NON-PARTIES, PAT BAINTER, MATT MITCHELL, MICHAEL SHEEHAN, and DATA TARGETING, INC.,

Appellants,

v.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, COMMON CAUSE FLORIDA, JOAN ERWIN, ROLAND SANCHEZ-MEDINA, JR., J. STEELE OLMSTEAD, CHARLES PETERS, OLIVER D. FINNIGAN, SERENA CATHERINA BALDACCHINO, DUDLEY BATES, RENE ROMO, BENJAMIN WEAVER, WILLIAM EVERETT WARINNER, JESSICA BARRETT, JUNE KEENER, RICHARD QUINN BOYLAN, BONITA AGAN, KENNETH W. DETZNER, in his official capacity as Florida Secretary of State, THE FLORIDA SENATE, MICHAEL HARIDOPOLOS, in his official capacity as President of the Florida State Senate; THE FLORIDA HOUSE OF REPRESENTATIVES, and DEAN CANNON, in his official capacity as Speaker of the Florida House of Representatives, and PAM BONDI, in her official capacity as Attorney General of the State of Florida,

Appellees.

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-2163

Opinion filed June 19, 2014.

An appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

D. Kent Safriet, Thomas R. Philpot, and Mohammad O. Jazil of Hopping Green & Sams, P.A., Tallahassee, for Appellants.

John S. Mills, Andrew D. Manko, and Courtney Brewer of The Mills Firm, P.A., Tallahassee; David B. King, Thomas A. Zehnder, Frederick S. Wermuth, and Vincent Falcone III of King, Blackwell, Zehnder & Wermuth, P.A., Orlando; Raoul G. Cantero, Jason N. Zakia, and Jesse L. Green of White & Case, LLP, Miami; George N. Meros, Jr., Charles T. Wells, Jason L. Unger, and Andy Bardos of GrayRobinson, P.A., Tallahassee; George T. Levesque, General Counsel, The Florida Senate, Tallahassee; Daniel E. Nordby, General Counsel, The Florida House of Representatives; Mark Herron and Robert J. Telfer III of Messer Caparello, P.A., Tallahassee; J. Andrew Atkinson, General Counsel, and Ashley E. Davis, Assistant General Counsel, Florida Department of State, Tallahassee, for Appellees.

EN BANC

PADOVANO, J.

This is an appeal from two orders requiring a nonparty to produce certain documents for use in a lawsuit challenging the constitutional validity of the 2012 legislative plan apportioning Florida's congressional districts. The panel assigned to the appeal entered an order on May 22, 2014, reversing these orders on the ground that the documents at issue were protected by a privilege arising under the First Amendment. By a separate order entered on the same day, the panel denied a

previously filed motion by the appellees to pass the case through to the Florida Supreme Court.

On May 27, 2014, a judge of this court filed an internal motion under rule 9.331(a) of the Florida Rules of Appellate Procedure for en banc review of the panel decision. The motion alleged that this was a case of exceptional importance and asserted that the decision by the panel was incorrect. While the motion for en banc review was pending in this court, the Florida Supreme Court issued an order under the all writs provision in article V, section 3(b)(7) of the Florida Constitution, staying the decision of this court until the conclusion of the trial in the circuit court. League of Women Voters of Florida v. Data Targeting, Inc., 2014 WL 2186202 (Fla. May 27, 2014). The motion for en banc review was granted and, at this point, the trial has been completed.

We conclude that the appeal should have been passed through to the supreme court either on the motion by the appellees or by the panel on its own motion. We do not address the merits of the panel decision. Instead, we vacate the panel decision and the order denying the motion for pass-through jurisdiction and certify the orders that are the subject of this appeal for direct review by the supreme court. In accordance with rule 9.125 of the Florida Rules of Appellate Procedure, we certify that the issue in this appeal is an issue of great public importance and that the orders of the trial court require immediate resolution by the supreme court.

BENTON, VAN NORTWICK, CLARK, and SWANSON, JJ., concur.

WETHERELL, J., dissents with opinion.

MARSTILLER, J., dissents in an opinion in which LEWIS, C.J., and MAKAR, J., join, and in which WETHERELL, J., joins in Part I.

MAKAR, J., dissents in an opinion in which WETHERELL, J., joins in Part I.

WETHERELL, J., dissenting.

I respectfully dissent because I disagree with the way in which the en banc process was used in this case. The en banc process should be used to decide important cases, not to side-step them.

I recognize the authority of the majority to do what it did. But that does not make it right. If the majority believed – as the internal motion for en banc review alleged – that the panel decision was wrong on the merits, it should have issued an opinion saying so. Such an opinion would have better framed the issue for review by the Florida Supreme Court and it would have given the Court the benefit of an analysis of both sides of the issue. There is no reason that such an opinion could not have been issued on the same expedited basis as the present en banc opinion.

Not only do I disagree with the procedure used by the majority, but I also disagree with the result reached by the majority. My views on this issue echo those expressed in the other dissenting opinions in two main respects. First, I agree with Judge Marstiller that certification under Florida Rule of Appellate Procedure 9.125 is not justified because the particular issue in this appeal is not one of "great public importance"; it is merely a discovery dispute that happened to arise in an important, high-profile case. Second, I agree with Judge Makar that the merits of the issue in this appeal could have been before the Florida Supreme Court much sooner – more

than two weeks ago – had the en banc court exercised restraint and simply allowed the panel to issue an opinion explaining its decision.

Despite my agreement with much of the sentiment expressed in the other dissenting opinions, I do not join the opinions in full because they explain the reasoning for the panel's decision and, unlike Judges Marstiller and Makar, I was not a member of the panel. I could comment on the merits of the appeal now that the case is before me as a member of the en banc court, but I see no reason to do so based upon the majority's decision to "pass through" this appeal to the Florida Supreme Court without addressing the merits of the proposed panel opinion.

MARSTILLER, J., dissenting.

As a member of the three-judge panel of this court whose decision on the merits of this appeal is being vacated solely to certify the orders at issue to the Florida Supreme Court, I respectfully dissent.

