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

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,

Plaintiffs,

vs. **Case No. 2012 CA 2842**

KENNETH W. DETZNER etc., et al.,

Defendants.

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AMENDED JOINT MOTION OF THE NON-PARTIES FOR REHEARING, RECONSIDERATION OR, ALTERNATIVELY, FOR CLARIFICATION

Pursuant to Fla. R. Civ. P. 1.530, certain Non-Parties, including Rich Heffley, Marc Reichelderfer, Joel Springer, Frank Terraferma, Rich Johnston, Andrew Wiggins, Patrick Bainter, Matthew Mitchell, Michael Sheehan, Stafford Jones, Christie Jones, Barbara Martin, Henry Russell, III and Delena May, respectfully move for rehearing, reconsideration or clarification of portions of the Court's Order, dated June 26, on the Non-Parties' Motions to Quash (the "Order").[1]

[1] The Court on July 9 issued its Order of Partial Clarification to address the Non-Parties' request to clarify how they should handle any documents they claimed were subject to First Amendment privilege. That Order directed that the Non-Parties were to provide any such documents, and privilege logs, to the Court for *in camera* inspection. Non-Parties Heffley and Reichelderfer complied on July 13 by filing their subpoena responses and by delivering the required materials to the Court. Non-Party Henry Russell, III also complied by filing his privilege log on July 5, and by then delivering the listed documents to the Court on July 14. Those documents await the Court's privilege rulings. The other Non-Parties have also complied with all of the Court's directives related to document production matters by filing responses stating, or otherwise reporting, that the other Non-Parties had no documents responsive to the subpoena, or any ones in addition to those provided previously.

More specifically, the Court should reconsider or clarify to what extent, if any, the Order is meant to govern the depositions of these Non-Parties that Plaintiffs now seek to schedule. In the alternative, pursuant to Fla. R. Civ. P. 1.280(c), the Non-Parties move for an order limiting the scope of any depositions Plaintiffs may schedule, as set forth herein.

As grounds for the requested relief, the Non-Parties state as follows:

1. Each of the Non-Parties filed motions to quash, or for protective order, initially directed to substantially identical records subpoenas that Plaintiffs caused to issue. Among other matters, the Non-Parties objected to the production of documents and materials to which they claimed privilege under the First Amendment. The Court heard those motions at the hearing on June 18.

2. After the subject subpoenas issued, but before the hearing, Plaintiffs noticed some of the Non-Parties for deposition.[2] The Non-Parties therefore argued that the Court should limit the scope of the requested examinations so that matters that had been the subject of any prior testimony would not be inquired into yet again and, more importantly, that the permitted scope of any new line of examinations be confined to Plaintiffs' learning what information, if any, the particular Non-Party communicated to the Legislature regarding the drawing of Senate district maps. The Non-Parties also argued that any communications or information exchanges that may

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[2] Plaintiffs filed on May 14 a series of notices of deposition related to Non-Parties Barbara May, Christie Jones, Delena May, Henry Russell, III, Matthew Mitchell, Michael Sheehan, Pat Bainter and Stafford Jones. The indicated deposition dates, which passed some time ago, were merely "place-holder" dates, or ones that were chosen merely to provide a basis or vehicle for the Court to consider issues related to the taking of those depositions. The other Non-Parties, however, were not noticed for deposition at all, an omission that Plaintiffs' counsel noted was the result of his error. Transcript of Motion Hearing conducted on June 18, 2015, pp. 143-144.

have occurred just between any of the Non-Parties was protected under the First Amendment, particularly because any such information was not highly relevant to Plaintiffs' claims as they chose to frame them in their pending complaint. The Court considered those issues and arguments at the last hearing but did not state any rulings.

3. The Court then issued the Order stating at paragraph 1 that:

> The discovery of non-parties in this case shall be governed by the decision in Perry v. Schwarzenegger, 591 F.3d 1147, 1160-1161 (9th Cir. 2010). *To the extent that this Order grants discovery objected to by the Defendants,* the Court finds that the information sought is highly relevant to the claims or defenses in the litigation; the request is carefully tailored to avoid unnecessary interference with protected activities; and the information is otherwise unavailable.

(Emphasis added). It is not clear from the text of the Order whether the Court meant to confine this ruling just to issues related to document production, to matters involving the Non-Parties proposed depositions, or both matters. Moreover, since the Order issued, Plaintiffs' counsel contacted undersigned counsel requesting that the Non-Parties agree to submit to deposition examination at agreed-upon times during the period August 10 – 31. The proper scope of those proposed examinations, particularly to the extent those issues were addressed or touched upon to any extent in the Order, is therefore ripe for the Court's clarification.

