No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Patrick Bainter, Matt Mitchell,
Michael Sheehan, and Data Targeting, Inc.,
Applicants,

v.

League of Women Voters of Florida, Common Cause, Brenda Holt, J. Steele Olmstead, Robert Schaeffer, Roland Sanchez-Medina, Jr., Rene Romo, Benjamin Weaver, William Warinner, Jessica Barrett, June Keener, Richard Boylan, and Bonita Again,
Respondents.

EMERGENCY APPLICATION FOR STAY OF THE FLORIDA SUPREME COURT'S DECISION REQUIRING DISCLOSURE OF MATERIAL PROTECTED BY THE FIRST AMENDMENT'S ASSOCIATIONAL PRIVILEGE AND FLORIDA'S TRADE SECRETS PRIVILEGE

To the Honorable Justice Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

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Dated: May 28, 2014

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CORPORATE DISCLOSURE STATEMENT

Data Targeting, Inc., has no parent company, and no publicly held company owns ten percent or more of Data Targeting, Inc., stock.

INTRODUCTION

At 5:41 PM on May 27, 2014, the Florida Supreme Court issued a "truly unprecedented" decision. Appendix A at 15. In it, the Florida Supreme Court ordered the **immediate** disclosure at an ongoing trial of 538 pages of the Applicants' confidential materials containing protected political speech – internal deliberations and strategy, and the names and contact information for like-minded individuals who wish to remain anonymous. Appendix A at 1-9. The Florida Supreme Court did so without applying the First Amendment's balancing test with "the closest of scrutiny" required by the Court's decision in *NAACP v. State of Ala.,* 357 U.S. 449, 460 (1958), and without an opportunity for the lower appellate court to provide an explanation of its preliminary decision or compile an appropriate record. The Florida Supreme Court justified this disclosure as necessary to assist the Respondents with their claims arising under two recently adopted, vague, and constitutionally-suspect Redistricting Amendments to the Florida Constitution that now seemingly serve as censors on the Applicants' political speech despite the fact that the Redistricting Amendments speak to the Florida Legislature's intent – not the intent of non-parties like the Applicants.

Disclosure of the privileged and confidential documents at trial (regardless of whether the proceedings are **temporarily** sealed) would chill the Applicants' ability (along with that of other concerned citizens) to organize and participate with others in an effort to petition their government generally, and participate in Florida's decennial redistricting process specifically. Because these 538 pages also include

trade secrets, disclosure at trial would cause irreparable harm to the Applicants' economic interests as well.

An emergency stay is necessary to prevent disclosure of this privileged information (and its entry into evidence) during the ongoing trial in the underlying case, to keep the proverbial cat in the bag, and to preserve the Applicants' ability to later petition this Court for a writ of certiorari. Already, the First Amendment Foundation and other news organizations are poised to sue in order to reveal whatever is disclosed at trial based on the Florida Supreme Court's invitation to challenge the **temporarily** sealed nature of the proceedings. *See* Appendix L. If this information is entered into evidence at trial, waiver of the Applicants' rights to later argue the privileged and confidential nature of the documents also remains a real threat – especially if the trial court relies on this privileged information to support its judgment in the underlying case.

Absent a stay then, the Florida Supreme Court's "censorious selectivity" of the perspectives allowed during the redistricting process would stand despite the fact that the Applicants' materials are wholly irrelevant (as Respondents themselves concede) to the central issue of *legislative* intent in the underlying case. *United States v. Alvarez,* 132 S. Ct. 2537, 2555 (2012) (Breyer, J., concurring).[1]

[1] Of the more than 175 maps submitted to the Florida Legislature through its public website, the Democratic-Respondents focus on only those submitted by the members of the Republican Party or those affiliated with Republican causes. This in itself is the type of persecution the associational privilege is designed to prevent. This is why in *NAACP,* 357 U.S. at 460, and *Bates v. City of Little Rock,* 361 U.S. 516 (1960), the associational privilege applied to the NAACP at the height of the civil rights movement; why in *Black Panther Party v. Smith,* 661 F.2d 1243 (D.C. Cir.

Self-censorship that "dampens the vigor and limits the variety of public debate" would result, depriving the Applicants and their associates of an opportunity to speak, and other like-minded individuals the opportunity to listen to the Applicants' political perspectives. *N.Y. Times v. Sullivan,* 376 U.S. 254, 279 (1964).

DECISIONS BELOW

The Florida Supreme Court's decision overturns two decisions by Florida's First District Court of Appeal. *See* Appendix A. The first granted Applicants an emergency stay of the trial court's order allowing disclosure at a public trial of 538 pages of privileged information. *See* Appendix B. The second reversed the trial court's order "to the extent [it] permit[ed] any degree of disclosure or use at trial of the constitutionally-protected contents of the privileged and confidential documents," presumably barring disclosure of all 1,833 pages of the Applicants' documents during the public trial with the promise of "an opinion . . . explaining [the First District's] reasoning [to] follow." Appendix C.

