No. 19-3551

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Appellees,

v.

LARRY OBHOF, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT CINCINNATI

BRIEF OF APPELLANTS REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, AND ADAM KINCAID

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellants are two national Republican party committees and an individual.

By: */s/ Jason Torchinsky*
Attorney for Appellants
Republican National Committee,
National Republican Congressional Committee,
and Adam Kincaid

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STATEMENT REGARDING ORAL ARGUMENT

Because this matter involves the fundamental constitutional right to speech, particularly internal associational political speech, Appellants respectfully request oral argument. *See* Fed. R. App. P. 34(a).

JURISDICTIONAL STATEMENT

Appellees brought this action pursuant to 42 U.S.C. § 1983 asserting violations of the First and Fourteenth Amendments and Article I, Section II and Article I, Section IV of the U.S. Constitution. Because Appellees challenge a congressional apportionment, a three-judge court was empaneled pursuant to 28 U.S.C. § 2284(a). *See* Fed. R. App. P. 28(a)(4)(A).

This appeal involves the three-judge district court's discovery rulings on December 21, 2018, granting Appellees' Motion to Compel (ECF 128) (PageID# 3465-3483), and January 30, 2019, denying Kincaid's Motion for a Protective Order (ECF 188) (PageID# 11114-11129). On May 3, 2019, the three-judge court issued an opinion and final order enjoining the State of Ohio from using its congressional maps in any further election. (ECF 262) (PageID# 23358-23658) and (ECF 263) (PageID# 23659). Appellants filed their notice of appeal on June 3, 2019. (ECF 273) (PageID# 23721-23723). Accordingly, this is an appeal from a final order. 28 U.S.C. § 1291.

Even though this is an appeal from a three-judge district court, the appeal is properly before this Court because the orders appealed from—ECF 128 and ECF 188—do not involve the grant or denial of an injunction concerning the merits of Plaintiff-Appellees' underlying constitutional claims. *See, e.g., MTM, Inc. v. Baxley*, 420 U.S. 799, 803 (1975).

STANDARD OF REVIEW

District court orders concerning determinations of privilege involve mixed questions of law and fact. Accordingly, this Court reviews privilege rulings *de novo*. *See Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under the First Amendment to the U.S. Constitution, did the three-judge district court commit an error of law when it ordered the Republican National Committee ("RNC"), National Republican Congressional Committee ("NRCC"), and Adam Kincaid (collectively, "Appellants") to produce all documents over which they asserted First Amendment privilege and ordered Kincaid to answer all questions at his deposition when the district court lacked jurisdiction, Plaintiffs-Appellees did not demonstrate that the documents and answers to deposition questions were crucial to their case; the court did not keep the infringement of First

Amendment rights to a minimum; and the Appellants demonstrated that disclosure would chill their First Amendment activities.

STATEMENT OF THE CASE

Partisan gerrymandering claims are non-justiciable as a matter of federal law and therefore federal courts do not have jurisdiction to hear them. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019). However, prior to the U.S. Supreme Court's ruling in *Rucho*, but seven years and three election cycles *after* the 2011 congressional reapportionment, the Ohio A. Philip Randolph Institute, the League of Women Voters of Ohio, Hamilton County Young Democrats, Northeast Ohio Young Black Democrats, the Ohio State University College Democrats, and seventeen individual Ohio voters (collectively "Plaintiffs," "Plaintiff-Appellees" or "Appellees") challenged Ohio's congressional map as a partisan gerrymander in violation of the First and Fourteenth Amendments as well as Article I of the U.S. Constitution. *See generally* Second Amend. Compl. (ECF No. 37) (PageID# 287). Although the Supreme Court has long acknowledged that "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), Plaintiffs sought to prove that this non-suspect classification—partisan affiliation—was used too much. Accordingly, communications within political entities like the RNC and NRCC became "suspect" under the theory of the case advanced by the Plaintiffs.

On June 18, 2018, the U.S. decided *Gill v. Whitford*, 138 S. Ct. 1916 (2018). There, the Court explained that it had never held that partisan gerrymandering claims were justiciable and signaled its doubt as to whether partisan gerrymandering claims were justiciable. *Id*. at 1929. Failing to heed this warning sign from the Supreme Court, Appellees served subpoenas on Kincaid—who at the relevant time period was the NRCC's Redistricting Coordinator—on June 28, 2018, the RNC on July 2, 2018, and the NRCC on July 2, 2018. Plaintiff-Appellees requested documents from 2009 through the end of 2012. Sheehy Aff. ¶ 13, *Ohio A. Philip Randolph Inst. V. Obhof*, No. 1:18-mc-31 (S.D. Ohio Oct. 26, 2019) (ECF 11-1) (PageID# 442).[1] Appellees asserted that they sought these documents to prove whether Ohio legislators drew congressional districts with partisan intent. Pls.' Mem. in Support Mot. to Compel, No. 1:18-mc-31 (ECF No. 1-1) (PageID# 3, 22).

Appellees' demands included numerous protected communications in which the RNC, NRCC, and Kincaid discussed analysis and strategy concerning redistricting and the impact that redistricting legislation has on the RNC, the NRCC, and their members. Appellees demanded the following:

(1) All documents concerning any proposed, draft, or final 2011

[1] The Motion to Compel was originally filed in the United States District Court for the District of Columbia. Subsequently, the action was transferred to the district court, consolidated, and opened as 1:18-mc-31.

Ohio congressional district maps; RNC Request 2, No. 1:18-mc-31 (ECF 1-3) (PageID# 50); NRCC Request 2, No. 1:18-mc-31 (ECF 1-3) (PageID# 66); Kincaid Request 2, No. 1:18-mc-31 (ECF 1-3) (PageID# 81);

(2) All documents concerning any services the RNC, NRCC, Mark Braden, and Adam Kincaid provided relating to the 2011 redistricting of Ohio's congressional map, including communications with anyone—including Republican House Members, House Candidates, Ohio Republican Party members, Ohio Republican legislators and legislative staff—regarding Ohio's congressional map, and analyses that the RNC, NRCC, or Kincaid conducted concerning the Ohio map. RNC Requests 3, 5, 7, 8, 9, 1:18-mc-31 (ECF 1-3) (PageID# 50-52); NRCC Request 3, 5, 7, 8, 9, 1:18-mc-31 (ECF 1-3) (PageID# 66-68); Kincaid Request 4, 5, 7, 8, 10, 11, 12, 13, 1:18-mc-31 (ECF 1-3) (PageID# 82-85);

(3) All documents concerning the involvement of the RNC, NRCC, Republican State Leadership Conference ("RSLC"), and the State Government Leadership Foundation ("SGLF")—a conservative state government focused non-profit and strategic

partner to the RSLC—in the redistricting of Ohio's congressional map. RNC Request 4, 1:18-mc-31 (ECF 1-3) (PageID# 50); NRCC Request 4, 1:18-mc-31 (ECF 1-3) (PageID# 66);

(4) All documents concerning RNC or NRCC conference trainings or meetings where Ohio's congressional map was discussed or where Ohio map drawers were present. RNC Request 10, 1:18-mc-31 (ECF 1-3) (PageID# 52); NRCC Request 10, 1:18-mc-31 (ECF 1-3) (PageID# 68), Kincaid Request 14, 1:18-mc-31 (ECF 1-3) (PageID# 85); and

(5) All documents concerning the process by which Ohio's congressional map was drawn including communications with Ohio legislators, Ohio members of Congress, and others concerning their input for Ohio's congressional map. Kincaid Request 6, 1:18-mc-31 (ECF 1-3) (PageID# 83).

Appellants timely served objections asserting that the information sought was protected under, *inter alia*, the First Amendment privilege. Oldham Aff. ¶3, 1:18-mc-31 (ECF 11-2) (PageID# 459); Winkelman Aff. ¶3, 1:18-mc-31 (ECF 11-2) (PageID# 465); Kincaid Aff. ¶¶3-4, 1:18-mc-31 (ECF 23-1) (PageID# 2701); *see also* Sheehy Aff ¶11, 1:18-mc-31 (ECF 11-1) (PageID# 443).

After reaching an agreement with Appellees on the production of non-privileged documents, Appellants began a rolling production on August 31, 2018.[2] The RNC, NRCC, and Kincaid withheld documents under the First Amendment privilege because they contained mental impressions and analyses that were, *inter alia*, intended to develop strategies to assist Republican House Members win their elections.[3] Oldham Aff. ¶9, 1:18-mc-31 (ECF 11-2) (PageID# 461); Winkelman Aff. ¶12, 1:18-mc-31 (ECF 11-2) (PageID# 468); Kincaid Aff. ¶17, 1:18-mc-31 (ECF No. 23-1) (PageID# 2703).

Unhappy with Appellants' assertion of various privileges, Plaintiffs, on October 12, 2018, filed motions to (1) compel production in the United States District Court for the District of Columbia, Mot. to Compel, No. 1:18-mc-31 (ECF 1 & 1-1) (PageID# 1-30); (2) transfer the case to the United States District Court for the Southern District of Ohio; and (3) expedite proceedings, Mot. to Transfer & Expedite, No. 1:18-mc-31 (ECF 2) (PageID# 292-299). The Motion to Expedite was granted on October 19, 2018. 1:18-mc-31 (ECF 6) (PageID# 305).

