IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTRODUCTION

Compelling high-ranking government officials to prepare for and attend depositions takes them away from their important duties and harms the public. For this reason, courts across the country—including this Court—require a party seeking to depose a high-ranking official to show extraordinary circumstances justifying the deposition.

The court of appeals disregarded that requirement. It ruled that the magistrate had properly ordered Attorney General Yost to sit for a deposition, but never determined that extraordinary circumstances existed. Nor did it even consider the question. Instead, it applied the factors this Court set forth in *State ex rel. Summit County Republican Party Executive Committee v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, 883 N.E.2d 452, as a simple balancing test. In so doing, it failed to apply the correct standard, ignored the purpose of the *Brunner* factors, and gave insufficient weight to the strong policy reasons behind the extraordinary circumstances standard. It also misapplied the *Brunner* factors. If left uncorrected, the court of appeals' decision will interfere not only with Attorney General Yost's ability to carry out his duties, but the ability of other high-ranking officials who depend on the essential safeguard the extraordinary circumstances standard provides. This Court should reverse.

STATEMENT OF *AMICI* INTEREST

Amici curiae, the States of Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Virginia, respectfully submit this brief in support of Appellant The Office of Attorney General David Yost. *Amici* States have an interest in protecting their senior officials from unnecessary and burdensome depositions. "Courts have reasoned that giving depositions on a regular basis would impede high-ranking governmental officials in the performance of their duties, and thus contravene the public interest." *Alberto v. Toyota Motor Corp.*, 289 Mich.App. 328, 796 N.W.2d 490, 493 (2010). *Amici* States are also frequent recipients of public records requests. This case involves the question of when a party can turn a public records request into the compelled deposition of a high-ranking state official and therefore implicates *Amici* States' common interest. *Amici* States submit this brief in support of Appellant because the answer is that depositions of high-ranking government officials should only be compelled in extraordinary circumstances.[1]

STATEMENT OF THE CASE AND FACTS

Public records request. In March 2020, Appellees Center for Media and Democracy and Richard Armiak ("CMD") submitted a public records request to Appellant Office of

[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

Attorney General David Yost ("the AGO"). Compl. ¶ 5, R.5.[2] The request sought 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." *Id.* The request further specified that the "scope of this request includes the Attorney General and Chief of Staff." *Id.*

Approximately three weeks later, the AGO responded that it had reviewed the request and "determined that all information is exempt from disclosure as it is not a record of this office." Compl., Ex. 1, R.6.

In June 2020, CMD submitted a request for reconsideration. *Id.* The AGO responded the following month that it had reviewed the 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." Compl., Ex. 2, R.7. The AGO further stated that "any other information does not meet the definition of a record as defined by Ohio's Public Records Act." *Id.*

Complaint for mandamus and discovery disputes. CMD filed a complaint for a writ of mandamus in the court of appeals below. Compl., R.5. CMD alleged in the complaint that the AGO had "deliberately withheld written communications and other records documenting the participation" of Attorney General Yost and his staff "in activities of RAGA and RLDF," in violation of the Ohio Public Records Act. *Id.* Compl. ¶¶ 28, 30, R.5.

[2] *Amici* obtained a copy of the complete record on appeal from the Ohio Supreme Court Clerk's Office.

CMD sought a writ of mandamus directing the AGO "to provide the requested records without further delay." Compl. at 13, R.5.

Discovery commenced and CMD deposed four AGO employees: the Attorney General's chief of staff, scheduler, and executive assistant, and a paralegal who works with the Public Records Unit. *See* Marrison Dep., R.71; Sexton Dep., R.75; King Dep., R.74; Clayton Dep., R.70. The Attorney General's scheduler and executive assistant described how they had searched the Attorney General's work email, paper correspondence, records, and calendar. Sexton Dep. 17:20-18:13, R.75; King Dep. 16:7-19, 28:7-23, R.74. The executive assistant did not find any responsive records. King Dep. 24:11-16, 26:19-23, 28:7-12, R.74; King Aff. ¶ 6, R.72.[3] The scheduler found some responsive calendar entries, which she forwarded to the Public Records Unit. Sexton Dep. 12:7-18, R.75. The Public Records Unit determined the calendar entries did not qualify as records within the meaning of the Public Records Act. *See* Compl., Ex 1, R.6; Compl., Ex. 2, R.7. The Attorney General's chief of staff likewise described how he had searched his own records but found nothing responsive. Marrison Dep. 16:21-17:8, R.71. The Attorney General did not participate in the records search, nor was he consulted during it. King Dep. 29:5-7, R.74;