4. As a preliminary matter, paragraph 2 of the Order appears to provide that matters into which Plaintiffs' counsel have already inquired at previous examinations of any of the Non-Parties should not be the subject of additional deposition questioning. The Order more particularly states that "[t]o the extent practicable, matters that were previously addressed . . . do not have to be provided a second time." To avoid future disputes or confusion on this important point, the Court should clarify that it intended to narrow the scope of any of the Non-Parties' depositions in this important manner.

5. Other disputes or controversies are also likely to arise between Plaintiffs and the Non-Parties regarding the proper scope of any new lines of deposition inquiry. The current Order, particularly the quoted language from paragraph 1, may have inadvertently heightened the potential for such controversies, rather than relieving that prospect. For example, at the June 18 hearing the following exchange occurred between Plaintiffs' counsel and the Court regarding this very issue:

By Mr. Zehnder	. . . If I could just speak to the issue of depositions --
The Court:	You know, that's the real issue in front of us is, who's going to be deposed . . .
By Mr. Zehnder	. . . But in terms of depositions, Judge, none of these people have been deposed in any case about the documents that we got in May right before the Congressional trial started, that 538 pages, and the additional 60 pages, by the way, that they produced out of the 1295 in the appeal.
The Court:	What is your response to their argument they have a First Amendment right not to be deposed?
By Mr. Zehnder:	They don't have a First Amendment right not to be deposed. What would that right be? Associational privilege? If it is, it has to yield under –
The Court:	They have a right to participate in politics even to the extent of being anonymous.
By Mr. Zehnder:	Well, Your Honor, that doesn't mean you don't have the right to be deposed if you're part of a conspiracy that a court, in a three-week trial, has already adjudicated occurred. We have to get to the bottom of whether that happened here in the Senate case. That's the whole point of this case.

Transcript of Hearings Conducted on June 18, 2015, pp. 116-117.

6. The Non-Parties disagree with Plaintiffs' characterization of their activities because of the very First Amendment protection of associational activity that the Court recognized at the hearing to be directly implicated here. The Non-Parties continue in their

assertions made at the last hearing that Plaintiffs should not only be prohibited from attempting to re-visit old ground; but also, because of the First Amendment's protections, Plaintiffs should be permitted to inquire only regarding what information, if any, the particular Non-Party actually communicated to the legislative members or staff regarding proposed Senate district maps. That information (if any) -- and only that information -- is the proper scope of any future deposition examinations. To the extent Plaintiffs seek to inquire at deposition regarding the Non-Parties' other associational activities, such deposition examination would improperly invade the Non-Parties' rights protected under the First Amendment. Those rights include, but are not limited to, the right of at least some of the Non-Parties to develop proposed Senate District maps among themselves, and to then submit those maps anonymously to the Legislature for its consideration in drawing the actual Senate district maps. The Order should be clarified in this regard.

7. The propriety of the Non-Parties' position is confirmed most directly both by the Florida Supreme Court's very recent decision in *The League of Women Voters v. Detzner*, SC14-1905 (July 9, 2015), and more generally in *Perry v. Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010) which the Order recognized is also controlling. In *League of Women Voters,* p. 9, fn 4, the Supreme Court recognized that "[t]here is nothing inherently in violation of the law or the Florida Constitution for an individual to anonymously submit a map to the Legislature for consideration or to submit a map through a third party." Why then should any of the Non-Parties be subject to deposition examination at the hands of their political opponents for engaging in completely lawful activities protected by the First Amendment?

8. The Non-Parties request for the Court to restrict the scope of any depositions is also supported by the analytical framework that *Perry* provides, particularly when the Court closely

considers (i) the limited matters Plaintiffs place at issue in their Amended Complaint, and (ii) the Plaintiffs' acknowledgments in open court at the June 18 hearing. To review briefly, the court in *Perry* stated:

> [A] claim of First Amendment privilege [as asserted by the Non-Parties] is subject to a two-part framework. The party asserting the privilege must demonstrate . . . a prima facie showing of arguable first amendment infringement . . . If [the Non-Parties] can make the necessary *prima facie* showing, the evidentiary burden will then shift to the [Plaintiffs] . . . [to] demonstrate the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] is the least restrictive means of obtaining the desired information . . . To implement this standard, we balance the burdens imposed on individuals and associations against the significance of the . . . interest in disclosure."