[2] Due to the expansive nature of the search terms provided by Appellees, the Appellants retrieved more than 23,000 documents, the majority of which were deemed irrelevant to Appellees' requests, and some 75 documents were produced. Sheehy Aff. ¶5, 1:18-mc-31 (ECF 11-1) (PageID# 443).

[3] One of the primary purposes of both the RNC and NRCC is to assist Republican candidates with winning elections – including Congressional elections. Accordingly, it is necessary to know the precise contours and composition of congressional districts. Oldham Aff. ¶11, 1:18-mc-31 (ECF 11-2) (PageID# 461); Winkelman Aff. ¶ 14, 1:18-mc-31 (ECF 11-2) (PageID# 468).

Subsequently, Appellants opposed transfer and then, on October 25, 2018, filed their Memorandum in Opposition to Plaintiffs' Motion to Compel. No. 1:18-mc-31 (ECF 9) (PageID# 313-388): On October 31, 2018, Judge Contreras granted Plaintiffs' Motion to Transfer. No. 1:18-mc-31 (ECF 12) (PageID# 495).

After the transfer of this case to the Southern District of Ohio, the district court ordered supplemental briefing by the parties. Minute Entry and Notation Order, 18-mc-31 (November 5, 2018) (no ECF docket number). Appellants filed their Supplemental Memorandum on November 14, 2018. (ECF 96) (PageID# 3199-3206). This was followed shortly thereafter by Plaintiffs' Supplemental Memorandum on November 16, 2018. (ECF 97) (PageID# 918-925).

On December 4, 2018, Adam Kincaid sat for a deposition at the Washington, D.C. offices of Covington & Burling. At the deposition, Appellees' counsel asked several invasive questions about the internal workings of the NRCC, a membership organization comprised of every elected Republican in the United States House of Representatives. To preserve the First Amendment rights of association, Mr. Kincaid, at the instruction of counsel, refused to answer these questions. *See generally* Resp. Supplemental Mem. in Opp.'n (ECF 126) (PageID# 3199-3206) (sealed).

On December 21, 2018, at 5:00 P.M. on the Friday before Christmas, the district court issued its Order Granting Plaintiffs' Motion to Compel. (ECF 3465-

3483). On Monday, December 24, 2018, Appellants filed an Emergency Motion to Stay in the district court and filed their Notice of Appeal. (ECF 129) (PageID# 3483-3501). The district court, at the request of Plaintiffs, set a status conference for December 28, 2018 to discuss production and the Motion for Stay. The stay motion was denied at the Status Conference. Minute Entry and Notation Order (December 28, 2018). The district court also gave Appellants a hard deadline of Friday January 4, 2019 at noon to produce documents. *Id*.; *see also* Notation Order (January 3, 2019). On December 30, 2019, Appellants filed a Motion to Expedite appeal in this Court. *Ohio A. Philip Randolph Inst. v. Kasich*, No. 18-425 (6th Cir. Dec. 31, 2018) (Doc. 7). The Motion was granted with respect to the briefing schedule only on January 3, 2019. (Doc. No. 9-1, 9-2). Also on January 3, 2019, Appellees' subpoenaed Mr. Kincaid to once again appear for a deposition at the Washington D.C. offices of Covington & Burling. Then, in accordance with the district court's order, the documents were produced to Appellees under the district court's "attorneys'-eyes-only" provision at 11:26 a.m. on January 4, 2019.

Also on January 4, 2019, the U.S. Supreme Court ordered expedited briefing and oral argument in *Benisek* and *Rucho*. *Common Cause v. Rucho*, No. 18-422) (U.S. Jan. 4, 2019); *Benisek v. Lamone*, No. 18-726 (U.S. Jan. 4, 2019). These orders also noted that the Supreme Court would consider whether federal courts had jurisdiction to hear plaintiffs' partisan gerrymandering claims. *Id*.

Later, on January 15, 2019, the district court held a status conference, at Plaintiffs' behest, seeking an order from the Court to compel the second deposition of Mr. Kincaid. *See* Transcript Telephonic Discovery Conference (ECF 142) (PageID# 4611-4630) (S.D. Ohio Jan. 15, 2019). During this hearing, counsel to Mr. Kincaid informed the Court that it should wait on compelling Mr. Kincaid's deposition until the Sixth Circuit ruled on the non-parties appeal. Mr. Kincaid's counsel also informed the Court that the U.S. Supreme Court would be ruling on the question of jurisdiction in both *Rucho* and *Benisek* – placing Plaintiffs' theory of the case in a very tenuous position. Telephonic Discovery Conference, Tr. at 7 (Jan. 15, 2018) (ECF 142) (PageID# 4617). Without even acknowledging the Supreme Court's action, the district court ordered the deposition to happen as scheduled under pain of contempt. *Id*. at 12 (PageID# 4622).

Three days later, after full briefing on the appeal, this Court dismissed the appeal for lack of jurisdiction. *Ohio A. Philip Randolph Inst, et al. v. Kasich, et al.* No. 18-4258 slip op. (6th Cir. Jan. 18, 2019) (Doc. 31-2). This Court ruled that the appeal was an interlocutory appeal that did not fit within the collateral order exception to the final order rule. This Court also ruled that the appeal did not satisfy the requirements to obtain a writ of mandamus. *Id*. at 6-14.

Judge Nalbandian issued a concurring opinion. *Id*. at 15 (761 Fed. Appx. 506, 516). Judge Nalbandian concurred in judgment, dismissing the case for lack

of jurisdiction. *Id*. However, Judge Nalbandian faulted the three-judge district court for issuing an opinion that did not explain how the discovery that the Plaintiffs' had sought was crucial to Plaintiffs' case. *Id*. This explanation was necessary because in late 2018 and early 2019 "the substantive contours of a partisan gerrymandering claim ha[d] yet to be fleshed out to a significant degree." *Id*. (citing *Gill*, 138 S. Ct. at 1926-27). Additionally, the three-judge court needed to provide a more thorough explanation of why the documents sought were "crucial" to Plaintiffs' case when, even under Plaintiffs' theory of the case, liability would have turned on "the intent of the Ohio legislature, not these third parties." *Id*. The three-judge court, according to the concurring opinion, needed to explain why the documents sought were crucial to Plaintiffs' claims "[s]uch that the plaintiffs could not prevail without them...." *Id*. Although the district court's decision may not constitute "more than" an abuse of discretion, *id*. at 12, it did leave "much to be desired in answering [the] question" of whether Plaintiffs could prevail on their claims without the RNC's and the NRCC's documents, and Kincaid's documents and testimony. *Id*. at 15 (Nalbandian, J., concurring).

Returning to the three-judge district court, Kincaid filed a Motion for a Protective Order either to prevent his upcoming deposition or to limit it. (ECF 165) (PageID# 7366-7391).

Undaunted by the U.S. Supreme Court's signal in *Rucho* and *Benisek* that it might find that partisan gerrymandering claims are non-justiciable, the three-judge district court below denied Kincaid's Motion for Protective Order and ordered Kincaid to sit for a second deposition. (ECF 188) (PageID# 11114-11129). Kincaid sat for a second, nearly seven-hour deposition in this case. This deposition included several questions about Mr. Kincaid's internal and private communications with Republican congressional members. *See, e.g.,Obhof*, No. 18-mc-00031, Kincaid Tr. Vol. 2 at 252-253 (S.D. Ohio Feb. 20, 2019) (ECF 230-28) PageID# 15754-55) (preserving First Amendment privilege objections); *id*. at 255-56; (PageID# 15757-58) (discussing how many maps Kincaid drew); *id*. at 258 (PageID# 15760) (discussing some of the actions he took analyzing maps); *id.* at 258-59, 271 (PageID# 15760-61, 15773) (discussing who Kincaid was interacting with). *Id*. at 261 (PageID# 15763) (limited involvement with Ohio legislative staff); *id*. at 273-282 (PageID# 15775-84) (describing the map proposal process that was done on behalf of the Ohio congressional delegation); *id*. at 288-89, 291, 295 (PageID# 15790-91, 15793, 15797) (discussing the types of data Kincaid used in conducting his analysis); *id*. at 337-43 (PageID# 15839-15845) (Kincaid discussing his communications with Republican Congressman Stivers); *id*. at 343-352 (PageID# 15845-15854) (Kincaid discussing his communications with Republican Congressman Tiberi).

The case went to trial during the first full week of March 2019, approximately three weeks prior to oral argument in *Rucho*. *See Rucho*, No. 18-422 (U.S. March 26, 2019). The three-judge district court rendered its decision on May 3, 2019. In the three-judge court's opinion, the court cited documents and deposition testimony from Kincaid approximately thirty times. On May 24, 2019, the United States Supreme Court granted the stay applications filed by the Ohio Attorney General and the Ohio Republican congressional delegation. *Chabot v. Ohio A. Philip Randolph Institute*, No. 18A-1166 (U.S. May 24, 2019); *appeal docketed*, *Chabot v. Ohio A. Philip Randolph Inst*., No. 19-110 (U.S. July 24, 2019).

On June 3, 2019, Appellants filed their notice of appeal. (ECF 273) (PageID# 23721-23723).

Less than two months after the district court's ruling, the U.S. Supreme Court declared all partisan gerrymandering claims non-justiciable. *Rucho*, 139 S. Ct. at 2506-07.

