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

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

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INTRODUCTION

Attempting to whistle past the graveyard of federal partisan gerrymandering claims, Appellees *never* cite the U.S. Supreme Court's opinion in *Rucho v. Common Cause*. Instead, Appellees ignore *Rucho*.

Rather than address Appellants' argument that when the district court issued the challenged subpoenas and orders, the district court lacked jurisdiction, Appellees turn their attention to why the RNC, NRCC, and Kincaid lack standing before this Court. Appellees believe that because Appellants disclosed the challenged documents and that Kincaid testified at a deposition, Appellants have waived their right to challenge the district court's orders compelling compliance with the subpoenas. Appellees also believe that because the documents and deposition testimony were used at a public trial, this appeal is moot because this Court cannot award any effectual relief.

First, Appellees *never* address the RNC's, NRCC's, and Kincaid's contention that the district court lacked jurisdiction. Accordingly, the subpoenas and challenged orders were void. Arguments not addressed are deemed conceded. *See Shoup v. Doyle*, 974 F. Supp. 2d 1058, 1081 (S.D. Ohio 2013) (citing *Scott v. Tennessee*, 878 F.2d 382 (6th Cir. 1989)).

Second, because the district court lacked jurisdiction to issue the subpoenas and challenged orders, it is irrelevant whether or not the RNC, NRCC, and Kincaid waived their rights. The district court lacked jurisdiction to compel Appellants in the first place. The RNC, NRCC, and Kincaid cannot waive rights granted under an order the district court lacked jurisdiction to issue.

Third, this case is not moot because the Court has the authority to issue the requested relief. This Court has the authority to vacate the district court's orders, ECF 128 and 188, order destruction of the documents that are in Appellees', Appellees' counsel's, and their counsels' employees and agents' possession, and to send that proof of destruction to Appellants. This Court also has the authority to prohibit the use of the documents the RNC, NRCC, and Kincaid disclosed in future legal proceedings.

Fourth, even if the district court had jurisdiction to issue the subpoenas and challenged orders, Appellees do not muster sufficient supporting case law for the proposition that disclosure of privileged documents waives the privilege. The one case that Appellees rely upon is ancient. This Court has not cited it in sixty-eight years. District courts citing it have disregarded its holding. Additionally, it was the compelled disclosure

to Appellees and Appellees' counsel alone that violated Appellants' constitutional rights.

Fifth, Appellees failed to demonstrate that the information that the RNC, NRCC, and Kincaid produced was crucial to their case. Appellees could have proven their claims and disproven Appellants' defenses without breaching Appellants' constitutional rights.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

A. This Court Has Jurisdiction To Review Whether District Court Had Jurisdiction In The First Place.

This Court has the duty to ensure both that it has jurisdiction to act and that the lower court had jurisdiction to proceed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). This obligation "assumes a special importance when a constitutional question is presented[,]" as it is here. *Bender*, 475 U.S. at 541-42. When an appellate court ascertains that the district court lacked jurisdiction, the appellate court has jurisdiction, "not on the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender*, 475 U.S. at 541 (internal quotations omitted).

Therefore, Appellants contend that even if the parties before a federal appellate court lack standing, the appellate court's obligation to ensure that the district court had jurisdiction remains. *See Arizonans for Official English*, 520 U.S. at 73. Even if this Court finds that the RNC, NRCC, and Kincaid waived their arguments, this Court must first exercise its authority and obligation to review the district court's jurisdiction. The Fifth Circuit recently took precisely this approach, vacating a lower court order denying legislative privilege when the plaintiffs lacked standing to pursue the claim to which the subpoena related. *Stallworth v. Bryant*, 936 F.3d 224 (5th Cir. 2019).

B. The District Court Never Had Jurisdiction To Issue Subpoenas, Compel Compliance To Produce Documents, Or Compel Kincaid To Sit For A Deposition.