The First District has not yet fully explained whether the trial court erred by ordering disclosure of the 538 documents without applying the First Amendment's balancing test with the closest scrutiny. And based on the First District's

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1981), an unpopular political party used the privilege to avoid disclosing the names of some its leaders and members; why in *Perry v. Schwarzenegger,* 591 F.3d 1147, 1160-61 (9th Cir. 2010), several individuals – who banded together as the proponents of a contentious California ballot initiative on gay marriage – asserted the privilege; why in *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980), a loose association of concerned students and parents (principally immigrants) avoided disclosure; and why in *DeGregory v. Attorney Gen. of New Hampshire,* 383 U.S. 825 (1966) a past member of the Communist Party could rely on the privilege in the midst of the Cold War.

preliminary order that implies the First Amendment's associational privilege is dispositive, the First District may or may not address whether the trial court erred by failing to provide a proper *in camera* review and evidentiary hearing as required by Florida's well-established procedural protections for trade secrets. *Id.*

Yet in what the dissent described as a "truly unprecedented" jurisdictional maneuver, Appendix A at 15, the Florida Supreme Court issued an opinion reversing the First District's orders (after giving the Applicants a mere two and a half hours to respond to Respondents' 50-page emergency petition). Appendix A at 1-9. The Florida Supreme Court held that the trial court "is not precluded from admitting the documents into evidence, subject to a proper showing of relevancy, but that any disclosure or use of the documents must take place under seal in a courtroom sealed to the public." *Id.* at 2. The Florida Supreme Court warns, however, that its "opinion is **not** a determination that these documents will be permanently under seal." *Id.* at 3 (emphasis added). The First Amendment Foundation and other media organizations are already considering lawsuits to open the proceedings. Appendix L (collecting materials).

It is important to reiterate that neither the First District nor the Florida Supreme Court has yet to issue an opinion explaining whether the trial court complied with the First Amendment's balancing test, using the closest scrutiny, before ordering disclosure. *See* Appendix A and C. The Applicants, therefore, include the trial court's orders in Appendix D, and the special master's findings with the trial court's order affirming in part the findings in Appendix E.

The Florida Supreme Court, however, makes clear that (1) the emergency stay granted by the First District is lifted, and (2) the privileged documents are immediately available for use at the trial in the underlying case. *See* Appendix A. It would be futile for Applicants to now petition the Florida Supreme Court to reinstate the very stay it has just lifted. *Compare* Supreme Court Rule 23.3 ("relief requested was first sought in the appropriate court or courts below") *with Western Airlines, Inc. v. Teamsters,* 480 U.S. 1301, 1304-05 (1987) (O' Connor, J.) (granting stay of court of appeals' order enjoining a merger where no motion for stay had been filed with the court of appeals because "the timing and substance" of the order made compliance with the rule "both virtually impossible and legally futile").

JURISDICTIONAL STATEMENT

Florida's First District Court of Appeal granted Applicants' Emergency Motion for Stay on May 16, 2014 and then, on May 22, 2014, issued a preliminary decision on the merits ostensibly protecting all 1,833 pages of the Applicants' documents from disclosure and use at a public trial. The Florida Supreme Court overturned both of the First District's orders at 5:41 PM on May 27, 2014. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651(a), and 2101(f).

STATEMENT OF THE CASE

The underlying case is a heavyweight bout between the country's two major political parties. The Democratic Respondents[2] contend that Florida's Republican-

[2] National Democratic interests, including the Democratic National Committee, fund the Respondents' participation in this case. *See* Appendix F (collecting citations to discovery by the Legislative parties in the underlying case).

led Legislature ran afoul of the Florida Constitution's Redistricting Amendments (themselves vague and constitutionally-suspect) by drawing political boundaries for state and federal elections that favor or disfavor a party or incumbent.[3] The Legislature disagrees. The Applicants – Patrick Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc. – are caught in the crossfire through non-party subpoenas and discovery under the Florida Rules of Civil Procedure that threaten their ability to participate in efforts to petition their government. *See FEC v. Wisc. Right to Life, Inc.,* 551 U.S. 449, 468 n.5 (2007) ("litigation constitutes a severe burden on political speech").

In a nutshell, the Respondents contend that the Legislature conspired with the Applicants and others to subvert Florida's recently adopted Redistricting Amendments. Not so. The Applicants are simply political consultants. They align with the Republican Party and conservative causes, and as a result are thus vilified by the Democratic-Respondents. But this does not mean that the Non-Parties conspired to violate the law as Respondents suggest. The Applicants already disclosed all documents that detail communications with the Florida Legislature, individual legislators, and legislative staff. In other words, the Applicants already

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[3] Section 16 of Article III of the Florida Constitution empowers the Florida Legislature to draw political boundaries for state and federal elections in the second year after each decennial census. Added to the Florida Constitution after the 2010 election, Sections 20 and 21 of Article III – the Redistricting Amendments – limit the Legislature's ability to draw districts "with the intent to favor or disfavor a political party or incumbent," and "with the intent or result" of diminishing the ability of "racial or language minorities" to "elect representative of their choice." Sections 16, 20, and 21 are reproduced in Appendix G.

disclosed all information that could possibly go to the issue of *legislative intent* – the central issue in the case.[4] Thus, no justification remained for the trial court to allow the Respondents to dig deeper into the Applicants' intent, the Applicants' private dealings and deliberations wholly irrelevant to the central issue in the case, especially where this inquiry would chill the Applicants' fundamental First Amendment right to organize, discuss, advocate for, or otherwise petition their government together with the people who share their views. *See* Appendix H (Applicant Patrick Bainter's affidavit before the special master below, noting the chilling effect of forced, public disclosures).

Yet the trial court's orders required the Applicants to disclose the very type of information that would chill their fundamental First Amendment rights without applying the First Amendment's balancing test with the closest of scrutiny. *See* Appendix D. The orders required the Applicants to disclose in a public trial 538 pages that contain the names, contact information, and internal deliberations of the Non-Parties, their employees, clients, and other like-minded individuals regarding the redistricting process. The trial court required this despite: (1) the Respondents' admission that such information is wholly irrelevant to the issues in the underlying case; (2) the Applicants' prior disclosure of all 112 pages of documents related to their communications with the individual legislators and legislative staff; (3) the

[4] The Florida Supreme Court even became the first court in the common law tradition to allow depositions of individual legislators and their staff to discern the intent of a collegial body – the Florida Legislature – carving an exception to the legislative privilege. *League of Women Voters of Fla. v. Fla. House of Reps.,* 132 So. 3d 135, 150 (Fla. 2013).

trial court's own failure to explain why its orders diverged from the conclusion of the Special Master in the case (a former Chief Justice of the Florida Supreme Court) who concluded that all 1,833 pages of documents are worthy of protection under the First Amendment after considering written and oral argument, an affidavit, oral testimony, an evidentiary hearing, and conducting an *in camera* review; and (4) the trial court's own failure to offer any indication of the type of "closest scrutiny" required by the First Amendment's associational privilege and the requisite balancing test. *NAACP,* 357 U.S. at 460.