[3] After the magistrate later ordered the AGO to run a particular set of search terms on the Attorney General's records, the executive assistant ran the terms and found a small number of documents that may have been responsive to the initial public records request. Resp't's Combined Resp. to Relators' Mot. for Leave to File a Supplemental Opp. & Mot. for Leave to File Supplemental Aff. *Instanter* 4-6, R.114. The AGO produced those documents to CMD. *Id.* at 5 The executive assistant submitted an affidavit stating that, to the best of her knowledge, she did not locate those documents during her earlier search of the Attorney General's records. *Id.*, Ex. 1.

King Aff. ¶ 7, R.72; Sexton Dep. 19:2-7, R.75; Sexton Aff. ¶ 7, R.73; Yost Aff. ¶¶ 4-5, 8, R.76.

CMD also sought to depose the Attorney General and Solicitor General. The AGO objected and moved for a protective order to prevent the depositions. Resp't Dave Yost's Mot. for Protective Order ("Mot. for Protective Order"), R.69. The AGO included an affidavit from the Attorney General stating that he forwards any AGO records he receives on his personal text messages or email account to an office account and that after CMD's suit was filed, he searched his personal texts and emails and did not find any responsive records. Yost Aff. ¶¶ 6-7, 9, R.76. The magistrate denied the AGO's motion for a protective order as to the Attorney General but granted it as to the Solicitor General. Magistrate's Order, R.93.[4]

Court of Appeals decision. The AGO moved the court of appeals to set aside the magistrate's order. Resp't Dave Yost's Mot. to Set Aside Magistrate's Order Compelling Disc. & Denying Mot. for Protective Order ("Mot. to Set Aside Order"), R.96. A divided panel of the Tenth District denied the motion. *State ex rel. Ctr. for Media & Dem. v. Att'y Gen.*, --- Ohio App.3d ---, 2023-Ohio-364, --- N.E. 3d --- (10th Dist.) ("App. Op."). Citing this Court's decision in *State ex rel. Summit County Republican Party Executive Committee v. Brunner*, 117 Ohio St. 3d 1210, 2008-Ohio-1035, 883 N.E.2d 452, in which this Court

[4] CMD additionally served a number of interrogatories and document requests. After the parties reached an impasse, CMD moved to compel. The magistrate granted in part and denied in part the motion, and the court of appeals rejected AGO's motion to set aside the magistrate's order on those points. Although the court of appeals' ruling as to the motion to compel is also before this Court on appeal, *Amici* States focus their brief on the issues related to the Attorney General's deposition.

set forth factors for evaluating whether "high-ranking government officials" should be required to sit for a deposition, *id.* ¶¶ 3-4, the majority held that the magistrate had "properly ordered" the Attorney General's deposition, App. Op. ¶ 51. First, the majority reasoned that whether a document qualifies as a public record can be a question "of great public importance." *Id.* ¶ 42. Second, it suggested the Attorney General has "firsthand knowledge" of the AGO's reasons for determining that documents weren't responsive to the public records request. *Id.* ¶ 44. Third, the majority assumed the deposition would be "short" and could be taken "remotely" at the Attorney General's convenience. *Id.* ¶ 47. Fourth, it said the AGO's "justifications" for the position that documents pertaining to the Attorney General's involvement in RAGA and RLDF activities are not public records "are not available through less onerous discovery procedures." *Id.* ¶ 50.

Judge Klatt dissented. He began by noting that *Brunner* said there must be "extraordinary circumstances" to justify the deposition of a high-ranking government official. *Id.* ¶ 53 (Klatt, J., dissenting) (quoting *Brunner* at ¶ 3). In Judge Klatt's view, "nothing about this case" presented such circumstances. *Id.* ¶ 54.