The RNC, NRCC, and Kincaid already argued that the lower court lacked jurisdiction to issue the relevant subpoenas and order compliance with those subpoenas. Opening Br. 16-20. This was because the U.S. Supreme Court ruled that partisan gerrymandering claims present non-justiciable political questions. *See id*. at 17; *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). A case that presents a non-justiciable political question means that no one has jurisdiction before the court. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 n.5

(1974). Accordingly, because the district court lacked jurisdiction, it did not have the authority to issue the underlying subpoenas and compel compliance with those subpoenas. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). The subpoenas are therefore void and the orders compelling compliance are void. *Id*. at 80 ("[O]n remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas *duces tecum* are void…."). The proper recourse therefore is to vacate the district court's orders. *See Anderson v. Green*, 513 U.S. 557, 560 (1995); *United States v. Munsingwear, Inc*., 340 U.S. 36, 39-40 (1950). Appellees never attempt to demonstrate that the district court had jurisdiction to issue the subpoenas and the challenged orders. Arguments not addressed are deemed conceded. *See Shoup*, 974 F. Supp. 2d at 1081.

Appellees confine *Catholic Conference* to its precise factual setting. To Appellees, *Catholic Conference* is factually distinct, limiting a finding that a subpoena is void only when a non-party appellant is appealing a contempt citation. AAB 18.[1]

Appellees misread the principle of *Catholic Conference*. That case did involve the appeal of a contempt citation from two non-parties who refused

[1] AAB refers to Appellees' Answering Brief.

to comply with discovery orders; but the petitioners there challenged the contempt citation on the basis that the district court lacked subject-matter jurisdiction over the case. 487 U.S. at 74-75. Thus, the district court's jurisdiction to issue the subpoenas in the first place was squarely at issue. *Id*. at 75. Necessary to the Court's holding was determining that a court's subpoena power "cannot be more extensive than its jurisdiction." *Id*. at 76. Thus, if a district court lacked jurisdiction, then the subpoena that a court issues is void. *Id*. Accordingly, "the judicial subpoena power not only is subject to specific constitutional limitations, … but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." *Id*. (quoting *United States v. Morton Salt Co*., 338 U.S. 632, 642 (1950)).

The Supreme Court made this jurisdictional limitation on the subpoena power palpable in its remand order to the court of appeals. There the Court instructed the court of appeals to "determine whether the District Court had subject-matter jurisdiction in the underlying action." *Id*. at 80. If the district court lacked jurisdiction, then the subpoenas are void. *Id*. These Article III jurisdictional principles promulgated in *Catholic Conference*, therefore, are not tethered to a court's contempt power. In fact, a federal

court of appeals recently applied *Catholic Conference* outside of the contempt context. *See Stallworth*, 936 F.3d 224.

Accordingly, reliance on *Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992) is misplaced. AAB 18. *Willy* did not hold, as Appellees imply, that the principle in *Catholic Conference* applies only in the case of contempt. Instead, *Willy* distinguished between why a jurisdictional challenge works in the case of contempt and why a jurisdictional challenge fails in the face of sanctions. The distinction is that sanctions are collateral to the merits. *Id.* at 138. This is because a sanction "is designed to punish a party who has already violated the court's rules." *Id*. at 139. Courts have an interest in having their "rules of procedure obeyed" and that interest "does not disappear upon a subsequent determination that the court" lacked jurisdiction. *Id*.

By contrast, a civil contempt order is "designed to force the contemnor to comply with an order of the court." *Id*. If the court lacks jurisdiction to issue the underlying order, then, logically, it cannot have the authority to coerce compliance with that order. *Id*.

Logic mandates that a court's power to issue subpoenas be limited to its jurisdiction. To gain access to federal court, a litigant must have a live case or controversy. *See* U.S. Const. art. III, § 2. The doors to discovery

remain locked unless the federal court has jurisdiction. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). This concept makes sense because "[t]he federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others. Rather, the discovery devices in federal court stand available to facilitate the resolution of actions cognizable in federal court." *Hous. Bus. Journal v. Office of the Comptroller of the Currency, United States Dep't of Treasury*, 86 F.3d 1208, 1213 (D.C. Cir. 1996). Accordingly, a subpoena issued from a court that lacks jurisdiction is void and unenforceable. *See Vera v. Republic of Cuba*, 867 F.3d 310, 316 (2d Cir. 2017).

The district court, therefore, lacked jurisdiction to issue subpoenas for documents to the RNC, NRCC, and Kincaid. The district court also lacked authority to issue a deposition subpoena to Mr. Kincaid. Furthermore, the district court lacked jurisdiction to issue orders compelling compliance with the subpoenas. Finally, the district court lacked jurisdiction to issue the confidentiality order. Accordingly, those orders are void and this Court should vacate those orders and grant Appellants' requested relief.

