

IN THE SUPREME COURT OF OHIO

State ex rel. Summit County Republican
Party Executive Committee,

Relator,

vs.

Secretary of State Jennifer Brunner

Respondent.

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:
: Case No. 08-0478
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: Original Action in Mandamus
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MOTION FOR A PROTECTIVE ORDER ON BEHALF OF
OHIO SECRETARY OF STATE JENNIFER BRUNNER

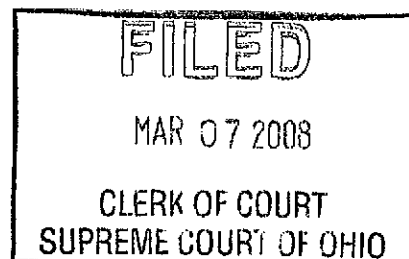
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Now comes Respondent Ohio Secretary of State Jennifer Brunner and, pursuant to S. Ct. Prac. R. X Sec. 2 and Ohio R. Civ. P. 26(C), asks this Court to issue a protective order prohibiting the Relator from taking her deposition. A memorandum in support is attached.

Respectfully submitted,

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Attorney General



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Memorandum In Support

I. Introduction

The Relator, Summit County Republican Party Executive Committee, has filed this litigation to challenge the Secretary of State's decision to reject its recommendation of Brian Daley as a member of the Summit County Board of Elections. The Secretary of State has the legal authority to reject a county executive committee's recommendation for appointment to the board of elections so long as the Secretary "has reason to believe that the elector would not be a competent member" of the board of elections. RC 3501.07. The Relator has just served a notice of deposition for Secretary of State Jennifer Brunner beginning on Monday March 10, 2008 and "continuing from day to day thereafter until completed." Notice of Deposition Attached as Exhibit A. Such a deposition is unnecessary and the Secretary of State is entitled to a protective order prohibiting the deposition from occurring. The Secretary is entitled to a protective order due to both the high-ranking governmental official privilege as well as the deliberative process privilege. Thus, this Court should grant the Secretary a protective order and prohibit the Relator from requiring her attendance at a deposition.

II. Law and Argument

A. The Secretary of State is entitled to the high-ranking governmental official privilege.

Numerous courts have held that requiring a high-ranking governmental official—such as the Secretary of State—to testify absent extreme and extraordinary circumstances, is contrary to public policy. See, *United States v. Morgan* (1940), 313 U.S. 409, 421; *In re United States of America* (11th Cir. 1993), 985 F.2d 510, 512, cert. denied sub nom. *Faloon v. United States* (1993), 510 U.S. 989; *In re Office of Inspector General* (5th Cir. 1991), 933 F.2d 276, 278; *Kyle*

Engineering Co. v. Kleppe (9th Cir. 1979), 600 F.2d 226, 231 (citing *People v. U.S. Dept. of Agriculture* (D.C. 1970), 427 F.2d 561, 567; *Church of Scientology v. IRS* (D. Mass. 1990), 138 F.R.D. 9, 12-13; *Cornejo v. Landon* (N.D.Ill. 1981), 524 F.Supp. 118, 122; *United States v. Northshore Realty Assoc., Inc.* (N.D. Ga. 1971), 324 F.Supp 287, 295. ¹

The policy behind the rule protecting high-ranking governmental officials from intrusive discovery and compelled testimony is to protect such persons from “undue burden.” *In re. Stone* (5th Cir. 1993), 986 F.2d 898, 904. “In order to protect officials from the constant distraction of testifying in lawsuits, courts have required that defendants show a special need or situation compelling such testimony.” *In re United States*, 985 F.2d at 512. This policy serves the “important public policy favoring the conservation of government resources and the protection of orderly governmental operations.” *Alex v. Jasper Wyman & Son* (E.D. Pa. 1986), 115 F.R.D. 156, 158-159. If, in every case concerning the government, high-ranking officials could be required to appear personally and testify, then the orderly working of the government would be greatly hampered.

The Office of the Secretary of State is established by Section 1, Article III of the Ohio Constitution. Further, R.C. 3501.04 states that “[t]he secretary of state is the chief election officer of the state.” Thus, the constitutional and statutory framework of the State of Ohio establishes the Secretary as a high-ranking government official. As such, the Secretary of State is entitled to the privileges and immunities.

High-ranking government officials have greater duties and time constraints than other witnesses. To protect officials from the constant distraction of testifying in lawsuits, the courts have required the party wishing to depose a high official to show a special need or situation

¹ While federal case law is not controlling on this Court, the similarity of the language employed by the federal and civil rules controlling discovery and the rationale underlying the decisions makes federal precedent highly persuasive here.

compelling such testimony. “A highly placed public officer should not be required to give a deposition in her official capacity in the absence of ‘compelling reasons.’ There must be some showing, if the right to take a deposition is challenged by the prospective witness, why the prospective witness should be examined.” *California State Board of Pharmacy v. The Superior Court of the City and County of San Francisco* (C.A. First District 1978), 78 Ca. App.3d 660, quoting *Weir v. United States* (8th Cir. 1962) 310 F. 149, 154-155); *Union Savings Bank of Patchogue, New York v. Saxon* (D.D.C. 1962), 209 F. Supp. 319, 319-320; *Capitol Vending Co. v. Baker* (D.D.C. 1964) 36 F.R.D. 45, 46.