The trial court also completely disregarded Florida's well-established procedural safeguards for protecting trade secret information. These procedural safeguards require Florida's trial courts to conduct an *in camera* review and then hold an evidentiary hearing once one asserts the trade secrets privilege. *See infra*.

On appeal, the First District granted an emergency stay of the trial court's order, and then reversed the trial court's order allowing certain privileged documents protected by the First Amendment's associational privilege to be disclosed at a public trial. Appendix B and C. The Florida Supreme Court, in turn, reversed the First District's decision. Appendix A. Neither court has had a chance to address the trial court's failure to follow the required procedural safeguards designed to protect trade secrets. The Applicants now move for an emergency stay because the underlying trial continues with Applicants' only witness, Patrick Bainter, facing potential contempt of court, and the Applicants facing the disclosure of their privileged and confidential information during the course of the trial.

REASONS FOR GRANTING THE APPLICATION FOR STAY

In determining whether to grant a stay, the Court considers the likelihood that "four Justices would vote to grant certiorari" and that "the Court would then set the order aside," and also takes into consideration "the so-called 'stay equities,'" *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson,* 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) – specifically, "whether the applicant will be irreparably injured absent a stay"; "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and "where the public interest lies." *Nken v. Holder,* 556 U.S. 418, 434 (2009). This case presents three related but distinct certiorari-worthy questions rooted in the First Amendment, and the Due Process Clause of the Fourteenth Amendment. Each provides an independent reason for granting review, and then reversing the Florida Supreme Court's decision. The equities also strongly favor a stay to prevent irreparable injury to both the Applicants and other like-minded individuals who hope to petition their government free from undue harassment, ridicule, vexatious litigation, and the possibility of having their sensitive, business-specific information disclosed.[5] Since a contempt order now likely awaits the Applicants at the ongoing trial, this request presents extraordinary circumstances that warrant extraordinary relief.

[5] As noted in footnote 1 *supra*, the associational privilege protects all political perspectives, not just popular perspectives.

I. DENYING A STAY COULD PRECLUDE THE APPLICANTS FROM LATER SEEKING A WRIT FOR CERTIORARI FROM THE COURT.

The Florida Supreme Court's decision allows the Respondents to immediately use privileged and confidential information at a trial to the detriment of the Applicants' First Amendment rights, and their right to Due Process under the Fourteenth Amendment. Once disclosed at trial and entered into evidence, the Applicants would be hard-pressed to maintain the information's privileged and confidential nature. As non-parties to the underlying litigation, the Applicants do not have the luxury of waiting until the end of trial and then using the improper admission of their privileged and confidential information into evidence as the basis for a mistrial. *Cf. Holmes v. Reg'l Med. Ctr., Inc. v. Agency for Health Care Admin.,* 731 So. 2d 51, 53 (Fla. 1st DCA 1999).[6] A subsequent petition for writ of certiorari to this Court would then become difficult if not impossible to pursue. Flagrant violations of the Applicants' constitutional rights would stand, namely the Florida Supreme Court's failure to apply (or require the lower courts to apply) the *closest scrutiny* in accordance with the First Amendment's balancing test, and its complete disregard of the well-established standards for protecting trade secrets. *See infra.*

This in itself provides justification for a stay. Indeed, as Justice Marshall noted in *New York v. Kleppe,* 429 U.S. 1307, 1310 (1976), "the most compelling justification for a Circuit Justice to upset an interim decision by a [lower court]

[6] There, the First District recognized that confidential information once disclosed cannot again become confidential, but explained that subsequent review may make the information inadmissible thus providing the aggrieved party grounds for a mistrial. *See Holmes,* 731 So. 2d at 53.

would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the [lower court]."

II. APPLICANTS HAVE A REASONABLE LIKELIHOOD FOR SUCCESS ON THE MERITS.

A. There is a reasonable likelihood that the Court would grant certiorari to assess whether a court can order the disclosure of protected political speech absent the "closest scrutiny" required by the First Amendment.

1. The associational privilege protects First Amendment rights from the demands of litigation.

"[T]he importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," cannot be underestimated. *Citizens Against Rent Control v. City of Berkley,* 454 U.S. 290, 295 (1981). In fact, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured" by the Constitution. *NAACP,* 357 U.S. at 460. This right to associate recognizes that sometimes only "by collective effort [can] individuals make their views known," where "individually, their voices would be faint or lost," *Citizens Against Rent Control,* 454 U.S. at 294, and that often people can only undertake these collective efforts if they can do so in private. *NAACP,* 357 U.S. at 462. Where these collective efforts may prove to be controversial, "[a]nonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 357 (1995).

Rooted in this sacrosanct First Amendment tradition, the associational privilege is a qualified privilege that protects one's right to freely associate with like-minded individuals or entities (often in anonymity) to pursue a common goal.

The privilege applies regardless of "whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *NAACP,* 357 U.S. at 461. Action "curtailing the freedom to associate is subject to the *closest scrutiny*." *Id.* (emphasis added). After one demonstrates "arguable first amendment infringements" through the kind of affidavit provided by the Applicants before the special master and trial court below, the party seeking discovery must demonstrate "an interest in obtaining the disclosures it seeks which is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association." *Perry,* 591 F.3d at 1160-61. The information yields only after a trial court concludes: (1) the information sought is "highly relevant" to the case under "a more demanding standard of relevance than that under [the rules of procedure]"; (2) the request is "carefully tailored to avoid unnecessary interference with protected activities"; (3) the information is central to the issues in the case; and (4) no less intrusive means of obtaining the information exists. *Id.* at 1060-61.