Judge Klatt then turned to the *Brunner* factors. First, he said the "underlying legal issue in this case"—"[w]hether or not certain documents are potentially responsive" to CMD's public records request—was a "straightforward legal question" that was "far from extraordinary or substantial." *Id.* ¶ 55. Second, he said it was "clear" the Attorney General "lacks firsthand knowledge of how his staff conducted" the records search and was not involved in determining which documents "were or were not deemed public records." *Id.* ¶ 56. Third, he reasoned that the "time needed for deposition preparation, document review,

consultation with counsel, and transcript review is substantial" and that a deposition "would be a major distraction from official duties." *Id.* ¶ 57. Fourth, he emphasized that CMD had already taken a number of depositions of other "employees of the attorney general's office who," unlike the Attorney General, "were directly involved in responding to its public records request." *Id.* ¶ 58. Thus, he concluded, "[t]here are simply no extraordinary circumstances presented here that justify taking the deposition of the Ohio Attorney General." *Id.*

This appeal followed.

ARGUMENT

Amici Curiae States' First Proposition of Law:

A party must demonstrate extraordinary circumstances to justify the deposition of a high-ranking government official.

1. "Depositions are an extensively used and rampantly abused discovery tool." A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 Geo. J. Legal Ethics 1, 1 (1998). Depositions of "apex" or high-ranking individuals in particular "raise tremendous potential for discovery abuse and harassment." Scott A. Mager & Elaine J. LaFlamme, *At the "Apex" of the Problem: Stopping the Abuse of Requests for Depositions of High Ranking "Apex" Executives*, 23 No. 3 Trial Advoc. Q. 19, 19 (2004). Depositions of high-ranking government officials also implicate serious separation of powers concerns and harm the public by diverting officials from their important duties.

As a result, courts across the country—including this Court—require a party seeking to depose a high-ranking government official to demonstrate "extraordinary" or

"exceptional" circumstances justifying the deposition. *See, e.g.*, *Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, 883 N.E.2d 452, at ¶ 3; *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (listing cases); *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (same); *Clarke v. State Att'y Gen.'s Off.*, 133 Wash.App. 767, 138 P.3d 144, 151 (2006); *Commonwealth v. Vartan*, 557 Pa. 390, 733 A.2d 1258, 1266 (1999); *see also* Fern L. Kletter, Annotation, *Deposition of High-Ranking Government Officials*, 15 A.L.R. 3d Art. 5 (2016) (explaining that "[n]early all courts require that a party demonstrate exceptional circumstances justifying the deposition of a high-ranking government official"). Although courts differ somewhat in how they articulate what constitutes extraordinary circumstances, virtually all require parties to "meet a high bar in order to depose high-ranking officials." *In re Off. of the Utah Att'y Gen.*, 56 F.4th 1254, 1259 (10th Cir. 2022).

In Ohio, the extraordinary circumstances inquiry involves consideration of several factors. Under this Court's decision in *Brunner*, courts weigh (1) "the necessity to depose or examine an executive official" against (2) "the substantiality of the case," (3) "the degree to which the witness has first-hand knowledge or direct involvement," (4) "the probable length of the deposition and the effect on government business if the official must attend the deposition," and (5) "whether less onerous discovery procedures provide the information sought." *Brunner* at ¶ 4 (quoting *Monti v. State*, 151 Vt. 609, 563 A.2d 629, 632 (1989)). The burden is on the party requesting the deposition to "make a particularized showing of need." *Monti*, 563 A.2d at 632.

2. The extraordinary circumstances standard serves multiple important interests.

First, it protects separation of powers. *See S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986) (describing the doctrine of separation of powers as "implicitly embedded in the entire framework" of the Ohio Constitution). As the U.S. Court of Appeals for the Eleventh Circuit recognized, "the compelled appearance of a high-ranking officer of the executive branch in a judicial proceeding implicates" significant separation of powers concerns. *In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010). A subpoena issued by a judge to a high-ranking executive official requires the official to spend time away from his or her duties preparing for and attending the deposition. *See id.* "The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam).

