

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* OHIO LIBERTY COUNCIL, *et al.* : Case No. 10-0643  
:   
Relators, : **Original Action in Mandamus**  
:   
v. :   
:   
HON. JENNIFER BRUNNER : Expedited Election Matter  
OHIO SECRETARY OF STATE, *et al.* :   
:   
Respondents. :

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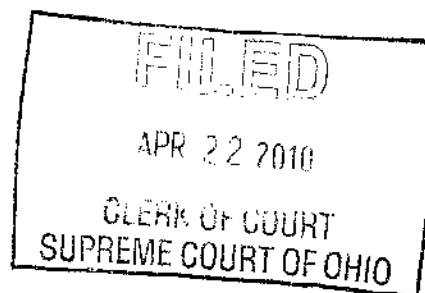
**RELATORS' MEMORANDUM IN OPPOSITON TO RESPONDENTS' APRIL 21, 2010  
MOTION FOR EXTENSION OF TIME TO FILE MERIT BRIEF**

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This court must deny Respondents' Motion for an Extension of Time to file their Merit Brief because (1) the delay would severely prejudice Relators' case; (2) the requested relief is substantively inequitable; (3) the motion is not properly brought pursuant to Supreme Court rules; (4) the motion is not supported with good cause; and (5) Respondents made no real good faith effort to communicate their request with undersigned counsel.

Time is of the essence in this case. Accordingly, Relators' have previously filed a motion to expedite the matter, which this Court granted and which Relators, despite having *vastly* inferior resources compared to those of the Attorney General's office) have managed to comply with. The requested delay, if granted, would not just be prejudicial, it would serve as a *de facto* deathblow to Relators' case.

Just as Chief Justice John Marshall famously expressed that "the power to tax involves the power to destroy,"<sup>1</sup> here the power to delay involves the power to destroy. And one can be assured that Respondents and their attorneys are well aware of this fact.

Assuming a favorable ruling from this Court by May 1, 2010, Relators will be left with just 60 days to collect over 400,000 to obtain access to the November ballot. This task is not insurmountable. However, arithmetically, it equates to approximately 6,667 signatures per day. A ten-day delay here means that Relators lose the opportunity to gather nearly 67,000 signatures - - an amount which could ultimately make the difference in whether they attain ballot access, and the people of Ohio are able to vote on the Health Care Freedom Amendment in November.

Certainly, one would think, given this impact on Relators, there must be an intensely compelling reason for such a delay. Here, it is that the Attorney Generals' Office, with a total

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<sup>1</sup> *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579, 607.

staff of 1,445 and a budget of \$223 million dollars,<sup>2</sup> and *four* attorneys on this case alone, considers itself “too busy” to abide by this Court’s order for an expedited calendar. Meanwhile, *one* counsel for Relators, without a staff, is able to abide by this Court’s calendar. All attorneys are busy: undersigned counsel was required to file Appellee’s Brief on April 21, 2010 in *Ohio Department of Health v. Bartec*, Case No. 10-AP-000173, a constitutional case of first impression that will plausibly ultimately end up in this Court. If this counsel can find the time to abide the Court’s scheduling order, certainly *four* highly-compensated and heavily-assisted attorneys general should be able to do the same, rather than fritter away Relators’ constitutional rights due to their remarkable and unexplained inability to balance more than one case at a time.

Further, to initiate a ten day delay at this juncture vitiates the very purpose of this Court’s April 15, 2010 scheduling order, recognizing the exigent nature of this case and placing it on an expedited briefing schedule as a result.

Additionally, the request by the Attorney General is simply unfair. There is nothing about this case that is newly discovered yesterday such that the Attorney General did not know about it last week. As such, their request for an extension of time, if genuine, could have been filed *seven days ago*, and could have thus allowed Relator some benefit of the extension. As it stands, Respondents chose to lie in the weeds and wait to file (for no discernable reason), seeking an Order for which they and they alone will benefit.

Indeed, counsel for Relators had no trouble producing the Complaint for this case within four days of the Ballot Board hearing, and Relators’ Merit Brief in five days (it was ordered due

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<sup>2</sup> <http://www.lbo.state.oh.us/fiscal/budget/Redbooks128/AGO.pdf>; See also “Ohio Attorney General Cordray Boosts Staff and Payroll, [despite plummeting tax revenues].” *Cleveland Plain Dealer*, May 10, 2009.

five days from the date of the April 15 scheduling order). To now allot Respondents three times as much time to complete their Merit Brief is substantively inequitable and unjustifiable.

Finally, and perhaps most pertinently, the type of extension Respondents request is not warranted under Supreme Court rules. S.Ct. Prac. R. 14.3(B)(1), a “general prohibition against extensions of time,” states “[e]xcept as provided in division (B)(2), the Supreme Court will not extend the time for filing a document as prescribed by these rules or by Court order, and the Clerk shall *refuse to file* requests for extension of time.”

In turn, Division (B)(2) prohibits parties from *even stipulating* to extensions of time in expedited elections cases such as this one. Even then, in other cases, a stipulation is required. There is certainly not one here.

Division (B)(2)(b) allows for the filing of a Motion for an extension only when one cannot be obtained. Here, no sincere effort was made: Respondents’ counsel emailed, rather than called, Relators’ counsel, requesting stipulation for an extension, and then immediately filed Respondents’ Motion for an extension within a matter of several hours. Further, although Relators’ counsel promptly replied to Respondents, indicating that an extension would be opposed, Respondents’ Motion misleadingly states “Respondents have attempted to confer with counsel for Ohio Liberty Counsel, who has not yet responded to this request.”

Most importantly, Respondents’ request is not made upon a showing of “good cause.” S.Ct. Prac. R. 14.3(B)(1)(b) requires that, to be granted, the request for an extension of time must state “good cause” for an extension. Although not defined or elaborated upon in the Supreme Court’s rules of practice, “good cause,” with request to a motion for an extension of time, means “Substantial reason, one that affords a *legal* excuse.”<sup>3</sup> “‘Good cause’ for extension of time in

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<sup>3</sup> Black’s Law Dictionary, 4<sup>th</sup> Edition.

which to serve bill of exceptions exists if delay was for good reason, or that there was justification or excuse for the delay."<sup>4</sup>

Here, there is no good reason for delay. Respondents unsubstantiated assertion that this case represents "an issue of first impression concerning complex issue of interrelationships between several constitutional amendments," is a purely normative allegation. What is more, it is made by counsels who, in their own words, supposedly have not had much time to evaluate the case. Meanwhile, Relators' brief demonstrates the issues to be straightforward, and the case to be so "complex," that Relators were able to draft and file a Complaint within just four days of the Ohio Ballot Board's April 9, 2010 failure to certify, and substantive brief in accordance with this Court's scheduling order, which permitted just five days.<sup>5</sup>

Consequently Respondents' unsubstantiated claims that this case is "complex," which is proven false by Relators' capacity to cooperate with the Court's scheduling order despite also being unprepared, in conjunction with their complaint that they are "busy," like all other attorneys, are not "good cause" to destroy Relators' case, their capacity to attain ballot access this November, and ultimately, their constitutional rights. Respondents' attorneys are seasoned elections lawyers: - - they know of the looming deadline for submission of signatures, and recognize this procedural tactic for what it is: a shortcut to an unearned victory and permanent derailment of Relators' efforts. This Court must recognize the same.

If Relators' are to have access to meaningful relief, Respondents' Motion *must* be denied.

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<sup>4</sup> Id.

<sup>5</sup> This information can be verified through reference to the docket in this case.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served upon the parties specified below via e-mail and fax this 22<sup>nd</sup> day of April, 2010.

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