Id. at 1161 (citations omitted, emphasis added). Next, the court explained that:

> A "*prima facie* showing requires [the withholding party] to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights . . . The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.

Perry, 591 F.3d at 1160, 1161 (emphasis added).

9. Being subject to deposition examination at the hands of attorneys who represent one's political opponents, and who have stated that they intend to pry into one's political speech and associational activities with other, like-minded individuals, self-evidently has an "impact" or "chilling" effect on the Non-Parties' exercise of activities the First Amendment was fundamentally designed to protect. In other words, the First Amendment privilege that *Perry* and the Court recognize will be directly and unavoidably "in play" at any depositions of the Non-Parties that Plaintiffs may choose to convene.

10. Since the Non-Parties have demonstrated a valid *prima facie* claim of First Amendment privilege to be invoked at any deposition examination as to questions beyond what was communicated to the Legislature, the Court should consider the second stage of the *Perry* analysis: In order to continue with the examination, the burden is on the Plaintiffs to make two showings to sustain any argument that the Non-Parties' First Amendment privilege claim should be overruled: (i) the information that is the subject of deposition questioning is *highly relevant* to Plaintiffs' claims in this case, and (ii) the line of questioning is *narrowly tailored* to meet Plaintiffs' demonstrated, compelling need for the requested information. *Perry,* 591 F.3d at 1161.

11. That analysis must be grounded on what Plaintiffs have actually alleged in their Amended Complaint. In their pending pleading, Plaintiffs allege:

> During the 2012 redistricting cycle, **legislators and legislative staff** gave partisan political operatives insider access to the legislative redistricting process, privately sought input from partisan political operatives regarding redistricting decisions, invited the surreptitious submission of maps by partisan political operatives, and intentionally caused the Legislature's redistricting plans to incorporate various partisan- and incumbent-biased features and to achieve overall political-performance bias in the Republican majority's favor. As a result, the Legislature's initial Senate plan - CS/SJR 1176 (S9008) - included various districts that Senate decision makers knew were tainted with partisan- and incumbent-biased intent . . . After the Florida Supreme Court struck down the first Senate map . . . the Legislature adopted a new Senate plan - CS-SJR 2-B (S9030) - that once again reflected blatant incumbent favoritism and partisan gamesmanship, and once again included various districts that **Senate decision makers knew** were tainted with partisan- and incumbent-biased intent . . . Indeed, the Senate decision makers portrayed to the Florida Supreme Court and citizens of Florida that the redistricting process was fair, unbiased, open and transparent, **even though Senate decision makers knew it was not.**

Amended Complaint, ¶¶4, 5 (emphasis added).[3]

12. As is apparent from their Amended Complaint, the issues Plaintiffs raise have no bearing at all on what the Non-Parties said or did among themselves in the context of their protected associational activities. The only communications relevant to the claims asserted in the Amended Complaint are those (if any) the Non-Parties had with members or staff of the Legislature in the course of the adoption of the current Senate District map. Under *Perry's* analysis, deposition questions that go beyond what any of the Non-Parties communicated to the Legislature is not *highly relevant* to the Plaintiffs' case as they themselves have stated it, nor is the expansive questioning Plaintiffs admittedly seek to pursue *narrowly tailored* to obtain any information Plaintiffs need in order to prove what they allege.

13. Under the final part of the *Perry* test, the Court must balance the Non-Parties' clear constitutional right to protect their communications and associational activities from deposition questioning at the hands of their political opponents against the Plaintiffs' alleged need for testimony from the Non-Parties to prove their alleged case against the Florida Legislature. The Court must consider several factors in the final balancing.

(A) First, the fact that the Non-Parties seek no relief in the case "weighs against compelling disclosure." *See Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.,* 2007 WL 852521 at *6 (D. Kan. 2007) (collecting other cases).

(B) Second, the Court must closely examine and weigh the Plaintiffs' claims that they actually need access to the requested information to prove their case. As the court stated in *Perry,* the courts must evaluate what is the "*centrality* of the information sought to

[3] In the remainder of their pleading, Plaintiffs raise a host of other Tier 1 and Tier 2 challenges to the current Senate district map that are unrelated to the Non-Parties.

the issues in the case"? *Perry,* 591 F.3d at 1161 (emphasis added). *See also Heartland,* 2007 WL 852521 at *6 (refusing to require the production of documents that were "only *minimally* relevant to the claims made in the lawsuit").

