
Julie Pfeiffer (0069762)
Section Chief- Constitutional Offices
Ann Yackshaw (0090623)
Assistant Attorney General
benjamin.flowers@OhioAGO.gov
michael.hendershot@OhioAGO.gov

Julie.Pfeiffer@OhioAGO.gov
Ann.Yackshaw@OhioAGO.gov

Counsel for Respondent-Appellant

Melissa A. Holyoak
(PHV-26716-2023)
Utah Solicitor General
Christopher A. Bates
(PHV-26717-2023)
Deputy Solicitor General
Office of the Utah Attorney General
melissaholyoak@agutah.gov
chrisbates@agutah.gov

Counsel for *Amici Curiae* Utah, *et al.*

By: /s/*Madeline J. Rettig*
Madeline J. Rettig (0098816)