

In the  
**Supreme Court of Ohio**

STATE EX REL. CENTER FOR MEDIA : Case No. 2023-0270  
AND DEMOCRACY, ET AL., :  
: On appeal from the  
Appellees, : Franklin County  
: Court of Appeals,  
v. : Tenth Appellate District  
: Court of Appeals  
THE OFFICE OF ATTORNEY : Case No. 20AP-554  
GENERAL DAVID YOST, :  
: Appellant.

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**MERIT BRIEF OF APPELLANT**

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## INTRODUCTION

This should be an ordinary public-records case. Relator David Armiak, and the organization for which he works, sought public records concerning the Attorney General's communications involving two private organizations and one event. The private organizations are the Republican Attorneys General Association and the Rule of Law Defense Fund. The event is a single meeting the Association hosted in 2020.

But this ordinary case bears a partisan edge. Armiak accuses the Attorney General's Office of allowing "private donors[]" to illegitimately influence the Office's work and of strategizing with private groups to take actions that "diverge from the legitimate functions of the office." R.5, Compl. at ¶16 (Dec. 1, 2020); R.22, Opp. to Mot. to Diss. at 3 (Jan. 21, 2021). While the smears are regrettable, they also come with the territory; high-ranking officials must develop thick skin. *See, e.g., Cleveland Metro. Bar Ass'n v. Morton*, 166 Ohio St. 3d 266, 2021-Ohio-4095 ¶47 (Kennedy, J, dissenting); *id.* at ¶72 (DeWine, J., dissenting). So Armiak's accusations are neither surprising nor concerning.

The same cannot be said of the Tenth District's ruling, which adopts a farcically broad view of discovery in public-records cases—a view that, if embraced by this Court, will empower "partisans" to use "the courts to harangue executive officers through depositions, discovery, delay, and distraction." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2583 (2019) (Thomas, J., concurring in part and dissenting in part). In a divided decision, the Tenth District approved a magistrate's discovery order compelling the Attorney

General himself to sit for a deposition. *See State ex rel. Ctr. for Media & Democracy v. Attorney General*, 2023-Ohio-364 (10th Dist.) (“App.Op.”). It approved this order even though this Court’s cases forbid parties from deposing “high-ranking government officials” except in “extraordinary circumstances,” *State ex rel. Summit Cnty. Republican Party Exec. Comm. v. Brunner*, 117 Ohio St. 3d 1210, 2008-Ohio-1035 ¶3, and even though neither Armiak nor the Tenth District has plausibly explained why a deposition is justified in this quite-ordinary public-records dispute, App.Op. ¶55 (Klatt, J., dissenting). What is more, the decision below requires that the Attorney General’s Office respond to immensely overbroad requests for production and interrogatories. Absent relief from this Court, every lawyer in the Attorney General’s Office will have to wade through tens of thousands of case files to track down the innumerable instances in which they communicated with any lawyer who worked for an out-of-state attorney general’s office run by a Republican. These lawyers will also be forced to search their personal email accounts.

All of this is illegal. Ohio law permits parties to “obtain discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or defense and *proportional to the needs of the case.*” Ohio Civ. R. 26(B)(1) (emphasis added). The vast majority of the evidence the Tenth District ordered the Attorney General’s Office to produce is not relevant to the narrow question presented, which is whether the Attorney General or his chief of staff failed to turn over public records relating to two private organizations and one event. To the extent the ordered deposition, requests for production, and interrogatories

might produce relevant evidence, they are far from “proportional to the needs of the case.” *Id.* Complying with these orders will require an immense amount of time and resources. Those efforts are unlikely to produce any relevant evidence beyond the (vast amounts) of evidence produced already—but they are certain to distract the Attorney General and the Office from fulfilling their important public duties.

To make matters worse, the ordered discovery will give Armiak information—answers to questions, non-public records, non-responsive records, and so on—to which he would not be entitled even if he were to prevail on the merits of his mandamus claim. Put differently, the Tenth District’s order guarantees Armiak “all the disclosure to which he will be entitled in the event he prevail on the merits “and much more besides.” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 388 (2004). An order guaranteeing that the plaintiff or relator gets all he wants *regardless* of whether he prevails on the merits is hardly “proportional to the needs of the case.” Ohio Civ. R. 26(B)(1). And to hold otherwise would put Rule 26 in constitutional jeopardy: if a civil rule of procedure allows parties in public-records cases to secure disclosures to which they have no entitlement under public-records laws, then the rule violates the Modern Courts Amendment, which forbids court-issued rules of procedure from “enlarg[ing] ... any substantive right.” Ohio Const. art. IV, §5(B).

The Tenth District’s holding, if not reversed, will enable just about anyone to force just about any statewide officeholder to sit for a deposition in just about any public-

records dispute. And its holding, if not reversed, will enable just about anyone to force just about any state office to spend hundreds (perhaps thousands) of hours on minimally relevant discovery in just about any public-records dispute. The result would be constant litigation and frequent, “unwarranted impairment of” the other branches “in the performance of [their] constitutional duties.” *Cheney*, 542 U.S. at 390.

One final note before moving on. This Court has appellate jurisdiction under R.C. 2505.02(B)(4), for reasons addressed in greater detail below. It should exercise that jurisdiction and reverse the Tenth District. But if the Court concludes that it lacks jurisdiction, then the Attorney General is entitled to a writ of prohibition. To preserve his entitlement to that relief, he is filing just such a petition alongside this brief.

## STATEMENT

1. This case began when David Armiak and the Center for Media and Democracy—“Armiak,” collectively—filed a public-records request. Armiak sought documents from the Office of the Ohio Attorney General. Specifically, he sought documents relating to the Republican Attorneys General Association, the Rule of Law Defense Fund, and the Association’s 2020 winter meeting. The request read:

Pursuant to Ohio’s open records law, I request access to and a copy of all records that pertain to the Republican Attorneys General Association (RAGA), Rule of Law Defense Fund, and the RAGA Winter Meeting held February 29 through March 2 from the Office of Attorney General Dave Yost.

The scope of this request includes the Attorney General and Chief of Staff. The scope of this request should include but is not limited to emails, attachments, both sent and received, all draft records, briefing books, memos,

notes, minutes, scheduling records, text messages, other correspondence (internal and external) and all other records.

The search for records may be limited to those sent and received between February 3, 2019 and the date of your final response.

R.5, Compl., Ex. 1.

The Attorney General's Office responded by email less than one month later. The Office's Public Records Unit explained that "all information" responsive to the request "is exempt from disclosure as it is not a record of this office, pursuant to *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993)." *Id.*

A few months later, Armiak objected to the Attorney General's response letter. *See id.* He insisted that the requested records documented the functioning of the Attorney General's Office. Specifically, he claimed that the "Attorney General and Chief of Staff's interactions with RAGA and Rule of Law Defense Fund involve extensive matters of public policy and the conduct of public business." *Id.* Armiak went on: "The AG and his staff appear to have attended RAGA and RLDF events in their official capacities and by virtue of the public offices they held." *Id.* Those events, Armiak alleged, "included legal and policy-focused presentations and panel discussions, as well as the opportunity for personal interactions with corporate executives, lobbyists, and lawyers concerning matters of public policy." *Id.* Armiak urged the Attorney General's Office to reconsider his public-records request.

In response, the Public Records Unit again reviewed the original records request. It again determined that the Office had no “email, text, drafts, memo, minutes, or other correspondence records” that were responsive. R.5, Compl., Ex. 2. The Office reiterated that any other information in the Office’s possession “does not meet the definition of a record as defined by Ohio’s Public Records Act.”

2. Unsatisfied, Armiak petitioned the Tenth District for a writ of mandamus compelling the Attorney General’s Office to turn over the sought-after records.

That suit led to abundant discovery. Armiak has already deposed the Attorney General’s chief of staff (Ben Marrison), scheduler (Amy Sexton), and executive assistant (Jacqueline King), along with MacKenzie Clayton, a member of the Public Records Unit. Armiak also noticed the depositions of Attorney General Yost and Solicitor General Ben Flowers. As for paper discovery, Armiak posed two dozen interrogatories and requests for production. In response, the Attorney General’s Office provided “a substantial quantity of material” for *in camera* review. App.Op. ¶75 (Magistrate’s Order). The Office also supplemented document production as the parties continued the dialogue about Armiak’s records request. And the Attorney General himself submitted a signed affidavit attesting to the fact that none of the unproduced documents were “public records” subject to the Ohio Public Records Act.

This appeal stems from a magistrate’s order that required four types of discovery relevant for present purposes:

*First*, the magistrate ordered the deposition of the Attorney General personally—more precisely, it denied the Attorney General’s request for a protective order that would have barred his deposition. *Id.* at ¶87.

*Second*, the magistrate ordered the Attorney General’s Office to answer three exceptionally broad interrogatories. Interrogatory two requires the Office to list every employee who drafted (or assisted in drafting) documents that “involved other Republican state attorneys general and/or their offices in any way.” App.Op. ¶68 (quoting interrogatory two). Interrogatory four asked the Office to “identify [Republican Attorneys General Association] and [Rule of Law Defense Fund] events attended by respondent or the agency’s staff.” *Id.* at ¶72. Interrogatory five asked the Office to identify briefs, letters, or “other interactions with public officials for which” the Association or Fund gave assistance or input. *Id.*

*Third*, the magistrate ordered the Office to produce, among other things, all documents related to letters and amicus briefs prepared “in conjunction with” other members of the Republican Attorneys General Association. *Id.* at ¶78.

*Finally*, the magistrate ordered the Office to conduct searches of staff’s personal email accounts. *Id.* at ¶77.

3. The Attorney General’s Office moved to set aside the magistrate’s order, but the Tenth District affirmed. App.Op. ¶¶23, 24, 29, 36, 38, 50–51. The majority did narrow the order in one limited respect. Armiak had requested the production of all documents

relating to the Office’s coordination with attorneys general offices in other States. But in fact, Armiak wanted only documents pertaining to coordination with other *Republican* attorneys general offices. *See id.* at ¶28. The Tenth District accepted this limitation. *Id.* at ¶29. In all other respects, however, it affirmed the magistrate’s order.

Judge Klatt dissented. The deposition of the Attorney General, he argued, was a “major event” that would “significantly intrude[] upon government business.” App.Op. ¶57 (Klatt, J., dissenting). That intrusion was unjustified in a case, like this one, presenting the “straightforward legal question” of whether the sought-after documents are public records for purposes of Ohio law. *Id.* at ¶55. Judge Klatt further argued that the remaining discovery orders should be set aside as either irrelevant or “not proportional” to the needs of the case. *Id.* at ¶59.

4. The Attorney General’s Office appealed to this Court.

5. In addition to seeking a writ of mandamus in the Tenth District, Armiak filed a separate original action in this Court. That original action, much like this suit, sought the production of records related to the Republican Attorneys General Association and the Rule of Law Defense Fund. In that case, Armiak deposed the Attorney General’s communications director (Bethany McCorkle) and the Attorney General’s senior advisor for business and government (Kevin Servick). *See* No. 2022-0977. Armiak voluntarily dismissed the case in February 2023.

## ARGUMENT

### **Appellant's Proposition of Law I:**

*The interlocutory-appeal statute (R.C. 2505.02(B)(4)) empowers this court to hear immediate appeals of discovery orders that risk interfering with the ability of other branches to fulfill their constitutional obligations.*

Before proceeding to the merits, the Court must assure itself that it has jurisdiction to hear the Attorney General's appeal. *See Ames v. Rootstown Twp. Bd. of Trustees*, \_\_ Ohio St.3d \_\_, 2022-Ohio-4605 ¶15 n.1. It does, under R.C. 2505.02.

1. Ohio's interlocutory-appeal statute empowers courts, including this Court, to entertain some interlocutory appeals. Relevant here, courts may, in some circumstances, hear an immediate appeal of an "order that grants or denies a provisional remedy." R.C. 2505.02(B)(4). "'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence," and so on. R.C. 2505.02(A)(3). Parties may immediately appeal an order granting or denying a provisional remedy if (1) the order "determines the action" as to the provisional remedy, and (2) the appealing party has no means of securing a "meaningful or effective remedy" if it awaits a final judgment before appealing. R.C. 2505.02(B)(4).

Breaking this down, parties may immediately appeal an interlocutory order if they can answer three questions in the affirmative. *First*, does the order grant or deny a provisional remedy? R.C. 2505.05(A); *see also State v. Muncie*, 91 Ohio St. 3d 440, 450 (2001). *Second*, does the order resolve the action "with respect to the provisional remedy"? R.C.

2505.02(B)(4)(a). *Third*, will the appealing party lose the chance to fully vindicate its interests if it waits for a final judgment before appealing? R.C. 2505.02(B)(4)(b).

This framework permits the immediate appeal of significant orders if they ring a “proverbial bell [that] cannot be unrung” later. *Burnham v. Cleveland Clinic*, 151 Ohio St. 3d 356, 2016-Ohio-8000 ¶36 (Kennedy, J., concurring in judgment only) (quotation marks omitted); *see also State v. Glenn*, 165 Ohio St. 3d 432, 2021-Ohio-3369 ¶22. For example, the Court has held that it has jurisdiction to hear immediate appeals of orders transferring a case from the juvenile division to the general division, along with orders compelling the release of grand-jury materials. *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307 ¶28; *See In re Grand Jury Proceeding of John Doe*, 150 Ohio St. 3d 398, 2016-Ohio-8001 ¶23. Such orders inflict harm that is irreversible, or only imperfectly reversible, if not appealed immediately. An improperly transferred juvenile, if he does not appeal immediately, will be subjected to the very proceedings and punishments from which he claims immunity. And there is no way to re-seal grand-jury materials once they are released.

In contrast, parties *may not* immediately appeal orders that, even if misguided, can be corrected in a later appeal or a subsequent suit. For example, parties cannot immediately appeal the denial of intervention motions or the denial of motions to disqualify counsel. *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 2007-Ohio-607 ¶27; *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St. 3d 90, 2011-Ohio-2317 ¶11. Nothing stops a party

from correcting the harms that flow from such orders through a later appeal or a separate suit.