Second, the extraordinary circumstances standard preserves the integrity of executive branch decision-making. As the U.S. Supreme Court instructed over eighty years ago, "it [is] not the function of the court to probe the mental processes of" senior executive branch officials. *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941) (quoting *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1936)). Just as the "examination of a judge would be destructive of judicial responsibility," so too "the integrity of the" executive branch process "must be equally respected." *Id.* Because depositions of high-ranking government officials intrude into such officials' thought processes and decision strategies, they should be carefully limited to situations where there has been a showing of exceptional need.

Third, the standard enables high-ranking executive officials to carry out their duties without unwarranted interference. High-ranking government officials "have greater duties and time constraints than other witnesses," and their "time is very valuable." *In re U.S.*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam). Public policy therefore "requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases." *Monti*, 563 A.2d at 631 (quoting *Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983)). "[W]ithout appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation." *Bogan*, 489 F.3d at 423.

State attorneys general in particular are "often drawn into lawsuits." *In re Paxton*, 60 F.4th 252, 258 (5th Cir. 2023). "They cannot perform their duties if they are not personally shielded from the burdens of litigation." *Id.*; *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (per curiam) ("Obviously, high-ranking officials of cabinet agencies could never do their jobs if they could be subpoenaed for every case involving their agency."). "[T]he executive branch's execution of the laws can be crippled if courts can unnecessarily burden [officials] with compelled depositions." *In re U.S. Dep't of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022).

Attorney General Yost leads a large office that performs crucially important work for Ohio and its citizens. Across its ten offices and thirty sections and special divisions throughout the state, the AGO works "to fight crime and help victims heal, to support law enforcement and consumers, to safeguard those in need, and much more." Ohio Att'y Gen., *About the AGO*, https://www.ohioattorneygeneral.gov/About-AG (accessed Apr. 26,

2023). Among other services, the AGO operates the Scientific Committee on Opioid Prevention and Education (SCOPE), "a science-based push to reduce the number of people who succumb to substance-use disorder," and the Human Trafficking Initiative, which seeks to fight the scourge of labor and sex trafficking in Ohio. Ohio Att'y Gen., *SCOPE*, https://www.ohioattorneygeneral.gov/SCOPE (accessed Apr. 26, 2023); Ohio Att'y Gen., *Human Trafficking Initiative*, https://www.ohioattorneygeneral.gov/humantrafficking (accessed Apr. 26, 2023). Other initiatives include providing funding and services to victims of crime, enforcing consumer protection laws, and assisting local law enforcement in fighting organized crime. Ohio Att'y Gen., *About the AGO*, https://www.ohioattorneygeneral.gov/About-AG (accessed Apr. 26, 2023). To carry out these essential functions, Attorney General Yost oversees an agency with 1,500 employees. *Id.* The demands on his time are immense.

The same is true of other attorneys general across the country. *See* Nat'l Ass'n of Att'ys Gen., *State Attorneys General Powers and Responsibilities*, https://www.naag.org/publication/state-attorneys-general-powers-and-responsibilities (accessed Apr. 26, 2023). Like Attorney General Yost, Utah Attorney General Reyes confronts issues of critical importance for Utahns, including opioid addiction, human trafficking, and sexual exploitation of children. Utah Att'y Gen., *Utah Opioid Task Force*, https://attorneygeneral.utah.gov/initiatives/utah-opioid-task-force (accessed Apr. 26, 2023); Utah Att'y Gen., *Utah Trafficking in Persons Task Force*, https://attorneygeneral.utah.gov/initiatives/human-trafficking (accessed Apr. 26, 2023);

Utah Att'y Gen., *ICAC Task Force*, https://www.attorneygeneral.utah.gov/initiatives/icac (accessed Apr. 26, 2023).

The U.S. Court of Appeals for the Tenth Circuit recently granted a petition for a writ of mandamus vacating a district court order requiring the deposition of Attorney General Reyes in a wrongful termination case brought by a former employee of the Utah Attorney General's Office. *In re Off. of the Utah Att'y Gen.*, 56 F.4th at 1255-56. In applying the extraordinary circumstances test, the court noted that the rule "is based on the notion 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." *Id.* at 1259-60 (quoting *Bogan*, 489 F.3d at 423). The Tenth Circuit concluded that the employee did not satisfy the extraordinary circumstances standard because Attorney General Reyes's deposition was not "essential" to the employee's case and the employee had already taken the depositions of those who made the decision to terminate who were "*better* sources of information concerning the termination." *Id.* at 1264.