I.

The panel reviewed two related circuit court orders compelling the appellants, a political consulting group and its employees who are not parties to the litigation below, to disclose communications protected by the First Amendment associational privilege, and permitting use of the privileged information at trial. The second of the two orders was entered on the eve of trial, and the appellants moved for an emergency stay of the orders from this Court, which we granted. Because the circumstances required an expeditious decision on the merits—the trial was underway—the panel issued a dispositive order reversing the trial court's orders, notifying the parties that a written opinion would follow. The panel simultaneously denied the plaintiff-appellees' motion to lift the stay and alternative suggestion to certify the orders under review as requiring immediate resolution by the supreme court, filed just as the panel prepared to issue the dispositive order.

Before the panel could publish the opinion explaining its decision, however, two things happened. An internal request to consider the case en banc was filed. And shortly thereafter, the supreme court, using its "all writs" jurisdiction, see article

V, section 3(b)(7), Florida Constitution, "stayed" the dispositive order. *See League of Women Voters of Fla. v. Data Targeting, Inc.*, No. SC14-987 (Fla. May 27, 2014). In so doing, the supreme court permitted admission of the appellants' privileged information into evidence at trial, "subject to a proper showing of relevancy," but directed the trial court to "maintain the confidentiality of the documents by permitting any disclosure or use only under seal of the court and in a courtroom closed to the public." *Id.* at 9. By using its "all writs" power in this instance, the supreme court intended to preserve its jurisdiction over this case pending issuance of the panel opinion which likely would establish the independent grounds for its ultimate jurisdiction. *See Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) ("[W]e have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction imposed [elsewhere in the constitution].").[1]

Notwithstanding the supreme court's apparent expectation that the panel would issue its opinion, and the undoubted expectation of the parties, the trial court and the public that the panel's opinion was forthcoming, five judges of this court, who constitute an en banc majority because six judges are recused from this case,

[1] The supreme court's opinion makes several references to our "forthcoming opinion" or "forthcoming decision," see slip opinion at 4, 7, 8, and its likely jurisdiction to review this decision, see *id*. at 8 ("In order to . . . preserve this Court's ability to completely exercise the eventual jurisdiction it is likely to have to review the First District's decision . . . .").

now vacate the panel's dispositive order because they believe the panel should have passed the case through to the supreme court.

Florida Rule of Appellate Procedure 9.125 is the mechanism by which to invoke the supreme court's discretionary jurisdiction under article V, section 3(b)(5), of the Florida Constitution, to review trial court orders the district courts of appeal otherwise have jurisdiction to review. Under the rule, a district court may certify "any order or judgment of a trial court . . . to require immediate resolution by the supreme court because *the issues* pending in the district court are of great public importance or have a great effect on the proper administration of justice throughout the state." Fla. R. App. P. 9.125(a) (emphasis added).

First, vacating the panel's dispositive order to employ this rule en banc seems, at best, unnecessary when the order was stayed and supreme court review of the panel's decision was all but guaranteed. Indeed, but for the internal request for en banc consideration, the panel by now would have issued its opinion and the supreme court's review surely would have commenced.

Second, the orders at issue in this case resolve a third-party discovery dispute over specific documents and communications in which the third parties, who are non-parties to the litigation below, claim a First Amendment privilege. The question of whether, in the first instance, the appellants were entitled to First Amendment

protection has not been properly raised for review.[2] Thus, the narrow issue in this appeal is whether the plaintiff-appellees,[3] who seek to invalidate the congressional district apportionment plan and the revised Senate legislative redistricting plan[4] the Florida Legislature adopted in 2012, met their burden under the stringent standard articulated in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), to permit them access to and use of the appellants' constitutionally-protected communications at trial.[5] And as more fully explained *infra*, the test set forth in *Perry* is a case-by-case balancing test, the outcome of which turns on the particular facts of a given case. It therefore was not unreasonable for the panel to conclude that the discovery issue is not one needing immediate resolution by the supreme court. Even if the panel had been called upon to decide whether the First Amendment privilege applies, that, too, is not necessarily an issue requiring pass-through to the supreme court.

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[2] The plaintiff-appellees did not appeal or cross-appeal that ruling by the trial court. *See* Fla. R. App. P. 9.110(g); *see also* Philip J. Padovano, *Florida Appellate Practice*, § 23.9, at 494 (2011-2012 ed.) ("[T]he filing of a notice of cross appeal is a prerequisite to a claim of error by the appellee.").

[3] For purposes of this appeal, the defendants in the litigation below are designated as appellees.

[4] The Florida Supreme Court invalidated the initially-adopted Senate apportionment plan. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012).

[5] Appellants also put forth a trade secrets argument. Contrary to media reports, the panel did not base its decision on trade secrets because the trial court did not appear to have directly addressed that argument below.

Florida's district courts of appeal routinely decide, via three-judge panel, constitutional questions and myriad other complex matters. This is what we do. *See* Art. V, § 4(a), Fla. Const. ("There shall be a district court of appeal serving each appellate district. . . . Three judges shall consider each case and the concurrence of two shall be necessary to a decision.").

Finally, the fact that the lawsuits underlying this appeal challenge legislatively-adopted apportionment plans does not elevate the case-specific discovery issue here to one of great public importance requiring immediate review by the supreme court—ultimate review, perhaps, but not certification and pass-through review. The panel's decision on the merits would not have created a bright-line rule of law limiting discovery availability in future lawsuits of this type. It bears pointing out that in a prior appeal arising from these lawsuits, a different three-judge panel of this court considered the hefty issue of whether legislators and their staff were immune from testifying about matters pertaining to their activities in the reapportionment process—a constitutional issue whose resolution would affect all such future lawsuits. Yet, this court did not convene en banc to wrest the case from the panel and certify the trial court's order to the supreme court. Rather, the case proceeded as it should, with a decision by the assigned panel that, in turn, was reviewed by the supreme court. *See Fla. House of Representatives v. Romo*, 113 So. 3d 117 (Fla. 1st DCA), *quashed sub nom League of Women Voters of Fla. v. Fla.*

House of Representatives, 132 So. 3d 135 (Fla. 2013). I see no meaningful, objective distinction between *Romo* and the instant appeal that would justify the action taken by the en banc majority here, especially because supreme court review of the panel's decision was a virtual certainty.[6]

II.