2. The appealed-from order — which compels the deposition of a statewide officeholder and requires that his Office spend many hours combing tens of thousands of case files for needles in innumerable haystacks — is precisely the type of order that can be appealed immediately under R.C. 2505.02. This follows from a straightforward application of each step in the just-discussed three-step framework.

*Step 1: Provisional remedy.* The appealed-from order grants a provisional remedy. Recall that the interlocutory-appeal statute defines “provisional remedy” as “a proceeding ancillary to an action, including, but not limited to,” certain enumerated proceedings. R.C. 2505.02(A)(3). That definition is not especially helpful. But “the doctrine of *noscitur a sociis*,” under which “the meaning of an unclear word may be derived from the meaning of accompanying words,” puts some meat on the law’s definitional bones. *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 406 (2011). This interpretative canon suggests that, when the interlocutory-appeal statute speaks of “proceeding[s] ancillary to an action,” it most naturally refers to proceedings similar to those specifically listed. R.C. 2505.02(A)(3). One such proceeding stands out: the statute expressly defines “a proceeding for ... discovery of privileged matter” to constitute a provisional remedy. R.C. 2505.02(A)(3).

The provisional remedy here is like a proceeding pertaining to the discovery of a privileged matter. The discovery is so broad and unjustified that it risks intruding upon the qualified privilege that inheres in the separation of powers—namely, the qualified privilege from being subjected to immensely burdensome discovery unless the ordered discovery strictly accords with law.

By virtue of the Constitution’s separation of powers, constitutional officers and offices—the Attorney General and his office, for example—possess a qualified privilege against discovery that would unjustly interfere with their ability to discharge their constitutional roles. “The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.” *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825 ¶56. The “respect” that a coordinate branch owes the executive, “though not justifying a rule of categorical immunity,” should inform any litigation against the executive, “including the timing and scope of discovery.” *Clinton v. Jones*, 520 U.S. 681, 707 (1997). When the judiciary unlawfully subjects one of Ohio’s constitutional officers to exceptionally burdensome discovery, it interferes with the qualified privilege inherent in a system of separated powers, as such orders interfere with the executive offices’ and officers’ ability to discharge their duties. See *In re Univ. of Mich.*, 936 F.3d 460, 465–66 (6th Cir. 2019).

Constitutional officers' and offices' qualified privilege against discovery, much like evidentiary privileges more broadly, reflects the principle that some interests are so important that they cannot be sacrificed in service of litigation. And since orders regarding discovery of privileged matters qualify as "provisional remedies," orders forcing overbroad discovery in violation of constitutional officers' and officers' *qualified* privileges do also. This Court's precedent bolsters this point. In *State ex rel. Thomas v. McGinty*, the Court held that trial courts grant an immediately appealable provisional remedy when they order discovery that allegedly infringes crime victims' "qualified privilege ... to refuse such discovery." 164 Ohio St. 3d 167, 2020-Ohio-5452 ¶45. The same logic applies here: when a court orders immensely broad, burdensome discovery against a constitutional officer or office, it implicates the officer's and office's qualified privilege not to be burdened with such discovery.

The scale of the discovery ordered leaves little doubt that this case implicates the qualified privilege. The challenged order requires hundreds of employees to scour tens of thousands of case files, along with their personal and professional devices. An order like that gives no "recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004) (internal quotation marks omitted). That is even more true of the order that Attorney General Yost sit for a deposition. Because time that Attorney General Yost spends preparing for and

attending any deposition subtracts from his ability to “discharge ... his public duties,” *Clinton*, 520 U.S. at 710 (Breyer, J., concurring in judgment), compelling his deposition in this ordinary public-records suit threatens to interfere unjustifiably with the Attorney General’s constitutional duties. Precisely because courts necessarily interfere with the duties of independent government actors when they order the depositions of “high-ranking government officials,” such depositions are permitted only in “extraordinary circumstances.” *State ex rel. Summit Cnty. Republican Party Exec. Comm. v. Brunner*, 117 Ohio St. 3d 1210, 2008-Ohio-1035 ¶3; accord *In re Office of the Utah Att’y Gen.*, 56 F.4th 1254, 1261 (10th Cir. 2022); *Univ. of Mich.*, 936 F.3d at 466.

Importantly, the Court need not *accept* the Attorney General’s merits arguments in order to conclude that it has jurisdiction. The Court’s jurisdiction does not depend on whether the appealed-from order was actually improper. Instead, so long as the Attorney General and his Office have advanced “a colorable claim” that the discovery invades their qualified privilege given its breadth and illegality, the Court has jurisdiction to hear the appeal and resolve that claim. *Glenn*, 165 Ohio St. 3d 432 at ¶20. As Judge Klatt’s dissent indicates, and as this brief shows, the Attorney General’s arguments are *at least* colorable.

**Step 2: Finality.** The appealed-from order “in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of [the Attorney General] with respect to the provisional remedy.” R.C. 2505.02(A)(4)(a). An order resolves the action “with respect to” the provisional remedy if the order is a “final

determination” adverse to the appellant as to that remedy. *State v. Upshaw*, 110 Ohio St. 3d 189, 2006-Ohio-4253 ¶17. There is “no question” that the Tenth District’s decision resolves once and for all whether the Ohio Attorney General’s Office is subject to the magistrate’s order. *In re D.H.*, 152 Ohio St. 3d 310, 2018-Ohio-17 ¶15. Unless this Court grants relief, the Office will be made to comply with the broad discovery orders and the Attorney General himself will have to be deposed. Once a party is subjected to court-ordered discovery in violation of an actual or qualified privilege, it is “no longer ... possible” for that party “to obtain a judgment preventing” the already-concluded discovery. *Thomas*, 164 Ohio St. 3d 167 at ¶46. Just so here. So the second step is satisfied.

***Step 3: No meaningful or effective remedy.*** The Attorney General “would not be afforded a meaningful or effective remedy by an appeal following final judgment.” R.C. 2505.02(A)(4)(b). The order below threatens to significantly intrude upon, and interfere with, the operations of the Ohio Attorney General’s Office. Compliance will take immense time and resources—time and resources the Office will be unable to dedicate to the many other pressing issues it faces. None of that can be cured by a later appeal; the Attorney General would have no means for recovering wasted time and resources. The appealed-from order thus constitutes the sort of “proverbial bell [that] cannot be un-rung.” *Burnham*, 151 Ohio St. 3d 356 at ¶36 (Kennedy, J., concurring in judgment only) (quotation marks omitted). There is no way to address the Office’s injuries after a final

judgment on the merits. *See, e.g., Thomas*, 164 Ohio St. 3d 167 at ¶46; *In re Grand Jury Proceeding of Doe*, 150 Ohio St. 3d 398 at ¶22. Thus, the final factor is satisfied.

\* \* \*

Because the appealed-from order threatens serious, irreparable harm that cannot be redressed in a later appeal, the Court has jurisdiction to entertain this appeal under the interlocutory-appeal statute, R.C. 2505.02(B)(4).

**Appellant’s Proposition of Law II:**

*The Tenth District erred because it ordered discovery that is irrelevant and out of proportion to the needs of the case.*

Now turn to the merits question, which is whether the Tenth District erred when it affirmed the magistrate’s discovery order. In answering this question, the Court reviews the Tenth District’s decision under an abuse-of-discretion standard, though any underlying legal issues must be reviewed *de novo*. *See Torres Friedenber*g *v. Friedenber*g, 161 Ohio St. 3d 98, 2020-Ohio-3345 ¶22.

The Tenth District abused its discretion in affirming the magistrate’s order. This Court should reverse.

**A. Relators are entitled to limited discovery in public-records cases.**

The case is easiest to understand against the backdrop of Ohio public-records law and the rules governing discovery in public-records cases. This section provides the relevant background.

**1. Rule 26 of the Ohio Rules of Civil Procedure forbids discovery that is irrelevant or not proportional to the needs of the case.**

Rule 26 of the Rules of Civil Procedure governs discovery in public-records cases, just as it governs discovery in civil cases generally. Of most importance here, that rule imposes a relevance requirement and a proportionality requirement: parties may “obtain discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or defense and *proportional* to the needs of the case.” Ohio Civ. R. 26(B)(1) (emphasis added).

*a.* Consider first the “relevance” requirement. Matters are relevant “at the discovery stage” if they might “reasonably lead to the discovery of admissible evidence.” *Weckel v. Cole + Russell Architects*, 2013-Ohio-2718 ¶23 (1st Dist.). In a mandamus action under the Ohio Public Records Act, the relator seeks to secure records that he contends are being wrongfully withheld. See R.C. 149.43(C)(1)(b). Thus, relevant evidence is that which might reasonably lead to the discovery of admissible evidence showing that a public office has wrongfully withheld documents that qualify as public records.

What is a public record? It is a record “kept by any public office” that “serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.43(A)(1), 149.011(G); see, e.g., *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384 ¶19. Most public-records disputes implicate the back half of this definition. “[A]lmost all documents memorializing the activities of a public office” qualify as a public records. *State ex rel. Cincinnati Enquirer v. Ohio Dep’t of Pub. Safety*, 148 Ohio St. 3d 433, 2016-Ohio-7987 ¶33 (quotation omitted).

But a record that “does not serve to document the activities of a public office” is “not a public record and need not be disclosed.” *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117 ¶9 (emphasis added). Thus, even a record that is created by a state official or kept by a state office will not qualify as a public record if it “does nothing to document any aspect of the” office’s public work. *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 368 (2000); accord *State ex rel. Armatas v. Plain Twp. Bd. of Trs.*, 163 Ohio St. 3d 304, 2021-Ohio-1176 ¶¶14–16.

Relevance, as a precondition for discovery, must also account for the presumption of regularity. When public actors respond to public-records requests, they are “presumed to have properly performed their duties ... regularly and in a lawful manner.” *State ex rel. Toledo Blade Co. v. Seneca Cnty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253 ¶29. To be relevant, then, discovery in a public-records case must be reasonably likely to turn up evidence that the state officer or office is breaching the legal obligation to turn over public records.

**b.** In addition to being relevant, discovery must also be “proportional to the needs of the case.” Ohio Civ. R. 26(B)(1). The Ohio rule tracks the federal rule. And, as now-Chief Judge Sutton has explained in an opinion for the Sixth Circuit, the federal rule “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality”; discovery is not supposed to facilitate “costly and delay-inducing efforts to look under every stone in” a “world populated by

many stones.” *Helena Agri-Enterprises, LLC v. Great Lakes Grain, LLC*, 988 F.3d 260, 273 (6th Cir. 2021) (quotation omitted).

Several features of public-records law inform the proportionality inquiry in public-records cases.

For starters, discovery in such cases can quickly outstrip the merits, thus becoming disproportionate. That is because discovery in public-records cases is aimed at securing the same thing the relator hopes to win via final judgment: disclosure. So, unless courts limit discovery to predicate questions necessary to decide *whether* a document is a public record, the discovery phase could give full relief (complete disclosure of sought-after documents) to an undeserving litigant. Precisely to avoid giving plaintiffs this Trojan-horse merits victory, federal courts have decided that discovery “is generally unavailable” in suits brought under the Freedom of Information Act. *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003). Discovery in these cases “generally is limited to the scope of the agency’s search and its indexing and classification procedures.” *Heily v. U.S. Dep’t of Commerce*, 69 F. App’x 171, 174 (4th Cir. 2003). Any other approach would flip the public-records law “on its head.” *Tax Analysts v. IRS*, 410 F.3d 715, 722 (D.C. Cir. 2005); *see also Lawyers’ Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep’t of the Treas.*, 534 F. Supp. 2d 1126, 1137 (N.D. Cal. 2008). While these federal cases have not considered the issue through the lens of Rule 26’s proportionality requirement, the principle applies with full force to that context: discovery is not “proportional to the needs of the case,” Ohio Civ.

R. 26(B)(1), if it guarantees plaintiffs or relators access to documents they have no right to access.

A discovery order in a public-records case might also flunk the proportionality requirement if it permits the requester to obtain information unavailable under the relevant public-records laws. For example, parties in discovery routinely ask questions and demand answers through interrogatories and requests for admission. Ohio Civ. R. 33, 36. But in public-records cases, such requests are “improper” because the public-records laws require officials to disclose documents, not to answer questions. *See State ex rel. Morgan v. New Lexington*, 112 Ohio St. 3d 33, 2006-Ohio-6365 ¶30; *see also State ex rel. Lanham v. Ohio Adult Parole Auth.*, 80 Ohio St. 3d 425, 427 (1997). So allowing this type of discovery in a public-records case would allow relators to obtain, through discovery, records to which they have no right under public-records laws. Facilitating that sort of overreach via discovery would make discovery disproportionate to the needs of the case—rather than helping ensure that relators are not denied records to which they are entitled, such discovery would entail the *creation* of records that relators have no right to receive.

Finally, a unique proportionality concern arises in public-records suits involving high-ranking state officials. Again, the “separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.” *Dann*, 109 Ohio St. 3d 364 at ¶56. This doctrine bears on proportionality concerns because broad, time-consuming discovery

interferes with another branch’s ability to “discharge” its “public duties.” *Clinton*, 520 U.S. at 710 (Breyer, J., concurring in judgment). In other words, discovery is exceptionally unlikely to be “proportional to the needs of the case,” Ohio Civ. R. 26(B)(1), if it will “distract” a high-ranking state official or his office “from the energetic performance of ... constitutional duties.” *Cheney*, 542 U.S. at 382. Thus, in all but the most exceptional cases, a discovery order is improper if it “impair[s] ... another branch in the performance of its constitutional duties.” *Id.* at 390.

Cases from this Court and others appreciate the problems with making high-ranking officials sit for depositions or engage in similarly burdensome discovery. And though the cases do not address the issues under Rule 26’s proportionality rubric, their logic applies with full force under that rubric. Take, for example, a case in which this Court held that orders requiring a “high-ranking government official” to sit for a deposition are permitted only in “extraordinary circumstances.” *Brunner*, 117 Ohio St. 3d 1210 at ¶3. Before ordering such depositions, courts must “weigh” the need for the deposition “against, among other factors”: (1) “the substantiality of the case in which the deposition is requested”; (2) “the degree to which the witness has first-hand knowledge or direct involvement”; (3) “the probable length of the deposition and the effect on government business”; and (4) “whether less onerous discovery procedures provide the information sought.” *Id.* at ¶4 (quoting *Monti v. State*, 151 Vt. 609, 613 (1989)). All told, the factors

require courts to determine that a high-ranking official's deposition is necessary and justified by the case's import before ordering discovery.