SUMMARY OF THE ARGUMENT

Appellants present two arguments. *First*, this Court should vacate all of the orders issued by the three-judge district court regarding discovery because it has since become clear that the three-judge district court lacked jurisdiction to hear Plaintiffs' claims. In *Rucho*, the Supreme Court clearly held that federal courts lack

jurisdiction to hear partisan gerrymandering claims like those brought by Plaintiffs here. 139 S. Ct. at 2506-07. In *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), the Supreme Court held:

> [T]he subpoena power of a court cannot be more extensive than its jurisdiction. It follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and . . . it must be reversed.

Accordingly, because it is now apparent that the three-judge district court lacked subject-matter jurisdiction over this action, this Court should vacate the three-judge district court's orders compelling Appellants to disclose documents and testimony that were protected by their First Amendment privilege and grant Appellants the requested relief necessary to remediate the harm to their First Amendment rights.

Second, even if the three-judge district court had subject-matter jurisdiction over this action, it erred when it compelled Appellants to disclose documents that were protected under the First Amendment privilege. Appellees do not challenge the correct determination by the three-judge district court that Appellants have made a *prima facie* showing that disclosure would harm Appellants First Amendment associational rights. Furthermore, Kincaid made a *prima facie* showing that compelling him to sit for his deposition would harm his First Amendment associational rights.

The three-judge district court erred when it determined that Appellees met the bar to compel disclosure despite the harm to Appellants' First Amendment privilege rights. Appellees did not establish a crucial need for the privileged documents or deposition testimony they sought from Appellants.

This privileged evidence was not crucial to Appellees' case because it was the intent of the Ohio legislature, not Appellants, which was crucial to Appellees claims. Indeed, the district court did not explain why the privileged material Appellees sought was crucial to Appellees' case. If the First Amendment privilege is to have any teeth, the district court must provide a sufficient explanation for why the information sought is crucial. *Ohio A. Philip Randolph Inst, et al. v. Kasich, et al.* No. 18-4258 at 15 (6th Cir. Jan. 18, 2019) (Doc. 31-2) (Nalbandian, J., concurring).

The three-judge district court also erred by failing to adequately take into account the fact that Appellees already had ample evidence regarding the issues crucial to their claims from other, more reasonable, non-privileged alternative sources in the form of evidence from the Ohio legislature and expert testimony.

Finally, the district court erred because it did not account for the tenuous nature of Appellees' claims in light of the Supreme Court's decision to postpone jurisdiction in *Rucho*. This is a particularly salient analysis given that until very recently, no district court had found that a set of plaintiffs had proven an unconstitutional

partisan gerrymander. *Vieth v. Jubelirer*, 541 U.S. 267, 282-284 (2004) (plurality op.).

ARGUMENT

The RNC, NRCC, and Kincaid appeal the district court's rulings granting Appellees' Motion to Compel (ECF 128) (PageID# 3465-3483) and denying Kincaid's Motion for a Protective Order (ECF 188) (PageID# 11114-11129). Appellants only appeal the portions of those rulings concerning the First Amendment privilege. Appellants are not appealing the district court's ruling as to attorney-client privilege and attorney work-product.

This appeal presents a live matter because Appellants continue to suffer an injury. Appellees still have the RNC's, NRCC's, and Kincaid's documents, as well as Kincaid's deposition testimony, and can use them in other cases. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). Accordingly, this Court can still fashion an order that at least partially remedies the injuries to the First Amendment rights of the Appellants. *Id*. Therefore, Appellants respectfully request that this Court vacate the district court's order. Appellants further request that this Court order that the Appellees identify all individuals, persons, agents, associates, organizations and independent contractors who had access to the deposition transcripts and documents that Appellants disclosed. Finally, Appellants request that all the identified individuals be required to destroy

the documents and deposition transcripts and send proof of destruction to Appellants.[4]

I. THE DISTRICT COURT LACKED JURISDICTION TO ISSUE THE CHALLENGED ORDERS.

It is now settled law that the three-judge district court did not have subject-matter jurisdiction over this case. On June 27, 2019, in *Rucho v. Common Cause*, the Supreme Court ruled that partisan gerrymandering claims are non-justiciable political questions and therefore federal courts lack jurisdiction to entertain these claims. 139 S. Ct. 2484 (2019). Appellees here brought their claims under the same legal theories used by the plaintiffs in *Rucho*, and the three-judge district court here adopted the standards promulgated by the three-judge district court in *Rucho*. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1083, 1093-99 (S.D. Ohio 2019), *stay granted Chabot v. Ohio A. Philip*

[4] Appellants will likely seek attorneys' fees in the district court against Appellees. Mr. Kincaid's second deposition should have been stayed pending the U.S. Supreme Court's decision in *Rucho*. Additionally, the RNC, NRCC's, and Kincaid's documents were then publicized in both public court filings and in the district court's opinion. These private communications were protected under the First Amendment and they should never have become public. They would not have become public had the district court exercised caution and agreed to stay the trial pending the Supreme Court's decision in *Rucho*. Barreling ahead with discovery and trial was detrimental to Appellants' constitutional rights as documents that should have remained privileged were publicly disclosed. Barreling towards trial was also unreasonable. Attorneys' fees are warranted. *See Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). This request will likely be filed before the district court on remand from this appeal.

Randolph Institute, No. 18A1166 (U.S. May 24, 2019), *appeal docketed*, *Chabot v. Ohio A. Philip Randolph Inst.* No. 19-110 (U.S. July 24, 2019). It inexorably follows that if the three-judge district court in *Rucho* lacked jurisdiction, the three-judge district court here also lacks jurisdiction.

Because federal courts lack jurisdiction over Appellee's claims, this action should never have reached discovery to aid in determination of the merits of Plaintiffs' claims. *United States Catholic Conf.*, 487 U.S. at 76. This is because the subpoena power is subject to constitutional limits and it "cannot be more extensive than its jurisdiction." *Id.* Accordingly, "[i]t follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and . . . it must be reversed." *Id.*; *see also Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (en banc) *rev'd on other grounds*, 470 U.S. 373 (1985) (discovery may not be obtained in the absence of a pending lawsuit, and if it turns out that the lawsuit should not have been pending from the outset because it is barred by res judicata, the discovery order fails); *Stanford v. Kuwait Airlines Corporation*, 1987 WL 26829 (S.D.N.Y. 1987) ("[W]here a discovery order is made against the party and the Court later determines that it lacks subject matter jurisdiction over the lawsuit against the party, the discovery order must fall.").

Accordingly, because it is now clear that the three-judge district court lacked subject-matter jurisdiction over Appellees' underlying action, the subpoenas issued to the RNC, NRCC, and Kincaid are void, as are the three-judge district court's orders compelling disclosure of First Amendment privileged information in compliance with those subpoenas.

The three-judge district court's lack of jurisdiction over Appellees' underlying claims does not deprive this Court of jurisdiction to afford Appellants their requested relief. This Court can still remedy the harms the district court's order continues to impose upon Appellants. *See Church of Scientology of Cal.* 506 U.S. at 12-13.

In *Church of Scientology*, the IRS had obtained petitioners' documents through an IRS proceeding in federal district court to enforce a summons for the documents. *Id*. at 11. The petitioners intervened in the district court to prevent their disclosure, but the district court ordered compliance with the summons. *Id*. After unsuccessfully seeking a stay, petitioners appealed. While the appeal was pending, the petitioners complied with the order disclosing documents. *Id*. The court of appeals then dismissed the appeal as moot. *Id*. at 12. But the Supreme Court disagreed.

The U.S. Supreme Court held that although it could not "return the parties to the *status quo ante*" after the documents were disclosed it could still "fashion *some*

form of meaningful relief." *Id*. at 13 (emphasis in the original). This is because persons have a possessory interest in their records. *Id*. When the Government obtains these documents through an unlawful summons, that possessory interest is violated. *Id*. Furthermore, the Court held that when the Government maintains possession of these documents, the owner of the documents continues to suffer an injury. *Id*. The case, therefore, was not moot because the "court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession." *Id*. Some courts have even held that they have the power to prevent the future use of those records. *Id*. at n.6. Accordingly, if the subpoena below was issued improperly, "a court could order that the [Appellees'] copies of the [documents and transcripts] be either returned or destroyed." *Id*. at 15.

Here, the RNC, NRCC, and Kincaid continue to suffer an injury: Appellees continued possession of documents and deposition transcripts containing privileged information which were obtained through an unlawful, void court order. This Court can and should grant Appellants' requested relief to remedy the ongoing injury caused by the three-judge district court's unlawful order compelling disclosure of privileged material. *Church of Scientology of Cal.*, 506 U.S. at 13, 15.

II. THE RNC'S, NRCC'S, AND KINCAID'S DOCUMENTS ARE PROTECTED UNDER THE FIRST AMENDMENT PRIVILEGE.

Even if the three-judge district court had jurisdiction over this action, it erred when it compelled Appellants to disclose documents that were protected under the First Amendment privilege.

A. THE STANDARD.

The First and Fourteenth Amendments guarantee the "freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Therefore "the right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

Because the right to free speech is enhanced through associating with others, *Buckley*, 424 U.S. at 15, and the associational right is effectively exercised when the association is able to formulate messages and develop strategies in private, *id.* at 75, courts have developed a framework to protect internal associational communications from disclosure. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (The Supreme Court "has recognized the vital relationship between freedom to associate and privacy in one's associations."); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010); *Tree of Life Christian, Sch. v. City of Upper Arlington*, No. 11-00009, 2012 U.S. Dist. LEXIS 32205 (S.D. Ohio 2012).