The Fifth Circuit also recently vacated an order requiring the deposition of Texas Attorney General Ken Paxton. *In re Paxton*, 60 F.4th at 260. In that case, the plaintiffs sought to depose Attorney General Paxton regarding the Texas Attorney General Office's authority to enforce a newly passed law. *Id.* at 255-56. Like the Tenth Circuit, the Fifth Circuit held that other representatives from the Attorney General's Office could clarify the office's enforcement policy. *Id.* at 258. That Attorney General Paxton had made public statements about the law did not give him "unique knowledge" on the subject. *Id.* The court

additionally reasoned that extraordinary circumstances justify the deposition of high-ranking officials only in the "rarest of cases." *Id.* High-ranking government officials cannot perform their important and significant duties "if they are not personally shielded from the burdens of litigation." *Id.* at 258.

So too here. As further described below, Attorney General Yost's deposition is not essential to this case. Appellees already took the deposition of AGO staff who *actually* conducted the search and produced the documents; the AGO staff are *better* sources of information concerning decisions of whether documents were responsive. Given the importance of the work of state attorneys general and their offices, courts should not interrupt their duties with compelled depositions unless doing so is "absolutely essential to the case." *In re U.S. Dep't of Educ.*, 25 F.4th at 703 n.3.

3. This case underscores the importance of the extraordinary circumstances standard. It began with a public records request. The AGO tasked the relevant parties with running searches, those parties turned any potentially responsive records they found over to the Public Records Unit, and the Public Records Unit determined whether those documents qualified as public records under the Ohio Public Records Act. Clayton Dep. 20:6-11, R.70; Marrison Dep. 16:21-17:8, R.71; King Dep. 16:7-19, 28:7-23, R.74; Sexton Dep. 12:7-18, 17:20-18:13, R.75; Compl., Ex 1, R.6; Compl., Ex. 2, R.7. Public officials routinely receive these sorts of requests. Indeed, the Attorney General alone received 38 public records requests directed to him in 2020. Clayton Aff. ¶ 6, R.81.

Dissatisfied with the response it received, CMD filed a complaint for mandamus. It deposed the officials who ran the searches. But that wasn't enough for CMD. It also wants

to depose the Attorney General himself, arguing that "only" the Attorney General has "knowledge that would shed light" on whether documents pertaining to RAGA and RLDF are public records. Relators' Mem. in Opp. to Resp't's Mot. to Set Aside Magistrate's Order Compelling Disc. & Denying Mot. for Protective Order 12, R.100. In so doing, CMD is attempting to bootstrap a public records request—dozens of which are directed to the Attorney General every year—into a compelled deposition that will take the Attorney General away from his official duties and require him to spend hours preparing for, attending, and reviewing the transcript of the deposition. Moreover, any deposition of the Attorney General himself would come after multiple members of his staff have already spent hours searching for and reviewing records and sitting for depositions themselves, and even though the Attorney General *was not even involved* in the records search.

If every public records request could be turned into a deposition of a high-ranking government official, such depositions would quickly become an enormous disruption to public administration at every level. The wheels of government would grind to a halt. The extraordinary circumstances standard ensures that high-ranking officials are not needlessly and routinely pulled away from their official duties to provide testimony in litigation involving their offices—particularly when the subject is something as frequent as a public records request.

***Amici Curiae* States' Second Proposition of Law:**

The Court of Appeals disregarded the extraordinary circumstances standard and misapplied the Brunner *factors.*

1. The court of appeals' decision below did not even mention the extraordinary circumstances standard, let alone acknowledge the need to make a heightened showing to justify the deposition of a high-ranking government official like Attorney General Yost. Although the majority recited the *Brunner* factors, App. Op. ¶ 40, it did so devoid of any recognition that depositions of high-ranking officials are appropriate only in "extraordinary circumstances" or that the purpose of the *Brunner* factors is to determine whether such circumstances exist, *Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, 883 N.E.2d 452, at ¶ 3. Nor did the majority mention, let alone grapple with, the important public policy interests that lie behind the extraordinary circumstances standard. Rather, it treated the *Brunner* factors as a simple balancing test, stripping them of their purpose and divorcing them from the very standard the factors are supposed to inform.