The United States Supreme Court relied on similar insights when it vacated a discovery order requiring the "Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President." *Cheney*, 542 U.S. at 372. The broad discovery request, it explained, would "provide respondents all the disclosure to which they would be entitled in the event they prevail on the merits, and much more besides." *Id.* at 388. This broad demand for production from high-ranking officials would pose an "unwarranted impairment of another branch in the performance of its constitutional duties." *Cheney*, 542 U.S. at 390 (vacating discovery orders).

Recently, courts have applied similar logic in rejecting efforts to depose, or to secure discovery from, high-ranking state officials. The Fifth Circuit, for example, recently explained that a state attorney general is the "paradigm" example of a high-ranking official who is "often drawn into lawsuits," and who cannot perform his "duties" if he is "not personally shielded from the burdens of litigation." *In re Paxton*, 60 F.4th 252, 258 (5th Cir. 2023); *see also, e.g., Utah Atty. Gen.*, 56 F.4th at 1263. Other decisions from courts around the country are in accord. *See, e.g., In re U.S. Dep't of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022) (cabinet secretary); *In re Clinton*, 973 F.3d 106, 109 (D.C. Cir. 2020) (former cabinet secretary); *In re United States*, 624 F.3d 1368, 1377 (11th Cir. 2010) (EPA

Administrator); *In re United States*, 197 F.3d 310, 316 (8th Cir. 1999) (U.S. Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (FDIC board members); *In re United States*, 985 F.2d 510, 512–13 (11th Cir. 1993) (FDA Commissioner); *Commonwealth v. Vartan*, 557 Pa. 390, 403–04 (1999) (former supreme court chief justice).

In sum, discovery orders demanding the attention of high-ranking state officers distract those officers from fulfilling their constitutional duties. Such orders are thus proportional, and permissible, only in exceptional cases—cases of immense importance that cannot be fairly resolved without the high-ranking official’s personal participation in discovery.

## **2. The Modern Courts Amendment imposes limits on discovery in public-records cases.**

The discovery rules are part of the rules of civil procedure, promulgated under the Modern Courts Amendment. *See* Article IV, Section 5. Section 5(B) of the amendment prohibits the promulgation of rules that “enlarge ... any substantive right.” By this language, “the Ohio Constitution expressly prohibits the adoption of any rules of practice or procedure that affect substantive rights.” *State ex rel. Ware v. Kurt*, 169 Ohio St. 3d 223, 2022-Ohio-1627 ¶ 43 (Kennedy, J, concurring in part and dissenting in part); *see also State ex rel. Cincinnati Enquirer v. Forsthoefel*, \_\_\_ Ohio St. 3d \_\_\_, 2022-Ohio-3580 ¶¶31–33 (Kennedy, J., concurring in judgment only). So while the Constitution empowers this Court to write various rules of practice, those rules may not change the substantive rights marked out in legislation. *See, e.g., Erwin v. Bryan*, 125 Ohio St. 3d 519, 2010-Ohio-2202

¶¶27–28 (civil rule); *Hartsock v. Chrysler Corp.*, 44 Ohio St. 3d 171, 173 (1989) (same); *State v. Boczar*, 113 Ohio St. 3d 148, 2007-Ohio-1251 ¶19 (rule of evidence). A court rule that “enlarges the substantive right conferred” by statute exceeds the judiciary’s power and invades the legislative role as “the sole body responsible for the establishment of substantive law.” *Morris v. Morris*, 148 Ohio St. 3d 138, 2016-Ohio-5002 ¶32.

The Ohio Public Records Act grants the “substantive right to inspect and copy public records.” *Rhodes v. New Philadelphia*, 129 Ohio St. 3d 304, 2011-Ohio-3279 ¶19 (quotation omitted). It extends that right to records, but not to non-records. *See, e.g., McCleary*, 88 Ohio St. 3d at 368; *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St. 3d 61, 63 (1998). The civil discovery rules, therefore, may not “enlarge” what a citizen may secure through a public-records request. *Morris*, 148 Ohio St. 3d 138 at ¶32 (quotation omitted). Insofar as courts use discovery rules to permit relators to obtain access to documents not subject to the Public Records Act, they wield Rule 26 in a way that contravenes the Ohio Constitution.

**B. The discovery orders in this case are all irrelevant, not proportional to the needs of the case, or unconstitutional.**

Recall the facts that gave rise to this case. After the Ohio Attorney General’s Office refused to turn over information it deemed not to constitute a public record, Armiak sought a writ of mandamus. Armiak hoped to obtain an order requiring the Attorney General’s Office to produce:

[A] copy of all records that pertain to the Republican Attorneys General Association (RAGA), Rule of Law Defense Fund [RLDF], and the RAGA Winter Meeting held February 29 through March 2 from the Office of Attorney General Dave Yost. The scope of this request includes the Attorney General and Chief of Staff. The scope of this request should include but is not limited to emails, attachments, both sent and received, all draft records, briefing books, memos, notes, minutes, scheduling records, text messages, other correspondence (internal and external) and all other records.

App.Op. ¶2 (quoting request) (brackets in original).

In the mandamus proceedings, Armiak sought and the magistrate entered an exceptionally broad discovery order. Under that order, the Attorney General must personally sit for a deposition, the Office must answer a bevy of interrogatories requesting information not contained in any public record, and the Office must produce, among other things, any documents regarding communications between a member of the Attorney General's staff and the staff at any other attorney general's office headed by a Republican. In sum, the discovery order entitles Armiak to "all the disclosure to which [he] would be entitled in the event [he] prevail[s] on the merits, and much more besides." *Cheney*, 542 U.S. at 388.

The magistrate's order is illegal: all of the discovery it required is either irrelevant or far out of proportion to the needs of the case. The Tenth District egregiously erred by approving that order. This Court should reverse.

**1. The order to personally depose Attorney General Yost authorizes discovery that is not proportional to the needs of the case.**

The part of the magistrate's order requiring Attorney General Dave Yost to personally sit for a deposition is not "proportional to the needs of the case." This follows for

two reasons. First, it follows under the factors laid out in *Brunner*, 117 Ohio St. 3d 1210 at ¶4. Second, it follows from the fact that the ordered deposition will allow Armiak to obtain, through discovery in this public-records case, information to which he would not be entitled were he to prevail on the merits.

*a.* Recall that courts may order a high-ranking official to sit for a deposition in “extraordinary circumstances.” *Id.* at ¶3. To determine whether those circumstances exist, courts must “weigh the necessity” of the deposition “against, among other factors”: (1) “the substantiality of the case in which the deposition is requested”; (2) “the degree to which the witness has first-hand knowledge or direct involvement”; (3) “the probable length of the deposition and the effect on government business if the official must attend the deposition”; and (4) “whether less onerous discovery procedures provide the information sought.” *Id.* at ¶4 (quoting *Monti*, 151 Vt. at 613); *see also State ex rel. Paige v. Canady*, 197 W. Va. 154, syl. ¶4 (1996); *Vartan*, 557 Pa. at 403–04.

The appealed-from order stumbles out of the gate, because Armiak never established any “necessity” to depose Attorney General Yost. “[L]ess onerous discovery procedures” could “provide the information sought.” *Brunner*, 117 Ohio St. 3d 1210 at ¶4. Armiak has already deposed multiple members of the Attorney General’s Office, including the two executive assistants that report directly to the Attorney General and the Office’s chief of staff. In another case, Armiak disposed two other high-ranking member of the Attorney General’s team. These important members of the Attorney General’s team

are able to provide all that is needed to determine whether the sought-after records really are public records subject to disclosure; they would know whether the records “document” the office’s “official activities.” *McCleary*, 88 Ohio St. 3d at 367 (quoting R.C. 149.011(G)). Insofar as these individuals have no knowledge of the records in question, that is good evidence that the records *do not* document official activities—a conclusion further bolstered by the presumption of regularity. But even if there were any debate on this score, there are ample means for examining public-record status that do not entail the Attorney General’s deposition. *In camera* review, affidavits (the Attorney General himself already produced one), and similar less-intrusive options come readily to mind. Neither the relators, the magistrate, nor the Tenth District ever suggested that the Attorney General *needs* to be deposed in order for the court to determine whether the sought-after records are “public records” that must be disclosed.

On the other side of the scale, various factors militate against allowing the deposition. First, because the “underlying legal issue in this case is far from extraordinary or substantial,” App.Op. ¶55 (Klatt, J., dissenting), the “substantiality of the case” hardly supports the extreme step of making the Attorney General sit for a deposition, *Brunner*, 117 Ohio St. 3d 1210 at ¶4. This case presents a kiln-run dispute regarding “[w]hether or not certain documents are potentially responsive to relators’ public records request,” and whether or not certain documents qualify as “public records under Ohio law.” App.Op. ¶55 (Klatt, J., dissenting). To be sure, citizens have an interest in, and a right to receive,

public records. But the particular dispute here is no more important than any other public-records dispute. As Judge Klatt observed, nothing “about relators’ public records request ... suggests the presence of extraordinary circumstances.” *Id.*

“Second, it’s clear that the attorney general lacks firsthand knowledge of the public records request and lacks firsthand knowledge of how his staff conducted the search for potential responsive documents. Nor was the attorney general involved in the determinations of what documents were or were not deemed public records.” *Id.* at ¶56. The Attorney General himself said so in a signed affidavit. R.76, Mot. for Protect. Order, Ex. 7, Yost Aff. These “uncontested facts” make the deposition in this case far more unjustified than the deposition in *Brunner*—there, the relators sought to depose the secretary of state regarding an issue with respect to which “the secretary of state *had* firsthand knowledge.” App.Op. ¶56 (Klatt, J., dissenting)

The most important factor of all is the third. Forcing the Attorney General to attend the deposition—thereby establishing a precedent empowering trial courts to order the deposition of state officials in similarly insubstantial cases—will have a severely deleterious “effect on government business.” *Brunner*, 117 Ohio St. 3d 1210 at ¶4. The primary reason that courts allow high-ranking officers to be deposed only in “extraordinary circumstances,” *id.* at ¶3, is “that high ranking government officials have greater duties and time constraints than other witnesses and that, without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation” instead

of their constitutional duties, *Utah Att’y Gen.*, 56 F.4th at 1259–60 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)). The only-in-extraordinary-circumstances rule also respects the separation of powers; it keeps courts from allowing the judicial process to become a tool that “partisans” can use “to harangue executive officers through depositions, discovery, delay, and distraction.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2583–84 (2019) (Thomas, J., concurring in part and dissenting in part).

If the Attorney General can be made to sit for a deposition in this case, then any statewide official can be made to sit for a deposition in most any public-records case involving his or her activities—even activities that turn out *not* to be official, and with respect to which the public-records laws do not even apply. *Cf. Paxton*, 60 F.4th at 258. So affirming the Tenth District means adopting a rule that permits the grave and “unwarranted impairment of another branch in the performance of its constitutional duties.” *Cheney*, 542 U.S. at 390. That would be out of step with state and federal decisions from across the country. *See, e.g., id.*; *Paxton*, 60 F.4th at 258–59; *Utah Atty. Gen.*, 56 F.4th at 1263; *Dep’t of Educ.*, 25 F.4th at 701; *Clinton*, 973 F.3d at 109; *United States*, 624 F.3d at 1377; *United States*, 197 F.3d at 316; *FDIC*, 58 F.3d at 1060; *United States*, 985 F.2d at 512–13; *Paige*, 197 W. Va. at 161; *Monti*, 151 Vt. at 613; *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459, 461 (Fla. 2021); *Vartan*, 557 Pa. at 403–04.

It is no answer to say, as the Tenth District did, that the deposition can be limited to “two hours.” App.Op. ¶47. Even a short deposition distracts constitutional officers

from fulfilling the duties they were elected to fulfill. After all, in addition to the deposition itself, the official must prepare for the deposition. More fundamentally, depositions provide the relators with an opportunity to “embarrass or harass” the official in question. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978). Worse, relators can use depositions to extract testimony on *non-official* matters—matters that are otherwise outside the scope of the Ohio Public Records Act.

To see why this last point matters, recall that something constitutes a record only if it “document[s]” a public office’s “activities.” R.C. 149.011(G). The definition does not extend to records that are in an official’s or office’s possession but that do “nothing to document any aspect of” the “*activities of the office*,” *McCleary*, 88 Ohio St. 3d at 367–68 (quoting R.C. 149.011(G)); *Armatas*, 163 Ohio St. 3d 304 at ¶14. This means that records of an official’s political and personal activities do not qualify as public records. The Attorney General may do something (like attend a campaign event) *because* he is the Attorney General without acting *as* the Attorney General; the Attorney General is not engaged in “activities of the office” at all times. *McCleary*, 88 Ohio St. 3d at 367 (quoting R.C. 149.011(G)). The fact that he attended an event or viewed a document does not, by itself, mean information pertaining to the event or document constitutes a public record. The same goes for any other official in Ohio. If the Speaker of the Ohio House gives a commencement address, his speech does not document the function of the House, and thus does not constitute a public record. If the Governor speaks at a Rotary dinner while

campaigning, his remarks are not public records. And if a judge serves on a panel at an American Constitution Society event—even an event at which participants express the Society’s view that “*Dobbs* requires a response from our government at all levels”—neither the agenda nor the remarks constitute public records. See American Constitution Society, *Protecting Reproductive Rights* (available at <https://perma.cc/R79E-LCWM>).

The decision below empowers relators to probe constitutional officers about discussions and goings on at such non-official events, all under the guise of trying to determine whether documents relating to such events are subject to the public-records law. That is apparently what Armiak seeks to do in this case. Allowing that will, in addition to wasting officials’ time, chill their ability to engage in free discussion at such events, including at campaign events or in discussions with voters. But those events and discussions are core First Amendment activities, which, the Supreme Court has taken pains to reiterate, “government regulation may not target.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 192 (2014). Discouraging free discussion at such events means reducing candidates’ opportunities to learn information that can help them better serve the people should they win the election and take office. That will, ultimately, have a seriously negative “effect on government business.” *Brunner*, 117 Ohio St. 3d 1210 at ¶4.