The right to associate for the common advancement of the association's beliefs is firmly protected by the Constitution. *Tashjian v. Republican Party,* 479 U.S. 208, 224 (1986) ("The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."); *Tree of Life Christian, Sch.*, 2012 U.S. Dist. LEXIS 32205 at *5 ("It is well established that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the freedom of speech") (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (internal quotation marks and alterations omitted). The right to associate writ large is therefore intimately intertwined with the ability and right to do so privately. *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (citing *Buckley*, 424 U.S. at 64-68 and *NAACP*, 357 U.S. at 462-63) ("[C]ompelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation."); *see also Tashjian,* 479 U.S. at 214; *Tree of Life Christian, Sch.*, 2012 U.S. Dist. LEXIS 32205 at *4.

The First Amendment therefore protects from disclosure internal associational communications, including communications between separate entities that associate together to advance a common interest. *See Int'l Union v. Nat'l Right to Work Comm.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978) ("[T]he First Amendment's protection . . . extends not only to the organization itself, but also to its staff,

members, contributors, *and others who affiliate with it*.") (emphasis added); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388-90 (D.C. Cir. 1981) (recognizing that the First Amendment protects groups from an FEC subpoena seeking, in part, "[a]ll materials concerning communications *among various groups* whose alleged purpose was to defeat the President . . . .") (emphasis added)*; see also Ohio Org. Collaborative v. Husted*, No. 15-01802, 2015 U.S. Dist. LEXIS 153279, at *9 (S.D. Ohio Nov. 12, 2015) ("[C]ompelled disclosure may be inappropriate when it negatively impacts an organization's ability to 'pursue collective effort to foster beliefs . . . .'" (quoting *NAACP*, 357 U.S. at 462-63)).

Communications between a national political party, its state affiliates, and other aligned entities are firmly within the scope of the privilege. *See AFL-CIO*, 333 F.3d at 171, 176-78; *see also* RNC Privilege Log at 1-3, 1:18-mc-31 (ECF 1-3) (PageID# 165-169) (asserting privilege over communications between Dr. Thomas Hofeller, RNC/RSLC redistricting expert, and Mike Lenzo, Ohio House of Representatives Republican Caucus Counsel). Finally, the right to direct and organize Appellants' associations to advocate effectively for their positions and beliefs is paramount:

> The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If

> that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.

Ripon Soc.'y v. Nat'l Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc); *see also Husted*, 2015 U.S. Dist. LEXIS 153279 at *12 ("The Court has no doubt that the compelled disclosure of such sensitive information in the context of highly charged litigation involving issues of great political controversy would have a chilling effect on plaintiffs' freedom of association by adversely impacting their ability to organize, promote their message(s), and conduct their affairs."); Oldham Aff. ¶18, 1:18-mc-31 (ECF 11-2) (PageID# 462-63); Winkelman Aff. ¶21, 1:18-mc-31 (ECF 11-2) (PageID# 469); Kincaid Aff. ¶27, 1:18-mc-31 (ECF 23-1) (PageID# 2704) (stating that disclosure will directly frustrate the organizations' ability to pursue their legal and political goals effectively).

Accordingly, to protect the constitutional rights of litigants, and especially of non-parties, the courts have developed the following framework to evaluate First Amendment privilege claims. First, the party asserting the privilege must make a *prima facie* case that disclosure could arguably infringe its First Amendment rights. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1267-68 (D.C. Cir. 1981); *see also Tree of Life Christian, Sch.*, 2012 U.S. Dist. LEXIS 32205 at *7. Once a party asserting the privilege has satisfied the threshold for showing a First Amendment infringement, the burden then shifts to the party seeking disclosure.

Black Panther Party, 661 F.2d at 1268; *see also In re: Deliverance Christian Church*, No. 11-62306, 2011 Bankr. LEXIS 5219, *13 (N.D. Ohio Dec. 1, 2011) (When the "prima facie case of entitlement to a First Amendment privilege . . . is satisfied, the party seeking discovery must demonstrate a compelling need for the information."). At this stage, the party seeking disclosure must then show that the information sought is "crucial" or "goes to the heart of the matter." *Black Panther Party*, 661 F.2d at 1268; *In re: Deliverance Christian Church*, 2011 Bankr. LEXIS 5219 at *13. Finally, if the party seeking disclosure shows that the information is "crucial," they must then show that they have exhausted every reasonable alternative avenue to obtain the information sought. *Black Panther Party*, 661 F.2d at 1268. Overall, disclosure must be kept to a minimum. *Id*. The decision below acknowledged that this basic framework governs the discovery sought by Plaintiffs but applied the framework incorrectly.

1. <u>The RNC, NRCC, And Kincaid Satisfied The Light Burden Of Establishing A Prima Facie Case.</u>

Because the right to associate and to formulate strategies to influence the political process is enshrined in the First Amendment, the RNC's, NRCC's, and Kincaid's burden to demonstrate a *prima facie* case of infringement is light. *See, e.g.*, *Black Panther Party*, 661 F.2d at 1267-68 (stating that because of the preferred position of First Amendment rights, infringement of those rights through compelled disclosure must be kept to a minimum); *AFL-CIO*, 333 F.3d at 176

(stating that the evidence presented in the affidavits was "[f]ar less compelling than the evidence presented in cases involving groups whose members had been subjected to violence, economic reprisals, and police or private harassment, [but] that difference speaks to the strength of the First Amendment interests asserted, not to their existence.") (internal citations omitted); *Perry*, 591 F.3d at 1163 (stating that at this stage of the analysis, it is sufficient for the party asserting privilege to create a "[r]easonable inference that disclosure would have the practical effects of discouraging political association...."); *New York State NOW v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989) ("Mindful of the crucial place speech and associational rights occupy under our constitution, we hasten to add that in making out a prima facie case of harm the burden is light."). The numerous opinions noting the light burden of demonstrating a *prima facie* case of infringement comport with the basic meaning of the term: "prima facie" means "at first sight" or "on first appearance" and is sufficient to raise a presumption unless disproved. Black's Law Dictionary 1228 (Bryan A. Garner Ed., 8th Ed. 2004).

Courts have found that litigants have made a *prima facie* case of infringement of First Amendment rights where the compelled disclosure of internal campaign communications would cause members of an association to "drastically alter" how they communicate with each other. Additionally, courts have found that litigants have established a *prima facie* case where disclosure would make

members of the association and/or the association itself less likely to engage in the same activity in the future. *See Perry*, 591 F.3d at 1163. Furthermore, courts have found a *prima facie* harm established where compelled disclosure would frustrate how the organization operates and crafts and selects its message as well as the best means to promote that message. *AFL-CIO*, 333 F.3d at 177; *DeGregory v. Atty. Gen. of N.H.*, 383 U.S. 825, 827-29 (1966) (First Amendment protects from disclosure the views expressed at associational meetings); *Perry*, 591 F.3d at 1162-63 ("Compelling disclosure of internal campaign communications can chill the exercise of [First Amendment] rights."). The ACLU of Northern California has noted that compelled disclosure in civil litigation of internal campaign communications "can discourage organizations from joining the public debate over an initiative." *Id*. at 1162 n.8.

a. <u>The RNC, NRCC, and Kincaid Satisfied The Light Burden As To Their Documents.</u>

In granting Appellees' Motion to Compel, the district court correctly found that the RNC, NRCC, and Kincaid satisfied their burden of demonstrating *prima facie* harm. Order Granting Mot. Compel (ECF 128) (PageID# 3472-73). Specifically, the district court found that Appellants "[h]ave met their prima facie burden, that is, that they have shown an 'arguable First Amendment infringement.'" (ECF 128) (PageID# 3473) (internal alterations omitted). This is because "the right to exchange ideas and formulate strategy in private is implicit in

the right to associate with others to advance shared political beliefs" and "[d]isclosure of the types of internal documents at issue here may have a deterrent effect on the free flow of information within campaigns." (ECF 128) (PageID# 3473) (citing *Perry*, 591 F.3d 1147). In this instance, it is hard to argue that Appellants have not met the "light" threshold required to make a *prima facie* showing of First Amendment infringement. *See Black Panther Party*, 661 F.2d at 1268; *see also Tree of Life Christian, Sch.*, 2012 U.S. Dist. LEXIS 32205 at *7 (a party must merely show "some probability that disclosure will lead to reprisal or harassment"); *N.Y. State NOW*, 886 F.2d at 1355. Plaintiffs have not cross-appealed this finding. This Court should not disturb this holding by the district court.

Mr. Winkelman, then NRCC's General Counsel; Mr. Oldham, RNC's Redistricting Counsel; and Mr. Kincaid have all completed and signed affidavits detailing the harm their organizations and associations are suffering and will continue to suffer absent an order from this Court granting Appellants requested relief. Winkelman Aff. ¶13-14, 1:18-mc-31 (ECF 11-2) (PageID# 468); Oldham Aff. ¶10-11, 1:18-mc-31 (ECF 11-2) (PageID# 461); Kincaid Aff. ¶18-19, 1:18-mc-31 (ECF No. 23-1) (PageID# 2703). In this specific instance, disclosure deters NRCC's and the RNC's Members, staffers, and other association participants from engaging in full and honest discussion about redistricting; and impairs the analysis

of redistricting's impacts on the NRCC's Members and their districts. Winkelman Aff. ¶14, 1:18-mc-31 (ECF 11-2) (PageID# 468); Oldham Aff. ¶11, 1:18-mc-31 (ECF11-2) (PageID# 461); Kincaid Aff. ¶19, 1:18-mc-31 (ECF No. 23-1) (Page ID# 2703). Knowing, discussing, and analyzing the impacts of redistricting—especially as it relates to assisting Members in their elections and outreach—are primary purposes of both the NRCC and RNC. Winkelman Aff. ¶14, 1:18-mc-31 (ECF 11-2) (PageID# 468); Oldham Aff. ¶11, 1:18-mc-31 (ECF11-2) (PageID# 461); Kincaid Aff. ¶¶18-19, 1:18-mc-31 (ECF 23-1) (PageID# 2703).