2. The Florida Supreme Court ignores this Court's requirement of subjecting protected communications to the "closest scrutiny" before ordering disclosure.

Without any real explanation of the First Amendment implications of its decision, the Florida Supreme Court reverses the First District's decision and temporarily reinstates the trial court's constitutionally infirm order that falls far short of the "closest scrutiny" required by this Court. *NAACP,* 357 U.S. at 460. The Florida Supreme Court's order further conflicts with the Ninth Circuit's test for allowing disclosure only where (1) the information sought is highly relevant, (2) the

request carefully tailored, (3) the information central to the case, and (4) no less intrusive means of obtaining the information are available.

a. Failure to provide the "closest scrutiny" generally.

The special master assigned to the case, himself a former Chief Justice of the Florida Supreme Court, prohibited disclosure of all 1,833 pages of the Applicants privileged and confidential documents after considering written submissions, hearing oral argument, and conducting an evidentiary hearing and *in camera* review. *See* Appendix E. The special master concluded that the Respondents had failed to "show[] a compelling need sufficient to deny Non-Parties Pat Bainter, Matt Mitchell, Michael Sheehan and Data Targeting, Inc. the privilege." *Id.* at 6.

The trial court, however, departed from the special master's findings and required the disclosure of 538 pages of documents without any scrutiny, much less the closest scrutiny. *See* Appendix D. The trial court instead issued its order without holding a separate hearing to discuss why the First Amendment's balancing tilts in favor of disclosure for these 538 pages, and without issuing any findings concerning the factors identified by the Ninth Circuit. *Id.*

A review of the 538 pages reveals that the trial court's order was the product of a standardless standard – an *ad hoc* approach that requires disclosure of some privileged documents, but not substantially similar (and sometimes identical) privileged documents. The following is a list of some of the numerous inconsistencies in the trial court's order:

- DATAT CONF 78 – Ordered Disclosed:[7] e-mail regarding Senate 4a Map;
  DATAT CONF 79 – Not Ordered Disclosed: attached Map of Senate 4a.

- DATAT CONF 108-109 – Order Disclosed: e-mail and map;
  DATAT CONF 228-229 – Not Ordered Disclosed: same e-mail and same map.

- DATAT CONF 139-140 – Ordered Disclosed: map and performance data regarding 7b 10272011 Map;
  DATAT CONF 25-26 – Not Ordered Disclosed: same map and same performance data.

- DATAT CONF 298 – Ordered Disclosed: performance data for Senate 143COASTAL 2a 11182011;
  DATAT CONF 1128 – Not Ordered Disclosed: same performance data.

- DATAT CONF 313-314 – Ordered Disclosed: candidate area map;
  DATAT CONF 1126 – Not Ordered Disclosed: same candidate area map.

- DATAT CONF 94 – Ordered Disclosed: document regarding grassroots coordination efforts;
  DATAT CONF 8, 95-98, 125, 126-132, 162-200 – Not Ordered Disclosed: documents regarding similar grassroots efforts; interestingly, DATAT CONF 95 (not disclosed) is the signature block for DATAT CONF 94 (ordered disclosed).

- DATAT CONF 1135-1141 – Ordered Disclosed: e-mail chain regarding purely business matters, unrelated to the redistricting process, of whether Non-Parties have the ability to do overlays for an analysis from available data;
  DATATCONF 215-220 – Not Ordered Disclosed: same e-mail chain regarding the same subject with slight variations in the chain of messages.

In addition, had the trial court applied the closest scrutiny, the following privileged and confidential documents would not have been ordered disclosed:

[7] The Applicants provided documents labeled DATAT CONF in a sealed appendix to the First District in Case No. 1D14-2163. Should this Court so desire and order, the Applicants would submit the documents under seal to this Court.

- DATAT CONF 70-72, which is identical to 212-214 –These documents include an e-mail that has nothing to do with the redistricting process. The e-mail instead includes an inquiry regarding the Non-Parties' ability to prepare "direct mailers," which rely on database analysis to better target recipients for specific advertising or political campaigns. Direct mailers are a service the Non-Parties provide to their clients. The e-mail should have, therefore, been excluded just as DATAT CONF 215-220 and DATAT 1135-1141 noted above.

- DATAT CONF 105 –This document is an e-mail from one of the Non-Parties' employees to a former state legislator (not in office at the time of the redistricting process) regarding assistance in Non-Parties' grassroots coordination efforts. The Non-Parties' employee refers to the legislator by his former title as a matter of courtesy. The legislative title presumably prompted the Circuit Court to order this e-mail disclosed when there was no basis for doing so.

- DATA CONF 248-249 –This document is an e-mail that contains no reference to any submission to the Legislature, actual or anticipated, and is clearly a draft that reflects internal analysis that cannot justify the Circuit Court's order to disclose it.

- DATA CONF 257 –This document is a one-line e-mail from Non-Parties to a like-minded individual. The document contains no contextual clues regarding relevance or centrality to the case.

- DATAT CONF 299-303 –This document is an e-mail chain that represents the Non-Parties' purely internal reflections on the data related to the latest released legislative map – reflections that contain a proprietary analysis for internal business purposes.

- DATAT CONF 1111 –There is no content on this page; it is simply blank.

- DATAT CONF 1112-1115 –This document is unrelated to a map drawing exercise. It is an e-mail chain that relates to the Non-Parties' legal considerations as they consider the universe of options available for identifying districts by number designations that ensure equal opportunity to elect Senators and Congressional members; it has nothing to do with the design, map line, or drawing of any district plan in conformity with the Constitutional standard, and therefore again, is far from being central to the case.