The only remaining factor asks whether “less onerous discovery procedures” would be capable of “provid[ing] the information sought.” *Id.* (quotation omitted). As outlined above, there are less-onerous procedures for obtaining the needed information.

In sum, the Attorney General’s deposition is unnecessary, and any relevance it might have is vastly outweighed by the factors that inform the question whether a high-ranking state official can be made to sit for a deposition.

*b.* The portion of the magistrate order requiring the Attorney General to sit for a deposition is improper for a second reason: it empowers Armiak, who seeks relief under the Ohio Public Records Act, to secure information he is barred from obtaining under the Ohio Public Records Act.

The magistrate ordered the Attorney General to sit for a deposition to be interrogated about events and activities in which he participated *without regard* to whether those events or activities bear on the Attorney General’s official duties. What is more, the deposition will enable Armiak to go beyond securing records—he will be able to elicit information not contained in any public record. That amounts to a request for information, which this Court has said is “improper” in the public-records context. *Morgan*, 112 Ohio St. 3d 33 at ¶30. The Public Records Act entitles citizens to seek records, not to pose “questions,” *State ex rel. Gregory v. Toledo*, \_\_\_ Ohio St. 3d \_\_\_, 2023-Ohio-651 ¶¶2, 6, or to demand “information” other than the record itself, *Lanham*, 80 Ohio St. 3d at 427.

In short, the deposition will enable Armiak to mine for information unrelated to public records or to the way in which the Ohio Attorney General’s office managed Armiak’s public-records request. A discovery order like that fails the proportionally requirement. *See, e.g., In re Clinton*, 973 F.3d at 115.

**2. The order to produce documents authorizes irrelevant and disproportionate discovery, and violates the Modern Courts Amendment.**

The Tenth District’s order compelling document production likewise exceeds the bounds of relevance and proportionality. The Tenth District commanded the Office to produce, and to conduct searches for, all documents related to letters, amicus briefs, or meetings in which another Republican attorney general’s office participated. App.Op. ¶¶14, 29, 78. The Tenth District also affirmed the aspect of the order requiring a search of the *personal* and *campaign* accounts of every member of the Attorney General’s Office involved with these multi-state letters, briefs, and meetings. *Id.* at ¶¶30–31, 36; *id.* at 77 (Magistrate’s Order). All this compels irrelevant and disproportionate discovery, and would make Rule 26 unconstitutional as applied to this case.

*a.* The order for document production sweeps in a tremendous amount of irrelevant information. Again, the merits question in this suit is whether the Attorney General or his chief of staff failed to turn over documents relating to two private organizations (the Republican Attorneys General Association and the Rule of Law Defense Fund) and one event hosted by one of those organizations (“the RAGA Winter Meeting held February 29 through March 2” of 2019). *See* App.Op. ¶2. Yet the magistrate’s order requires the Office to produce all records of discussions concerning amicus briefs, letters, and other coordinated efforts between lawyers from the Office and lawyers in the offices of other Republican attorneys general. *See* App.Op. ¶¶14, 29, 78. And the order requires a

search of attorneys' emails for invitations to private events—that is, for events that are not official activities. *See id.* at ¶¶11, 38, 77. The Office will apparently need to search attorneys' official *and personal* email accounts for that information. *See id.* at ¶¶36; *id.* at 77 (Magistrate's Order).

Almost none of the information the magistrate ordered the Office to produce will have any relevance to the question in this suit; this information is not “reasonably” likely to “lead to the discovery of admissible evidence.” *Weckel*, 2013-Ohio-2718 ¶23. Attorneys from the Office communicate with lawyers in other state attorneys-general offices—offices run by Republicans and Democrats alike—on a daily basis. To give a sense of the scale of joint efforts, in 2022, the Office of the Solicitor General alone reviewed over 100 amicus briefs produced by other States. That figure does not count the many dozens of letters the Solicitor General received and reviewed. Nor does it count the hundreds of communications between other sections of the Office and other States. And there are many such efforts, such as the 33-state settlement with an e-cigarette maker for its misleading marketing practices; the settlement with Volkswagen over its diesel-gate scandal; the 18-state antitrust settlement with a pharmaceutical maker regarding allegations it paid to keep a generic drug off the market; the 8-state effort to secure a judgment shutting down a robocall operation that had bombarded Ohioans with more than 69 million calls; the 16-state preliminary agreement (worth over \$3 billion) to resolve Walmart's role in the opioid epidemic; and the 40-state settlement with Google over its location-tracking

practices. And all that represents only a small sampling of the multi-state work in which the Office is involved.

No records relating to such efforts have anything to do with the Republican Attorneys General Association or the Rule of Law Defense Fund. And it is impossible to imagine how such records could lead to evidence admissible in a dispute about the supposed failure to produce records relating to those organizations or any events they may have held. The same goes for the portion of the order compelling attorneys to search for things like invitations to third-party events other than the single meeting that is the subject of the public-records request. *See* App.Op. ¶31 (citing request), ¶77 (Mag. Order). Not only are such invitations irrelevant to this case, they would be irrelevant to *any* public-records case, since they do not “document” the workings of the Attorney General’s Office. R.C. 149.011(G).

None of this ordered discovery is relevant, and the magistrate erred by ordering it.

**b.** Beyond the relevance problem, the ordered production is not “proportional to the needs of the case.” Civ. R. 26(B)(1). As just discussed, few if any of the documents at issue have any bearing on this suit. Yet the ordered production would cost the Attorney General’s Office immense resources: hundreds of attorneys will need to spend hours, perhaps days, combing their personal and official email accounts for likely nonexistent needles in thousands of haystacks. Put differently, hundreds of employees working on

the taxpayers' dime will be made to put aside the important work they do for the public in pursuit of evidence that likely does not exist. If a search like that is proportional to the needs of the case, proportionality means nothing.

It is worth noting that attorneys do not sort their records based on the political party of the attorney general for whom the sender or recipient works. So the request for production does not permit a simple search: attorneys will need to identify all of the various Republican attorneys general who served in any of the other 49 States during the relevant timeframe; then, they will need to review their emails to see whether the out-of-office attorneys with whom they communicated worked for one of those offices during the relevant time period.

c. Finally, the order compelling document production applies Rule 26 in a manner that violates the Modern Courts Amendment. That amendment forbids court-issued rules, like Rule 26, from "enlarg[ing] ... any substantive right." Ohio Const. art. IV, §5(B). In other words, the amendment "expressly prohibits the adoption of any rules of practice or procedure that affect substantive rights." *Ware*, 169 Ohio St. 3d 223 at ¶43 (Kennedy, J., concurring in part and dissenting in part). As the discussion above shows, the order requires the Office to produce records that *do not* document the Office's official activities, and that are therefore *not* public records subject to the Public Records Act. By wielding Rule 26 to permit the disclosure of such records, the magistrate enlarged Armiak's substantive rights under the Ohio Public Records Act, thus violating the amendment.

**3. The order compelling interrogatory answers authorizes irrelevant and disproportionate discovery, and also violates the Modern Courts Amendment.**

The magistrate issued, and the Tenth District approved, an order compelling the Attorney General's Office to answer interrogatories. Three such interrogatories are relevant here. Interrogatory two asks the Office to identify "every person" in the Office from 2019–2021 who, among other things, communicated with "other Republican state attorneys generals [sic] ... seeking cooperation" or "participation in litigation." App.Op. ¶13 (quoting interrogatory). Interrogatory four asked for a list of all Attorney General's Office employees who attended a Republican Attorneys General Association or Rule of Law Defense Fund event. App.Op. ¶72. Finally, interrogatory five asked for all public documents of the Office in which the Association or the Fund had any involvement. *Id.*

These interrogatories suffer from the same problems as the production orders.

Begin with relevance. Each asks for information with no reasonable likelihood of leading to the discovery of admissible evidence. Again, this public-records dispute concerns an exceptionally narrow issue: whether the Attorney General or his chief of staff improperly failed to disclose documents relating the Republican Attorneys General Association, the Rule of Law Defense Fund, and a single Association-hosted meeting. Each of the interrogatories requests immense amounts of information with no apparent relationship to any of that. Interrogatory two requires a list of all attorneys in the Office who corresponded with "other Republican state attorneys general[]" regarding "cooperation"

or “participation in litigation.” App.Op. ¶13. That list will be hard to compile, could be long, and little of it will have anything to do with the organizations or event to which the public-records request related. Further, the list of individuals will not shed light on whether the records Armiak sought are public records or (if so) whether they are in the possession of the Attorney General and his chief of staff. Similarly, interrogatories four and five sweep in information bearing little or no relation to the merits issue, and that are therefore not reasonably likely to produce admissible evidence.

Now turn to proportionality. The order is not proportional to the needs of the case. As just discussed, while the interrogatories appear to have an at-most-limited connection to the narrow question presented, they will require a great deal of effort to complete. Tracking down all the lawyers who communicated with other Republican-run attorneys-general offices about litigation will be no mean feat. What is more, the interrogatories are aimed at securing information to which Armiak has no right: a list that does not already exist as a public record, created specially for Armiak. This Court has already held that a public-records request requires no response if it poses “questions” rather than demanding records. *Gregory*, 2023-Ohio-651 at ¶6. Nor can a requester demand that a public office “search for records containing selected information” or require that an office provide “certain information” not already in a public record. *See respectively, State ex rel. Thomas v. Ohio State Univ.*, 70 Ohio St. 3d 1438, 1438; *Lanham*, 80 Ohio St. 3d at 427. Those precedents make improper any discovery request aimed at forcing the same actions: a

discovery request is not proportional to the needs of a public-records case if it will guarantee the relator access to information to which he would not be entitled even if he were to prevail. *See Tax Analysts*, 410 F.3d at 722.

Finally, as explained above, Rule 26 violates the Modern Courts Amendment insofar as it empowers relators in Public Records Act cases to secure documents to which they have no substantive right under the Ohio Public Records Act. The Ohio Public Records Act creates only a limited right to “records”—it does not give citizens any right to demand the answers to “questions.” *Gregory*, 2023-Ohio-651 at ¶6. Thus, reading Rule 26 to permit the use of interrogatories like those at issue here—interrogatories that demand answers to questions about the internal operation of a public office, and the personal or political activities of those within the office—would mean reading Rule 26 to expand the substantive rights the Ohio Public Record Acts confers. If that is what Rule 26 does, then the rule violates the Constitution as applied in this case.

**C. The Tenth District incorrectly analyzed the issues.**

The Tenth District failed to justify its decision.

1. Begin with its decision to affirm the order requiring Attorney General Yost to sit for a deposition. Although the Tenth District identified the *Brunner* factors, App.Op. ¶40, it never acknowledged that those factors must be weighed against the “necessity to depose” the Attorney General, *see Brunner*, 117 Ohio St. 3d 1210 at ¶4. From there, the court went further awry.

With respect to the first *Brunner* factor—“the substantiality of the case”—the Tenth District apparently concluded that the question whether a document qualifies as a public record is *always* “of great public importance.” App.Op. ¶¶41–42. That cannot be right; it would undermine the purpose of the *Brunner* factors, which is to forbid courts from ordering high-ranking officials’ depositions in all but the most “extraordinary circumstances.” 117 Ohio St. 3d 1210 at ¶3.

As for the second factor, the Tenth District reasoned that, because *the Office* concluded that the sought-after records either “did not exist” or “did not qualify as public records,” the *Attorney General himself* would have “firsthand knowledge of the grounds for taking this position.” App.Op. ¶44. “That is a non-sequitur to end all non-sequiturs.” *Helix Energy Sols. Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 688 n.5 (2023). The fact that the Office made these determinations hardly suggests that the Attorney General himself has firsthand knowledge. And in fact, he does not have firsthand knowledge. The Public Record Units made the determinations without his input. Insofar as the Tenth District meant the Attorney General has firsthand knowledge of whether the documents are public records, that is false. The question whether something is a public record is a legal determination as to which no one has firsthand knowledge. *Cf. TWISM Enterprises, LLC v. State Bd. of Registration for Pro. Eng’rs & Surveyors*, \_\_\_ Ohio St. 3d \_\_\_, 2022-Ohio-4677 ¶33.

As for the third factor, the effect on government business, the Tenth District concluded that a two-hour deposition is not likely to impose a major burden. App.Op. ¶47. But the Tenth District focused myopically on the two-hour period during which the deposition might take place. It is true enough that a two-hour break from official duties would not greatly interfere with government business — though it would be much harder to arrange than the Tenth District assumed, given the Attorney General’s many obligations. *See id.* But as already explained, the time spent in the deposition is only the tip of the iceberg. “[H]igh ranking government officials have greater duties and time constraints than other witnesses and ... without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation.” *Utah Att’y Gen.*, 56 F.4th at 1259–60 (quoting *Bogan*, 489 F.3d at 423). The primary interference with government business stems from the fact that the order here sets a precedent that future relators can exploit to secure a deposition in almost any public-records case. Such depositions *will* require officials to take substantial time away from their official duties. Political opponents will then file no shortage of suits hoping “to harangue executive officers through depositions, discovery, delay, and distraction.” *Dep’t of Commerce*, 139 S. Ct. at 2583 (Thomas, J., concurring in part and dissenting in part). Further, forcing officials to answer questions under oath about political activities will chill the political speech that is integral to our republican form of government. That too will detract from the smooth operation of government business. *See above* 30–31.

Finally, with respect to the question whether there are “less onerous discovery procedures” that might secure the information sought, the Tenth District blithely concluded that the Attorney General is “the only person qualified to explain the relation between” the Attorney General’s “RAGA and RLDF activities and the public functions of the Office.” App.Op. ¶48 (quotation omitted). But the court never explained why this is so—it never explained, for example, why *in camera* review of disputed documents would not suffice to enable the courts to determine whether the records in question must be turned over.