Although I disagree with the en banc decision, it is now the decision of this court. Nevertheless, I believe the parties and the public still deserve the long-awaited explanation for the panel's now-vacated May 22, 2014, dispositive order.

The plaintiff-appellees commenced declaratory actions in Leon County Circuit Court seeking to invalidate the Legislature's 2012 congressional district apportionment plan and revised Senate legislative apportionment plan. The consolidated lawsuits were brought under article III, sections 20 and 21, of the Florida Constitution, which prohibit the Legislature from drawing congressional and legislative apportionment plans or individual districts to intentionally favor or disfavor any political party or incumbent, or to hinder any minority group from being able to elect representatives of their choice. The gravamen of the lawsuits is that the Legislature, with the intent proscribed by sections 20 and 21, collaborated behind the scenes with Republican "political operatives" to create discriminatory

[6] I am under no illusion the panel's opinion would have survived supreme court review.

apportionment plans that were ultimately enacted.

During discovery, the plaintiff-appellees served subpoenas duces tecum on the appellants asking for "[a]ny communication with any person about (1) congressional or [state] senate redistricting in Florida in 2012; and (2) congressional or state senate redistricting maps (whole or partial, completed or draft) that were submitted to or discussed with any legislator, legislative staff members, or any legislators, staff member, or committee." In response, the appellants produced their communications with legislators and legislative staff, but filed a motion for protective order, asserting that the remaining communications contained trade secrets and also were protected by the First Amendment associational privilege. They further asked for in camera review of more than 1,800 pages of documents potentially responsive to the subpoenas. The trial court appointed former Florida Supreme Court Justice Major B. Harding as special master to conduct the in camera review and to hold a hearing on the issues raised.

Following the hearing and document review, the special master entered a report concluding:

- The subpoenaed information was largely contained in email messages exchanged internally between employees of Data Targeting, Inc.

- Some of the email exchanges were between Data Targeting employees and one or more individuals at the Republican Party of Florida, for whom Data Targeting provided consulting services under contract.

- Consistent with appellant Pat Bainter's testimony at the hearing, the

email communications reflected typical activities undertaken by Data Targeting political consultants, including evaluating and analyzing district-level voting performance.

- The subpoenaed communications are protected by the First Amendment associational privilege,[7] and the appellants had satisfied the first prong of *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) by making a prima facie showing of the chilling effects that disclosure of the protected information would cause.

- The plaintiff-appellees failed to show a compelling need sufficient to justify denying the appellants protection of the constitutional privilege.

- Having reached these two conclusions, there was no need to address the trade secrets issue.

In a March 20, 2014, order, the trial court adopted the special master's conclusions that the subpoenaed information is entitled to First Amendment protection, and that the appellants had satisfied the chilling-effects prong under *Perry*. But the court postponed ruling on whether the plaintiff-appellees had overcome the appellants' constitutional privilege, stating, "The second prong of the *Perry* analysis requires me to balance the competing interests to determine whether the [First Amendment associational] privilege should yield. Such analysis will require me to review the documents in camera . . . to determine which, if any, specific

[7] The report did not set forth a full analysis on the associational privilege, but referred to an earlier report in which the special master reached the same conclusion regarding information subpoenaed from another non-party who is not an appellant in the instant appeal. The prior special master's order is not included in the record provided to this court. This is of no consequence, however, because the trial court adopted the special master's conclusion as to the documents at issue in this appeal, and plaintiff-appellees did not cross-appeal that ruling. *See supra*, note 2.

documents should be provided to Plaintiffs despite the associational privilege asserted by the non-parties."

On May 2, 2014, the trial court issued its second order on the special master's report (the first of the two orders now on appeal) directing the appellants to hand over to the plaintiff-appellees a specified subset—totaling 538 pages—of the disputed documents, and designating the documents confidential, only to be viewed by the plaintiff-appellees' counsel and retained expert. The court stated it would "provide further guidance . . . regarding how any of the privileged Produced Data Targeting Documents may be used at the trial in this case at the pre-trial conference scheduled for Friday, May 9, 2014[.]" Notably, the court provided no explanation for its decision to order the documents produced, except to say:

> The Court has completed its review *in camera* of the Data Targeting Documents and performed the balancing test required under the second prong of the *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) analysis to determine whether the associational privilege of the Data Targeting Documents should yield. The Court has also considered Non-Parties' assertion of trade secret protection. Based on the Court's review, balancing and analysis, the Court finds that the associational privilege of certain of the Data Targeting Documents should yield and shall be produced to Coalition Plaintiffs[.]

There is no official transcript in the record provided to this court evidencing what occurred at the May 9 pre-trial conference. However, on May 15, 2014, the trial court entered a subsequent order (the second of the two orders now on appeal)

deeming all the documents produced as a result of the May 2, 2014, order confidential pursuant to Florida Rule of Judicial Administration 2.420. The court further ruled:

> To preserve the confidentiality granted by this Order, the Confidential Documents shall be kept confidential as previously ordered by this Court unless and until any of the Confidential Documents is submitted to the Court as evidence in the trial of this case. The proceedings of this Court shall remain open during use of the Confidential Documents by any party at trial. At such time as any of the Confidential Documents is offered as an exhibit in witness examination or entered into evidence in the trial of this case, the exhibit itself, if admitted into evidence, shall be sealed as confidential and not subject to disclosure.

When the trial court refused to stay the May 15 order to prevent use of the documents at trial so the appellants could appeal the May 2 and May 15 orders, the appellants sought, and obtained, an emergency stay from this court.