This factor is particularly important, in light of the concessions by Plaintiffs' counsel at the hearing conducted on June 18, including the following:

> By Mr. Zehnder: Remember, our theory that we proved in the Congressional case was that the process was tainted because these folks, the operatives -- the Bainter operatives, the Heffley Group, members of the Republican Party of Florida, and also these third parties that they've called themselves the Alachua Republicans -- were all involved in a conspiracy, Your Honor. And Judge Lewis found that there was a conspiracy to infiltrate the public map submission process that the legislature touted as the most open and transparent process in history, to infiltrate that behind the scenes so that that's how they could get their maps to the legislature. And what we found out from these documents is how they did it.

Transcript of Motion Hearing, pp. 11-12. These and similar statements by Plaintiffs' counsel are telling. They confirm that Plaintiffs already have the information they feel they need to make their case. The private associational communications they intend to inquire about at depositions of the Non-Parties is, at best, cumulative of the information they admit they already have. And, inquiry into such private communications among associational members clearly breaches the First Amendment's associational privilege.

Next, counsel for other Non-Parties associated with the Data Targeting firm stated in open court at the same hearing as follows:

> By Mr. Safriet: We'll stipulate that the nine maps -- well, the five that my clients [identified in Plaintiffs' response to their Motion to Quash] were submitted by my clients with the intent to support the Republican Party. So take that map and go to the legislature and prove their case if they can with that.

Transcript of Motion Hearing, p. 157, lns. 17-22.[4] Thus, counsel for the "Alachua Republicans" Non-Parties confirmed that his clients exercised their First Amendment right to petition government, on a First-Amendment-sanctioned anonymous basis, by submitting proposed Senate district maps through the public submission portal.

Moreover, counsel for the "Alachua Republicans" Non-Parties readily acknowledged that those maps, as submitted, were drawn to favor either the Republican Party or individual Republican incumbents or candidates for the Florida Senate. In light of those admissions, Plaintiffs can show no compelling need to pry at deposition into the workings and communications of the Non-Parties under the compelling need test that *Perry* and other cases have established. More particularly, the Plaintiffs can examine legislative representatives or agents to what extent, if any, they referred to or relied on any maps submitted by any Non-Party in drawing the Senate District map. Also, Plaintiffs can retain their own experts to opine regarding the relationship between the Non-Parties' submission and what the Legislature drew in the final map iteration.

(C) Thirdly, the Court must weigh "the substantiality of the First Amendment interests at stake." *Perry,* 591 F.3d at 1161. Without question, the line of questioning Plaintiffs' admittedly intend to pursue bears directly on the Non-Parties' communications within their association about matters of core political concern. Therefore, the information the Non-Parties would be required to disclose in response to such questioning invades rights fundamentally protected by the First Amendment.

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[4] Counsel Safriet clarifies that it is only four (not five) of the Alachua Republicans that submitted maps through the Legislative public portal: Christie Jones (HPUBS0090); Henry E. Russell, III (SPUBS0105); Delena May (SPUBS0123); and Barbara Martin (SPUBS0146).

(D) Finally, the Court must consider "the importance of the litigation" and "the existence of less intrusive means of obtaining the information." *Id.* This consideration is particularly significant. In their Amended Complaint, Plaintiffs allege with specificity the "Senate leaders" or other members and staff who supposedly were instrumental in tainting the current Senate District map. Indeed, the Amended Complaint specifically names certain Florida Senators who introduced amendments to the draft district map, which Plaintiffs claim were the primary instruments in the supposed taint.

Plaintiffs have issued records subpoenas to current and former Senators and members of staff. Yet, astonishingly, Plaintiffs have not bothered to depose the alleged actual decision makers, even though this case has been pending since 2012. Nevertheless, Plaintiffs continue a campaign to obtain their political adversaries' First Amendment protected communications and other First Amendment protected information regarding the Non-Parties' associational activities. Moreover, Plaintiffs have not even attempted to offer any *evidence* that they cannot obtain the information that claim Plaintiffs need for trial except from these Non-Parties.[5] As the foregoing discussion demonstrates, the Non-Parties have *bona fide* First Amendment privileges that will be compromised if Plaintiffs are allowed to proceed with Non-Party depositions in the manner they have conceded they intend. Moreover, the Non-Parties are likely to succeed in having privilege invocations judicially sustained regarding questions that do not deal with what a particular Non-Party communicated to the Legislature.