All told, the Tenth District never established that the Attorney General’s deposition is even justified, let alone necessary. Under its logic, just about every statewide officeholder can be haled into court and made to sit for a deposition in just about every public-records case. Before the Tenth District’s decision can metastasize, this Court must reverse.

2. The Tenth District’s assessment of the requests for production and interrogatories fared no better. The court set off on the wrong foot by determining that discovery in public-records cases is not cabined by the scope of the Ohio Public Records Act. That is, the court saw nothing troubling about allowing Armiak to obtain, through discovery, records and information he would be unable to obtain were he to prevail on the merits. App.Op. ¶22. That is wrong—and likely unconstitutional—for all the reasons addressed above.

Relatedly, the court erred in rejecting the Office’s arguments that the ordered discovery is massively disproportionate to the needs of the case. The Office stressed that the *only* question in this mandamus case is whether the Attorney General or his chief of staff wrongfully withheld public records. Thus, the challenged interrogatories and requests for production—all of which seek documents possessed by *other people* or information regarding *other individuals’* work with certain outside entities—have no apparent relationship to the merits question. Yet completing these interrogatories and producing these documents would take immense amounts of resources. The resource-intensive nature of the task, combined with the minimal relevance of the documents sought, means the ordered discovery is not proportional to the needs of the case.

In rejecting this argument, the Tenth District suggested the interrogatories and requests for production went to the heart of the case. It supported this conclusion by quoting statements in the complaint alleging that members of the Attorney General’s staff coordinated with the Republican Attorneys General Association and the Rule of Law Defense Fund. App.Op. ¶23. This allegation, the Tenth District reasoned, justified the sweeping discovery aimed at the entire Attorney General’s Office. *See id.* But that loses sight of what this case is all about. It is a public-records request for documents possessed by the Attorney General and his chief of staff, not the entire Office. The Tenth District erred by measuring the scope of discovery against accusations in the complaint rather than against the narrow merits question this case presents.

## CONCLUSION

The Court should vacate the discovery order in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Appellant was served by email

this 26th day of April, 2023 upon the following:

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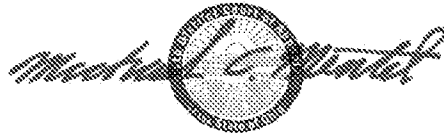
# APPENDIX



Tenth District Court of Appeals

**Date:** 02-08-2023  
**Case Title:** STATE OF OHIO, EX REL CENTER FOR MEDIA AND DEMOCRACY -VS- DAVID YOST  
**Case Number:** 20AP000554  
**Type:** JEJ - JUDGMENT ENTRY

It Is So Ordered

A circular embossed seal of the Tenth District Court of Appeals is centered over a handwritten signature in black ink. The signature is written in a cursive style and appears to read 'Michael C. Mentel'. The seal is partially obscured by the signature.

/s/Judge Michael C. Mentel

Electronically signed on 2023-Feb-08 page 2 of 2

Court Disposition

Case Number: 20AP000554

Case Style: STATE OF OHIO, EX REL CENTER FOR MEDIA AND  
DEMOCRACY -VS- DAVID YOST

Motion Tie Off Information:

1. Motion CMS Document Id: 20AP0005542 [REDACTED] 980000  
Document Title: 09-30-2021-MOTION TO SET ASIDE - DAVID  
YOST  
Disposition: 3200

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel.,	:	
Center for Media and Democracy et al.,	:	
	:	No. 20AP-554
Relators,	:	
	:	(REGULAR CALENDAR)
v.	:	
	:	
The Office of Attorney General David Yost,	:	
	:	
Respondent.	:	
	:	

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D E C I S I O N

Rendered on February 8, 2023

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**On brief:** *The Gittes Law Group, Frederick M. Gittes, and Jeffery P. Vardaro* for Relators.

**On brief:** *Dave Yost, Attorney General, Ann Yackshaw, and Bridget C. Coontz* for Respondent.

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IN MANDAMUS  
ON MOTION TO SET ASIDE THE MAGISTRATE'S ORDER

MENTEL, J.

{¶ 1} Respondent, David Yost, filed a motion under Civ.R. 53(D)(2)(b) to set aside the magistrate's order of September 20, 2021. The magistrate denied respondent's motion for a protective order seeking to prevent relators, the Center for Media and Democracy and David Armiak, from deposing him and granted relators' motion to compel discovery responses to a number of interrogatories and requests for production of documents ("RFPs"). For the reasons that follow, respondent's motion to set aside the magistrate's order is denied.

{¶ 2} On March 10, 2020, relators submitted a public records request seeking:

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[A] copy of all records that pertain to the Republican Attorneys General Association (RAGA), Rule of Law Defense Fund [RLDF], and the RAGA Winter Meeting held February 29 through March 2 from the Office of Attorney General Dave Yost. The scope of this request includes the Attorney General and Chief of Staff. The scope of this request should include but is not limited to emails, attachments, both sent and received, all draft records, briefing books, memos, notes, minutes, scheduling records, text messages, other correspondence (internal and external) and all other records.

(Dec. 1, 2020 Compl. at ¶ 5.)

{¶ 3} On March 30, 2020, respondent replied via email, refusing the request because the requested records were "exempt from disclosure" and "not a record of" the Attorney General's Office. *Id.* at ¶ 6. On June 10, 2020, relators sent an email reply asking for reconsideration of the denial and elaborated their position that the requested records fell within the scope of the definition of public records subject to disclosure. *Id.* at ¶ 8.

{¶ 4} On July 13, 2020, respondent again denied the request, reiterating the position that the records requested did not meet the definition of public records. *Id.* at ¶ 10. In addition, respondent stated that "no such email, text, drafts, memo, minutes, or other correspondence records" existed. *Id.*

{¶ 5} On December 1, 2020, relators filed a complaint for a writ of mandamus, arguing that respondent had violated its duty of disclosure under R.C. 149.23. In the complaint, relators described Republican Attorneys General Association ("RAGA"), and the Rule of Law Defense Fund ("RLDF"), as "extremely influential pressure groups whose shared mission is to advance the interests of their corporate patrons and other right-wing causes, including the electoral interests of the national Republican party, by leveraging the official powers of state attorney general offices." *Id.* at ¶ 13. Relators alleged that a number of respondent's official actions, including signing letters to the United States Congress advocating for the acquittal of President Donald Trump during impeachment proceedings and business liability exceptions during the COVID-19 pandemic, "were drafted and coordinated with RAGA's assistance." *Id.* at ¶ 20. Relators also alleged that respondent had "coordinated" with RAGA and other attorneys general in the drafting, signing, and presentation of amicus briefs in high profile litigation. *Id.* Relators accused respondent of attempting to obscure his relationship with RAGA and RLDF, based on those organizations'

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encouragement and "redactions" in respondent's calendar that coincided with "dates on which RAGA and RLDF events were held." *Id.* at ¶ 26. Relators alleged that in "separate litigation involving other state attorneys general," they had "obtained multiple email communications between RAGA and RLDF and Yost regarding policy discussions implicating the public functions of the Respondent, none of which were produced" in response to their requests. *Id.* at ¶ 27. Relators alleged that respondent had "deliberately withheld written communications and other records" and accordingly sought a writ of mandamus ordering disclosure under R.C. 149.43. *Id.* at ¶ 28.

{¶ 6} Respondent filed a motion to dismiss on January 5, 2021. He argued that the relators' "request had nothing to do with the function of the Attorney General's office" because it "relate[d] to independent, outside organizations," not respondent, his office, or "the manner in which the office carries out its function." (Jan. 5, 2021 Mot. to Dismiss at 12.) Respondent also argued that relators had requested documents "that do not exist. These records cannot be produced." *Id.* at 18.

{¶ 7} Relators argued in response that the arguments for dismissal relied upon post-discovery case law, and that the proper standard of review on a motion to dismiss required assuming as true the allegation in their complaint that respondent "withheld records based on a claim that they did not meet the definition of public records." (Jan. 21, 2021 Brief in Opp. at 10.)

{¶ 8} The magistrate denied respondent's motion to dismiss on February 24, 2021. After "examin[ing] relators' complaint to determine if it states a claim for a writ of mandamus on its face," as well as the alleged correspondence between the parties that precipitated the filing of the complaint, the magistrate concluded that respondent had "asserted two inconsistent positions" when denying the request. (Feb. 24, 2021 Mag.'s Order at 2, 5.) "[F]irst, that no such records existed, and second, that the requested records, on their face, were exempt from production as public records and would not be furnished." *Id.* at 5. He concluded that relators had stated a claim for the production of public records under R.C. 149.43, because "[f]rom the face of the complaint and attached documents, it cannot be ascertained whether the records are exempt from disclosure or do not exist." *Id.*

{¶ 9} Respondent filed an answer on March 25, 2021. Discovery commenced, but respondent filed a motion for a protective order under Civ.R. 26(C) on June 18, 2021,

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seeking an order preventing relators from deposing him and Solicitor General Benjamin Flowers. The same day, relators filed a motion captioned "Relators' Motion to Compel Interrogatory Answers and Production of Documents and Expand Production of Records for In Camera Inspection." (June 18, 2021 Relators' Mot. to Compel.)

{¶ 10} The magistrate resolved the parties' dispute over these issues in an order filed September 20, 2021. In the order, he sustained relators' request to compel answers to Interrogatories Two, Four, and Five, but overruled their request to compel an answer to Interrogatory Six. Concerning the RFPs, the magistrate ordered 1-5, 9, 15, and 16 to be produced for in-camera review; ruled that number 13 was moot; sustained numbers 10 and 11, "to a limited extent," based on a forthcoming "detailed answer" from respondent; sustained relators' motion to compel requests 6, 7, 8, and overruled the request for number 14. Finally, the magistrate overruled respondent's motion for a protective order preventing his deposition, but sustained the motion as to Solicitor General Benjamin Flowers. (Sept. 30, 2021 Mot. to Set Aside at 22-23.)

{¶ 11} On September 30, 2021 respondent filed a motion to set aside the magistrate's order pursuant to Civ.R. 53(D)(2)(b). Respondent asks this court to set aside the order compelling discovery responses and the order compelling him to appear for a deposition.

{¶ 12} Civ.R. 53(D)(2)(a)(i) allows "a magistrate [to] enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party." The rule also states that, "[a]ny party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed." Civ.R. 53(D)(2)(b).

{¶ 13} We begin by addressing Interrogatory Two and RFPs 6-8 together because the magistrate's order and the parties' arguments concerning them are interrelated. Interrogatory Two states:

2. Identify each and every person employed by the Office of the Ohio Attorney General who did any of the following in the years 2019-2021:

a. Communicated in any form with representatives, officers, and/or employees of RAGA and/or RLDF.

- b. Attended any meeting and/or conference sponsored in whole or part by RAGA and/or RLDF.
- c. Requested, received, and/or assisted in processing any reimbursement of expenses by RAGA and/or RLDF.
- d. Drafted and/or assisted in drafting documents (including briefs, letters, and/or press releases) that involved other Republican state attorneys general and/or their offices in any way (including by signing, co-authoring, drafting, and/or revising).
- e. Received, sent, and/or were copied on requests to and/or from RAGA, RLDF, and/or other Republican state attorneys generals and/or their offices seeking cooperation and/or participation in litigation, amicus curiae filings, lobbying, petition, and/or corresponding with government bodies.
- f. Accessed any RAGA and/or RDLF online "briefing room" or other file-sharing system sponsored, hosted, and/or arranged by RAGA and/or RLDF.

{¶ 14} RFPs 6-8 state:

6. For the period January 14, 2019, to the present, produce any and all documents generated and/or received by the Respondent and/or any of Respondent's employees concerning and/or related to the planning, coordination, preparation, circulation, and/or signature of any and all letters signed by the Respondent (and/or presented to the Respondent for consideration of signing) together with any one or more other Republican state attorneys' general and/or attorney general candidates.

\* \* \*

7. For the period January 14, 2019, to the present, produce any and all documents generated and/or received by the Respondent and/or any of Respondent's employees concerning and/or related to the planning, coordination, preparation, circulation, and/or signature of any and all amicus briefs signed by the Respondent (and/or presented to the Respondent for consideration of signing) together with any one or more other Republican state attorneys' general and/or attorney general candidates.

\* \* \*

8. For the period January 14, 2019, to the present, produce any and all documents generated and/or received by the Respondent and/or any of Respondent's employees regarding in-person and/or remotely conducted meetings, briefings,

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seminars, and/or continuing education events the Respondent and/or the Respondent's staff was invited to, agreed to attend, and/or did attend that any one or more other Republican state attorneys' general, attorney general candidates, and/or members of their staff also attended, including but not limited to all invitations and/or other communications, minutes, notes, sign-in sheets, PowerPoints and/or other slide decks, and/or handouts.

(June 18, 2021 Respondent's Answer/ Objs. to Relators' First Set of Interrogos. 27-33.)

{¶ 15} The magistrate granted relators' motion to compel responses to Interrogatory Two, reasoning as follows:

The magistrate agrees with relators that part of respondent's answer to Interrogatory Two confuses matters by considering the interrogatory as another public records request rather than discovery pursued by relators in order to ascertain the public/non-public nature of the records sought in the underlying request. While respondent is correct that "the Public Records Act does not mandate that a public office seek out and provide information of interest to the requester, such as the identification of certain persons," discovery proceedings in this mandamus action might require exactly that. Relators are not limited to the described records in the underlying public records. \* \* \*

The magistrate also disagrees with respondent's assertion that Interrogatory Two is overbroad in relation to the core issue in the case. Again, relators are entitled to obtain discovery to challenge the factual basis for respondent's refusal to provide the requested records, and the interrogatory request is proportional to that determination. *See, generally, State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 36-37; *State ex rel. Batt Law Group, LLC v. Ohio Dept. of Natural Resources*, 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 18. Identifying staff who, in the course of their agency duties, attend RAGA- and RLDF-related functions is relevant to evaluating respondent's claim that these organizations are unrelated to his official duties. Relators are therefore entitled to an order compelling an appropriate response to Interrogatory Two providing the requested information.

(Sept. 20, 2021 Mag.'s Order at 4-5.)