C. This Court Can Award Effectual Relief, Therefore This Case Is Not Moot.

The RNC, NRCC, and Kincaid request that Appellees, their counsel, employees who are employed at counsel's offices, independent consultants,

independent experts and their staff, employees of any party, and any of Appellees' witnesses or court reporters, destroy all copies of documents and deposition transcripts that they have in their possession that Appellants produced and Appellants want proof of this destruction. *See* Stipulation and Protective Order ¶¶4, 16, ECF 57 (PageID#604-05, 608). Appellants also request an order preventing the use of these documents and deposition transcripts in future legal proceedings *see also* Opening Br. 16-17, 20. This requested relief is broader than the relief the Stipulation and Protective Order provides. As Appellees rightly state, the Protective Order requires destruction of only those documents that were not produced at trial. *See* AAB 19. The RNC, NRCC, and Kincaid ask, however, that this Court order Appellees to destroy all documents they have in their possession. This order constitutes sufficient relief to avoid mootness. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992); *see* Opening Br. 19-20. Even Appellees' own cited cases recognize that where the relief requested is the destruction of documents produced pursuant to an erroneous discovery ruling, it presents a live controversy and is not moot. *Office of Thrift Supervision, Dep't of Treasury v. Dobbs*, 931 F.2d 956, 958 (D.C. Cir.

1991); *Fed. Ins. Co. v. Me. Yankee Atomic Power Co.*, 311 F.3d 79, 82 (1st Cir. 2002); *see* AAB 20-21.[2]

Granting the requested relief will require Appellees to destroy the RNC's, NRCC's, and Kincaid's documents. Granting the requested relief will prevent Appellees and others from using the RNC's, NRCC's, and Kincaid's documents and deposition testimony in any future litigation as they were obtained from an order where the court lacked jurisdiction to give it. *Church of Scientology*, 506 U.S. at 13 and n.6; *FTC v. Gibson Prod. of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) ("If this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing."); *United States v. Waltman*, 525 F.2d 371, 373 n. 1 (3d Cir. 1975) ("Because a stay was denied, the diary was produced. However, the case is not moot since if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression of the use of its contents."); *FTC v. Browning*, 435 F.2d 96, 97 n.1 (D.C. Cir. 1970) (rejecting mootness argument "because, among other things, the

[2] Of course, this relief does not destroy documents that are available on PACER. Nor does this relief destroy documents that Appellees submitted into evidence and are available at the courthouse. Accordingly, the amicus brief is irrelevant.

records are still in the government's possession and thus if they were wrongfully subpoenaed, Browning would be entitled to their return.").

Appellees' attempt to distinguish *Church of Scientology* is unavailing. Appellees contend that *Church of Scientology* is *sui generis* because the party complaining of disclosure did not make the production, a state government agent made the production. *See* AAB 20. But Appellees never explain how this factual difference requires a different legal result. In light of the opinion, disclosure from the state government agent to the federal IRS was not a material fact to the decision. *Church of Scientology* stands for the proposition that despite a disclosure of documents to an opponent pursuant to an erroneous discovery ruling, and even recognizing that the opponent cannot un-see and unlearn what was produced, an appellant can still obtain some relief through an order of return or destruction of documents in the opponents' possession. *See Church of Scientology*, 506 U.S. at 12-13. Appellees do not address this central principle of Supreme Court authority.

In an effort to reframe the RNC, NRCC, and Kincaid's relief, Appellees contend that Appellants are attempting to keep documents secret. AAB 21. Appellants are not. The RNC, NRCC, and Kincaid simply do not want Appellees in possession of these documents and do not want these

documents used in any court in the future. Opening Br. 20. Contrary to Appellees' statement, AAB 21, an available remedy does remain.