It was left to the dissent to point out that a party must show "'extraordinary circumstances' to justify the deposition" of a high-ranking government official and that the purpose of the *Brunner* factors is to "assess[] whether extraordinary circumstances" exist. App. Op. ¶ 53 (Klatt, J., dissenting). The dissent then worked through the *Brunner* factors, explaining that "there is nothing about this case that presents 'extraordinary circumstances' justifying the deposition of the Ohio Attorney General." *Id.* ¶¶ 54-58. The majority did not respond to the dissent's analysis, nor did it explain why extraordinary circumstances justified the Attorney General's deposition. Rather, it treated the *Brunner* factors as though

they exist in a vacuum. This overarching error contributed to the majority's flawed conclusion that the magistrate had "properly ordered" the Attorney General's deposition. *Id.* ¶ 51 (majority op.).

2. In addition to ignoring the extraordinary circumstances standard, the majority also misapplied the *Brunner* factors.

To start, the majority completely overlooked the first *Brunner* factor, namely, "the necessity to depose or examine" the high-ranking official. *Brunner* at ¶ 4 (quoting *Monti*, 563 A.2d at 632). As the Vermont Supreme Court explained in *Monti v. State*—the case from which the *Brunner* factors derive—"the party requesting the deposition [must] make a particularized showing of need for the deposition." 563 A.2d at 632; *see also In re Off. of the Utah Att'y Gen.*, 56 F.4th at 1264 ("The result of the extraordinary circumstances test will most frequently hinge on whether the party can prove that the deposition is 'essential' to its case. Something is 'essential' if it is not only relevant, but '*necessary*.'" (quoting *In re U.S.*, 197 F.3d 310, 314 (8th Cir. 1999)).

The majority, however, failed to evaluate the need for the Attorney General to sit for a deposition, nor did it consider how important or central to CMD's suit his testimony would be. Although the majority did consider—per the final *Brunner* factor—whether the information sought could be obtained from another source, App. Op. ¶ 50, it did not consider whether the information was necessary to CMD's suit and whether deposing the Attorney General was "necessary to prevent prejudice or injustice" to CMD. *Monti*, 563 A.2d at 632. That omission, like the majority's disregard of the extraordinary circumstances standard, infected the majority's entire analysis because "the necessity to

depose or examine" a high-ranking official is to be weighed "against" the other *Brunner* factors. *Brunner* at ¶ 4 (quoting *Monti*, 563 A.2d at 632). The lower the showing of particularized need, the stronger the showing on the other *Brunner* factors must be.

The majority's application of the other *Brunner* factor was similarly flawed. With regard to the "substantiality of the case in which the deposition is requested," *id.* (quoting *Monti*, 563 A.2d at 632), the majority reasoned that "the question of whether or not a document qualifies as a public record" under the Ohio Public Records Act "*may* be considered of great importance," App. Op. ¶ 42 (emphasis added). But the question is not whether public records *questions* are important generally but whether *this case* is of significant importance. Indeed, if the substantiality of a case were based merely on the inclusion of a public records issue, then every public records case would satisfy this factor. The majority provided no explanation for why *this case* is so important that it constitutes extraordinary circumstances justifying the Attorney General's deposition.

Next, the majority held that the Attorney General has "first-hand knowledge or direct involvement," *Brunner* at ¶ 4 (quoting *Monti*, 563 A.2d at 632), because he has "firsthand knowledge of the grounds" for the AGO's position that responsive records "both did not exist and did not qualify as public records," App. Op. ¶ 44. The majority reasoned that while a database search may uncover documents, "someone" must determine if those documents are responsive. *Id*. But Attorney General Yost was not that "someone." The record shows that the Attorney General did not participate in the records search and was not consulted during the search to determine what was "responsive" or not responsive to

the request. *See* King Dep. 29:5-7, R.74; King Aff. ¶ 7, R.72; Sexton Dep. 19:2-7, R.75; Sexton Aff. ¶ 7, R.73; Yost Aff. ¶¶ 4-5, 8, R.76.

