

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

THE LEAGUE OF WOMEN VOTERS OF FLORIDA,
ET AL.

PLAINTIFFS,
v.

KENNETH W. DETZNER, ET AL.

DEFENDANTS.

CASE NO.: 2012-CA-2842

PLAINTIFFS' RESPONSE TO NON-PARTIES'
JOINT SUPPLEMENTAL MEMORANDUM
REGARDING FIRST AMENDMENT ISSUES

The Bainter Group and Heffley Group strive mightily to repackage their associational privilege claim into a convoluted irrelevancy objection. As Plaintiffs made clear in their response to the motions to quash, Judge Lewis repeatedly ruled that communications among the partisan operatives and their collaborators are relevant. (Resp. to Mot. Quash at 15-19). He held Bainter and his colleagues in contempt over their persistent refusal to produce documents, and the First District denied certiorari relief based on their claim of irrelevancy. (*Id.* at 15). Many of these non-parties – including Reichelderfer, Heffley, Johnston, and Springer – voluntarily produced documents or testified falsely about the “internal” dealings of the operatives without ever asserting associational privilege or any other First Amendment right. (*Id.* at 22). Terraferma, for his part, invoked the First Amendment only in a very limited way and never objected to providing documents or testimony about operative-drawn maps. (*Id.* at 21). Perhaps recognizing that history, the Heffley Group did not raise irrelevancy in their motion to quash.

Like a phoenix arisen from the ashes, the irrelevancy objection has now returned in the guise of a First Amendment argument that supposedly threatens a “constitutional crisis.” (Supp. Memo. at 3). The First Amendment, however, does not render relevant communications about the redistricting activities of the Bainter Group and Heffley Group any less relevant. This case involves a *conspiracy* to violate the Florida Constitution and *active collaboration* between

partisan operatives and the Legislature. If political operatives met openly with the Legislature, handed the Legislature highly partisan maps, and the Legislature adopted those same districts, no one could deny that there would be evidence of partisan intent on the part of the Legislature. Here, the Legislature did precisely the same thing, albeit indirectly. It met behind closed doors with these well-connected operatives, sought ways to keep them secretly involved in the redistricting process, funneled non-public legislative draft maps to them, and then relied overwhelmingly on districts drawn by the operatives and submitted through “straw” persons. The Bainter Group and Heffley Group are well aware that, without the communications among the operatives participating in this scheme, there would be no trace of what had occurred.

In any event, the First Amendment does not automatically insulate individuals from discovery or liability in judicial proceedings simply because they desire anonymity. *See, e.g., Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 349 (D.D.C. 2011); *Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145, 1153-54 (N.D. Cal. 2013); *In re Does 1-10*, 242 S.W.3d 805, 820-22 (Tex. Ct. App. 2007); *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666, 674-75 (Ill. Ct. App. 2010). Any constitutional right to anonymous speech is “not absolute,” *Call of the Wild*, 770 F. Supp. 2d at 348, and can be overcome when a party’s “need for identifying information outweighs the . . . right to First Amendment anonymity.” *Id.* at 351. The scrutiny applied “varies depending on the circumstances and the type of speech at issue.” *Signature Mgmt.*, 941 F. Supp. 2d at 1154. The *McIntyre* decision cited by the Bainter Group and Heffley Group is entirely consistent with these principles. There, the Court rejected an across-the-board prohibition on anonymous leafletting, but emphasized that a more narrowly tailored statute might survive review. *See McIntyre v. Ohio*, 514 U.S. 334, 348-53 (1995).

In discovery disputes over the petitioning activities of a purported “association,” the effect of the First Amendment right to anonymity is defined by associational privilege – not

strained notions of irrelevancy. The principal case that the Bainter Group and Heffley Group rely upon for the associational privilege test involved the backers of a ballot petition to prohibit same-sex marriage who wished to remain anonymous. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009) In *Perry*, the Ninth Circuit held that the First Amendment provided for a *qualified* privilege that could be outweighed by competing considerations, rather than an outright prohibition on discovery. *Id.* at 1159-61. The associational privilege balancing framework set forth in *Perry* – not an all-or-nothing relevancy determination – is the proper means to test the strength of each non-party’s supposed right to anonymity, if it has not been waived.¹

Finally, the Bainter Group and Heffley Group only highlight the frailty of their position by attaching an email from an individual opining that Reichelderfer is “a blatant liar” for testifying that “[t]he fact” that certain maps are “on [his] computer doesn’t tell [him] how they got there.” (Supp. Memo., Ex. A). The testimony in question was about the secret transmission of draft legislative maps to Reichelderfer from Kirk Pepper (“Pepper”), the deputy chief of staff for Speaker Cannon. (See **Ex. A** at 103:12-106:2). It was not some revelation of the internal workings of the “association,” but the decision of Reichelderfer and Pepper to testify falsely about *the Legislature’s* transmission of draft maps to partisan operatives that led this individual to call Reichelderfer “a blatant liar.” (See Resp. to Mot. to Quash, Ex. 1 at 29-30 (Judge Lewis discrediting related testimony about dealings among Pepper, Cannon, and Reichelderfer as “unusual and illogical” and “a stretch”)). If anything, the email establishes that these partisan operatives are hardly the patriotic bystanders that they claim to be, but are instead partisans who collaborated with the Legislature to subvert the FairDistricts Amendments.