D. Appellants Did Not Waive Their Right To Keep Documents And Testimony Confidential.

Throughout the litigation, the RNC, NRCC, and Kincaid's primary concern was disclosure to the Appellees themselves. Winkelman Aff. ¶¶14-21, 1:18-mc-31, ECF No. 11-2 (PageID#468-69); Oldham Aff. ¶¶12-18, 1:18-mc-31, ECF No. 11-2 PageID#461-62); Kincaid Aff. ¶¶19-27, 1:18-mc-31, ECF No. 23-1 (PageID#2703-04). In their Opposition to the Motion to Compel, and before this Court, the RNC, NRCC, and Kincaid vigorously defended their position that the confidentiality order was insufficient to protect their rights and privileges. *See, e.g.*, Opp'n to Pls.' Mot. to Compel at 19-21, ECF No. 11 (PageID#414-16); Appellant Opening Br. 49-53, No. 18-4258 (6th Cir. Jan. 4, 2019), ECF No. 19.

Therefore, because the injury to the RNC's, NRCC's, and Kincaid's constitutional rights was disclosure to their political adversaries, there was no waiver of any rights when Appellants did not attempt to prevent public disclosure at trial. Whether the documents were publicly disclosed was not dispositive of the harm that had already occurred, namely, disclosure of documents and deposition testimony to Appellees.

Appellees present a red herring by claiming that Appellants want this Court to destroy publicly filed documents or have those documents sealed. AAB 16, 21. Nowhere in Appellants' opening brief did they ask for this relief. Appellants simply want the Appellees, the Appellees' counsel, and their agents to destroy the documents that they have in their possession. Opening Br. 16-17. Appellees even acknowledge this. AAB 18. Appellants also want the underlying orders that mandated disclosure of the documents and deposition testimony vacated, and for this Court to issue an order preventing the use of the documents Appellants produced in future legal proceedings. Opening Br. 16-17, 20. This Court should disregard Appellees' red herring.

E. Appellants' Production Of Documents Does Not Constitute Waiver.

Appellees are wrong when they assert that the RNC's, NRCC's, and Kincaid's January 4 production and compliance with the Court's December 21, 2018 court order constitutes waiver precluding an appeal after a final order. *See* AAB 15-16. Even the case they cite for the proposition that a contempt citation involves a deliberate significant risk, AAB 15, also stands for the proposition that appeals of discovery orders after a final order are appropriate. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 471 (6th Cir. 2006).

Furthermore, the case they cite for waiver if a non-party complies with a discovery order, *Fraser v. United States*, 145 F.2d 139, 144 (6th Cir. 1944), is weak. AAB 15. *First*, this Court has not cited *Fraser* since 1952. *See United States v. Brunner*, 200 F.2d 276, 277-78 (6th Cir. 1952).

Second, this Court did not cite *Fraser* as an example of waiver if the party does not risk contempt. Instead, this Court cited *Fraser* for the proposition that—under the spousal privilege—"a voluntary disclosure made by a wife in a civil proceeding *where the acts disclosed were in furtherance of a fraud* to deprive the government of opportunity to collect lawfully imposed revenue" was admissible. *Id.* (emphasis added). A district court opinion analyzing *Fraser* stated, "it is difficult to divine the basis for that decision." *RL BB Fin., LLC v. Robinette*, No. 3:11-CV-49, 2013 U.S. Dist. LEXIS 191146, *7 (E.D. Tenn. Mar. 26, 2013). The district court found that it appeared the *Fraser* court ruled there was a fraud exception to the Tennessee spousal privilege statute. *Id.* at *7-8. Although the *Fraser* court stated other possibilities for why the Tennessee spousal privilege did not apply, "one is persuaded that the court of appeals was disinclined to be made an unwilling accessory to fraud, and it grasped at any device possible to avoid that unpalatable result." *Id.* at *8. The magistrate judge in *Robinette* then disregarded *Fraser* and held that the Tennessee spousal privilege statute

did not contain a fraud exception. *Id.* Aiding the court's holding was its finding that "*Fraser* is also ancient; it was decided in 1944. In the 69 years which have passed, there is still no Tennessee case that explicitly carves out an exception for a suit which alleges that the spouses committed fraud." *Id.* at *7 n.2.

Fraser does not appear to stand for much, but it certainly does not stand for the proposition that the RNC, NRCC, and Kincaid waived their rights when they produced documents in accordance with the district court's December 21, 2018 order.