{¶ 16} The magistrate referred to this reasoning when granting relators' request to compel responses to the RFPs:

Requests for Production 6, 7, and 8 seek all documents from all staff related to planning, attendance, preparation, and signature of letters, amicus briefs, and events attended or prepared in conjunction with other RAGA members. For the reasons stated in evaluating relators' Interrogatory 2, the motion to compel is granted for these and respondent will furnish the requested documents.

(Mag.'s Order at 7.)

{¶ 17} Respondent argues that the magistrate's order compelling responses to RFPs 6-8 should be set aside because the order is incongruent with relators' discovery requests. Citing the magistrate's reference to "other RAGA members," respondent argues that the magistrate's order "modified" the RFPs because "'RAGA members' and 'Republican state attorneys general and/or attorney general candidates' are not coextensive groups." (Mot. to Set Aside at 14-15.) Accordingly, respondent requests that we "clarify what exactly Respondent has been compelled to do." (Emphasis deleted.) *Id.* at 15.

{¶ 18} We do not believe that the magistrate's summarization of RFPs 6-8 indicates that he actually sought to alter or "modify" their scope. The reasoning he set forth when compelling a response to Interrogatory Two expressly rejected respondent's argument that the scope of discovery should encompass no more than the public records request itself, and Interrogatory Two itself included references to other Republican state attorney generals, not just RAGA or RLDF members. The magistrate was unequivocal when concluding that a discovery request was overbroad. (*See* Mag.'s Order at 6 (agreeing with respondent that Interrogatory Six was "overbroad on its face.")). If respondent is confused by the scope of the discovery requests he had been compelled to respond to, he need only to consult them as written.

{¶ 19} Respondent also argues that RFPs 6-8 are not proportional to the needs of the case, as Civ.R. 26(B)(1) requires. "The central issue" of relators' case, respondent argues, is whether he "or his Chief of Staff have records relating to RAGA, RLDF or the RAGA Winter Meeting. Whether the hundreds of *other* AGO employees attended an event with an employee of another Republican attorney general's office or helped them to prepare

a letter or amicus brief sheds little light on whether the Attorney General or Chief of Staff have responsive records." (Emphasis sic.) (Mot. to Set Aside at 16.)

{¶ 20} Civ.R. 26(B)(1) states:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

{¶ 21} When considering the factors laid out in the rule to determine whether a discovery request is proportional to the needs of the case, respondent's argument appears to invoke only "the importance of discovery in resolving the issues." (Mag.'s Order at 2.) In other words, respondent appears to argue that the documents described in RFPs 6-8 would not resolve the issue of whether the documents sought exist, and are therefore not proportional to the needs of the case.

{¶ 22} Respondent's argument is functionally indistinguishable from that rejected by the magistrate in that respondent is, once again, attempting to restrict the scope of discovery so that it is coterminous with the records request itself. The parties are engaged in discovery and "discovery is generally permissible in mandamus actions." *State ex rel. Marchiano v. School Emps. Retirement Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, ¶ 24. See also Civ.R. 1(A) (stating that the Ohio Rules of Civil Procedure apply "in all courts of this state in the exercise of civil jurisdiction at law or in equity," subject to exceptions) and Loc.R. 2(B) ("The Ohio Rules of Civil Procedure, as supplemented hereby, shall govern procedure in original actions filed in this Court."). Thus, relator is permitted to seek "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," the scope of which is necessarily broader than the "claim" itself for the records requested under R.C. 149.43. (July 6, 2021 Relators' Reply Memo at 6.)

{¶ 23} RFPs 6-8, which seek, as the magistrate summarized, "all documents from all staff related to planning, attendance, preparation, and signature of letters, amicus briefs, and events attended or prepared in conjunction with other RAGA members," are proportional to relators' allegations as stated in the complaint. (Mag.'s Order at 7.) There,

relators allege that "RAGA and RLDF coordinate" the joint litigation engaged in by not only respondent but "other state attorneys general," with reference to specific amicus briefs and letters that this alleged coordination produced. (Compl. at ¶ 16-21.) The allegations include coordination among aides and staff. *Id.* at ¶ 25-27. Relators allege, based on "multiple email communications between RAGA and RLDF and Yost" already obtained in other litigation that "Respondent has deliberately withheld written communications and other records documenting the participation of Yost *and his staff* in activities of RAGA and RLDF." (Emphasis sic.) *Id.* at ¶ 27-28. Relators' requests for documents are proportional to resolving these issues, and the magistrate did not err by compelling their production.

{¶ 24} For the same reasons, relators' Interrogatory Two, which seeks the identity of persons employed by the Office of the Ohio Attorney General who communicated with RAGA and RLDF members, attended RAGA and RLDF conferences, or were variously associated with producing or sending or receiving documents for those organizations, is not overbroad or disproportional to the issues discovery may address. (Mot. to Set Aside at 28.) This conclusion is not theoretical. Relators' supplemental filings since respondent filed the motion to set aside the magistrate's order have revealed a number of disclosed emails, both on private and state accounts, between respondent and his staff communicating about and coordinating attendance at RAGA and RLDF events. (Feb. 9, 2022 Relators' Supp. Memo in Opp. to Respondent's Mot. to Set Aside Mag.'s Order, Exs. 1A-1K, hereinafter "Relators' Supp. Memo.")

{¶ 25} Respondent describes the "burden of complying with RFPs 6-8" as "astronomical," and gives as "one example among potentially thousands to illustrate this point" the documents generated in planning an event entitled the Robocall Virtual Summit. (Mot. to Set Aside at 16.) RFP 8 demands that respondent "produce any and all documents generated" by him or his staff concerning "meetings, briefings, seminars, and/or continuing education events the Respondent and/or the Respondent's staff was invited to, agreed to attend, and/or did attend that any one or more other Republican state attorneys' general, attorney general candidates, and/or members of their staff also attended." (Respondent's Answer/ Objs. to Relators' First Set of Interrogs. at 33.) But the Robocall Virtual Summit involved not only other Republican attorneys general, but a host of other persons, such as "Consumer Protection staff members soliciting speakers and requests to various state

supreme courts," that generated a trove of documents when preparing the event that would be irrelevant to relators' claims. (Mot. to Set Aside at 17.)

{¶ 26} Relators admit that the scope of documents respondent describes "would include not only information about his interactions with RAGA and RLDF, and RAGA's members (the other Republican state attorneys general) and staff, but also various multistate efforts through the National Association of Attorneys General (NAAG) and other initiatives that have included Democratic attorneys general." (Oct. 22, 2021 Relators' Memo in Opp. to Respondent's Mot. to Set Aside Mag.'s Order, hereinafter "Memo in Opp." at 18.) According to relators, this is an unintended consequence of their request. However, they claim that respondent never described this potential burden in any of the parties' discovery discussions, in his previous objections to discovery requests, in the conference with the magistrate, or in his "extensive briefing" to the magistrate. *Id.* at 18-19. If respondent had raised the issue at those times, relators assert that they "would not have hesitated to narrow their requests." *Id.* at 20. Respondent's reply does not counter the assertion that the burden he describes is being raised now for the first time. (*See* Nov. 18, 2021 Respondent's Reply in Support of His Mot. to Set Aside the Mag.'s Order at 10-14.)

{¶ 27} Civ.R. 26(B)(5) states: "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." This is logical because "[a] party requesting discovery \* \* \* may have little information about the burden or expense of responding." (Civ.R. 26, Staff Notes to July 1, 2020 Amendment.) Any such "uncertainties should be addressed and reduced in the parties' Civ.R. 26(F) conference and in scheduling and pretrial conferences with the court." *Id.* It was respondent's duty to inform relators that the scope of their RFPs, as drafted, might balloon the scope of discoverable documents to potentially include all attorneys general office employees in the nation.

{¶ 28} Relators have offered a solution to this impasse in their briefing:

The Relators intended to ask only for responsive information relating to initiatives and projects (such as briefs, regulatory filings, and letters) involving *only* Republican attorneys general (*i.e.*, those projects most likely to have involved coordination by RAGA/RLDF). They thus waive the enforcement of the Magistrate's order to the extent it would require the production of documents and information as to

initiatives projects involving both Democratic *and* Republican attorneys general.

(Emphasis sic.) (Relators' Memo in Opp. at 20.)

{¶ 29} Respondent does not challenge the adequacy of relators' concession in his reply briefing. Accordingly, we deem it tacitly accepted and consider the issue of the scope of RFPs 6-8 settled.

{¶ 30} We now turn to respondent's challenge to the magistrate's order concerning RFPs 10 and 11. RFP 10 states:

For the period January 14, 2019, to present produce any and all e-mail and/or text messages, relating in any way to the topics listed in Requests for Production Nos. 1 through 8, above, stored on the computers and/or mobile devices of, and/or sent or received (including by "cc" or "bcc") using any personal, business, campaign, and/or state-provided e-mail and/or mobile account of the following:

- a. Dave Yost
- b. Benjamin Flowers
- c. Benjamin Marrison
- d. Amy Sexton
- e. Each other person identified in response to Interrogatory 2.

{¶ 31} RFP 11 states:

For the period January 14, 2019, to present produce any and all e-mails, text messages, and/or word-processing files (such as files created by Microsoft Word, Excel or PowerPoint), containing the terms "RAGA," "RLDF," "Republican Attorneys General Association," "Rule of Law Defense Fund," "Piper," "apiper", "Jason Heath", "jheath", "Bisbee", "pbisbee", "Amanda Gonzalez", "agonzalez", "Ashley Highlander", "ahighlander", "Collins Atkinson", any email ending in "@republicanags.com" or "@rldf.org", noreply@wufoo.com", "impeach", "impeachment", "war games", "Michael Flynn", "Mike Flynn", "Armiak", and/or "Center for Media and Democracy", stored on the computers and/or mobile devices of, and/or sent or received (including by "cc" or "bcc") using any personal, business, campaign, and/or state e-mail and/or mobile account of the following:

- a. Dave Yost
- b. Benjamin Flowers

- c. Benjamin Marrison
- d. Amy Sexton
- e. Each other person identified in response to Interrogatory 2.

{¶ 32} When ordering compliance with the foregoing RFPs, the magistrate stated:

Requests for Production 10 and 11 seek the production of emails related to the subject matter of certain targeted search terms including RAGA and RLDF, and certain names. Again, respondent objected to the requests as unduly burdensome and not proportional to the needs of the case. For these interrogatories [sic], relators' motion to compel is granted to a limited extent. Respondent will provide a detailed answer regarding which of the search terms would generate unduly broad results, and, consistent with the deposition testimony of respondent's scheduling assistant, Amy Sexton, conduct searches of personal and public email accounts containing the pertinent information.

(Mag.'s Order at 7.)

{¶ 33} Respondent describes the magistrate's order to compel compliance with RFP 10 as "nonsensical," claiming that it would "result[] in absurdity and should be set aside." (Mot. to Set Aside at 21.) According to respondent, complying with the order is "impossible" because "RFP 10 includes no search terms." *Id.* He claims that he "cannot provide any details as to the burden generated by RFP 10's search terms because no such search terms exist." *Id.* at 21-22.

{¶ 34} Respondent's argument misreads the magistrate's order. The order addresses both RFPs 10 and 11 together. RFP 11 contains a plethora of search terms that are clearly what the magistrate references in the order. RFP 10 incorporates by reference the "topics" of RFPs 1-8, such as RAGA and RLDF (RFP 1), the 2020 RAGA winter meeting (RFP 2), the RAGA 20th anniversary celebration and other RAGA and RLDF events (RFP 3), the "RAGA online 'briefing room' " (RFP 4), and travel expense documents from such events (RFP 5). The topics of RFP 6-8 have previously been discussed. RFP 10 specifically requests documents on such topics from the email and mobile accounts of the specific persons list. These persons are what the magistrate's order refers to when it mentions "certain names" in both RFP 10 and 11, both of which are directed at those persons' email and mobile accounts. We read the magistrate's order as giving respondent the opportunity

to make the case that the results generated would be of such overwhelming quantity and irrelevance that they might be considered "unduly broad."

{¶ 35} In challenging the magistrate's order compelling a response to RFP 11, respondent argues that searching the email accounts referenced with the search terms listed would be burdensome and of "minimal benefit." (Mot. to Set Aside at 23.) He argues that "[t]he record in this case establishes that the Attorney General and Chief of Staff do not maintain public records on their personal accounts." *Id.* He cites his own statement in "a sworn affidavit that he regularly forwards documents with public records content from his personal devices and private accounts to AGO employees or his own official account," and similar statement of his Chief of Staff. *Id.* Respondent claims that, "both officials searched their private accounts and found no responsive public records." *Id.*

{¶ 36} These assertions are partially confirmed, but also partially undermined, by the disclosure of a number of documents disclosed to relators after respondent partially complied with RFP 11. In a letter to relators' attorney, counsel for respondent acknowledged that "the keyword searches have been completed" for "Attorney General Yost and Chief of Staff Marrison's AGO accounts." (Relators' Supp. Memo, Ex. 1., at 1-2.) The searches resulted in "a set of 11 documents" that included ones "responsive to the initial public records request and should have been produced when then request was made in March 2020." *Id.* The searches of the state email accounts of respondent and his Chief of Staff produced emails sent to and received from both the private and state accounts of respondent and the private account of Amy Sexton. (Relators' Supp. Memo, Ex. 1A, Ex. 1B, & Ex. 1C.) Because the searches have been completed for relator and his Chief of Staff's state email accounts, the RFP has been partially complied with. However, the fact that the searches uncovered documents not merely responsive to the discovery request but also to the original public records request contradicts respondent's claim that they would be of "minimal benefit." (Mot. to Set Aside at 23.) Furthermore, the documents produced from just respondent's state email account demonstrate that at least one of his employees is using a personal email account to create discoverable documents. (Relators' Supp. Memo, Ex. 1A.) Accordingly, we decline to set aside the magistrate's order compelling respondent to comply with RFP 11 in its entirety.

{¶ 37} Respondent also argues that the magistrate's order should be set aside to the extent it compels production of documents that postdate relators' original public records request. (Mot. to Set Aside at 30.) Respondent cites *State ex rel. Hogan Lovells U.S., L.L.P. v. Dept. of Rehab. & Corr.*, 156 Ohio St.3d 56, 2018-Ohio-5133, ¶ 29, in which the Supreme Court of Ohio held that a requestor of public records in a mandamus action under R.C. 149.43 was only entitled to records created before the date of the request.