¹ For the reasons stated in Plaintiffs’ response to the motions to quash, the claim of associational privilege cannot be sustained. (See Resp. to Mot. to Quash at 20-27).

Respectfully Submitted,

/s/ Vincent Falcone III

David B. King

Florida Bar No.: 0093426

Thomas A. Zehnder

Florida Bar No.: 0063274

Frederick S. Wermuth

Florida Bar No.: 0184111

Vincent Falcone III

Florida Bar No.: 0058553

KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.

P.O. Box 1631

Orlando, FL 32802-1631

Telephone: (407) 422-2472

Facsimile: (407) 648-0161

dking@kbzwlaw.com (Primary)

tzehnder@kbzwlaw.com (Primary)

fwermuth@kbzwlaw.com (Primary)

vfalcone@kbzwlaw.com (Primary)

aprice@kbzwlaw.com (Secondary)

courtfilings@kbzwlaw.com (Secondary)

-and-

Gerald E. Greenberg

Florida Bar No. 0440094

Adam M. Schachter

Florida Bar No. 647101

GELBER SCHACHTER & GREENBERG, P.A.

1441 Brickell Avenue, Suite 1420

Miami, Florida 33131

Telephone: (305) 728-0950

Facsimile: (305) 728-0951

ggreenberg@gsgpa.com

aschachter@gsgpa.com

efilings@gsgpa.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2015 I filed the foregoing using the State of Florida ePortal Filing System, which will serve a copy by email on all counsel listed on the Service List below.

/s/ Vincent Falcone III

Vincent Falcone III
Florida Bar No.: 0058553

Counsel for Plaintiffs

SERVICE LIST

Gerald E. Greenberg
Adam M. Schachter
GELBER SCHACHTER & GREENBERG, P.A.
1441 Brickell Avenue, Suite 1420
Miami, Florida 33131
ggreenberg@gsgpa.com
aschachter@gsgpa.com
efilings@gsgpa.com

Counsel for Plaintiffs

George T. Levesque
General Counsel
THE FLORIDA SENATE
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
Levesque.George@flsenate.gov
GLEVESQUE4@comcast.net
everette.shirlyne@flsenate.gov

Raoul G. Cantero
Jason N. Zakia
Jesse L. Green
WHITE & CASE LLP
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
rcantero@whitecase.com
jzakia@whitecase.com
jgreen@whitecase.com
ldominguez@whitecase.com
mgaulding@whitecase.com
lorozco@whitecase.com
miamilitigationfileroom@whitecase.com

Counsel for the Florida Senate

Matthew J. Carson
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, FL 32399-1300
matthew.carson@myfloridahouse.gov

Michael B. DeSanctis
Jessica Ring Amunson
Paul Smith
JENNER & BLOCK, LLP
1099 New York Ave NW, Suite 900
Washington, DC 20001
mdesanctis@jenner.com
jamunson@jenner.com
PSmith@jenner.com

Counsel for Plaintiffs

J. Gerald Hebert
191 Somerville Street, #415
Alexandria, VA 22304
ghebert@campaignlegalcenter.org

Counsel for Plaintiffs

Adam S. Tanenbaum
General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399
adam.tanenbaum@dos.myflorida.com

Counsel for Florida Secretary of State

Charles T. Wells
George N. Meros, Jr.
Andy Bardos
GRAYROBINSON, P.A.
P.O. Box 11189 (32302)
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301
Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Andy.bardos@gray-robinson.com
croberts@gray-robinson.com
tbarreiro@gray-robinson.com
mwilkinson@gray-robinson.com

Counsel for Florida House of Representatives

betty.money@myfloridahouse.gov

Counsel for Florida House of Representatives

Blaine Winship

OFFICE OF THE ATTORNEY GENERAL OF
FLORIDA

The Capitol, Suite PL-01

Tallahassee, FL 32399-1050

blaine.winship@myfloridalegal.com

lila.neal@myfloridalegal.com

Counsel for the Attorney General

D. Kent Safriet

Mohammad O. Jazil

Hopping Green & Sams, P.A.

P.O. Box 6526

Tallahassee, Florida 32314

kents@hgslaw.com

mohammadj@hgslaw.com

Counsel for Non-Parties

David P. Healy

Dudley, Sellers & Healy, PL

3522 Thomasville Rd., Suite 301

Tallahassee, Florida 32309

dhealy@davidhealylaw.com

Daniel C. Brown

Carlton Fields Jordan Burt

215 S. Monroe Street, Suite 500

Tallahassee, Florida 32301

dbrown@cfjblaw.com

Counsel for Non-Parties