The trial court's questioning of Patrick Bainter, one of the Applicants, *after* ordering disclosure of the 538 pages confirms that the Circuit Court's May 2, 2014

Order was not the product of the closest scrutiny required by this Court, but was of the type of cursory review that invites error. *See* Appendix I at 77. There, the trial court asked Patrick Bainter, "[w]hat exactly does your company do?" *Id.* The trial court seemingly remained unaware that the Applicants are "a political consulting firm" even though the court had already: concluded that the associational privilege applied to the Applicants, *id.*; reviewed documents that detail the Applicants' operations and confidential client communications; and ordered that the Applicants disclose 538 pages of documents because the documents are ostensibly central to the issue of legislative intent, otherwise highly relevant, and no less intrusive means of obtaining the information in these documents exists.

Occam's razor slices through the various explanations for the trial court's decision to settle on the simplest explanation. The trial court asked about the Applicants' business because it did not know, and it did not know because it failed to apply "the closest scrutiny" before ordering the privileged and confidential documents disclosed. *NAACP,* 357 U.S. at 460; *see also* Bryan Garner, *Garner's Modern American Usage* 584 (3d ed. 2009) (discussing Occam's razor). In its decision, the Florida Supreme Court did not even consider (much less decide) whether the trial court applied this closest scrutiny before allowing disclosure of the Applicants' privileged and confidential documents. *See generally* Appendix A.

b. The information sought is not "highly relevant."

The trial court's order also made no mention of whether the Respondents had satisfied their burden of showing that the information in the 538 pages of privileged

documents is "highly relevant" to the issues now before the trial court. *Compare* Appendix D *with Perry,* 591 F.3d at 1160-61. As the Ninth Circuit explained in *Perry*, the "highly relevant" standard is a "more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)," the federal analog to Florida Rule of Civil Procedure 1.280(b)(1). *Perry,* 591 F.3d at 1061. The trial court and the Florida Supreme Court completely ignored the high bars erected by this more demanding standard.

Had the trial court applied the "highly relevant" standard, the trial court would have concluded that the information in the 538 pages of documents is wholly irrelevant to the case. The central issue before the trial court in the ongoing trial is the Florida Legislature's intent, and whether that intent violated the Redistricting Amendments during the 2012 redistricting process.

The Applicants already disclosed all 112 pages of documents that include communications between the Applicants and the Legislature, including individual legislators and legislative staff. The remaining documents include the Applicants' internal deliberations – discussions with employees and like-minded individuals – regarding their strategy for participating in the redistricting process. The views expressed and strategies outlined in these documents have no bearing on the underlying issue of legislative intent. These documents show only the *Applicants' intent*. *See* Fla. Const. Art. III, Sections 21 and 22; *League of Women Voters,* 132 So. 3d at 150 ("the communications of *individual legislators or legislative staff members*, if part of a broader process to develop portions of the map," are relevant

to the issue of "whether the plan as a whole or any specific districts were drawn with unconstitutional intent") (emphasis added); *In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So. 3d 597, 641 (Fla. 2012) (referring to "the Legislature's 'intent'" as the appropriate inquiry); *Tamiami Trail Tours v. City of Tampa,* 31 So. 2d 468, 470-71 (Fla. 1947) ("we should, if possible, determine from the *legislative record* what was the legislative intent") (emphasis added).

The Applicants' intent is just as irrelevant as the Respondents' intent. In fact, the Respondents previously argued that the Legislative parties in the underlying case cannot seek from them discovery related to the Respondents' intent in drawing maps for the redistricting process. *See* Appendix J at 14-17. To avoid sanctions for fraud on the trial court,[8] the Respondents specifically explained that "there would have been nothing illegal about [the Respondents drawing maps with partisan intent] since there are no legal restrictions on the [*Respondents'*] *intent*." *Id.* at 17 (citations omitted and emphasis added). The Respondents further

[8] The Legislative Parties' Motion for Sanctions for Plaintiffs' Fraud on the Court details the Respondents' duplicity. *See* Appendix F. Shortly after the Respondents filed the complaint in the trial court, they sought entry of summary judgment asking the trial court to invalidate the Legislature's maps and adopt instead maps submitted by the Respondents. The Legislature then sought discovery regarding all aspects of the maps offered by the Respondents. Discovery revealed that the Respondents' maps were laden with partisan intent intended to favor the Democratic Party and its incumbents. The Legislative Parties' Motion for Sanctions for Plaintiffs' Fraud on the Court compiles a list of specific deposition testimony and documents to highlight the Plaintiffs' partisan intent. One e-mail disclosed during discovery describes a directive to Democratic Party map drawers to "scoop as many Jews out of Tamarac and Sunrise" as possible to create more favorable Democratic districts. Appendix K. When faced with defending the Legislature's Motion for Sanctions for Fraud on the Court, the Respondents asserted that only the *Legislature's* intent is relevant, and that their own intent is wholly irrelevant.

explained that the Redistricting Amendments' restraints on partisan politics "[do] not impose any corresponding restraints on private citizens who submit exemplar plans." *Id.* According to the Respondents, "[i]n evaluating a proposed map submitted by a private litigant, the focus remains on whether the *Legislature* – not the *submitter of the proposed map* – considered impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.* (citations omitted and emphasis added). Here, the Applicants and Respondents agree.

