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IN THE SUPREME COURT OF FLORIDA

PAT BAINTER, MATT MITCHELL, MICHAEL SHEEHAN, AND DATA TARGETING, INC.,

Appellants,

v.

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

Plaintiffs – Appellees.

Case No. SC14-1200
Lower Tribunal No. 1D14-2163
2012-CA-00412
2012-CA-00490
2012-CA-2842

SUPPLEMENTAL REPLY BRIEF OF PAT BAINTER, MATT MITCHELL, MICHAEL SHEEHAN, AND DATA TARGETING, INC.

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Dated: Aug. 8, 2014

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ARGUMENT

In their Supplemental Answer Brief, Plaintiffs say much, signifying nothing. First, Plaintiffs provide a more detailed procedural history to support their waiver arguments previously rejected by the First District. *See* Plaintiffs' Supp. Ans. Br. at 1-15. But Plaintiffs fail to mention that the trial court did not make any specific finding either before or after May 15, 2014 that there was an *intentional* relinquishment of rights by the Non-Parties. Indeed, the trial court refused to make such a finding despite multiple requests by Plaintiffs to do so. *See* Plaintiffs' Supp. Ans. Br. at 5. Thus, there was and can be no waiver. *E.g., Reynolds v. State*, 99 So. 3d 459, 484 (Fla. 2012) (waiver of a fundamental right must be "knowingly, voluntarily, and intelligently made"); *Gustavo Prieto v. Union Am. Ins. Co.*, 673 So. 2d 521, 523 (Fla. 3d DCA 1996) ("Waiver imports the intentional relinquishment of a known right."); *see also C.P. Smith v. Armour Pharm. Co.*, 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (explaining that a privilege is not waived even if information is published in newspapers, inadvertently disclosed by one's own attorneys, or obtained by theft).

Second, Plaintiffs credit the Non-Parties for "correctly stat[ing] the general rule that [matters occurring after the trial court made the rulings under review] are not properly brought before the appellate court," and promise to list the "numerous exceptions" to this general rule. Plaintiffs' Supp. Ans. Br. at 5. But, against the

clear weight of authority in the Non-Parties' Supplemental Brief, *see* Non-Parties' Supp. Br. at 3-7, Plaintiffs only muster passages from a legal treatise, a Second District case, and a legal publication. *Id.* at 6. Plaintiffs cite this authority for the *limited* proposition that, when arguing mootness, they may rely on material outside the record – material provided to the trial court *after* the Non-Parties filed their notice of appeal. *Id.* They are wrong. *See* Non-Parties' Supp. Br. at 3-7.[1]

Regardless, the Non-Parties concerns are not moot and Plaintiffs' reliance on the mootness exception is unavailing. At the very least, the Court must decide whether the trial court correctly applied the First Amendment's balancing test, under the closest of scrutiny, before deciding whether to keep the Non-Parties' materials permanently sealed. In fact, Plaintiffs agree that the issue of whether the admitted material should remain sealed is ripe for review. Plaintiffs' Supp. Ans. Br. at 15-16. But then Plaintiffs argue that the reason for keeping the materials sealed is now moot. Plaintiffs' argument makes little sense because the issue of whether to keep the documents sealed is inextricably linked to the reason for keeping them sealed.

[1] There, the Non-Parties cite cases from this Court, the district courts of appeal, and the federal courts for the propositions that (1) the record on appeal includes material before the trial court prior to the filing of a notice of appeal, (2) review on appeal is limited to the record on appeal, (3) references to material outside the record on appeal is sanctionable, and (4) this Court's reliance on material provided to the trial court after May 15, 2014 would violate the Non-Parties rights under the Fourteenth Amendment's Due Process Clause because, among other things, the Non-Parties had no ability to shape the record after May 15, 2014.

The case remains ripe for review for other reasons as well. The trial court has before it two distinct cases: one concerning Congressional redistricting, and another concerning Senate redistricting. The trial in the Congressional redistricting has ended, but the trial in the Senate redistricting case has yet to begin. Depending on the outcome of this appeal, additional testimony from the Non-Parties may be elicited (although it should not), and more of the 538 pages of documents may be entered into evidence (although they should not). This appeal then is far from moot, and Plaintiffs err by relying on the mootness exception when referring to material compiled *after* the Non-Parties filed their notice of appeal. All such material is outside the record. None should be considered by the Court.[2]