14. Although recognizing the applicability of *Perry*, the Court's Order, at

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[5] At most, Plaintiffs' counsel asserted at hearing that this is supposedly the case. But, the unverified statements of a party's counsel are not evidence. *State v. Thompson*, 852 So. 2d 877, 878 (Fla. 2d DCA 2003) (Argument of counsel is not evidence.).

paragraph 1, summarily states that:

> To the extent that this Order grants discovery objected to by the Defendants, the Court finds that the information sought is highly relevant to the claims or defenses in the litigation; the request is carefully tailored to avoid unnecessary interference with protected activities; and the information is otherwise unavailable.

The Non-Parties respectfully submit that the quoted finding is not supported by the record, and should be revisited or clarified.

15. It is not clear that the Court intended to make that finding with respect to Non-Party depositions that have not yet occurred. Nonetheless, the Non-Parties are confident that Plaintiffs will seize on that passage to claim they have unfettered right to depose the Non-Parties regarding any topic or issue, even as to those matters protected from inquiry by the First Amendment. At a minimum, therefore, the Court should clarify that it did not intend to summarily and preemptively decide the propriety of such questioning under *Perry* and similar decisions.

16. Indeed, the Non-Parties have good reason to believe that the Court's Order did not so intend. None of the prior cases applying *Perry*, or analyzing the First Amendment associational privilege, did so without the benefit of the actual documents or questioning that were the subject of the claim of privilege. The Non-Parties are not aware of any case involving a First Amendment privilege claim in which the trial court summarily applied the required balancing test before conducting a particularized inquiry in the manner that *Perry* requires.

17. Moreover, the quoted portion of the Court's Order appears inconsistent with the manner in which other Florida appellate cases have directed that the courts should address invocations of privilege at deposition. In the normal course, deponents invoking a claim of privilege must do so on a question-by-question basis. *See, e.g., Kanji v. Valli,* 621 So. 2d 750,

751 (Fla. 5th DCA 1993); *Fischer v. E.F. Hutton and Co., Inc.,* 463 So. 2d 289, 291 (Fla. 2nd DCA 1984).[6] The reason for the rule is apparent. It creates the proper context in which the trial court may assess the claim of privilege and a clear record for appellate review. Without revision or clarification, Plaintiffs will no doubt seize upon the quoted portion of the Court's Order to contend that the Court has summarily overruled any claims of First Amendment privilege, even before the first question is asked. That is inconsistent with established Florida law.

18. In connection with the impending depositions of the Non-Parties which Plaintiffs have announced that they intend to take, the Court should likewise clarify that the Order does not predetermine that a voluntary disclosure of a privileged First Amendment communication by one of the communicants amounts to a waiver of the First Amendment privilege as to another Non-Party who did not make a voluntary disclosure. *See Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 226 (S.D.N.Y. 2000) (waiver of rights by plaintiff legal aid society is not deemed binding on co-plaintiff union and legal aid employees.) Indeed, even as to a communication privilege that is merely statutory, a breach of the privilege by one communicant over the objection of another does not constitute a waiver as to the objecting communicant. *See Taylor v. State*, 855 So. 2d 1, 26 (Fla. 2003) (spousal privilege). *See also,* § 90.507, Fla. Stat. ("A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses . . . .") (underscoring added). That rule is all the more imperative in the case of a constitutionally guaranteed First Amendment privilege against compelled disclosure. A waiver

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[6] *Compare Rainerman v. Eagle National Bank of Miami,* 541 So.2d 740 (Fla. 3d DCA 1989), where the court found that a blanket invocation of privilege was permitted when the scope of the examination was narrow and the questions would necessarily trigger privileged matters.

of First Amendment privilege "must be narrowly rather than expansively construed." *Christ Covenant Church v. Town of Southwest Ranches,* 2008 WL 2686860, *9 (S.D. Fla. June 29, 2008).

19. As required by §2.2 of the Court's rules and procedures, undersigned counsel certify that they conferred with counsel to the Plaintiffs in a good faith effort to resolve the issues raised by this Motion.

WHEREFORE, the Non-Parties for the stated reasons respectfully move for rehearing, reconsideration or clarification of the Order, as well as such other and further relief that is just and appropriate.

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Certificate of Service

I HEREBY CERTIFY that I filed the foregoing on July 15, 2015 using the State of Florida's online filing portal which will cause a true and correct copy to be electronically transmitted to all counsel and interested parties of record.

/s/ David P. Healy (940410)