The intent of anyone other than the Legislature is thus irrelevant to the underlying case. *See* Fla. Const. Art. III, Sections 21 and 22. This is particularly true here because the Florida Supreme Court took the very unusual step of allowing depositions of individual legislators and legislative staff to discern the intent of a collegial body, the Florida Legislature, and individual legislators have already testified at the underlying trial regarding their intent. *See League of Women Voters,* 132 So. 3d at 137-38. But the trial court still ordered the disclosure during a public trial of 538 pages of documents to which the associational privilege applies without any consideration of whether these pages are "highly relevant." Now the Florida Supreme Court seemingly ignores this standard altogether, not once referring to the Respondents' burden of showing that material is "highly relevant." *See generally* Appendix A. Without any explanation, the Florida Supreme Court reinstates the trial court's order that also ignored the "highly relevant" standard, albeit with a temporary seal that is already cracking.

c. The Respondents' request is not "carefully tailored"

The trial court's orders similarly included no consideration of whether the Respondents' request for disclosure was carefully tailored to avoid unnecessary interference with fundamental First Amendment rights. *See Perry,* 591 F.3d at 1061. While the Respondents seemingly agree that the documents they seek are irrelevant to the central issue in the case – legislative intent – the Respondents' persistence suggests that the public use of the Applicants' information is intended to harass, discourage, and otherwise chill the Applicants' First Amendment right to petition their government on issues that matter most to them. Indeed, Patrick Bainter's affidavit and testimony before the special master highlight the Applicants' concerns of an unconstitutional chilling effect. *See* Appendix H. The special master, the trial court, and the First District found these concerns compelling enough to apply the First Amendment's associational privilege. But without any explanation or analysis, much less close scrutiny, the trial court required the disclosure of 538 pages of privileged information. This unnecessary interference cannot now be justified despite the Florida Supreme Court's most recent opinion. *NAACP,* 357 U.S. at 460. Like the other prongs of the First Amendment balancing test, the Florida Supreme Court completely ignores this prong with no mention of it at all. *See generally* Appendix A.

d. The information sought is not central to the issue in the underlying case.

The Supremacy Clause of the U.S. Constitution makes the Applicants' First Amendment rights paramount notwithstanding the Florida Supreme Court's most

recent opinion preaching the virtues of Florida's vague and constitutionally-suspect Redistricting Amendments. *See* Appendix A at 5-9. At the very least, therefore, the Florida courts must subject any possible disclosure of protected speech to the absolute "closest scrutiny," and provide an explanation for why the First Amendment's associational privilege must yield for 538 pages of documents under the relevant four-prong balancing test. *See Perry,* 591 F.3d at 1161. The trial court's orders provided no such explanation, and the Florida Supreme Court fails to offer any in its opinion – again ignoring a prong of the required balancing test. And for the reasons stated above in the discussion of the "highly relevant" prong of the First Amendment's balancing test, the information sought cannot be central to the issue of legislative intent when the information is wholly irrelevant – when the Respondents themselves concede that the Non-Parties' partisan intent does not matter. *See supra*.

e. The trial court rejected less intrusive means of obtaining the information.

The trial court further compounded its mistakes by refusing a less intrusive means of using the 538 pages of documents at trial. A **permanently** sealed proceeding, as the Applicants originally recommended, offered the promise of a compromise between the Applicants and the Respondents. More importantly, a **permanently** sealed proceeding offered a way to avoid having to weigh the First Amendment on the one hand and Florida's Redistricting Amendments on the other. The Respondents could have entered into evidence and discussed the information in the 538 pages of privileged documents, so long as the trial court **permanently** sealed

the documents and the proceedings related to Patrick Bainter, the Applicants' sole witness at trial. The Respondents did not agree to this approach, and the trial court rejected it. The Florida Supreme Court now rejects it too by requiring the disclosure (in a **temporarily** sealed proceeding) of the Applicants' 538 pages of privileged and confidential documents in direct contravention of this Court's requirements as interpreted by the federal courts. *See* Appendix A at 3.

B. There is a reasonable likelihood that the Court would grant certiorari to decide whether the Florida Supreme Court deprived the Applicants, without due process of law, of their First Amendment right to freely and anonymously associate with like-minded individuals.

A related certiorari-worthy issue is whether the Florida Supreme Court denied the Applicants their procedural due process rights under the Fourteenth Amendment's Due Process Clause when it failed to subject the Applicants' privileged information to the closest scrutiny before allowing disclosure at a public trial. The Florida Supreme Court did deny these due process rights.

Based on this Court's prior precedents and rulings by the lower federal courts, the Applicants had an expectation that their internal deliberations, which eventually mature into advocacy through a grassroots network, would remain confidential unless first subjected to the "closest scrutiny." *NAACP,* 357 U.S. at 460. The Applicants also had an expectation that courts would not encroach on their liberty and property interests in this political speech – or otherwise make this speech subject to disclosure at a trial – unless justified by a careful balancing. *See Perry,* 591 F.3d at 1160-61. But as discussed above, no such close scrutiny or

balancing occurred **prior** to the trial court order and then the Florida Supreme Court's opinion requiring disclosure of 538 pages of privileged and confidential documents at trial. The Florida courts deprived the Applicants of their procedural due process rights.

C. There is a reasonable likelihood that the Court would grant certiorari to assess whether the Florida Supreme Court's sudden, unpredictable, and complete break from Florida's well-established procedural mechanisms for protecting trade secrets deprives the Applicants of due process of law.

A court's sudden and unpredictable break from well-established law may similarly deprive one of due process of law under the Fourteenth Amendment's Due Process Clause. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,* 130 S. Ct. 2592, 2617-18 (Kennedy, J., concurring).[9] Well-established law in Florida entitles a party to specific safeguards once that party claims that the trade secrets privilege applies. More specifically, under Florida law, a court must conduct an *in camera* review and hold an evidentiary hearing before disclosing material that is claimed as trade secret. *Summitbridge National Invs., LLC v. 1221 Palm Harbor LLC,* 67 So. 3d 448, 449-51 (Fla. 2d DCA 2011) (holding that the compelled disclosure of information from investment company to borrowers was improper because the trial court did not conduct an *in camera* review to determine the status of the claimed trade secret); *Premiere Lab Supply, Inc. v. Chemplex Indus., Inc.,*

[9] In *Stop the Beach Renourishment,* in an opinion joined by Justice Sotomayor, Justice Kennedy explained that a court may deprive a party of due process of law through a sudden, unpredictable change in the law. *See Stop the Beach Renourishment,* 130 S. Ct. at 2617-18.