The prohibition against obtaining the testimony of a high-ranking public official, of course, is balanced by the need for parties to obtain information. To properly balance these interests, courts have required the party seeking the testimony of the high government official to make a clear showing that the government official possesses personal knowledge essential to his case and which cannot be acquired through less burdensome or obtrusive sources. *Wirtz v. Local 30, International Union of Operating Engineers* (1963), 34 F.R.D. 13; *Sweeney v. Bond* (8th Cir. 1982), 669 F.2d 542, 546, cert. denied sub nom *Schenberg v. Bond* (1982) 459 U.S. 878; *Martin v. Valley National Bank of Arizona* (S.D.N.Y. 1991), 140 F.R.D. 291, 314; *Cornejo v. Landon* (N.D. Ill. 1981), 524 F. Supp. 118, 122; *Capitol Vending Co. v. Baker* (D.C. 1964), 36 F.R.D. 45, 46.

In this case, the Executive Committee has not and cannot make such a showing. The legal issue in this case is whether the Secretary of State has “reason to believe that the elector would not be a competent member” of the Summit County Board of Elections. RC 3501.07. There is no reason to depose Secretary of State Brunner to determine whether she had a reasonable belief that Brian Daley would not be a competent member of the Board of Eleciotns

in Summit County. All relevant information on that issue can be easily obtained from other, lower ranking employees of the Secretary of State's office.

Thus, the Executive Committee cannot identify specific, necessary information within the knowledge of Secretary of State Brunner that only she, a high-ranking official, can provide. If the Secretary was required to testify under such circumstances, future Secretary of States will face harassment from parties routinely seeking depositions every time they dislike an elections related decision. This is especially true, with the ever increasing amount of election-related litigation being filed within the State. Accordingly, a protective order should be granted.

B. The Secretary of State is entitled to a protective order based on deliberative process privilege.

In addition to the privilege accorded to the Secretary as a high-ranking government official, the Secretary is entitled to a protective order based on the deliberative process privilege. The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *State ex rel. Dann v. Taft*, 2006-Ohio-1825, ¶ 34, 109 Ohio St. 3d 364, citing *In re Sealed Case* (C.A.D.D. 1997), 121 F.3d 729, 736-41. In other words, the privilege protects predecisional and deliberative materials. *Id.* As recognized by the Ohio Supreme Court, the privilege is not limited to the governor or to the chief executive officer of a governmental unit. *Id.* Rather, this category of privilege extends to high-ranking government officials like the Secretary of State based on "judicial recognition of a valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Dann v. Taft, supra; Nixon*, 418 U.S. at 705. The ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions, which are clearly

affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. See, e.g., *NLRB v. Sears, Roebuck & Co.* (1975), 421 U.S. 132, 153.

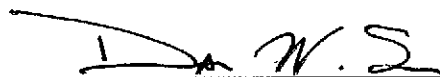
The underlying concerns of the deliberative process privilege apply to the testimony of the Secretary of State sought by the Relator in this case. To the extent that the Relator seek to inquire into the communications and deliberative process of the Secretary and her staff before determining whether she believed Brian Daley would not be a competent member of the Summit County Board, that line of inquiry fits squarely into this category of privileged information. See *Grumman Aircraft Engineering Corp. v. Renegotiation Board* (D.C. Cir. 1973), 482 F.2d 710, 718 (the deliberative process privilege protects communications between decision makers and their advisors and “protects the integrity of the decision-making process by allowing officials to be judged for what they decided, not for what they considered in making the decision”) *reversed* on other grounds *sub nom. Renegotiation Board v. Gunman Aircraft Engineering Corp.* (1975), 421 U.S. 168.

III. Conclusion

The factual and legal issues in this case can easily be determined using testimony and documentation from other lower level employees within the Secretary of State's office without resort to deposing the Secretary of State herself. In addition, deposing the Secretary of State would be an undue burden and an unwarranted and unconstitutional intrusion by the judiciary into the functions of the executive. Therefore, Respondent Secretary of State Brunner respectfully requests that a protective order be granted precluding her testimony in any form in this case.

Respectfully submitted,

Marc Dann
Attorney General



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Attorneys for Secretary of State
Jennifer Brunner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Motion for Protective Order* was sent on March 7th, 2008, via email and via U.S. mail, postage prepaid, to the following:

Timothy J. Grendell
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440-746-9604 (Fax)

Attorney for Relator



Damian Sikora

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SUMMIT COUNTY REPUBLICAN
PARTY EXECUTIVE COMMITTEE

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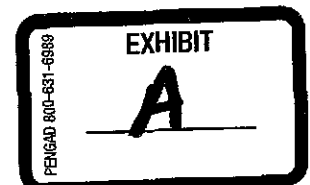
JENNIFER BRUNNER
OHIO SECRETARY OF STATE

RESPONDENT.

RELATOR'S NOTICE OF DEPOSITION OF
JENNIFER BRUNNER

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COUNSEL FOR RELATOR
SUMMIT COUNTY REPUBLICAN PARTY EXECUTIVE COMMITTEE



Please take notice that Relator, Summit County Republican Party Executive Committee, will take the deposition of Jennifer Brunner, Monday, March 10, 2008, commencing at 9:30 a.m., said deposition continuing from day to day thereafter until completed. The deposition will take place at the offices of Secretary of State Office, 180 East Broad Street, Columbus, Ohio 43215.

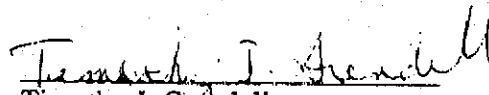
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CERTIFICATE OF SERVICE

Counsel for Relator has served a copy of this Notice of Deposition of Jennifer Brunner by facsimile to 614-728-7592 to Richard N. Coglianesse and Damian W. Sikora.


Timothy J. Grendell
Timothy J. Grendell
Attorney for Relator