Turning to the "probable length of the deposition and the effect on government business," *Brunner* at ¶ 4 (quoting *Monti,* 563 A.2d at 632), the majority faulted the AGO for not providing a "concrete illustration of the burden a short deposition would impose," App. Op. ¶ 47. But this improperly placed the burden on the AGO, when it is the party *requesting* the deposition that must make a showing of extraordinary circumstances. Furthermore, as the majority acknowledged, the AGO told the court that forcing the Attorney General to sit for a deposition, including "building in time for preparation with and without counsel, document review, and transcript review, would disrupt his packed, travel-intensive schedule." *Id.* ¶ 47 (quoting Mot. to Set Aside Order 11, R.96). The majority's back-of-the-hand treatment of this statement gave insufficient weight to the applicable factor.

Finally, with regard to whether "less onerous discovery procedures provide the information sought," *Brunner* at ¶ 4 (quoting *Monti,* 563 A.2d at 632), the majority concluded the answer was no because the Attorney General had "consistently pointed to" his "relationship with the organizations in question" as "the basis for asserting that the documents" requested were "not public records," and only the Attorney General could explain those relationships, App. Op. ¶ 50. But as explained, the Attorney General had no involvement in the decisions in this case to classify documents as record or non-record. To the extent there are questions about those decisions, the people to ask are the ones who

made those decisions, and those individuals have already been deposed. *See* Clayton Dep., R.70; Marrison Dep., R.71; King Dep., R.74; Sexton Dep., R.75.

In sum, the majority's application of the *Brunner* factors was both incomplete and rife with error. It gave little or no weight to the first *Brunner* factor (the need for the deposition), contradicted the record, and improperly shifted the burden to the AGO.

3. Under a proper application of the *Brunner* factors, CMD has failed to show that extraordinary circumstances justify the deposition of Attorney General Yost.

Starting with the first factor, "the necessity to depose or examine" the Attorney General, *Brunner* at ¶ 4, (quoting *Monti*, 563 A.2d at 632), CMD has made no showing that deposing the Attorney General is "essential" to its case, *In re Off. of the Utah Att'y Gen.*, 56 F.4th at 1264. CMD's complaint hinges on (1) whether there are responsive documents in the Attorney General's and chief of staff's files, and (2) whether those documents are record or non-record. *See* Compl., Ex. 2, R.7. The Attorney General's executive assistant and scheduler have access to the Attorney General's files and ran the searches on those files. King Dep. 16:7-19, 28:7-23, R.74; Sexton Dep. 17:20-18:13, R.75. The Public Records Unit, in turn, made determinations about whether any potentially responsive documents were record or non-record. *See* Compl., Ex 1, R.6; Compl., Ex. 2, R.7. CMD has made no showing that the Attorney General has any "unique information" about those searches or determinations, *In re Paxton*, 60 F.4th at 258, let alone that deposing the Attorney General is "necessary to prevent prejudice or injustice," *Monti*, 563 A.2d at 632. And this is no surprise: as explained, the Attorney General did not participate

in the records search, nor was he consulted during it. *See* King Dep. 29:5-7, R.74; King Aff. ¶ 7, R.72; Sexton Dep. 19:2-7, R.75; Sexton Aff. ¶ 7, R.73; Yost Aff. ¶¶ 4-5, 8, R.76.[5]

Turning to the second *Brunner* factor, "the substantiality of the case," *Brunner* at ¶ 4, (quoting *Monti*, 563 A.2d at 632), Judge Klatt rightly noted in dissent that "the underlying legal issue in this case"—whether there are responsive documents and whether those documents qualify as public records—is "a straightforward legal question," App. Op. ¶ 55 (Klatt, J., dissenting). And it is a question that has been addressed by this Court numerous times in the past. *See* Mot. for Protective Order 17-19, R.69 (citing cases). This contrasts with the important, unusual issue in *Brunner*: a decision by the Secretary of State to reject a person recommended by a local party committee for a county elections board and instead appoint the Secretary's preferred candidate. *Brunner* at ¶¶ 1, 5.