Disclosure of these documents has harmed and will continue to harm the RNC and NRCC by hampering their ability to conduct their internal affairs and assist Members in their elections, in their communications with voters, and because disclosure was to Appellants' political opponents. Winkelman Aff. ¶¶14-21, 1:18-mc-31 (ECF 11-2) (PageID# 468-69); Oldham Aff. ¶¶12-18, 1:18-mc-31 (ECF 11-2) (PageID# 461-62); Kincaid Aff. ¶¶ 19-27, 1:18-mc-31 (ECF 23-1) (PageID# 2703-04); *see Perry*, 591 F.3d at 1163 (holding party satisfied *prima facie* step where party stated that it would "drastically alter" how the association communicated in the future and would thus "[b]e less willing to engage" in similar activity in the future); *see also Tree of Life Christian, Sch.*, 2012 U.S. Dist. LEXIS 32205 at *7; *cf. 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.") (internal citations omitted).

Disclosure of the produced documents and Appellees' continued possession of these disclosed documents severely impairs the ability of the RNC, NRCC, and Kincaid to achieve their associational goals of helping Republicans win congressional seats. This is because their mental impressions and confidential advice to their clients and Members are in Appellees' and Appellees' counsel's possession. Appellees and their counsel will be advising the Democratic legislators, candidates, and Members of Congress against whom Appellants will be running. Winkelman Aff. ¶21, 1:18-mc-31 (ECF 11-2) (PageID# 469); Oldham Aff. ¶18, 1:18-mc-31 (ECF 11-2) (PageID# 462-63); Kincaid Aff. ¶27, 1:18-mc-31 (ECF 23-1) (PageID# 2704).

Furthermore, disclosure and continued possession of the documents and deposition transcripts impairs Appellants' ability to hire and retain talent. Winkelman Aff. ¶¶13-14, 1:18-mc-31 (ECF 11-2) (PageID# 468); Oldham Aff. ¶¶10-11, 1:18-mc-31 (ECF 11-2) (PageID# 461); Kincaid Aff. ¶¶18-19, 1:18-mc-31 (ECF 23-1) (PageID# 2703); *see also AFL-CIO*, 333 F.3d at 176 (noting that the DNC and AFL-CIO affidavits would make it difficult to recruit volunteers).

All of these harms to the RNC, NRCC, and Kincaid are salient because the Appellants will likely conduct similar analyses following the next decennial census. Winkelman Aff. ¶21, 1:18-mc-31 (ECF 11-2) (PageID# 469); Oldham Aff. ¶18, 1:18-mc-31 (ECF 11-2) (PageID# 462-63); Kincaid Aff. ¶27, 1:18-mc-31 (ECF 23-1) (PageID# 2704); *see also AFL-CIO*, 333 F.3d at 176-77 (stating that disclosure of polling data, member mobilization campaigns, and state-by-state strategies would reveal to political opponents strategies and tactics that the entity would likely use again implicates significant First Amendment interests and intrudes on the "privacy of association and belief" guaranteed under the First Amendment).

Given the abundant evidence that forced disclosure has harmed and will continue to harm Appellants and chill their First Amendment rights, the district court was correct in finding *prima facie* harm. This Court should affirm this specific finding of the district court.

b. Kincaid Satisfied The Light Burden As To His Deposition.

The district court, however, did not clearly rule that Kincaid had established a *prima facie* harm to his First Amendment rights if compelled to sit for a deposition. *Compare* Order Denying Motion for Protective Order And Granting In Part Motion To Limit The Scope Of The Deposition at 8 (ECF 188) (PageID# 11121) ("We conclude that Kincaid has not demonstrated any threat that

participating in the deposition would subject him to retaliation or harassment..."); *with id*. at 12 (PageID# 11125) ("Having identified Kincaid's First Amendment interest (albeit insubstantial) in preserving the confidentiality of certain information..."). The district court's analysis on this point was both unclear and wrong.

First, to the district court, the only harm that satisfies the *prima facie* standard is physical threats, violence, or economic retribution, and this harm comes from the public release of membership lists disclosing members who were not previously known. (ECF 188) (PageID# 11121-22). But this is not the standard. Members of an association who are publicly known can still establish a *prima facie* harm if their internal associational communications are disclosed. *De Gregory*, 383 U.S. at 828 (noting Appellant had already admitted his association with the Communist Party as recently as 1957 but protecting from disclosure "[t]he views expressed and ideas advocated at any such gatherings."). *Perry*, 591 F.3d at 1162-63 (citing affidavit of a member of ProtectMarriage.com's ad hoc executive committee who was publicly known).

Second, the district court did not apply the proper standard when it stated that Kincaid's deposition testimony would not lead to the Republican Party disbanding and "consequently, no expression of the ideas that association helps to foster." ECF 188 (PageID# 11122). This is not the standard under the First

Amendment generally. A statute can still violate the First Amendment even if it merely limits First Amendment rights as opposed to an outright prohibition of those rights. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree."). Additionally, the U.S. Supreme Court has ruled on several occasions that extensive interference with a political party's operations and effectiveness violates the First Amendment. *See, e.g., Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 223, 229-31 (1989) (declaring unconstitutional California statutes that *limited* "[a] political party's discretion in how to organize itself, conduct its affairs, and select its leaders," and therefore affected "the parties' message and interfere[d] with the parties' decisions as to the best means to promote that message."); (*id*. at n.21) *Tashjian*, 479 U.S. at 224 ("[T]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."); *see also Ripon Soc'y, Inc.*, 525 F.2d at 585.

Accordingly, the D.C. Circuit was not so blithe with protecting the First Amendment associational speech of the Democratic National Committee, its state party affiliates, and labor unions. *See, generaly, AFL-CIO*, 333 F.3d 168. If the D.C. Circuit had decided differently and ordered disclosure, the Democratic National Committee would still exist. But the disclosure would have intruded on

"the privacy of association and belief guaranteed by the First Amendment," and "seriously interfere[d] with internal group operations and effectiveness." *Id*. at 177.

Therefore, the fact that Kincaid did not express "any concern that his deposition might subject him to harassment or retaliation" is irrelevant. (ECF 188) (PageID# 11122). Kincaid rightly noted that disclosure would "frustrate" the NRCC's ability to pursue political goals effectively because Appellants' political opponents would know the NRCC's strategies. Kincaid Aff. In Support of Protective Order ¶26 (ECF 165-1) (PageID# 7387). Accordingly, disclosure invades the privacy of the association and interferes with the effectiveness of the association. *AFL-CIO*, 333 F.3d at 177. Additionally, Kincaid, much like the ad hoc committee member in *Perry*, noted that disclosure of Kincaid's communications and mental impressions at a deposition would cause Kincaid to drastically alter his communications in the future. *Compare* Kincaid Aff. ¶¶17-19 (ECF 165-1) (PageID# 7385-7386) *with Perry*, 591 F.3d at 1163 ("I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative ... are ordered to be disclosed through discovery … it will drastically alter how I communicate in the future…I will be less willing to

engage in such communications knowing *that my private thoughts*[5] on how to petition the government and my private political and moral views may be disclosed.") (emphasis added). This is a First Amendment injury.

Third, the district court next attempts to drive a distinction between the discussions related to campaign strategy and discussions about redistricting. (ECF 188) (PageID# 11122-23). But this line is arbitrary and not supported by First Amendment jurisprudence. The Supreme Court has recognized that the freedom of association applies whether the beliefs advanced by the association "pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460. Accordingly, the privilege can be applied to lobbying communications between trade associations. *In re Motor Fuel Temperature Sales Practices Litig*., 641 F.3d 470, 481 (10th Cir. 2011) ("Thus, we conclude that the First Amendment privilege applies to the district court's discovery order, which requires trade groups and their members to disclose to a private party their communications regarding strategy for lobbying against the implementation of ATC in the United States."); *id*. at 492-93 (Kelly, J., concurring) (stating that had the affidavits been signed and timely, the affidavits would have been sufficient to satisfy the prima facie first step because they asserted that had the speakers known their internal inter-organization lobbying

[5] The district court contends that the protection of Kincaid's mental impressions finds no support in the case law. (ECF 188) (PageID# 11124). As can be seen here, mental impressions are protected. *See, e.g., Perry*, 591 F.3d at 1163.

strategy communications were discoverable, they likely would not have spoken)[6]; *see Perry*, 591 F.3d at 1164-65 (applying privilege to internal associational communications about a ballot initiative, essentially legislation). If the First Amendment protects from disclosure internal associational communications about the advancement of Communist Party beliefs, *DeGregory*, 383 U.S. at 827-29, internal communications about redistricting legislation are also protected.

Finally, the district court contended that the association whose communications Kincaid sought to protect "goes far beyond that seen in the relevant caselaw." (ECF 188) (PageID# 11123).

