

IN THE SUPREME COURT OF FLORIDA

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

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

Appellants,

v.

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

Plaintiffs – Appellees.

**MOTION FOR STAY OF MANDATE PENDING FILING AND
RESOLUTION OF A PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 9.310 of the Florida Rules of Appellate Procedure and 28 U.S.C. § 2101(f), the Non-Parties – Pat Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc. – ask the Court to stay the effect of the Court’s November 13, 2014 opinion until the time for filing a petition for writ of certiorari expires or, if a petition for writ of certiorari is filed, until the U.S. Supreme Court resolves that petition.¹ In support, the Non-Parties state:

1. In *State ex rel. Gibbs v. Couch*, 139 Fla. 709, 710 (Fla. 1939), this Court stated that “if the case was one that would likely be reviewed by the Federal

¹ The Non-Parties note that the Court’s internal operating procedures allow the Court to grant “a thirty-day stay of mandate pending review by the United States Supreme Court in order to allow counsel the opportunity to obtain a stay from that Court.” Florida Supreme Court Internal Operating Procedures § VI. At a minimum, this thirty-day stay is appropriate in this instance.

Court on *certiorari* or one in which the balance of convenience requires suspension of this Court's decree and a withholding of its mandate, the stay order should be granted." Here, the Non-Parties satisfy this standard.

Balance of Convenience

2. Rule 13(1) of the U.S. Supreme Court's Rules provides that "a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely filed with the Clerk of [the U.S. Supreme Court] within 90 days after entry of the judgment." Assuming no motion for rehearing is filed, that time expires on February 11, 2015.

3. The Court's opinion, however, provides for the "production of the 538 pages of disputed documents," and unsealing of "portions of the trial transcripts" as early as "3 p.m. on November 20, 2014."

4. Disclosure of the documents and sealed materials before the 90 day deadline expires would deprive the Non-Parties of the time needed to formulate the precise question(s) for a petition for writ of certiorari, and to then draft and file the petition. U.S. Supreme Court Rule 13 (providing 90 days to do the same); *see also* Florida Supreme Court Internal Operating Procedures § VI (empowering the "[C]hief [J]ustice and the [C]hief [J]ustice's designee" to grant "a thirty-day stay of mandate pending review by the United States Supreme Court in order to allow counsel the opportunity to obtain a stay from that Court").

5. Disclosure of the documents and sealed materials would also cause the Non-Parties irreparable harm by making the Non-Parties' confidential information available to the public.

6. By contrast, allowing the 538 pages of documents and trial transcripts to remain sealed would preserve the Non-Parties' rights as they seek further appellate review. Parties to the underlying case would suffer no harm because, should they decide to use the sealed materials, they could file sealed briefs before this Court. The Court recognized this in *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510, 511 (Fla. 2014) when it allowed the use of sealed materials and closed a portion of the trial proceedings to "maintain the status quo" pending further review.

Likelihood of Review by U.S. Supreme Court

7. While the Non-Parties continue to consider the precise question(s) for a petition for writ of certiorari, the Non-Parties note that the underlying issue in this appeal concerns the Non-Parties' fundamental First Amendment rights. The U.S. Supreme Court has, in recent years, placed a special emphasis on protecting First Amendment rights. *See, e.g.,* Megan Chester & Brian Palumbo, *A Positive Supreme Court Term for the First Amendment*, First Amendment Center (July 23, 2014) ("The Roberts Court has proven to be a champion of the First

Amendment”);² Ronald K.L. Collins, *Exceptional Freedom – The Roberts Court, the First Amendment, and the New Absolutism*, 76 Albany L. Rev. 409 (2013).

8. In the November 13, 2014 opinion, applying Florida law, the Court concluded that Non-Parties waived their First Amendment rights. *Bainter v. League of Women Voters*, Case No. 14-1200 (Fla. Nov. 13, 2014). In the concurring opinion, Justice Polston further explained that Florida law provided the Non-Parties “a reasonable opportunity to assert their federal rights.” *Id.* at 43. As support for this proposition, Justice Polston quoted from a legal treatise that provides: “The best interpretation of the cases, together, is that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights.” *Id.* at 42 (quoting 16B Charles Alan Wright, Arthur R. Miller & Edward H. Hopper, *Federal Practice and Procedure* § 4028 (3d ed. 2014)).

9. The Court’s November 13, 2014 opinion thus raises at least two *certiorari*-worthy questions. The first concerns the obligations of state courts to apply a heightened standard, consistent with federal law, when deciding whether First Amendment rights have been waived. Federal courts already apply a heightened standard such that: (1) “waiver of a fundamental right must be undertaken voluntarily, knowingly, and intelligently,” (2) “waiver must be established by clear and compelling evidence,” and (3) “courts must indulge every

² This article is available at <http://www.firstamendmentcenter.org/a-positive-supreme-court-term-for-the-first-amendment> .

reasonable presumption against waiver of fundamental constitutional rights.”
Legal Aid Society v. City of New York, 114 F. Supp. 2d 204, 277 (S.D.N.Y. 2000)
(collecting cases and applying them in a First Amendment context). It is for the
U.S. Supreme Court to decide whether state courts must follow federal law or can
avoid federal law and its heightened standard.

10. The second, related *certiorari*-worthy question concerns when (if
ever) state procedure provides an adequate basis for waiver of fundamental First
Amendment rights. While Justice Polston did quote from a legal treatise for the
proposition that state procedure may suffice, that same treatise, in the same section,
also states that:

The [U.S. Supreme] Court evidently is not comfortable with
committing itself to recognize forfeiture of federal rights in all
cases of failure to satisfy apparently reasonable and apparently
knowable state procedure.

As confusing as all of this is, it would be a mistake to suppose
that [a particular decision on the issue] set any clear new
direction. As with so many of the other decisions, it could
mean a great deal or it could mean very little.

The best that can be made of this formula is that it will provide
a polite expression of the conclusion that in a particular case a
state court has applied a general procedural rule arbitrarily; with
a perhaps unconscious hostility to federal rights; or recklessly
in light of the importance of the federal rights advanced and the
absence of any significant countervailing state procedural
interest.

16B Wright, Miller & Hopper at § 4028. As such, a decision by the U.S. Supreme Court would provide added clarity for all courts in an area that is far from clear.

11. Simply put, it is difficult to separate the waiver of a fundamental First Amendment right from the right itself. Questions presented by the Non-Parties in a subsequent petition for writ of *certiorari* would clarify the Constitutional minimums regarding waiver of the fundamental First Amendment rights.

Conclusion

12. On balance, a stay is both appropriate and necessary. It would provide the Non-Parties an opportunity to seek a petition for writ of *certiorari* before the U.S. Supreme Court; prevent irreparable harm to the Non-Parties in the process; and would cause the parties to the underlying case no harm.

13. Counsel for the Non-Parties contacted counsel for the plaintiffs below regarding this Motion. Plaintiffs intend to oppose this Motion.

WHEREFORE the Non-Parties ask the Court to stay the effect of the Court's November 13, 2014 opinion until the time for filing a petition for writ of *certiorari* expires or, if a petition for writ of *certiorari* is filed, until the U.S. Supreme Court resolves that petition.

Respectfully submitted:

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Dated: November 18, 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/ D. Kent Safriet
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via transmission of a Notice of Electronic Filing through the Court's Efiling Portal to counsel of record identified on the attached service list on November 18, 2014.

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