{¶ 38} Again, respondent is attempting to constrain the scope of discovery under Civ.R. 26 with reference to the substantive law governing public records disclosure. The scope of discovery defined under Civ.R. 26(B)(1), "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," contains no post-complaint temporal restriction. We are not persuaded that "the date on which the complaint was filed is some sort of talismanic date after which no relevant documents could possibly have been produced." *Wilmington Trust Co. v. AEP Generating Co.*, S.D. Ohio No. 2:13-cv-01213, 2016 U.S. Dist. LEXIS 28762, \*8-9 (Mar. 7, 2016). "It is not uncommon for a document to refer to events which occurred days, months, or even years before, so even if the filing date of a complaint represents the last date on which relevant actions were taken, it does not necessarily represent the last date on which relevant documents were created." *Id.* Civ.R. 26 provides sufficient grounds for ruling that a document is not subject to disclosure without creating an arbitrary rule arising from the date a complaint is filed. Furthermore, respondent fails to cite a single document created after relators filed their case that should be subject to such a rule. Accordingly, the issue is hypothetical and provides no basis for setting aside the magistrate's order.

{¶ 39} Finally, we turn to the issue of respondent's deposition. The magistrate overruled respondent's motion for a protective order that would shield him from a deposition, but sustained the motion as it related to relators' request to depose Solicitor General Benjamin Flowers. Respondent argues that the magistrate's order "misapplies the law, misstates the record, and must be set aside." (Mot. to Set Aside at 5.)

{¶ 40} In *State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 4, the Supreme Court of Ohio held that four factors must be weighed when determining whether to order the deposition of a high-ranking elected official. The factors to be weighed are "the substantiality of the case in which the

deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures provide the information sought." *Id.*, quoting *Monti v. State*, 151 Vt. 609, 613-14 (1989).

{¶ 41} Respondent first argues that the magistrate "fails to say" what the substantiality of the case even is. (Mot. to Set Aside at 7.) The magistrate stated: "The question of whether the Ohio Attorney General's documents and materials pertaining to his participation in the activities of organizations related to, but not officially a part of, his duties is facially important enough to support a deposition in this case if the other factors are met." (Mag.'s Order at 9.)

{¶ 42} According to respondent, "[t]his difficult-to-parse sentence neglects to define the underlying 'question' the magistrate found substantial." (Mot. to Set Aside at 7.) Thus, "Respondent suggests that the underlying question is whether the documents found in the office's search for records and submitted for *in camera* review are records or non-records." (Emphasis sic.) *Id.* We think this interpretation would be obvious after reading the citation immediately preceding the sentence that respondent is unable to parse. The magistrate referred to *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Office*, 153 Ohio St.3d 63, 2017-Ohio-8988, ¶ 10, which acknowledged that the question of "whether autopsy reports in open homicide investigations are public records and therefore available for public inspection" was an issue of "great public importance." Thus, even the question of whether or not a document qualifies as a public record under R.C. 149.43 may be considered of great public importance. *Id.* We find no fault with the conclusion that the issue of whether the documents relators seek are public records is one of great public importance, and this supports a finding of substantiality under the first *Brunner* factor.

{¶ 43} The second *Brunner* factor to consider is "the degree to which the witness has first-hand knowledge or direct involvement." *Brunner* at ¶ 4. The magistrate concluded that "the definition of what constituted responsive documents was necessarily the primary defining factor that underlay the ministerial or clerical process of a search conducted by respondent's staff, and respondent is the only person who can explain the elaboration of that definition." (Mag.'s Order at 9.)

{¶ 44} Respondent criticizes the magistrate's assertion: "Even assuming this statement correctly conveys what sort of first-hand knowledge a public records case calls for, the statement does not fit the factual record." (Mot. to Set Aside at 9.) As support, he cites his affidavit claiming that he forwards all public records "from his personal emails and texts to his AGO account," and the fact that initial searches by his staff failed to uncover "any responsive records." *Id.* at 9-10. This argument blurs the distinction between the definition of a public record, which is a legal conclusion, with the results of keyword searches. A database search might uncover documents, but someone must make the determination of whether those documents qualify as a public record under R.C. 143.49. Relators' complaint was prompted by respondent's refusal to provide records because he asserted that they both did not exist and did not qualify as public records. The magistrate was not wrong in assuming that respondent himself has firsthand knowledge of the grounds for taking this position.

{¶ 45} Respondent's assertion concerning the record has also been superseded by its development since filing his motion. The emails unearthed in response to RFP 11 demonstrate that he not only forwards emails to his state account from his private ones, but that he also sends them to his private account. (Relators' Supp. Memo, Exs. 1C & 1D.) This is inconsistent with the assertion in his affidavit that emails are only forwarded to his state account. If anything, the indicia of respondent's firsthand knowledge of the records relators seek has grown since the magistrate ordered his deposition.

{¶ 46} Under the third *Brunner* factor, "the probable length of the deposition and the effect on government business if the official must attend the deposition" must be considered. *Brunner* at ¶ 4. The magistrate stated that respondent "presents no real argument that a reasonably conducted deposition, arranged at his convenience, would disrupt the conduct of his official duties." (Mag.'s Order at 9.)

{¶ 47} Respondent claims, without citation to where in the record it exists, that this court "has received the Attorney General's calendar and can see for itself that a deposition, building in time for preparation with and without counsel, document review, and transcript review, would disrupt his packed, travel-intensive schedule."<sup>1</sup> (Mot. to Set Aside at 11.) This

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<sup>1</sup> The only exhibit attached to respondent's Motion to Set Aside is 34 pages documenting the Attorney General Office's document retention schedules.

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claim is difficult to evaluate without a more concrete illustration of the burden a short deposition would impose. A short deposition is what relators envision, as they cite to the fact that the other three depositions conducted in this case clocked in at around two hours each. (Relators' Memo in Opp. at 14.) They also offer to take the deposition remotely at respondent's convenience. *Id.* We cannot conclude that the third *Brunner* factor weighs against upholding the magistrate's order.

{¶ 48} The final factor to consider is "whether less onerous discovery procedures provide the information sought." *Brunner* at ¶ 4. The magistrate concluded that "there are not" because respondent "is, ultimately, the only person qualified to explain the relation between his RAGA and RLDF activities and the public functions of the office." (Mag.'s Order at 9.)

{¶ 49} Respondent argues that the magistrate's reasoning "misses the point" because he "confuses discovery into the existing responsive records, which is permissible, with discovery into relationships, which is not." (Mot. to Set Aside at 12.) Respondent cites the definition of a public record under R.C. 149.011(G), ("any document, device, or item, regardless of physical form or characteristic, including an electronic record \* \* \* created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office"), as the sole support for this contention.

{¶ 50} Respondent's attempt to cabin the definition of what is permissible discovery with public records law is, by now, a familiar argument in the parties' dispute. For the reasons previously discussed, we reject this artificial limitation. Furthermore, as relators point out, it is respondent's relationship with the organizations in question that he has consistently pointed to as the basis for asserting that the documents they seek are not public records. (Relators' Memo in Opp. at 16.) Relators are entitled to probe these justifications, and the answers are not available through less onerous discovery procedures.

{¶ 51} After consideration of the *Brunner* factors, we conclude that the magistrate properly ordered his deposition. Respondent is not entitled to have the magistrate's order set aside on any of the grounds proposed and is accordingly overruled.

*Motion denied.*

BEATTY BLUNT, P.J., concurs.  
KLATT, J., dissents.

KLATT, J., dissenting.

{¶ 52} Because I would grant respondent's motion to set aside the magistrate's order pursuant to Civ.R. 53(D)(2)(b), I respectfully dissent.

#### **A. Deposition of the Ohio Attorney General**

{¶ 53} Before permitting the deposition of a high-ranking government official, the Supreme Court of Ohio appears to require "extraordinary circumstances" to justify the deposition. *State ex rel. Summit Cty. Republic Party Executive Commt. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 3. In describing the criteria for assessing whether extraordinary circumstances justify the deposition, the Supreme Court stated:

"[T]rial courts should weigh the necessity to depose or examine an executive official against, among other factors, the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures provide the information sought." *Monti v. State* (1989), 151 Vt. 609, 613, 563 A.2d 629, 632. See also *State ex rel. Paige v. Canady* (1996), 197 W.Va. 154, 475 S.E.2d 154, paragraph four of the syllabus.

*Id.* at ¶ 4.

{¶ 54} In the case at bar, relators requested "all records that pertain to the Republican Attorney General Association (RAGA), Rule of Law Defense Fund [RLDF], and the RAGA Winter Meeting held February 29 through March 2" from the Ohio Attorney General and his Chief of Staff. (Dec. 1, 2020 Compl. at ¶ 5.) This public records request, and the attorney general's response thereto, is the subject of this mandamus action. In my view, based upon the criteria set forth in *Brunner*, there is nothing about this case that presents "extraordinary circumstances" justifying the deposition of Ohio Attorney General.

{¶ 55} First, the underlying legal issue in this case is far from extraordinary or substantial. Whether or not certain documents are potentially responsive to relators' public records request, or are not, public records under Ohio law are a straightforward legal

question. Nor is there anything about relators' public records request itself that presents a context that even remotely suggests the presence of extraordinary circumstances.

{¶ 56} Second, it's clear that the attorney general lacks firsthand knowledge of the public records request and lacks firsthand knowledge of how his staff conducted the search for potential responsive documents. Nor was the attorney general involved in the determinations of what documents were or were not deemed public records. These uncontested facts are in marked contrast to the facts presented in *Brunner*, where the secretary of state *had* firsthand knowledge of an important electoral decision. Here, it is difficult to conceive what testimony the attorney general could offer relevant to the legal issue before the court.

{¶ 57} The absence of substantiality and the attorney general's lack of firsthand knowledge must also be considered in assessing the effect on government business if the relators are permitted to depose the attorney general. The deposition of a high-ranking governmental official like a governor or attorney general is a major event and significantly intrudes upon government business. The time needed for deposition preparation, document review, consultation with counsel, and transcript review is substantial, and such a deposition would be a major distraction from official duties. This negative impact on governmental business seems particularly unjustified given the attorney general's lack of involvement with this public records dispute.

{¶ 58} Lastly, I believe that the relators has available, and has in fact exercised, far less onerous discovery devices to acquire information relevant to this public records dispute. Relators has already taken the deposition of a number of employees of the attorney general's office who were directly involved in responding to its public records request. Relators has also availed itself of other discovery devices provided by the civil rules. There are simply no extraordinary circumstances presented here that justify taking the deposition of the Ohio Attorney General.

### **B. Compelling Discovery Responses**

{¶ 59} I would also grant respondent's motion to set aside the magistrate's order to the extent that it compels responses to the disputed discovery requests. These discovery requests are not proportional to the issue before the court and they are only remotely relevant to relators' request for documents relating to RAGA, RLDF, or the RAGA winter

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meeting. Moreover, the scope of the search required to respond to the discovery goes far beyond the scope of the public records request at issue here. Given the limited nature of the underlying public records dispute, the disputed discovery requests are not sufficiently relevant or proportional to the needs of the case in light of the burden and expense of compliance. It appears that relators' discovery requests are designed to elicit information about which the relators simply has an interest, rather than information that is likely to be relevant to the public records dispute at issue here.

{¶ 60} For the foregoing reasons, I respectfully dissent.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel.,	:	
Center for Media and Democracy et al.,	:	
	:	
Relators,	:	
	:	
v.	:	No. 20AP-554
	:	
The Office of Attorney General David Yost,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

**MAGISTRATE' S ORDER**

{¶ 61} Relator submitted a public records request to respondent Dave Yost seeking the following:

[A] copy of all records that pertain to the Republican Attorneys General Association (RAGA), Rule of Law Defense Fund [RLDF], and the RAGA Winter Meeting held February 29 through March 2 from the Office of Attorney General Dave Yost. The scope of this request includes the Attorney General and Chief of Staff. The scope of this request should include but is not limited to emails, attachments, both sent and received, all draft records, briefing books, memos, notes, minutes, scheduling records, text messages, other correspondence (internal and external) and all other records.

(Relator's Compl. at 3-4.)

{¶ 62} Respondent's office answered with an email dated March 30, 2020 stating that the requested information was "exempt from disclosure as it is not a record of this office, pursuant to *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993)." Relators restated their request, and received further response by email dated July 13, 2020 which appeared to shift the emphasis of respondent's response

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to the public records request to assert that the records were non-existent rather than merely exempt:

The Ohio Attorney General's Office reviewed your request and determined that no such email, text, drafts, memo, minutes, or other correspondence records exist with the Attorney General and his Chief of Staff and while we understand your position regarding your request, please note that any other information does not meet the definition of a record as defined by Ohio's Public Records Act (Ohio Revised Code Section 149.43). See *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384 (public office has no obligation to produce items that do not document the organization, functions, policies, procedures, operations, or other activities of the office.)

{¶ 63} Relators commenced this mandamus action under R.C. 149.43(C)(1)(b) to compel compliance with the Public Records Act. Discovery proceedings ensued. Relators conducted depositions of four members of respondent's staff and served interrogatories and requests for production. Respondent provided his own affidavit and that of several staff members. Relators sought to depose respondent personally as well as Solicitor General Benjamin Flowers.

{¶ 64} Discovery reached an impasse. Counsel and the magistrate held a status conference leading to the present cross-motions for discovery rulings. Respondent has submitted a number of documents under seal for in camera inspection.

{¶ 65} Relator seeks to obtain expanded answers to interrogatories already served and to expand the classes of records made available to the magistrate for in camera inspection.

{¶ 66} Respondent seeks a protective order for himself and Solicitor General Flowers to avoid submitting to depositions.