At the outset, the district court misunderstands the association that Kincaid is describing. Kincaid does not assert that he has responsive communications with the National Republican Redistricting Trust or Fair Lines America. These two

[6] The district court also takes issue that the only evidence supplied to support the First Amendment privilege assertion was Kincaid's affidavit. (ECF 188) (PageID# 11122). The district court then cited *In re Motor Fuel*, 641 F.3d at 491-92 for the proposition that a single affidavit is insufficient. But the single affidavit in *In re Motor Fuel* was insufficient not because it was the only one, but because it was unsworn and did not describe a First Amendment injury. The only injury described was that disclosure would be unfair:

> [O]ne witness who presented only an *unsworn* statement. The substance of the statement is ambiguous, appearing to reflect Ms. Alfano's sense of unfairness in having to share her association's work as much as her concern that any court-ordered disclosure in this case will actually prevent the associations from gathering facts for their lobbying efforts. *Id*. at 491 (emphasis added).

Kincaid's affidavit does not suffer the same problem.

entities are Kincaid's current employers, neither of which existed during the relevant time period. Instead, the mention of NRRT and Fair Lines America is to describe only the injury that disclosure would cause Kincaid *now*, especially when Kincaid intends to use the same methods of analyzing redistricting maps in the next decade. Kincaid Aff. ¶¶7-9, 17-18, 26 (ECF 165-1) (PageID# 7384-7387). This is a point that courts have found dispositive in sustaining a First Amendment privilege assertion. *See AFL-CIO*, 333 F.3d at 176-77. If this Court denies Kincaid's requested relief, *supra* at 16-17, the disclosure will continue to harm his ability to conduct his analysis and communicate that within the association now in his current roles as executive director of NRRT and Fair Lines America. This is especially true since he intends to use the same strategies again. Kincaid Aff. ¶¶7-9, 17-18, 26 (ECF 165-1) (PageID# 7384-7387).

Having worked at the NRCC as Redistricting Coordinator, Kincaid also knows that disclosure adversely affects communications within the NRCC. Kincaid Aff. ¶9, 18, 27; (ECF 23-1) (PageID#2701-2704). In summary, Kincaid is not seeking to protect communications within an association that is defined as the NRCC, NRRT, and Fair Lines America. (ECF 188) (PageID#11125). There are no such communications responsive to Plaintiffs' subpoena. Rather, Kincaid wishes to protect from disclosure those communications within the NRCC and its Members and state affiliates that occurred while he was employed by the NRCC during the

time period covered by the subpoena. Kincaid Aff. ¶¶17-19; (ECF 165-1) (PageID# 7385-7386); Winkelman Aff. ¶8 (ECF 9-1) (PageID# 370); Oldham Aff. ¶6 (ECF 9-1) (PageID# 364).

As a legal matter, however, the district court is wrong that this type of association is beyond what is protected in the case law. In fact, it is just the opposite. It is a bedrock First Amendment principle that associations can decide who to affiliate with to best advance their message. *See Tashjian*, 479 U.S. at 224; *Int'l Union*, 590 F.2d at 1147 ("[T]he First Amendment's protection . . . extends not only to the organization itself, but also to its staff, members, contributors, and others who affiliate with it."). Accordingly, in *AFL-CIO*, the D.C. Circuit protected communications shared between the DNC and its state affiliates and the DNC and Labor Unions. *AFL-CIO*, 333 F.3d at 171, 176-78; *see also Machinists Non-Partisan Political League*, 655 F.2d at 388-90 (recognizing that the First Amendment protects groups from an FEC subpoena seeking, in part, "[a]ll materials concerning communications *among various groups* whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him.") (emphasis added); *In re Motor Fuel*, 641 F.3d at 481, 488-90 (protecting communications between trade unions). And, contrary to the district court's understanding in *Perry*, (ECF 188) (PageID# 11124-25), the Ninth Circuit did not decide who constituted the "core group of persons." Rather it

remanded to the district court for a determination. But it appears that included within that "core group of persons" were outside consultants to Proposition 8. The First Amendment protects even inter-entity communications and not just intra-entity communications. *Perry*, 591 F.3d at 1153 n.2.

Accordingly, Appellants have satisfied their *prima facie* burden.

2. Appellees Failed To Demonstrate That The Information Sought Was Crucial To Their Case.

Having proven that the RNC, NRCC, and Kincaid satisfied the light burden of demonstrating a *prima facie* harm, the burden shifts to the Appellees to prove that the information sought is crucial to their case and that they have exhausted all other potential sources of the information. *See, e.g.*, *Black Panther Party*, 661 F.2d at 1268; *Perry*, 591, F.3d at 1160-61.

The information sought was too attenuated to be crucial to Plaintiffs' case. *Perry*, 591 F.3d at 1165. Under Plaintiffs' theory of the case, it was crucial to prove only that the Ohio legislators acted with partisan intent in drawing Ohio's congressional map; the partisan intent of the RNC, the NRCC, and Kincaid was not crucial. *Davis v. Bandemer* 478 U.S. 109, 127 (1986).

a. The Documents Sought Were Never Crucial To The Plaintiffs' Case.

Appellees sought to prove that the national Republican groups coordinated with Ohio Republicans to draw maps with the intent to favor GOP candidates. Pls.' Mot. to Compel 15-16 (ECF 1-1) 18-mc-31 (PageID# 17-18). Accordingly, the

evidence sought in Plaintiffs' motion is intended to satisfy the partisan intent prong of Plaintiffs' Equal Protection Claim and the intent prong of the First Amendment claim of partisan gerrymandering. Specifically, Plaintiffs' theory of the case required them to show that Ohio Republicans harbored the predominant intent to "subordinate adherents of one political party and entrench a rival party in power." *Ohio A. Philip Randolph Inst*., 373 F. Supp. 3d at 1093 (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 862 (M.D.N.C. 2018) (three-judge court). This theory was rejected by the United States Supreme Court in *Rucho.*

Even before *Rucho* entirely rejected the Plaintiffs' proposed test, the Supreme Court had suggested that proving intent in partisan gerrymandering claims should not be difficult, as partisan bodies draw districts. *See Bandemer*, 478 U.S. at 128-29 (plurality opinion); *id*. at 175 (Powell, J., concurring in part and dissenting in part). Furthermore, courts had regularly relied on testimony from expert witnesses to find partisan intent. *Id*. at 128; *Easley v. Cromartie*, 532 U.S. 234, 246-253 (2001) (reviewing expert testimony and reports in a racial gerrymandering case analyzing whether district lines were drawn with race or partisan reasons predominated for the lines drawn); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) (stating that determining invidious discriminatory purpose is susceptible to both direct and circumstantial evidence).

In *Perry*, the plaintiffs claimed that Proposition 8 violated their rights guaranteed under the Fourteenth Amendment's Equal Protection Clause. *Perry*, 591 F.3d at 1152. Plaintiffs alleged that Proposition 8 was adopted with "disapproval or animus against a politically unpopular group." *Id*. In discovery, plaintiffs sought the official Proposition 8 ballot committee's "internal campaign communications relating to campaign strategy and advertising." *Id*. It is important to note that the members of the official Proposition 8 ballot committee were, in effect, the legislators of Proposition 8. *See* Cal. Elec. Code § 342 (Deering 2010) (defining proponents of a ballot initiative as those who submit the text of the proposed initiative); *see Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659, 2662 and n.7 (2015) (holding that in Arizona, like California, legislative power is vested in the people through the initiative process). Because the Proposition 8 Proponents actually drafted the ballot proposition and actively urged California voters to vote for it, their internal campaign communications were relevant to the intent of Proposition 8 Proponents and voters. *Perry*, 591 F.3d at 1164. The information was also relevant because it could have led to evidence that undermined or impeached the official ballot committee's claims that Proposition 8 served a legitimate state interest. *Id*.

After ruling that the Proposition 8 ballot committee had made a *prima facie* showing of First Amendment harm, the Ninth Circuit then analyzed whether the

information that plaintiffs sought was highly relevant, and ultimately sustained the defendants' assertion of a First Amendment privilege. *Perry*, 591 F.3d at 1163-64. The Ninth Circuit noted that the official Proposition 8 committee had agreed to produce all communications disseminated to voters, including "communications targeted to discrete voter groups." *Id*. at 1164-65. Because of this, the court ruled that the determination of whether messages "were designed to appeal to voters' animosity toward gays and lesbians is a question that appears to be susceptible to expert testimony, without intruding into private aspects of the campaign." *Id*. at 1165. Accordingly, the Ninth Circuit held that the crucial question in *Perry*, whether there was unconstitutional animus in adopting Proposition 8, was "susceptible to expert testimony, without intruding into private aspects of the campaign," and the information sought was too attenuated from the crucial question to justify the additional infringement upon the First Amendment privilege. *Id.*

Here, as in *Perry*, Appellees were required to show that the information they sought from non-parties was "crucial" to their case. As discussed above, courts have regularly suggested that the partisan intent of a redistricting map is an issue which is susceptible to expert review. *See, e.g.*, *Bandemer*, 478 U.S. at 128-29; *Easley*, 532 U.S. at 246-253; *Rucho*, 318 F. Supp. 3d at 874) (holding that plaintiffs had demonstrated that partisan intent predominated in the redistricting

process through the analysis of plaintiffs' expert). If internal campaign communications of the official Proposition 8 ballot committee were not "highly relevant" to proving unconstitutional "animus" by California voters, then the same holds true here: internal communications by the RNC, NRCC, and Kincaid regarding redistricting legislation are not crucial to proving partisan intent by Ohio legislators. Even if the information were relevant to help identify the intent of Ohio legislators, or lead to evidence to impeach claims of legislative neutrality, such evidence is too attenuated to be *crucial* or highly relevant, and thus does not justify the abrogation of the First Amendment privilege. *See Perry*, 591 F.3d at 1164-65.

