IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

League of Women Voters, et al.

Plaintiffs, Case No.: 2012-CA-2842

v.

Kenneth W. Detzner, et al.

Defendants.
_____/

JOINT SUPPLEMENTAL MEMORANDUM REGARDING FIRST AMENDMENT ISSUES BY NON-PARTIES[1]

At the Court's direction, the Non-Parties file this supplemental memorandum to further discuss the two distinct but related set of First Amendment rights implicated by this discovery dispute: (1) the right to engage in political speech – often anonymously – and the right to petition one's government; and (2) the right to associate with others in furtherance of that speech.

I. Right to Engage in Political Speech and Petition Government

To date, when determining the relevance of material from private citizens like the Non-Parties and construing Florida's recent Redistricting Amendments, no court has had to consider whether allowing such private material to be discoverable would infringe a private citizen's First Amendment rights to engage in political speech, and petition government. This Court's determination of first impression must be guided by the following precedents.

Concerning the **right to engage in political speech**, the U.S. Supreme Court held in *Citizens United v. FEC,* 558 U.S. 310 (2010) that:

[1] "Non-Parties" refers collectively to include Patrick Bainter, Michael Sheehan, Matthew Mitchell, Christie Jones, Stafford Jones, Barbara Martin, Delena May, Henry Russell III, Richard Heffley, Richard Johnston, Marc Reichelderfer, Jim Rimes, Joel Springer, Frank Terraferman, and Andrew Wiggins. These individuals have filed no complaint, provided no answer to any complaint, and raised no affirmative defenses or counterclaims. They simply wish to extricate themselves from the ongoing discovery dispute in a case where they are not parties.

- Political speech "is central to the meaning and purpose of the First Amendment," *id.* at 329;
- Political speech is "indispensable to decision-making in a democracy," *id.* at 349;
- "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence," *id.* at 340; and
- "Courts, too are bound by the First Amendment."

Concerning the right to engage in **anonymous political speech**, the U.S. Supreme Court explained in *McIntyre v Ohio Elections Comm'n*, 514 U.S. 334 (1995) that:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind . . . On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," . . . [T]he most effective advocates have sometimes opted for anonymity.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.

Id. at 342-343, 355.

Concerning the right to **petition one's government**, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979), the U.S. Supreme Court stated:

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. . . . The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy... or by imposing sanctions for the expression of particular views it opposes.[2]

[2] The Court further held: "But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Id.* at 465.

As detailed in affidavits previously submitted by the Non-Parties in support of their Motions to Quash, disclosures or depositions would infringe upon, or chill, the Non-Parties' right to engage in political speech and petition their government. Any interpretation of Florida's Redistricting Amendments that allows the infringement of the right to anonymous, political speech and petitioning of government would violate the First Amendment. The U.S. Constitution's Supremacy Clause compels this Court to protect First Amendment rights even if Florida's Redistricting Amendments, or the state policies underlying the Amendments, might call for the disclosure of the Non-Parties' information.

Yet the Plaintiffs ask the Court to allow this infringement – to allow them to discover the Non-Parties "intent" so as to better understand the Florida Legislature's "intent." The Plaintiffs' request turns on whether the Non-Parties' "intent" – what they said and how they said it to other private citizens – is relevant to the issue actually framed by Florida's Redistricting Amendments: Legislative "intent." It is not. Holding otherwise would put the Florida's Redistricting Amendments on an unnecessary collision course with the First Amendment: the former would compel disclosures and depositions that infringe on the right to political speech, and petitioning of government while the latter, as our supreme law, protects the same.

But the Court can avoid a constitutional crisis by finding that the Non-Parties' "intent" – what they said and how they said it to other private citizens – is irrelevant to the issue actually proscribed by Florida's Redistricting Amendments: Legislative "intent." Should they so choose, the Plaintiffs can now depose every member of the Florida Legislature to discern Legislative "intent."[3] Accordingly, the discovery and depositions of Non-Parties should be quashed.