The question of whether the circuit court correctly determined that the appellants' established First Amendment privilege must yield involves "'an application of law to fact . . . subject to *de novo* review.'" *Varela v. Bernachea*, 917 So. 2d 295, 298 (Fla. 3d DCA 2005) (quoting *Slaughter v. State*, 830 So. 2d 955, 957 (Fla. 1st DCA 2002)).

"[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association." *McCutcheon v. Federal Election Comm'n*, 134 S.Ct. 1434, 1448 (2014). As to political

association, the First Amendment protects our freedom to gather in association for the purpose of advancing shared political beliefs, and the Fourteenth Amendment protects this freedom of association from state infringement. *See Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 121 (1981) (citing *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)); *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It 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 Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). In the litigation context, requests for discovery potentially implicate a party's First Amendment freedom of association. "Although the First Amendment does not normally restrict the actions of purely private individuals, the amendment may be applicable in the context of discovery orders, even if all of the litigants are private entities," because a trial court's order compelling discovery "provide[s] the requisite governmental action that invokes First Amendment scrutiny." *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987). "A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*." *Perry*, 591 F.3d at 1160 (emphasis in original); *see NAACP*, 357 U.S. at 462 (recognizing a party may claim potential violation of First Amendment freedom of association in defense of compelled disclosure during discovery).

Courts employ a two-part framework to a claim of First Amendment privilege by a party objecting to a discovery request. First, the objecting party must make a *prima facie* showing that disclosure of the requested information will result in "chilling" consequences to the party's associational rights. *Perry*, 591 F.3d at 1160. If the objecting party makes this showing, the burden shifts to the requesting party to "'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.'" *Id.* at 1161 (quoting *NAACP*, 357 U.S. at 463). To carry this burden, the party seeking disclosure must demonstrate that (1) "the information sought is highly relevant to the claims or defenses in the litigation," (2) the request is "carefully tailored to avoid unnecessary interference with protected activities," and (3) the information sought is otherwise unavailable. *Id.* The highly-relevant standard is decidedly more demanding than the relevance standard applied to typical discovery requests. *See id.*; Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). Rather, the information sought must go "to the heart of the matter." *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977). Ultimately, the court balances the burdens that disclosing the information would impose on the objecting party's First

Amendment rights against the requesting party's asserted interest in disclosure to determine whether the interest outweighs the harm. *Perry*, 591 F.3d at 1161. "This balancing may take into account, for example, the importance of the litigation . . .; the centrality of the information sought to the issues in the case . . .; the existence of less intrusive means of obtaining the information . . .; and the substantiality of the First Amendment interests at stake[.]" *Id.*

The special master concluded that the appellants sustained their burden under *Perry* to make a *prima facie* showing that disclosing the communications at issue would have chilling effects on their First Amendment freedom of association. The trial court adopted the special master's conclusion, and the plaintiff-appellees did not timely seek review of the order adopting that conclusion or file a cross-appeal. Thus, the only reviewable issue is whether the plaintiff-appellees have carried their burden under *Perry* to demonstrate an interest sufficient to justify the harm disclosing the privileged communications would cause the appellants.

The provisions in article III of the Florida Constitution on which the plaintiff-appellees' lawsuits are based provide, in pertinent part:

> **SECTION 20. Standards for establishing congressional district boundaries.**—In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal

> opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> * * *
> **SECTION 21. Standards for establishing legislative district boundaries.**—In establishing legislative district boundaries:
> (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

Art. III, §§ 20(a), 21(a), Fla. Const. The standards are thus identical for congressional and legislative district apportionment. Importantly, "[t]he language of article III, section 20(a) [and section 21(a)] explicitly places legislative 'intent' at the center of the litigation." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 147 (Fla. 2013). The provisions "outlaw[ ] improper partisan and discriminatory intent in the redistricting process." *Id.* at 148. Specifically, the provisions outlaw "improper *legislative* 'intent'" in the . . . reapportionment process." *Id.* at 147 (emphasis added). "[T]he voters clearly intended for the Legislature to be held accountable for violating the Florida Constitution and to curb unconstitutional legislative intent in [the] reapportionment processes." *Id.* at 151.

The gravamen of the plaintiff-appellees' lawsuits is that the Legislature, with

the requisite improper intent, collaborated behind the scenes with Republican "political operatives" to create discriminatory apportionment plans. However, the constitutionally-protected documents the plaintiff-appellees sought in discovery, and now desire to use at trial, are private internal communications with no obvious connection to the central issue in this case, i.e., whether the Legislature drew districts with impermissible intent. None of the requested communications at issue here was sent to or received from any legislator or legislative staffer; neither do they reveal directives from anyone in or working for the Legislature.[8, 9] Therefore, the information is not highly relevant to matters at issue in the lawsuits, which is the standard under *Perry*.

In the brief they filed in this court, the plaintiff-appellees asserted that they do not desire the documents to prove the non-parties' intent (despite also stating "the only people whose intent is on trial are the members, staffers, agents, and collaborators of the Legislature who were involved in the preparation of the adopted redistricting plans."). Rather, they want to prove the non-parties collaborated with legislators to conceal the true origins of some proposed apportionment plans

[8] The panel independently reviewed the 538 pages of documents at issue in this case.

[9] Because the documents and communications still, at this point, enjoy First Amendment privilege, it is not appropriate to provide specific descriptions of the matters discussed therein.

submitted by members of the public for the Legislature's consideration. Even so, absent a showing of more than a speculative connection between the appellants' privileged internal communications and the claims raised in the lawsuits, the communications are not "highly relevant" to matters being litigated.[10] Whatever the privileged information shows, it shows no collaboration between the non-parties and the Legislature. The appellants' privileged communications do not go to the heart of the matter—legislative intent—and therefore, do not satisfy the stringent highly-relevant standard set forth in *Perry*.