{¶ 67} The parties differ on the extent to which relators may pursue discovery to establish that the described records exist and should be made available. Original actions seeking a writ of mandamus from this court are governed by the Ohio Rules of Civil Procedure. Civ.R. 26(B) permits the discovery of all non-privileged matter "that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance

of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The standard used to determine relevancy for purposes of discovery " 'is much broader than the test to be utilized at trial. It is only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence.' " *Tschantz v. Ferguson*, 97 Ohio App.3d 693, 715 (10th Dist.1995), quoting *Icenhower v. Icenhower*, 10th Dist. No. 75AP-93 (Aug. 14, 1975). With respect to depositions, Civ.R. 30(A) provides that after the filing of any complaint, "any party may take the testimony of any person, including a party, by deposition upon oral examination."

{¶ 68} Addressing first relators' complaints regarding interrogatory answers and requests for production, relators specifically quote and object to respondent's answer to Interrogatory Two:

Identify each and every person employed by the Office of the Ohio Attorney General who did any of the following in the years 2019-2021:

- a. Communicated in any form with representatives, officers, and/or employees of RAGA and/or RLDF.
- b. Attended any meeting and/or conference sponsored in whole or part by RAGA and/or RLDF.
- c. Requested, received, and/or assisted in processing any reimbursement of expenses by RAGA and/or RLDF.
- d. Drafted and/or assisted in drafting documents (including briefs, letters, and/or press releases) that involved other Republican state attorneys general and/or their offices in any way (including by signing, co-authoring, drafting, and/or revising).
- e. Received, sent, and/or were copied on requests to and/or from RAGA, RLDF, and/or other Republican state attorneys generals and/or their offices seeking cooperation and/or participation in litigation, amicus curiae filings, lobbying, petition, and/or corresponding with government bodies.
- f. Accessed any RAGA and/or RLDF online "briefing room" or other file-sharing system sponsored, hosted, and/or arranged by RAGA and/or RLDF.

{¶ 69} The Respondent stated in response:

Respondent objects to this Interrogatory, including all subparts, as irrelevant, overly broad, unduly burdensome and not proportional to the needs of the case. Although Relators' public records request specifically targeted the records of the Attorney General and his Chief of Staff, this Interrogatory includes "each and every person employed by the Office of the Ohio Attorney General." By including hundreds of employees beyond the Attorney General and Chief of Staff, this Interrogatory is not proportional to the needs of this case, which is limited to whether the Attorney General and Chief of Staff have records that are responsive to Relators' public records request. Moreover, the time period of this Interrogatory encompasses 2019-2021, which is overly broad, unduly burdensome, and not proportional to the needs of the case, which is limited to public records that actually existed at the time of Relator's [sic] request. See, e.g., *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30, *Sinclair Media III, Inc. v. City of Cincinnati*, Ct. of Cl. 2018-01357PQ, 2019-Ohio-2623, ¶ 6 ("[A] requester must seek specific, existing records."). Relator's [sic] request was dated March 10, 2020, and this Interrogatory seeks information postdating the request by more than a year.

More fundamentally, this Interrogatory seeks the identification of persons, not specific public records, which is not the sole subject of this case. The Public Records Act does not mandate that a public office seek out and provide information of interest to the requester, such as the identification of certain persons. See, e.g., *State ex rel. McElrath v. City of Cleveland*, 8th Dist. Cuyahoga No. 106078, 2018-Ohio-1753, ¶¶ 18-19 (requests seeking information such as the names of officers involved in a police report and information about specific officers were not proper). Because this Interrogatory seeks the identification of certain persons, as opposed to specific and existing records, it is irrelevant, overly broad, unduly burdensome, and not proportional to the needs of this case.

Absent a court order, Respondent will not answer this Interrogatory, including its subparts.

{¶ 70} The magistrate agrees with relators that part of respondent's answer to Interrogatory Two confuses matters by considering the interrogatory as another public records request rather than discovery pursued by relators in order to ascertain the

public/non-public nature of the records sought in the underlying request. While respondent is correct that "the Public Records Act does not mandate that a public office seek out and provide information of interest to the requester, such as the identification of certain persons," discovery proceedings in this mandamus action might require exactly that. Relators are not limited to the described records in the underlying public records request when pursuing information that will help determine whether the requested records are in fact public records, and whether any potentially responsive records have been withheld. Relators are entitled to reasonable discovery to test respondent's claim that his relationship with RAGA and RLDF is a purely personal matter unrelated to the substantive work of his office.

{¶ 71} The magistrate also disagrees with respondent's assertion that Interrogatory Two is overbroad in relation to the core issue in the case. Again, relators are entitled to obtain discovery to challenge the factual basis for respondent's refusal to provide the requested records, and the interrogatory request is proportional to that determination. *See, generally, State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 36-37; *State ex rel. Bott Law Group, LLC v. Ohio Dept. of Natural Resources*, 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 18. Identifying staff who, in the course of their agency duties, attend RAGA- and RLDF-related functions is relevant to evaluating respondent's claim that these organizations are unrelated to his official duties. Relators are therefore entitled to an order compelling an appropriate response to Interrogatory Two providing the requested information.

{¶ 72} Similarly, Interrogatory Four asks respondent to identify RAGA and RLDF events attended by respondent or the agency's staff during the period from January 14, 2019 through the present, and Interrogatory Five asks respondent to identify court filings, agency submissions and other interactions with public officials for which RAGA or RLDF provided drafting or other assistance or input. Respondent's answer to both tracks the general objections expressed in his response to Interrogatory Two. Both Interrogatory Four and Interrogatory Five, as with Interrogatory Two, are within the scope of discovery in a public records case and respondent's outright refusal to answer is improper. The magistrate therefore grants the motion to compel as to Interrogatories Four and Five.

{¶ 73} Interrogatory Six asks broadly for information regarding RAGA or RLDF's impact on official positions and actions taken by respondent: "[A]ll official positions and actions taken by Respondent with respect to which the Respondent and/or any of Respondent's employees communicated with any representative and/or employee of RAGA and/or RLDF during any step of the decision-making or implementation processes." (Relators' Ex. 4 at 14.) Respondent again inappositely objects that this interrogatory seeks information that would not itself be subject to a public records request. More effectively, however, respondent characterizes this interrogatory as overbroad on its face. The magistrate agrees. Interrogatory Six requires respondent to identify "official positions and actions," arguably the entirety of his office's work product, and then sort through these to identify any influence attributable to respondent's participation in RAGA or RLDF, an inherently vague or subjective factor. This interrogatory is both overbroad and unduly burdensome in the context of the case, and the magistrate therefore denies relators' motion to compel as to Interrogatory Six.

{¶ 74} Relators served 16 requests for production. Respondent objected to all as irrelevant, overbroad, unduly burdensome, and not proportionate to the needs of the case. Respondent again bases many of these objections on the erroneous premise that no document need be produced in discovery if it would not have been directly responsive to the underlying public records request. While rejecting that premise, the magistrate must balance the broader scope of discovery against the court's past rulings that generally held the position that a requestor may not circumvent the procedures and restrictions of the Public Records Act by obtaining through discovery the very materials he was not entitled to receive in his public records request. In camera submission and examination provide the means to review the appropriateness of redactions and withheld documents in a public records action. *Henneman v. Toledo*, 35 Ohio St.3d 241 (1988); *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 57 Ohio St.3d 77 (1991).

[Nonetheless,] [a]s the Ohio Supreme Court recognized in *Henneman* \* \* \*, the Ohio Public Records Act does not create an 'absolute privilege' from discovery and 'does not protect records from a proper discovery request in the course of litigation, if such records are otherwise discoverable.' 35 Ohio St.3d 241, 520 N.E.2d 207, 210-11 (Ohio 1988). In fact, the list of documents that are not considered 'public record[s]' for the purpose of the Ohio Public Records Act serves only 'to exempt

the records described therein from the requirement of availability to the general public on request.' *Id.* at 211; *see also Mattox v. Village of Geneva on Lake*, No. 1:05-CV-2325, 2006 U.S. Dist. LEXIS 91952, 2006 WL 3762096, \*1-2 (S.D. Ohio Dec. 20, 2006) (holding that Ohio Rev. Code § 149.43 'does not provide an absolute privilege against discovery requests in civil litigation').

*Rose v. State Farm Fire & Casualty Co.*, S.D. Ohio No. 2:10-CV-874, 2011 U.S. Dist. LEXIS 142750, at \*4-5 (Dec. 9, 2011).

{¶ 75} For requests 1-5, 9, 15, and 16, respondent states that despite the above objections, respondent will produce the requested documents for in camera inspection by the magistrate. In furtherance of this commitment, respondent has already submitted a substantial quantity of material under seal. Because other aspects of this order may result in more such submissions, the magistrate cannot determine at this time whether this submission constitutes the entirety of materials sought in these requests. The magistrate therefore concludes that no order compelling discovery can be suitably tailored at this time for the materials sought in requests 1-5, 9, 15, and 16.

{¶ 76} Request for Production 13 sought the record retention schedules of respondent's office. This material has been provided, and no order compelling discovery is necessary.

{¶ 77} Requests for Production 10 and 11 seek the production of emails related to the subject matter of certain targeted search terms including RAGA and RLDF, and certain names. Again, respondent objected to the requests as unduly burdensome and not proportional to the needs of the case. For these interrogatories, relators' motion to compel is granted to a limited extent. Respondent will provide a detailed answer regarding which of the search terms would generate unduly broad results, and, consistent with the deposition testimony of respondent's scheduling assistant, Amy Sexton, conduct searches of personal and public email accounts containing the pertinent information.

{¶ 78} Requests for Production 6, 7, and 8 seek all documents from all staff related to planning, attendance, preparation, and signature of letters, amicus briefs, and events attended or prepared in conjunction with other RAGA members. For the reasons stated

in evaluating relators' Interrogatory 2, the motion to compel is granted for these and respondent will furnish the requested documents.

{¶ 79} Request for Production 12 seeks the timesheets for staff listed in response to Interrogatory 2. The magistrate agrees with respondent that this request is overbroad and unduly burdensome because it will require production of large amounts of material entirely unrelated to relators' inquiry into respondent's claim that his relationship with RAGA and RLDF is a purely personal matter unrelated to the substantive work of his office. Moreover, wholesale production of timesheets will likely require extensive redaction of personal identifiers, litigation materials, and other materials that are exempt or privileged. The magistrate denies the motion to compel as to Request for Production 12. For the same reasons the magistrate denies the motion to compel as to Request for Production 14, which seeks all personnel and telephone rosters for respondent's office. The pertinent staff may be identified through other interrogatories and requests for production discussed above, and the entire roster of the attorney general's office is unnecessary.

{¶ 80} Relator also seeks to expand the scope of in camera review by the magistrate of any documents that relators would deem potentially responsive to the discovery process but respondent considers privileged, exempt, or otherwise subject to dispute. The rulings set forth above essentially yield this result, and the motion to extend the scope of in camera review is granted to the extent necessitated by those rulings.

{¶ 81} Turning to respondent's motion for a protective order, relators seek to depose respondent personally and respondent's Solicitor General Benjamin Flowers.

{¶ 82} The law generally discourages gratuitous depositions of high-ranking public or elected officials because these proceedings present a high risk of pursuit for nuisance value—intrusive discovery and compelled testimony may needlessly disrupt the day-to-day operations of government. *In re Stone*, 986 F.2d 898, 904 (5th Cir.1993). In Ohio, a decision on whether to compel personal deposition testimony by high-ranking officials will be determined based upon "the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures

provide the information sought." *State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 4. In *Brunner*, the Supreme Court of Ohio determined that Jennifer Brunner, then the Secretary of State of Ohio, would sit for deposition because the case presented a matter of great public interest and inquired into the exercise of discretion by the secretary of state herself rather than staff or agency. The court noted that a deposition need not be lengthy under the circumstances and other methods would not yield the pertinent information.

{¶ 83} Respondent first argues that a public records case is inherently not important enough to meet the substantiality factor in *Brunner*. The frequency with which the Supreme Court of Ohio has taken up such cases belies this assertion. *See, e.g., State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Off.*, 154 Ohio St.3d 63, 2017-Ohio-8988, ¶ 10 ("This case involves a matter of great public importance: whether autopsy reports in open homicide investigations are public records."). The question of whether the Ohio Attorney General's documents and materials pertaining to his participation in the activities of organizations related to, but not officially part of, his duties is facially important enough to support a deposition in this case if the other factors are met.

{¶ 84} Respondent next argues that neither he nor the solicitor general can provide relevant information through deposition because neither "has first-hand knowledge of the search for responsive records in this case" conducted by subordinate staff. (Respondent's June 18, 2021 Mot. for Protective Order at 12.) Relators persuasively counter that the definition of what constituted responsive documents was necessarily the primary defining factor that underlay the ministerial or clerical process of a search conducted by respondent's staff, and respondent is the only person who can explain the elaboration of that definition.

{¶ 85} Turning to the question of whether there are less burdensome forms of discovery that will produce all the information to which relators are entitled, the state of discovery in this case argues that there are not. The magistrate concludes that respondent is, ultimately, the only person qualified to explain the relation between his RAGA and RLDF activities and the public functions of his office. Respondent has to date only provided an affidavit asserting only that no "records of my office in any of my personal devices or private accounts that would have been responsive to this request." (Yost Aff.

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at ¶ 9.) That answer, of course, refuses the question: By stating that no responsive documents exist because any documents that do exist are not records of his office, respondent evades any inquiry by relators or the court into the status of *potentially* responsive documents that do exist. There is no question that respondent, far more than his staff, has the pertinent information regarding the extent to which participation in RAGA and RLDF activities should be considered within the scope of his public duties and activities. There do not appear to be, therefore, less onerous discovery procedures that will provide the information sought.

{¶ 86} Finally, respondent presents no real argument that a reasonably conducted deposition, arranged at his convenience, would disrupt the conduct of his official duties.

{¶ 87} The magistrate therefore concludes that respondent's protective order as to himself must be denied. Relators having made no substantial argument with respect to deposition of Solicitor General Flowers on the above-defined factors, the protective order is granted as to the solicitor general.

{¶ 88} In summary, relators' motion to compel interrogatory answers and expand production of documents for in camera inspection is granted in part and denied in part, and respondent's motion for a protective order is denied as to himself and granted as to Solicitor General Flowers.

/S/ MAGISTRATE  
MARTIN L. DAVIS