Moreover, the legislature here did not claim legislative privilege, but rather disclosed all of its documents. That is the best direct evidence to determine if partisan intent of legislators existed. *Common Cause*, 318 F. Supp.3d at 868-70 (relying on statements made by the chairman of the House and Senate redistricting committees to prove discriminatory intent). It is difficult to see how internal communications from the RNC, NRCC, and Kincaid that were not communicated to the Ohio legislators are somehow crucial to Plaintiffs' case, or add anything beyond the communications of the legislators themselves.

b. <u>Appellees' Contention That The Information They Sought Was Crucial To Their Case Was Unpersuasive.</u>

First, the RNC's "internal redistricting updates," internal draft talking points, draft articles, and internal communications concerning Ohio's

congressional map and its communications with Ohio Republicans was not crucial to Appellees' attempt to demonstrate that Ohio's congressional map was drawn with intent to favor Republicans and harm Democrats. Pls.' Mot. to Compel at 16-17 (ECF 1-1) (PageID# 18-19). As Plaintiffs themselves demonstrate, the internal communications described in the Oldham affidavit reflect only the "monitoring" of the redistricting process in Ohio. *Id*. It is both unremarkable and irrelevant that the RNC was monitoring redistricting efforts nationwide. Oldham Aff. ¶ 7(a-f) (ECF 9-1) (PageID# 364-65) (18-mc-31), Under Appellees' now debunked theory of the case, the crucial intent was that of the Ohio legislators, their staff, or contractors who drew the map, not the intent of non-legislators. *See, e.g, Whitford v. Gill*, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016) (three-judge court) *rev'd and vacated Gill v. Whitford*, 138 S. Ct. 1916 (2018). The intent of someone else accused of trying to influence the intent of the group at issue is simply too attenuated to the crucial issue to justify infringing upon the First Amendment privilege. *See Perry*, 591 F.3d at 1165. In at least two recent federal court partisan gerrymandering cases prior to the Supreme Court's opinion in *Rucho*, the three-judge courts ruled that partisan intent was established by direct evidence without relying on any evidence from national political organizations—only evidence from state legislators, legislative staff, and hired redistricting experts. *Common Cause*, 318 F. Supp.3d at 868-70; *Whitford*, 218 F. Supp.3d at 890-96. Because the RNC's intent was not highly

relevant or crucial to the Appellees' case, the infringement of Appellants' First Amendment rights was unwarranted. Accordingly, neither the RNC's internal communications nor its fourteen communications with the Ohio House of Representatives Counsel to the Republican Caucus are highly relevant, let alone crucial, to determining whether Ohio *legislators* acted with partisan intent.

Second, the information that the NRCC has in its possession is not highly relevant or crucial to a showing of legislative intent. As with the RNC, none of the documents that the NRCC has in its possession were communicated to Ohio legislators. They were completely internal communications. Winkelman Aff. ¶¶10-11 (ECF 9-1) (PageID# 373) (18-mc-31). The NRCC's documents include general nationwide redistricting updates for NRCC staff and Republican Members of Congress to assist with its mission of helping Republican Members of Congress and candidates win elections. Winkelman Aff. ¶¶5, 9(a-c, g, h, j, k, l) (ECF 9-1) (PageID# 370-72). The NRCC conducted its analysis of the final Ohio Congressional District map so that the NRCC could understand the composition of the final Ohio redistricting map and prepare to help its members win in those newly drafted districts. This is critical to understand which voters candidates are addressing in a given election and necessarily impacts how these candidates will develop their campaign messaging. Winkelman Aff. ¶¶ 9(e, i, m) and 14 (ECF 9-1) (PageID# 371-72); Kincaid Aff. ¶12(ECF 23-1) (PageID# 2702). None of this was

crucial to Appellees' case that the Ohio legislature drew Ohio's congressional map with partisan intent. *See Perry*, 591 F.3d at 1165

Plaintiffs assert that these documents were "almost certainly shared with" Whatman and Kincaid and the Ohio Republican congressional delegation.[7] Pls.' Mot. to Compel at 18 (ECF 1-1) (18-mc-31) (PageID# 20). Plaintiffs contend that documents "relevant to an intent to increase [congressional Republicans'] electoral chances as a result of redistricting are discoverable[]" and that the affidavit lists "several documents that are directly relevant to this litigation and contain evidence of the intent of state and national Republicans to engage in partisan gerrymandering." *Id*.

Initially, although the information listed on the Winkelman affidavit may be relevant to Plaintiffs' asserted test, for the same reasons stated *supra* at 39-43, it is not crucial to their claims. Furthermore, it was Plaintiffs' burden to show that this information is crucial to proving the Ohio legislature acted with a partisan intent. Plaintiffs assert merely that the information sought is relevant, not crucial. But that

[7] Plaintiffs are wrong to suggest that because the Republican Congressional Delegation intervened in this case, that alone waives First Amendment privilege. Pls.' Mot. to Compel at 18, No. 18-mc-00031 (ECF 1-1) (PageID# 20). In fact, courts have upheld First Amendment privilege where the party asserting the privilege is the plaintiff or an intervenor. *See Black Panther Party*, 661 F.2d at 1265-66 (privilege applied where Black Panther Party was plaintiff in lawsuit against the government); *Perry*, 591 F.3d at 1152 (noting that Proposition 8 proponents had intervened in the case as Intervenor-Defendants).

is not the standard. As discussed above, the intent of national Republicans is not crucial to showing that the Ohio legislature acted with a partisan intent. The internal communications of the NRCC are simply too attenuated to the crucial question of whether Ohio legislators acted with partisan intent to justify infringing upon its First Amendment privilege.

Third, the information that Kincaid had in his possession was not crucial to Appellees' asserted need to prove the Ohio legislature acted with partisan intent. At the outset, there is no evidence that Mr. Kincaid was a "primary" map drawer "specifically engaged" in the redistricting of Ohio's congressional map. Pls.' Mot. to Compel at 19 (ECF 1-1, 18-mc-31) (PageID# 21). Mr. Kincaid was an NRCC employee during the time in question and neither an employee of nor an independent contractor to the State of Ohio or any state or federal government. Kincaid Aff. ¶¶10-11 (ECF 23-1) (PageID# 2702). These statements are not contradicted, and it is Plaintiffs' burden to adduce evidence that Kincaid was the "primary" map drawer "specifically engaged" to draw maps. At most, the documents requested by Plaintiffs demonstrate that Kincaid answered a few sporadic requests for assistance over a ten-day period. In these requests, Kincaid acted at Ohio's behest, not the other way around. *Id*; Kincaid Dep. Tr. at 261 (ECF 230-28) (PageID# 15763); *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 999-1000 n.51, 54, 1002 n.69, 71. Furthermore, Kincaid primary map drawing

activities was to draw a proposed map on behalf of the Ohio congressional delegation. Kincaid Dep. Tr. at 273-82 (ECF 230-28) (PageID# 15775-84).

Furthermore, Kincaid does not recall disseminating nor does he have any evidence that he disseminated any of the documents in his possession to any Ohio legislator or legislative staffer. Kincaid Aff. ¶16 (ECF 23-1, 18-mc-31) (PageID# 2703). Instead, Kincaid disseminated the documents in his possession only to the NRCC and its members. *Id*. at ¶ 15 (PageID# 2703). None of these documents concerned Kincaid's involvement in Ohio redistricting. Rather, the documents only demonstrate that Kincaid was monitoring the redistricting process in Ohio and elsewhere. *Id*. at ¶¶14-16 (PageID# 2702-03).

As discussed above, Plaintiffs can cite no case law for the proposition that the involvement of national political party employees or officials is crucial to prove partisan intent in partisan gerrymandering cases. However, there is ample case law suggesting that partisan intent can be demonstrated through the use of retained experts and direct evidence from state legislators and legislative staff as well as circumstantial evidence. Accordingly, Kincaid's internal documents containing his mental impressions and analyses, information that Kincaid did not share with Ohio legislators, were not crucial to Plaintiffs' case.

c. The District Court Failed to Adequately Explain Why the Privileged Documents Were Crucial To Appellees' Case And Made Numerous Errors Of Law.

In granting Plaintiffs' Motion to Compel and in denying Kincaid's Motion for a Protective Order the district court committed a reversible error of law.