As to the next factor, "the degree to which the witness has first-hand knowledge or direct involvement," *id.* ¶ 4 (quoting *Monti*, 563 A.2d at 632), again, the Attorney General did not participate in the records search and has no first-hand knowledge about the decisions to classify potentially responsive documents as record or non-record. This is the exact opposite of *Brunner*, where the relator challenged a decision of the Secretary of State "herself and not some lower-level employee in her office." *Id.* ¶ 6. In *Brunner*, the Secretary's "personal knowledge and thought process in arriving at her decision" lay "at

[5] Although the Attorney General later performed a search of his personal texts and emails *after* CMD filed suit, that search merely confirmed the absence of responsive records. Yost Aff. ¶ 9, R.76. And in any event, the Attorney General's voluntary decision to search non-office accounts after suit was filed does not make his deposition "essential" to CMD's case, which challenges the AGO's response to CMD's public records request. *See* Compl. ¶¶ 12, 28, 30, R.5. The Attorney General had no involvement in that response.

the heart" of the case. *Id.* Here, by contrast, the Attorney General played no role in the relevant decisions. That lack of involvement weighs heavily against a finding of extraordinary circumstances. *In re Off. of the Utah Att'y Gen.*, 56 F.4th at 1264 (extraordinary circumstances test not satisfied where Utah Attorney General had "*no* involvement or influence in the decision" that was the subject of litigation).

Regarding the next factor, "the probable length of the deposition and the effect on government business," *Brunner* at ¶ 4, (quoting *Monti*, 563 A.2d at 632), the AGO has explained that "a deposition, building in time for preparation with and without counsel, document review, and transcript review, would disrupt" the Attorney General's "packed, travel-intensive schedule." Mot. to Set Aside Order 11, R.96. Moreover, in the depositions already conducted, significant portions of time were spent on questions that had nothing to do with the records search or how record determinations were made. *See, e.g.*, King Dep. 74:12-80:13, R.74 (questions about ethics disclosure forms); *id.* at 111:7-116:11 (questions about travel coordination); *id.* at 63:18-69:23 (questions about attendance at various events). No extraordinary circumstances justify taking the Attorney General away from his important duties for this sort of fishing expedition.

The final *Brunner* factor is "whether less onerous discovery procedures provide the information sought." *Brunner* at ¶ 4, (quoting *Monti*, 563 A.2d at 632). As Judge Klatt correctly explained, CMD has already deposed "a number of employees of" the AGO "who were *directly* involved in responding to its public records request." App. Op. ¶ 58 (Klatt, J., dissenting) (emphasis added). And those officials have already testified about how and where they searched for records and how record classification decisions were made. King

Dep. 16:7-19, 24:11-16, 26:19-23, 28:7-23, R.74; Sexton Dep. 12:7-18, 17:20-18:13, R.75; Marrison Dep. 16:21-17:8, R.71; Clayton Dep. 20:6-11, R.70. Where the information sought can be obtained from other witnesses, deposition testimony from a high-ranking official "is justified only in the 'rarest of cases.'" *In re Paxton*, 60 F.4th at 258 (quoting *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995)). Particularly given the Attorney General's lack of involvement in or first-hand knowledge of the records search to begin with, this is not such a case.

Extraordinary circumstances do not justify the Attorney General's deposition. CMD has not shown that deposing the Attorney General is essential to its case, this suit does not present an unusual or novel legal issue, the Attorney General lacks first-hand knowledge or involvement, and other actors directly involved in the challenged decisions have already testified. Were records requesters able to compel depositions of state attorneys general based on such a thin-to-nonexistent showing, deposition demands would soon multiply without number. Canny opponents would use public records requests as footholds for fishing expeditions, diverting officials away from their important public duties.

There is a reason courts—including this one—require parties to show extraordinary circumstances before putting a high-ranking government official to the significant inconvenience of a compelled deposition. This Court should reject the court of appeals' disregard of that standard, which threatens significant mischief in Ohio and would cause serious disruption elsewhere if adopted by other state courts.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to set aside the magistrate's order denying Appellant's motion for a protective order to prevent Appellees from deposing Attorney General Yost.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, a copy of the foregoing Merit Brief of the States of Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Virginia as *Amici Curiae* in Support of Appellant was served via electronic mail on the following individuals:

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