[2] Reliance on the trial court's July 10, 2014 Order is particularly troubling because that order reflects the culmination of a process in which the Non-Parties could not examine, cross-examine, or otherwise contest the veracity of material now being used against them. In fact, the Non-Parties could not even object when Pat Bainter testified before the trial court. Allowing Plaintiffs to now rely on the July 10, 2014 Order, or any material provided *after* May 15, 2014, would not only carve a nonsensical exception to well-established Florida law, but would also raise serious concerns under the Due Process Clause of the Fourteenth Amendment. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Yet here the Non-Parties had no opportunity to be heard after May 15, 2014, and so this Court cannot consider material submitted after May 15, 2014 when adjudicating the Non-Parties' rights. *See Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Third, in response to the laundry list of errors that show the trial court failed to apply the closest scrutiny *before* requiring disclosure of documents, *see* Non-Parties Int. Br. at 16-18, Plaintiffs simply quote from the trial court's rationale provided *well after* the Non-Parties filed their notice of appeal. *See* Plaintiffs' Supp. Ans. Br. at 10-14. While this *post hoc* rationale is not part of the record on appeal, it is worth noting that this rationale still falls short of the mark.

Specifically, there is still no explanation for why the trial court disclosed some privileged documents, but not other substantially similar or identical documents. *See* Non-Parties Int. Br. at 16-18 (compiling list of such documents). There is still no explanation for why the trial court ordered disclosure of correspondence clearly unrelated to the redistricting process. *Id.* at 17 (referencing DATAT CONF 70-72). There is still no explanation for why the trial court ordered disclosure of some blank pages, but not others. *Id.* at 18.[3] And there is still no explanation for the trial court's use of a standard-less standard when the trial court should have been applying the "closest scrutiny" required by *NAACP v. Alabama,* 357 U.S. 449, 460 (1958) and its progeny.

Internal inconsistencies in the trial court's July 10, 2014 Order, in the trial court's *post hoc* rationale, cannot be ignored either. For example, the trial court

[3] The trial court, for instance, ordered DATAT CONF 1111 disclosed, but protected DATA CONF 1688, despite the fact that both pages are blank pages.

begins by noting the highly charged nature of the redistricting process at issue – the intense passions it elicits in the nation's two major political parties and their supporters, July 10, 2014 Order at 1-3, so much so that "winning is everything." *Id.* at 2. But then the trial court attempts to distinguish the *Perry v. Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010) decision relied on by Special Master Harding and the First District by noting that, unlike *Perry*, this case "does not arouse the type of intense passions that might justify a real fear of physical danger or mass public reprisals." July 10, 2014 Order at 11.

In this case concerning legislative intent, the trial court further explains the Non-Parties' privileged materials contain "no glaring 'smoking gun'" that suggests the Non-Parties conspired with the Legislature to subvert Florida law or even had "direct communications" with "specific staff or legislators." *Id.* at 11. But the trial court still concludes that the Non-Parties' 538 pages of documents are "highly relevant" to the issue of legislative intent. *Id.* at 11-12. The trial court suggests these documents are "highly relevant" because they help show an "extensive and organized" effort to participate in the political process in a way that protects the anonymity of some from the scorn of others. *Id.* at 12. Yet anonymity is precisely the thing the associational privilege "shield[s] from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995).

CONCLUSION

Anonymity matters. It matters for the NAACP, the Black Panthers, the Communist Party, past members of the Communist Party, people who support or oppose same-sex marriage, immigrants fighting for better schools, teachers, and even political consultants hoping to keep their internal strategies, correspondence, and the names of like-minded individuals private.[4] Without it there would be a chilling effect on the ability of people to formulate ideas (even partisan ideas), organize around these ideas (often along partisan lines), and then advocate for these ideas. "[C]onditions basic to the preservation of our democracy" would suffer as a result. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963). This is why our constitutional tradition requires courts to apply the closest scrutiny before ordering the disclosure of material otherwise entitled to anonymity. Here, the trial court failed to apply the closest scrutiny prior to ordering disclosure of 538 pages of documents. It erred. This Court should now

[4] Some of the many cases that stand for this proposition include *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825 (1966) where a *past* member of the Communist Party relied on the privilege; *Bates v. City of Little Rock*, 361 U.S. 516 (1960) where a non-profit corporation, *i.e.*, the NAACP sought anonymity; *Shelton v. Tucker*, 364 U.S. 479 (1960) where teachers sought anonymity; *NAACP v. Ala.*, 357 U.S. at 460 where the NAACP sought anonymity; *Perry*, 591 F.3d at 1152 where several individuals who banded together as proponents of a ballot initiative sought anonymity; *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981) where a controversial political party, *i.e.*, the Black Panthers, sought anonymity; and *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) where an unincorporated, loose association of students and parents sought anonymity.

reverse the trial court's May 2, 2014 and May 15, 2014 Orders because the law requires as much, because the law abhors double standards, and because the rule of law matters too.

Respectfully submitted:

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Dated: Aug. 8, 2014

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been generated with Times New Roman 14 point font and thus complies with Rule 9.100, Florida Rules of Appellate Procedure.

/s/ Mohammad O. Jazil
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to counsel of record identified on the attached service list on August 8, 2014.

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