First, as Judge Nalbandian noted, the district court "provide[d] almost no explanation as to why the documents at issue here meet the highly relevant standard necessary to overcome the First Amendment privilege" when granting Plaintiffs' Motion to Compel. *Ohio A. Philip Randolph Institute v. Kasich*, 761 Fed. Appx. 506, 516 No. 18-4258 (6th Cir. Jan. 18, 2019) (Doc. No. 31-2) (Nalbandian, J., concurring). The district court needed to explain why the information sought was crucial to Plaintiffs' case because, at that time, "the substantive contours of a partisan gerrymandering claim have yet to be fleshed out to a significant degree." *Id*. Most importantly, Judge Nalbandian rightly stated that liability turned not on the intent of national Republican political committees but on the intent of the Ohio legislature. *Id*. Finally, Judge Nalbandian noted that it was not clear that the documents sought were "crucial" to Plaintiffs' case "such that the plaintiffs could not prevail without them." *Id*. Judge Nalbandian closed stating that for the First Amendment privilege to "have any teeth…it must require something more than the conclusory assertion that the documents are crucial." *Id.*

Second, the district court contended that the documents Plaintiffs sought were crucial because under *Village of Arlington Heights*, 424 U.S. at 266-68, analyzing intent requires a "sensitive inquiry." Order Granting Pls.' Mot. to Compel at 10 (ECF 128) (PageID# 3474). But even in *Village of Arlington Heights*, the relevant—and crucial—sensitive inquiry was into the intent of the city government, not the intent of some non-party's internal communications. Furthermore, the Court in *Village of Arlington Heights* suggested that a plaintiff could demonstrate intent indirectly through a review of the legislative history and "the impact of the official action," to see if it produces a clear pattern unexplainable on any grounds other than racial animus. *Vill. of Arlington Heights*, 429 U.S. at 266-268 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of *official actions* taken for invidious purpose." (emphasis added)). Nowhere did the Court suggest that this sensitive intent inquiry requires breaching the First-Amendment-privileged internal communications of a non-governmental association. In fact, the Supreme Court acknowledged that despite the relevant inquiry into the intent of the state actors, legislators often cannot be compelled to testify because of legislative privilege. *Id.* at 268.

By failing to limit its order to communications with actual state government officials and requiring disclosure of internal communications inside non-

governmental political organizations, the district court infringed upon Appellants' First Amendment privileges without adequate justification.

Third, the district court failed to address Appellants' arguments regarding the Ninth Circuit's decision in *Perry*. *Perry* is simply the best and most analogous decision to the specific question before this Court. *See supra* at 41-42. This comparison is uniquely relevant since the complaints in both cases allege similar unconstitutional intent and animus. *Compare* Second Amend. Compl. ¶¶ 52-55 (ECF No. 37) (PageID# 302-303) (stating that the national Republican Party drew Ohio's congressional map with intent to entrench a Republican congressional majority) *with* Compl. ¶43, *Perry v. Schwarzenegger*, No. 09-02292 (N.D. Cal. May 22, 2009) (ECF 1-1) (stating that Proposition 8 was adopted as a result of animus against a politically unpopular group and that the history of Proposition 8's adoption shows that it was backlash against rights recently conferred upon gays and lesbians). If the documents containing internal strategy communications within the Proposition 8 committee were not crucial or highly relevant to proving animus, then the information Appellees sought and obtained about illicit intent on the part of the Ohio legislature is equally not crucial or highly relevant. *See Perry*, 591 F.3d at 1165. The district court did nothing to distinguish *Perry* from this case.

In *Perry*, the Ninth Circuit limited the disclosure required to external communications. The fact that the district court failed to address this argument, or

similarly limit its order to communications between Appellees and Ohio state legislators or their staffers is further evidence of the court's clear error.

Fourth, the district court's opinion denying Mr. Kincaid's requested protective order fairs no better. The district court again failed to articulate why Mr. Kincaid's deposition was crucial to Plaintiffs' case. The district court provides an example stating that if Kincaid directed an NRCC employee to tell an employee of an Ohio legislator to maximize Republican advantage, that conversation "would be highly relevant to an element of the Plaintiff's claim." Order Denying Kincaid's Mot. for Protective Order (ECF 188) (PageID# 11126-27). But the district court never explained why such a communication was crucial to Appellees' case, meaning the Plaintiffs could not win their case without it. *Ohio A. Philip Randolph Institute*, 761 Fed. Appx. at 516 (Nalbandian, J., concurring). Furthermore, similar hypotheticals could have been posed of the Proposition 8 campaign supporters in *Perry*, but still their internal campaign communications were protected.

Additionally, the district court never explained how Kincaid's minimal involvement in designing and analyzing Ohio's congressional map was crucial to proving Appellees' case. The court again failed to grapple with the fact that *Perry* held that the information sought by the plaintiffs was not crucial or highly relevant. If the information sought was not crucial in *Perry*, it is not crucial here.

Additionally, when the district court denied Kincaid's protective order on January 30, 2019, (PageID# 11114-11129), the district court was aware of the U.S. Supreme Court's decision to postpone its determination of jurisdiction until the hearing on the merits. *See* Telephonic Discovery Conference Hr. Tr. at 7 (S.D. Ohio Jan. 15, 2018) (ECF 142) (PageID# 4617). Despite the Court knowing that the theory upon which Appellees' case rested was in jeopardy, the Court never factored that into its balancing of the interests of invading the RNC's, NRCC's, and Kincaid's constitutional rights with the needs of Plaintiffs' case. Given that until *Rucho* and *Gill*, no federal district court had held that plaintiffs had proven an unconstitutional partisan gerrymander, *Vieth*, 541 U.S. at 282-284, this omission constitutes an error of law.

Furthermore, it cannot be said that without the RNC's and NRCC's documents and Kincaid's documents and testimony, Plaintiffs could not prove their—now non-justiciable—claims. Plaintiff-Appellees obtained significant amounts of discoverable information. For example, they received legislative emails and were able to seek legislative communications through freedom of information requests. Respts.' Opp'n. to Pls.' Mot. to Compel 30-31, 1:18-mc-31 (ECF No. 11) (Page ID# 431-32); *see* Jim Slagle *Ohio Redistricting Transparency Report The*

Elephant in the Room 16-18, 21[8] (quoting emails from Senator Niehaus, Ray DiRossi, and Heather Mann stating that Plaintiff League of Women Voters of Ohio, in response to its freedom of information act request, received documents from "Governor Kasich, Senator Niehaus, Senator Faber, Leader Budish, Heather Mann, Ray DiRossi, and the Legislative Services Commission….").[9] Plaintiff-Appellees delay in bringing their claims and ability to obtain significant amounts of discoverable information from other sources counsels against invading the First Amendment here.

[8] Available at https://my.lwv.org/sites/default/files/leagues/wysiwyg/%5Bcurrent-user%3Aog-user-node%3A1%3Atitle%5D/the_elephant_in_the_room_-_transparency_report.pdf (last visited Aug. 14, 2019).

[9] The district court's reliance on *Bethune-Hill* is misplaced. *See* Order Granting Mot. Compel, 11 n.5 (ECF No. 128) (Page ID# 3475). The district court takes out of context the statement that "officials seldom, if ever, announce on the record that they are pursuing a particular course of action . . . ." Mem. Op. 11 n.5 (ECF No. 128) (PageID# 3475). The court in Bethune-Hill made that statement in the context of overruling a legislative privilege objection. The argument the court was rejecting was that plaintiffs there could obtain the information they sought—legislative intent in redistricting case—from "special interest group position papers, press releases, newspaper articles, census reports, registered voter data and election returns." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015) (three-judge court) (internal quotations omitted). This is far afield from the situation presented here where Plaintiffs have obtained legislative emails.

d. The Number Of Documents Over Which The Privilege Is Asserted Is Not Dispositive.

The district court also took issue with the volume of documents over which Appellants' have asserted privilege. *See* Mem. Op. (ECF No. 128) (PageID# 3476) ("Respondents attempt to shield five bankers' boxes of documents from discovery . . . ."). The reality is that Appellants only asserted First Amendment privilege over approximately 500 total documents. However, some of the documents—especially those containing computer shapefiles[10]—contain a significant number of pages when printed. All that aside, the volume of documents withheld is simply not evidence for or against anything. *See AFL-CIO*, 333 F.3d at 172 (the AFL-CIO and the DNC petitioned to withdraw 6,000 pages of documents from public view and to prevent the disclosure of 10,000-20,000 more pages of documents). Therefore, the district court committed clear error in so far as it asserted that Appellants' withheld too many documents.

CONCLUSION

In the final analysis, this Court should vacate the district court's orders. The RNC, NRCC, and Kincaid demonstrated a *prima facie* injury to their First Amendment rights. The Plaintiffs' cannot demonstrate that the documents and

[10] A "shapefile" is essentially a collection of several different data files that collectively are used by a geographic information systems ("GIS") program to draw lines on a map.

deposition testimony they seek is crucial to their claim since their claim is now non-justiciable. In any event, the information they seek was not crucial because Plaintiffs could prevail on their claims without the information. Plaintiffs needed to prove that the Ohio legislature acted with "unconstitutional partisan intent" not that a non-governmental political party or employees of such an entity acted with "partisan intent." To that end, Plaintiffs had already received legislative emails and other communications.

Because *Rucho* was constantly looming over this case, the Plaintiffs and the district court should have been far more cautious in pursuing and compelling the production of these First Amendment protected materials. On the merits, the district court erred in its conclusory assertion that the internal communications from the RNC, NRCC, and Kincaid, as well as Kincaid's deposition testimony, were crucial. This is especially true when the district court's ruling required the RNC, NRCC, and Kincaid to produce their internal communications and mental impressions to political adversaries, and to the public. Absent an order from this Court, these internal communications, memoranda, and deposition testimony will remain in the possession of Appellants' political opponents. This Court can and should issue the requested relief, especially in light of the U.S. Supreme Court's ruling in *Rucho*.

For the aforementioned reasons, this Court should reverse the district court's denial of Appellants assertion of First Amendment privilege.

August 14, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of those sections listed in Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), this Opening Brief of Appellant contains 12,733 words.

I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, an electronic copy of the foregoing Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in these consolidated cases are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

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*indicates that the filing is from docket number 18-mc-00031.

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*indicates that the filing is from docket number 18-mc-00031.