791 So. 2d 1190, 1190 (Fla. 4th DCA 2001) (requiring "an *in camera* inspection to determine whether [the given material] constitute[s] a trade secret and a subsequent evidentiary hearing on the issue of reasonable necessity for disclosure"); *Am. Exp. Travel Related Services, Inc. v. Cruz,* 761 So. 2d 1206, 1208 (Fla. 4th DCA 2000) ("When trade secret privilege is asserted as the basis for resisting production, the trial court *must* determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the requested materials.") (emphasis added).[10]

The Florida courts afforded no such protections to the Applicants, depriving the Applicants of their due process rights. After the Applicants claimed trade secret protection, the trial court referred the matter to the special master. The special master conducted only a "very cursory examination of the documents" for trade secret protection, Appendix E at 4, because, having concluded that the associational privilege protected all of the documents, the special master explained that he "[did] not need to deal with the Trade Secret issue." *Id.* at 6. There was no clear finding regarding whether a trade secret actually applied, much less an evidentiary hearing

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[10] These requirements trace their origin to the First District Court of Appeal's decision in *Goodyear Tire & Rubber Co. v. Cooey*, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978). The requirements have been consistently followed by the Florida courts since then. *See, e.g., Post-Newsweek Station, Fla. Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992); *Barron v. Fla. Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988); *Bright House Networks, LLC v. Cassidy*, 129 So. 3d 501 (Fla. 2d DCA 2014); *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. 3d DCA 2005); *Salick Healthcare Inc. v. Spunberg*, 722 So. 2d 944 (Fla. 4th DCA 1998); *Uniroyal Goodrich Tire Co. v. Eddings*, 673 So. 2d 131, 132 (Fla. 4th DCA 1996); *Eastern Cement Co. v. Dep't of Envtl Reg.*, 512 So. 2d 264, 266 (Fla. 1st DCA 1987); *Becker Metals Corp. v. W. Fla. Scrap Metals*, 407 So. 2d 380 (Fla. 1st DCA 1981).

regarding the trade secret issue. Only after being prompted by the Applicants' counsel did the trial court make a passing statement regarding its ostensible *in camera* review for trade secret protection before entering an order that would deprive the Applicants of their trade secrets (and fundamental First Amendment rights) without procedural due process. *See* Appendix I at 7-8.[11]

This departure from the law's procedural protections is far from harmless. Had the trial court followed the entrenched procedural safeguards, the Applicants could have shown that their documents qualify for trade secret protections for several reasons. Some contain confidential data, analysis, and impressions crucial to the Applicants' business as political consultants, disclosure of which would be harmful to the Applicants' financial interests if obtained by other Republican or even Democratic political consultants. DATA CONF 00009-00011. Other documents include information on grassroots members, again information competitors would use to pick-off members of an organization the Applicants have

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[11] After the trial court listed the page numbers of the protected documents that it required the Applicants to disclose, counsel for the Applicants, Mr. Safriet, asked:

> MR. SAFRIET: And just if I can, ask a clarifying question on your prior ruling when you listed those numbers. We also had asserted trade secret privilege to numerous of those documents.
>
> And the special master didn't get there, because he found all of them to be protected by the associational privilege. So did Your Honor do the analysis for trade secret too when you looked at these documents, such that we don't need to go back through the record?
>
> THE COURT: I did.

Appendix I at 7-8.

carefully organized and maintained. DATA CONF 00094. Still other documents provide insight on the Applicants' direct mailing capabilities and the clients soliciting such services. DATAT CONF 00070-00072. Had they been given the opportunity, the Applicants could have shown that all such information qualified as trade secrets. *See, e.g., Bright House Networks,* 129 So.3d at 506 ("A customer list that is not readily ascertainable by the public can be a trade secret.") (citations omitted); *Salick Health Care*, 722 So.2d at 945 (holding that information concerning strategies, designs, and market analysis may constitute trade secrets).

The Applicants, however, were not afforded the procedural minimums under Florida law. And in completely ignoring the trial court's fundamental error on the issue, the Florida Supreme Court now suddenly and unpredictably departs from the need to afford these well-established procedural safeguards to the Applicants. This results in a violation of the Applicants' procedural due process rights under the Due Process Clause of the Fourteenth Amendment. *Cf. Stop the Beach Renourishment,* 130 S. Ct. at 2617-18 (Kennedy, J., concurring).

III. THE EQUITIES STRONGLY FAVOR A STAY BECAUSE THERE IS A SUBSTANTIAL LIKELIHOOD THAT APPLICANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY, THE ONGOING TRIAL MAY BE CONTINUED, AND THE PUBLIC INTEREST FAVORS PROTECTION OF POLITICAL SPEECH.

An emergency stay is both appropriate and necessary because the trial in the underlying case is ongoing and the Florida Supreme Court's order has immediate effect. Absent a stay from this Court, the Respondents may now use the Applicants'

confidential and privileged information during the trial. Several forms of irreparable harm would result.

First, Patrick Bainter, one of the Applicants here, faces the prospect of being held in contempt of court for not answering questions related to these privileged and confidential materials. Fines and jail are possible. Invoking one's First Amendment rights should not carry with it the threat of such severe sanctions. *Cf. Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) (allowing a *pre-enforcement* First Amendment challenge to a speech-proscribing law if the speaker faces a "credible threat of prosecution").

Second, as the special master observed, "the economic well-being of Data-Targeting, its employees and clients" is inextricably linked to the continuing confidentiality of the information at issue. Appendix E at 6. Irreparable harm would result from disclosure of the Applicants' confidential and privileged business processes and strategies because that information is proprietary information that the Applicants rely on in their business as political consultants.