The plaintiff-appellees also relied on the following passage in *League of Women Voters* to support their contention that the appellants' constitutionally-protected communications are highly relevant to the litigation:

> In [*In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012)], we acknowledged the Legislature for engaging in extensive public hearings as indicative of an unprecedented transparent reapportionment process. . . . However, if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in

[10] If, as it appears, the plaintiff-appellees' objective is to impute to the Legislature, alleged partisan and discriminatory intent on the part of the non-party appellants, they presented no authority for such a proposition, and an appellate court should be exceedingly hesitant, in the absence of such authority, to trample the First Amendment rights of *non-parties to this litigation* so that plaintiff-appellees can test this legal theory.

> support of the claim that the Legislature thwarted the constitutional mandate.
>
> > We . . . emphasize that this Court's first obligation is to give meaning to the explicit prohibition in the Florida Constitution against improper partisan or discriminatory intent in redistricting. The existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits. This constitutional mandate prohibiting improper partisan or discriminatory intent in redistricting therefore requires that discovery be permitted to determine whether the Legislature engaged in actions designed to circumvent the constitutional mandate.

League of Women Voters, 132 So. 3d at 149. It must be noted, however, *League of Women Voters* solely concerned whether a legislative privilege exists in Florida, and if so, whether the privilege protects legislators from being deposed in lawsuits brought under article III, section 20, of the Florida Constitution.[11] The First Amendment rights of non-parties was not at issue. The supreme court held that the legislative privilege must yield in order to effectuate the intent of the constitutional

[11] The supreme court framed the issue thusly:

> Does enforcement of the explicit prohibition in the Florida Constitution against partisan political gerrymandering and improper discriminatory intent in redistricting outweigh a claim of absolute legislative privilege? Specifically the issue presented to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory "intent." *See* art. III, § 20(a), Fla. Const.

League of Women Voters, 132 So. 3d at 137 (emphasis in original).

provision. *League of Women Voters*, 132 So. 3d at 154. Prudence and judicial restraint require construing the supreme court's statements in *League of Women Voters* strictly within the context of the issues that were before that court. As such, the policy reasons given to justify piercing legislative privilege do not necessarily also justify abrogating an individual's First Amendment freedom of association—particularly an individual who is not a party to the lawsuit.[12]

Even if the reasoning applied, the plaintiff-appellees still would have to satisfy the *Perry* requirements. Based on the particular circumstances of this case and the record provided to this court the plaintiff-appellees failed to demonstrate that the appellants' communications, protected by the First Amendment associational privilege and evincing no communication with any legislator or legislative staff member, are highly relevant to the lawsuits challenging the 2012 apportionment maps.

They further have not established that the constitutionally-protected information they requested is unavailable from another source. They previously have obtained not only fully-discoverable communications between the appellants (among other political consultants) and particular legislators and/or legislative

[12] The foundational policy consideration articulated by the supreme court is that article III, section 20(a), expresses the voters' desire for more judicial scrutiny of the apportionment process conducted by the legislative branch. *See League of Women Voters*, 132 So. 3d at 148.

staffers on the subject of apportionment, but also volumes of publicly available legislative email messages. *See, e.g., League of Women Voters*, 132 So. 3d at 148-49 ("The challengers assert that documents they have so far uncovered, primarily through third-party discovery, reveal direct, secret communications between legislators, legislative staff members, partisan organizations, and political consultants. In addition, because of Florida's broad public records laws, the challengers have received 16,000 e-mails, including e-mails between legislators and legislative staff, as part of the discovery process."). Some email messages indicate that political consultants provided input to the Legislature on apportionment maps before they were publicly published. Moreover, the plaintiff-appellees have deposition testimony from witnesses acknowledging that meetings took place between key legislators and staff and other political consultants to discuss apportionment and, notably, how the consultants could participate in the redistricting process in light of sections 20 and 21. Therefore, to the extent the plaintiff-appellees seek to obtain the appellants' constitutionally-protected information to prove collaboration between legislators and outside partisan operatives, and that a behind-the-scenes process was conducted in an attempt to favor or disfavor a political party, such information has been produced and is otherwise available to them.[13]

[13] Indeed, in the plaintiff-appellees' own answer brief filed in this court, they assert that "[t]he Produced Documents, if allowed to be used at trial, would provide *further* evidence of the Legislature's collaboration with partisan operatives." (Emphasis

The question then becomes whether the plaintiff-appellees have demonstrated an interest in the constitutionally-protected communications at issue "sufficient to justify the deterrent effect" disclosing the information will have on appellants' First Amendment rights. The significance of these lawsuits, which seek to ensure an apportionment process that promotes equal opportunity for all voters to choose their congressional and legislative representatives, is unquestioned. However, also at stake here is the appellants' freedom of association, guaranteed by the United States Constitution, and the demonstrated harm that disclosing their privileged communications would have on that freedom. The plaintiff-appellees have not established that the requested communications go the heart of the central issue being litigated—mere relevance is not enough—or, importantly, that needed information is unavailable from other sources. Balancing these factors as required under *Perry*, the plaintiff-appellees' interest in the privileged information does not outweigh the harm that would result from disclosure. Accordingly, the trial court's May 2, 2014, order ruling that the privilege must yield to allow the plaintiff-appellees access to the appellants' documents, and the May 15, 2014, order permitting use of the

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added.) Submitting additional evidence with the intention of bolstering evidence that is already otherwise available does not meet the stringent test set forth in *Perry* and does not provide a basis for overcoming the strict protection afforded to privileged First Amendment speech.

documents at trial, should be reversed.[14]

[14] Although the appellants produced the constitutionally-protected documents as ordered on May 2, that fact did not moot the May 2 order because it is the basis for the May 15 order permitting the plaintiff-appellees to use the documents at trial.

MAKAR, J., dissenting.

I.

Our Court's Latin motto, like that of the Florida Supreme Court, is "Sat Cito, Si Recte," which roughly translated means "Soon Enough, If Correct." In cases such as this one, where time is important and prompt judicial action is needed, the "soon enough" aspect of the motto takes second billing, which is why the emergency three-judge panel acted with speed and diligence upon being assigned to this matter on short notice just days before the underlying trial was to begin. Absent expedited appellate review, the uncontested constitutional privilege of the non-parties was in danger of being lost without due process of law, which can only be provided by careful appellate review of whether the strict test for overriding the constitutional privilege had been met. Conversely, expedited review of the plaintiffs' claim that they had met the strict test was of obvious importance given the soon-to-start bench trial. From a judicial administration perspective, an evidentiary ruling of the type at issue should not be made on the eve-of-trial in a case such as this one, but appellate courts generally don't control when or what is presented to them.