[3] The Special Session has now ended and, with it, any legislator immunity from deposition also expired.

II. Right to Associate in Furtherance of Political Speech.

Even assuming the Non-Parties' private documents and activities are relevant to the issue of legislative intent – which they are clearly not – the First Amendment's associational privilege applies and protects these private materials, and excuses the Non-Parties from being deposed. The First Amendment Associational Privilege is the right to "to associate with others to advance one's shared political beliefs … [and] to exchange ideas and formulate strategy and messages, and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162-63 (9th Cir. 2010).

When an associational claim of privilege is invoked, the party asserting the privilege must demonstrate a prima facie showing of arguable first amendment infringement. This is done though affidavits showing an objectively reasonable probability that the disclosure would have an "impact on, or chilling of, the members' associational rights." *Id.* at 1160. The party seeking disclosure must then show: (1) "that the information sought is highly relevant to the claims or defenses in the litigation – a more demanding standard of relevance than that under [the rules of procedure]" that looks to see whether the information would go to the heart of the matter in the case, (2) "[t]he request must also be carefully tailored to avoid unnecessary interference with protected activities," and (3) "the information must be otherwise unavailable." *Id.*

As Chief Justice Harding, Judge Lewis, and a panel of the First District have already concluded, the First Amendment's associational privilege applies here. This is because any order requiring disclosure of internal deliberations – separate and distinct from actual communications with the Florida Legislature already produced by the Non-Parties – or the names of people with whom the Non-Parties associated, would have a chilling effect on the Non-Parties' ability to engage in political speech and petition their government. This chilling effect and harassment is demonstrate in affidavits file by the Non-Parties as well as the attached e-mail

sent to many of one Non-Parties' clients encouraging the clients to fire the Non-Party simply because that Non-Party exercised his right to engage in protected political speech and the right to associate. (See "Exhibit A")

The Plaintiffs discovery requests do not and cannot overcome the balancing test in *Perry*. First, the information they seek from Non-Parties (i.e., private communications related to engaging in political speech) is not even relevant to the case, much less highly relevant. Second, the request is not narrowly tailored to avoid infringement of Non-Parties right to engage in political speech. In fact, the Plaintiffs requests are designed to get core internal information regarding the Non-Parties' association and more importantly to harass every member of the association to which the Plaintiff can ascertain their identity. Lastly, the relevant information from which Plaintiffs need to prove their case (i.e., intent of the Legislature) is available directly from the 160 members of the Legislature or, as Plaintiffs themselves stated at the last hearing, from the legislative leaders who Plaintiffs contend dominated the enactment of the current Senate District map.

Even under the Plaintiffs' theory of the case (i.e., non-parties submitted maps to the Legislature that favored the Republican Party and that intent can be imputed to the Legislature), only the Non-Parties direct communications with the Legislature would be relevant and the Non-Parties disclosed those communications in the Congressional Case. Thus, any further subpoenas and depositions seeking such information should be quashed. The Plaintiffs have unfettered access to the Legislature and can seek the information regarding the intent of the 160 members of the Legislature directly from the Legislators.

CONCLUSION

This Court should refrain from construing the Redistricting Amendments as suggested by Plaintiffs (i.e., that makes Non-Parties political speech relevant to the Legislature's "intent") that would result in the infringement of Non-Parties First Amendment Rights. Such a construction would render the Redistricting Amendments unconstitutional as applied in this case. For example, this court's approval of allowing depositions of select citizens (i.e., non-parties) of more than 1,600 citizens that exercised their rights to engage in free speech would no doubt suppress and infringe free speech not only of the Non-Parties but of countless other citizens from exercising those rights in the future out of fear of being subjected to vexatious litigation, harassment, and ridicule by their political rivals. Indeed, it is this fear of retaliation, which led citizens to associate with one another to engage in political speech anonymously.

Dated: June 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic service through the Florida ePortal Filing System to all counsel of record below on this 23rd day of June, 2015.

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