Third, disclosure of the lists of people with whom the Applicants associate – their names, contact information, and sometimes controversial views – would tear at the very fabric of the First Amendment that views "[a]nonymity [as] a shield from the tyranny of the majority." *McIntyre,* 514 U.S. at 357. This would chill the ability of the Applicants and their associates to organize and develop their thoughts, and to then petition their government. *See* Appendix H. Self-censorship would result, affecting not only the Applicants and their associates, but others who would

otherwise listen to the Applicants. *See Ashcroft v. ACLU,* 542 U.S. 656, 671 (2004) (fearing that if speakers self-censor "[t]here is a potential for extraordinary harm and a serious chill upon protected speech"); *Virginia v. Hicks,* 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.").

Fourth, the promise of several years of litigation to keep the Applicants' protected political speech sealed and anonymous presents an immediate, substantial, and severe burden on the Applicants' First Amendment right to associate freely and in anonymity. As this Court recognized in *Wisc. Right to Life,* 551 U.S. at 468 n.5, "litigation constitutes a severe burden on political speech." Here, litigation to keep the trial proceedings sealed would immediately chill political speech by the Applicants and their associates. Facing continued litigation, the Applicants and their associates would face a Hobson's Choice: either speak and face the severe burdens of litigation, or self-censor to avoid litigation. Many may choose self-censorship in light of the Florida Supreme Court's decision. This would directly contravene the constitutional tradition that puts a premium on free expression and abhors this kind of restraint on free speech, especially protected political speech. *Id.*; *see also Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 392-93 (1988) (finding that threatened enforcement and not just actual conviction is enough to allow one to challenge laws that limit free speech); *Southeastern*

Promotion, Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975) (holding that a system of prior restraint runs afoul of the First Amendment if it lacks the following procedural safeguards: the burden of instituting the proceedings and proving that the material is unprotected must be on the censor; any restraint imposed prior to judicial review must be limited in duration and must preserve the status quo; a prompt judicial determination must be assured).

Fifth, even the Florida Supreme Court's promise of a temporarily sealed proceeding, is inadequate. As the Second Circuit recognized in *In re the City of New York Hacer Dinler v. the City of New York,* 607 F.3d 923, 937 (2nd Cir. 2010), "[c]ourts are public institutions accustomed to making their files open to all comers, and their methods of preserving confidentiality are relatively unsophisticated and altogether too fallible." This is especially true of cases like this one, "high-profile litigation covered by a large and intrepid press corps." *Id.* at 938. Here, the press corps has even threatened to file lawsuits to unseal the proceedings. Appendix L.

Finally, as explained in section I above, if the privileged and confidential information at issue were entered into evidence and then disclosed to the public through the kinds of lawsuits already threatened by the press corps, or through the trial court's decision relying on the information, the Applicants would be hard-pressed to make the information confidential once more. Because the Applicants are not parties to the case, it is unclear what (if any) further rights the Non-Parties would have to seek a petition for writ of certiorari from this Court or to move for a mistrial at the conclusion of the underlying case now before the trial court.

By contrast, a stay would cause the Respondents very little harm. The trial court may continue the underlying trial until a full and complete resolution of the issues now before the Court. Surely the public interest lies in ensuring that First Amendment rights are not trampled on in this litigation. Otherwise, "free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser." *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965).

CONCLUSION

Quoting from lines attributed to Thomas More, in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978), the Court noted:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

Id. (quoting R. Bolt, A Man for All Seasons, Act I, 147 (Three Plays, Heinemann ed. 1967). For the fifth time in as many appeals, the Florida Supreme Court has now sided with the Respondents, making one extraordinary ruling after another.[12]

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[12] As noted *supra*, the Florida Supreme Court became perhaps the first court in the Anglo-American legal tradition to allow depositions of individual legislators to discern the intent of a collegial, legislative body. The Florida Supreme Court's approach turns on its head the admonition that legislative intent is "like entering a crowded cocktail party and looking . . . for one's friends." *Conroy v. Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring). To the Florida Supreme Court, legislative intent is like looking for one's enemies at a crowded cocktail party. Thus,

This time the Florida Supreme Court cast aside the First Amendment's associational privilege and the requirement to apply the *closest scrutiny* under the First Amendment's balancing test, and ignored well-established procedural safeguards for protecting trade secrets under Florida law. It now appears clear that the Florida Supreme Court did so because it has decided to "navigate" the "currents and eddies of right and wrong" rather than "the thickets of the law." *Id.*

The Applicants ask for an emergency stay so that there may yet be time to correct the Florida Supreme Court's fundamental errors that stand in stark contrast to this Court's First Amendment jurisprudence as well as Florida's trade secrets decisions. A stay is the only way to prevent the Florida Supreme Court from continuing to cut down the law to get after the Applicants simply because the Florida Supreme Court finds the Applicants' views objectionable.

Respectfully submitted,

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Dated: May 28, 2014

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the Democratic-Respondents' may cherry-pick testimony from a few, select legislators in an attempt to show an improper intent. But the Applicants are different; they are not legislators; they were not invited to the cocktail party; their intent and internal deliberations are not and cannot be subject to disclosure absent the closest scrutiny.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Patrick Bainter, Matt Mitchell,
Michael Sheehan, and Data Targeting, Inc.,
Applicants,

v.

League of Women Voters of Florida, Common Cause, Brenda Holt, J. Steele Olmstead, Robert Schaeffer, Roland Sanchez-Medina, Jr., Rene Romo, Benjamin Weaver, William Warinner, Jessica Barrett, June Keener, Richard Boylan, and Bonita Again,,
Respondents.

CERTIFICATE OF SERVICE

I, D. Kent Safriet, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application for Emergency Stay was served on:

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Service was made by U.S. Mail and electronic mail on May 28, 2014.

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