Because the matter was time sensitive, involved an evidentiary ruling that ordinarily is reviewed by certiorari (here, by appeal because it was brought by a non-party), and no litigant had asked us to pass through the case to the Florida Supreme Court at that time, the emergency panel structured the briefing so that a disposition

would be made prior to the end of the trial with time for potential review in the Florida Supreme Court, if necessary. Much like us, the trial judge bemoaned the shortness of time but he explicitly told the non-parties they "just need to go over to the DCA real quick and say, Judge Lewis is not giving us the protection we want, and see if they will give you some relief in that way." Because it was a bench trial, not involving a jury, the trial logistics could be adapted to allow for this Court's review.

Expedited briefing was ordered, no party making any mention that time was so critical and the issues so important that the case should bypass this Court. To the contrary, the plaintiffs asked only to clarify "whether their answer brief should be marked confidential and held under seal by the clerk." The panel then undertook intense review of the legal arguments as well as the record, which included the 538 pages of constitutionally-protected documents. The panel spent countless hours digging deeply into the matter by: (1) reviewing each of the documents; (2) assessing the arguments why the documents were highly relevant in the litigation given the other non-privileged evidence that existed; and (3) determining whether the stringent standard for overcoming the privilege existed in the record below. On this point, it bears emphasis that Judge Terry Lewis, Special Master Major Harding, and the three-judge panel all unequivocally agreed that a constitutional privilege existed, one that the plaintiffs had a high burden to overcome. Constitutionally-privileged

information isn't entirely off-limits at trial, but it is clear that a party seeking to overcome the privilege must meet the exceptionally high standard that courts, including the United States Supreme Court, have established for when the constitutional privilege must give way. Indeed, the parties, the non-parties, and all judges involved at the time agreed that the "strict scrutiny" test applied in the Perry[15] case should apply.

The only relevant issue presented to the panel was whether Judge Terry Lewis, an exceptionally well-regarded jurist, correctly applied this stringent test in determining whether the constitutional privilege had been overcome by the plaintiffs.[16] Judge Lewis's orders simply concluded—without any detailed explanation or legal analysis—that 538 documents he culled from the pile of almost 2,000 documents could be used in the imminent public trial. No individualized explanation was given why any of documents, or categories of documents, were highly relevant and the strict test necessary to overcome their constitutionally-privileged status met. The documents would be kept sealed, but a gaping hole was opened by allowing them to be used and discussed in a public setting. Absent appellate review, the non-parties' constitutional privilege was in jeopardy; this

[15] Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010).

[16] In my view, the trade secrets argument presented by the non-parties lacked any merit, the only issue warranting discussion being the constitutional privilege.

appeal was their only opportunity to protect that privilege, which no one disputes they possess. A close analogy is a ruling that a reporter must disclose her sources in an ongoing public trial; if forced to do so without appellate review, the protection afforded by the reporter's constitutional privilege is lost. The trial judge fully appreciated the conundrum, but was adamant that he was not going to close the proceedings.

Those were the challenging circumstances the three-judge emergency panel confronted: a barebones order lacking any justification and an imminent trial where privileged information was in danger of being revealed. A reversal on that basis alone would have been appropriate. But we undertook to explain—and it was entirely reasonable under the then-existing circumstances—that the trial judge's orders, and our plenary review of the record, failed to show that the plaintiffs met the exceedingly difficult test for overcoming the constitutional privilege as to the 538 documents. Shortly after briefing concluded, we met and decided that the orders could not be sustained on the record presented.

What the panel did next falls into the category of "no good deed goes unpunished." Consistent with its goal of expedited adjudication, it decided to avoid delay by issuing a dispositive order on the merits with written opinion to follow soon thereafter. Doing so would let the trial court—and the Florida Supreme Court—know that a panel adjudication on the merits had occurred, one the supreme court

could choose to review immediately upon issuance of an expedited written opinion. The panel's dispositive order was in the clerk's office about to be released. Moments beforehand, however, the plaintiffs filed a motion asking that we pass through the case to the Florida Supreme Court. Because we'd already entered a dispositive order, and felt a written opinion would be helpful to the supreme court, we denied that motion in an order simultaneously released with the dispositive order within the hour that day.

On the Tuesday following the intervening holiday weekend, our opinions were posted internally for expedited release, but a non-panel member moved for a hearing en banc, the effect of which was the withdrawal of the pending opinions. What happened next, of course, is the supreme court later that day stayed our order pending the trial's completion, allowing the use of the privileged documents in a non-public proceeding thereby preserving the non-parties' constitutional privilege, presumably so that either the trial judge could have a second opportunity to apply the Perry test to any privileged document the plaintiffs sought to enter into evidence, or to preserve the non-parties' rights to appellate review in this case. The panel interpreted the supreme court's order as permitting the release of the panel's opinions (which, of course, would be stayed pending completion of trial), which would "close the loop" on the supreme court's exercise of jurisdiction. But a renewed en banc motion was made that effectively prevented that from occurring

and which added weeks of avoidable delay in the ultimate disposition of this case. Had the en banc majority simply allowed our opinions to issue, the supreme court could have accepted review and probably adjudicated the matter by now; and it would have had the benefit of our opinions, even if they chose to disagree with them. Using the en banc process simply to second-guess a panel's denial of a belated pass through motion,[17] or to claim at this point that the panel should have sua sponte done so on its own, has no apparent benefit; delay is the only benefactor.

Because the en banc majority chose to withdraw our order on the merits and the denial of the pass through motion, the panel is entitled to explain the reasoning undergirding its initial adjudication of this case. Indeed, the supreme court encourages the district courts to provide it with written opinions, which helps clarify the issues and legal reasoning. My special concurrence to the then-majority opinion—verbatim as it existed at the time of the Florida Supreme Court's intervening decision—is below. Whether the panel's opinions are of help now, or have been eclipsed by intervening events, is uncertain; the privilege issue is now in

[17] No basis existed under the circumstances to grant the movants' request to pass the case through to the supreme court; the panel had already adjudicated the case expeditiously. The en banc majority, however, characterizes the plaintiffs' motion as "previously filed"—without mentioning it was filed after briefing was over and after the panel had already sent its dispositive order for release—thereby leaving unspoken the motion's belatedness under the circumstances. While Rule 9.125, Florida Rules of Appellate Procedure, allows ten days from the notice of appeal to file a pass through motion, the plaintiffs' motion was filed on the eighth day, but by then the briefing process was over and panel order issued internally.

a different posture compared to when the trial court first decided the issue. For instance, it appears that only a small subset of the 538 documents (32 pages) are now at issue, making the trial judge's initial ruling overbroad as applied to 95% of the subject documents. If the trial judge is allowed to undertake a second opportunity to issue a more detailed ruling on the 32 documents' admissibility, which would be (and would have been) of great help to facilitate appellate review, he will have the benefit of our non-binding analysis, which—as of almost a month ago—concluded that nothing in the then-existing record on the constitutional privilege had been overcome; perhaps something newly added to the record below, but unavailable at the time this appeal was briefed, has changed the legal landscape.

In conclusion, my resolve today is the same as it was over a month ago when this appeal was first lodged and the emergency panel called to duty: we must work in the appellate judiciary with the same intensity as the trial judge and the litigants to ensure that justice prevails as to all interests in these lawsuits. An easy way out would have been to punt this case onto the Florida Supreme Court's plate, relieving the panel from its primary responsibility to review the evidentiary matter presented. But had we done so, we'd have run afoul of Justice Barkett's statement "admonish[ing] the district courts in the future to discharge their responsibility to initially address the questions presented in a given case. [Pass through jurisdiction] is not to be used as a device for avoiding difficult issues by passing them through to

this Court." Carawan v. State, 515 So. 2d 161, 162 n.1 (Fla. 1987), superceded by statute on other grounds, ch. 88-131, § 7, Laws of Fla. as recognized in Hammonds v. State, 548 So. 2d 909 (Fla. 1st DCA 1989); see also Diana L. Martin & Robin I. Bresky, Taking the Pathway of Discretionary Review Toward Florida's Highest Court, 83 Fla. B.J. 55, 57 (Nov. 2009) (noting that use by supreme court of pass through jurisdiction "is understandably limited."). Also, as Judge Farmer has noted, "[w]e do not have much in the way of guidance as to when and under what circumstances we should . . . send a case immediately to the Supreme Court for resolution. When we do so, we thereby bypass the constitutional right to review in the district courts of final judgments of the circuit courts. Thus it should be rare that we consider doing so." Fla. Dep't of Agric. & Consumer Servs. v. Haire, 832 So. 2d 778, 781 (Fla. 4th DCA 2002); see also Tracy S. Carlin, The Ins and Outs of Pass-Through Jurisdiction, 80 Fla. B.J. 42, 42 (Dec. 2006) (noting that "the court has not articulated any particular guidelines to assist parties and the district courts in predicting which types of cases the supreme court will hear."). Given the limited and rare nature of pass through jurisdiction and the supreme court's admonitions that district courts not shirk their responsibilities, we chose to roll up our sleeves and give it our best in a time-sensitive way that was expedited but not a rush to judgment, which is what supporters of our form of government expect of judicial officers.

II.

This section contains my special concurrence verbatim as submitted for public release prior to the Florida Supreme Court's decision dated May 27, 2014, modified only to acknowledge that the panel decision to which I was concurring is now a dissent.

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations."[18]

Concurring in the [former majority/now dissenting opinion of Judge Marstiller], I write solely to emphasize the independent duty of the judicial branch of this state to protect the *federal* constitutional rights of persons or associations engaged in political activities from unwarranted governmental infringement.

This is a First Amendment case. At issue is the compelled disclosure and use in a public trial of confidential internal e-mail communications of a political consulting firm, one with many clients including a major political party in the fourth (perhaps third by now) most populous state in the Nation. Our three-judge panel, the trial judge, and the special master (a former Chief Justice of the Florida Supreme

[18] NAACP v. Button, 371 U.S. 415, 431 (1963) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

Court) have unequivocally concluded that all 538 pages of the documents at issue are legally protected by the First Amendment to the United States Constitution under basic freedoms of political association. Private political consulting—even if done for remuneration and for partisan purposes—involves protected speech and associational activities that are at the core of our constitutional democracy. Party affiliation, ideological view, or political gravitas of the people or associations involved are of no moment: our federal constitution equally applies in shielding the political activities of private persons and entities from governmental overreach absent the most compelling of reasons and proof. Justifiably so, the judiciary has cautiously guarded against legislative and executive overstepping lest a fear of governmental intrusion chill the robust degree of political discourse and civic engagement the Founders envisioned; the deleterious effects on a political organization's activities and relationships from compelled disclosures and testimony are obvious.

Under the Supremacy Clause of the United States Constitution, our foremost obligation is to protect federal civil rights, whether they be rights of a free press, equal protection, due process, or—as in this case—political association. Concomitantly, we must enforce—to the extent permissible under federal law—the provisions of our state constitution, including article III, sections 20 and 21, which are at issue here and were addressed in League of Women Voters of Florida v.

Florida House of Representatives, 132 So. 3d 135 (Fla. 2013). Unlike the present case, the legal dispute in League of Women Voters was a wholly intramural one between two portions of our state constitution: does the Fair Districts amendment prevail over the claim of legislative privilege rooted in the state constitution's separation of powers clause? The balance to be drawn was between these competing state constitutional provisions, the supreme court holding that its "first obligation is to give meaning to the explicit prohibition in the Florida Constitution against improper partisan or discriminatory intent in redistricting." Id. at 149.

A different balance presents itself in this case, one in which our obligation is to protect rights of political association under the federal constitution while concurrently effectuating the state's interest in ensuring the purposes of article III, sections 20 and 21 are fulfilled. In League of Women Voters, our supreme court indicated that the scope of the evidence and testimony that may prove useful in showing that article III, sections 20 or 21 have been violated is broad. As a result, the discovery in this case—much like the nature of the litigation itself—is unprecedented: legislators, legislative staff, political consultants and others have been deposed and required to testify; tens of thousands of pages of documents, communications, and data have been obtained; and expert testimony and statistical reports have been generated.

Amidst this evidentiary mountain is discovery obtained from subpoenas, public records, and depositions from a private political consulting firm, which has no official role in the redistricting process, but which the plaintiffs claim has some indirect involvement. The firm has already produced all of its emails and other external communications made with legislators or their staff for possible use at trial. And its principal has been deposed, testified live before the special master (but not the trial judge), and is scheduled to testify at trial. Testimony of other witnesses and evidence related to the firm's activities is also available. What remains undisclosed for use at trial lie at the core of the firm's operations: its private internal e-mail communications, primarily related to its private clients. Every judge to review them has held these communications are protected under the federal constitution—and that their disclosure and use in a public trial would chill and impede the fundamental federal right of political association.

To overturn the firm's First Amendment privilege in these communications plaintiffs must meet the test set out in Perry v. Schwarzenegger, 591 F.3d 1147, 1164 (9th Cir. 2010), a case not previously adopted by any Florida court, but one all the parties rely upon and whose underpinnings are rooted in Supreme Court precedents. Given the gravity of the federal constitutional privilege at stake, the test is one of the most difficult to meet, requiring "exacting scrutiny" through proof that the "information sought is highly relevant" ("a more demanding standard of relevance"

than is ordinarily applied); the request is "carefully tailored to avoid unnecessary interference with protected activities and the information must be otherwise unavailable[]"; and the balancing of interests demonstrates that the "burdens imposed on individuals and associations" are outweighed by the benefits of disclosure. Id. at 1161.[19]

As applied, the special master held that the non-parties' communications are protected under Perry, the plaintiffs failing to show "a compelling need sufficient to deny" the non-parties' constitutional privilege. The trial judge agreed in part, ruling that the "internal political communication made between" the non-parties are constitutionally protected and the non-parties' fear that disclosure would chill rights is a "logical and reasonable" conclusion on this record; he ruled without any stated reasons or application of the factors in Perry, however, that 538 documents could be used at public trial. Our three-judge panel painstakingly reviewed all of the disputed communications including each of the specific ones discussed as potentially relevant on pages 20-21 and 32-35 of the plaintiffs' answer brief. Applying the principles of Perry, we have unanimously concluded that the First Amendment privilege

[19] The balancing "may take into account, for example, the importance of the litigation, . . . the centrality of the information sought to the issues in the case, . . . the existence of less intrusive means of obtaining the information, . . . and the substantiality of the First Amendment interests at stake" as examples. Id. at 1161 and n.7.

applies, the record failing to show that plaintiffs met the "exacting scrutiny" required and extraordinarily heavy burden imposed to overcome the privilege, thereby preventing disclosure or use of the protected documents in a public trial.

Given the undisputed constitutionally protected status of the communications at issue and the deleterious effects disclosure would have on the political consulting firm and its future activities, coupled with the extensive disclosures the firm has already made and the testimony it will provide at trial, further combined with the broad scope of discovery made available to the plaintiffs from other sources to prove their case, an order compelling the disclosure of the core political communications at issue would raise a serious federal question. Put another way, compelled disclosure of the protected communications without a compelling justification could put our state judiciary in the discomforting position of defending how its own actions—not those of the legislative branch or an executive agency—meet First Amendment standards.

In a case from our state, Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963), the United States Supreme Court fifty years ago warned of the dangers of unduly intrusive governmental efforts to compel the disclosure of constitutionally-protected communications and information. In the midst of concerns about domestic activities of the Communist party, an investigative committee of the Florida Legislature in 1956—pursuing efforts to discover

subversive activities in Florida—attempted to force the president of the Miami branch of the NAACP to testify about its membership including fourteen who were alleged to have communist ties. The president, Mr. Gibson, refused to do so based on the associational rights of the organization, its members, and prospective members. He was adjudged in contempt, fined, and sentenced to six months' imprisonment, which our state supreme court upheld. Id. at 543.

The United States Supreme Court reversed, holding that the legislative investigative committee was not entitled to compel Mr. Gibson to testify about such matters or make the organization's membership records available. Id. at 558. It said the state must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Id. at 546. It found no "substantial connection between the Miami branch . . . and Communist activities," which was an "essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association." Id. at 551. The lack of a substantial foundational basis for inquiry about the fourteen named individuals prevented the committee's inquiry, the evidence being "attenuated" or "merely indirect, less than unequivocal, and mostly hearsay testimony" thereby failing to justify the committee's actions. Id. at 552, 554-55.

The Perry case aside, the principles of Gibson have direct application in this case. The political consulting firm at issue, though not of the stature or historically important lineage of the NAACP, is nonetheless entitled to judicial protection from governmental overreach when no substantial connection or need has been shown for the privileged information sought. In a passage relevant to this appeal, the Court in Gibson concluded:

> To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights; to impose a lesser standard than we here do would be inconsistent with the maintenance of those essential conditions basic to the preservation of our democracy.

Id. at 558. By parallelism, allowing judicially-sanctioned inquiry into the protected communications at issue in this case requires a substantial foundation lest the "heart of the constitutional privilege" be lost and the firm, and others similarly situated regardless of party affiliation, be chilled in their protected activities. Our judiciary is the last outpost to ensure that this privilege is protected, a serious responsibility and one where the supremacy of federal law tempers the extent to which state constitutional provisions can be expanded. On the record presented to us, an inadequate foundation exists to intrude any further than has already been allowed; to do so would be an Icarian step too far.