II. DISTRICT COURT ERRED ON FIRST AMENDMENT PRIVILEGE.

The First Amendment protects internal associational communications where disclosure would deter full and robust debate within the association. This protection exists because internal associational communications enhance an association's effectiveness, particularly when these discussions remain private. *Buckley v. Valeo*, 424 U.S. 1, 15, 75 (1976); *see also NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("This 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) ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and

messages, and to do so in private."). So precious is this constitutional right that appellate courts require district courts to conduct a "detailed and painstaking analysis" before deciding whether to sustain the privilege or order production. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1267 (D.C. Cir. 1981).[3] When ordering disclosure, "infringement of First Amendment interests must be kept to a minimum." *Id.* at 1268.

Despite reviewing so many briefs, and despite conducting an *in camera* review, AAB 28, the district court's analysis of the RNC, NRCC, and Kincaid's First Amendment privilege claim was anything but "detailed and painstaking." *Id.* at 1267. Instead, the district court issued a conclusory assertion that the information Appellees sought was crucial to their case. This alone is an abuse of discretion. *See* Opening Br. 49. Appellees do not attempt to rescue the district court's opinion for lack of explaining the crucial nature of the evidence sought. The district court's lack of explanation for its conclusion constitutes an abuse of discretion. *Mich. State v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997); *Ohio A. Philip Randolph Inst. v. Larose*, 761 F. App'x 506, 515 (6th Cir. 2019) (Nalbandian, J., concurring) ("I have serious misgivings about the adequacy of the opinion below.").

[3] Despite being vacated as moot, *Smith v. Black Panther Party*, 458 U.S. 1118 (1982), the D.C. Circuit still considers *Black Panther* to be good law. *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D. D.C. 2002)

A. The RNC, NRCC, and Kincaid Demonstrated A *Prima Facie* Harm To Their First Amendment Rights.

The RNC, NRCC, and Kincaid satisfied their "light" burden of demonstrating a First Amendment chill. *N.Y. State NOW v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989). A *prima facie* case is established 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. *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 827-29 (1966); *Perry*, 591 F.3d at 1162-63; *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003). 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." *Perry*, 591 F.3d at 1162 n.8. Accordingly, the district court rightly held that Appellants established a *prima facie* harm. Order Granting Mot. To Compel, ECF 128 (PageID#3472-73). The district court arrived at this conclusion based upon the affidavits that Mr. Oldham, Mr. Winkelman, and Mr. Kincaid submitted that detailed the harms disclosure would cause them and their respective organizations. *See* Opening Br. 28-31.

Appellees' agree that the burden to establish the *prima facie* harm is light; they just disagree that the RNC, NRCC, and Kincaid established it. AAB 30. Appellees present two arguments, both of which are unpersuasive.

First, Appellees contend the RNC, NRCC, and Kincaid failed to establish a *prima facie* harm because "one's political opponents being made privy to internal strategies is not sufficient alone to demonstrate chilling effect …." AAB 30 (citing *In re Motor Fuel Temperature Sales Practice Litig.*, 641 F.3d 470, 490 (10th Cir. 2011)). *First*, *Motor Fuel* does not support Appellees' proposition. *Motor Fuel* is a lack of evidence case. *See* Opening Br. 36n.6. *Motor Fuel* recognized that disclosure to one's political opponents can chill First Amendment associational rights, but the party asserting those rights must present evidence supporting the assertion. *See Motor Fuel*, 641 F.3d at 490 n.14 (citing *Perry*). In *Perry*, the party asserting privilege submitted an affidavit concerning the impact of disclosure on the Proposition 8 campaign's ability to formulate strategy, namely, that disclosure would drastically alter how the association communicates in the future. *Perry*, 591 F.3d at 1136; *see also* 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).

Additionally, Appellees rely on *Univ. of Pa. v. EEOC ("UPENN")*, 493 U.S. 182 (1990), for the proposition that the Supreme Court has "consistently rejected similar generalized allegations of a chilling effect." AAB 30. But the RNC, NRCC, and Kincaid made very specific allegations about why disclosure to Appellees and their counsel was harmful and would cause First Amendment chill. 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). Furthermore, *UPENN* was not about the advancement of political beliefs, rather, it was about whether the First Amendment privilege could be extended to prevent the disclosure of "peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions." 493 U.S. at 184. In fact, defendant in *UPENN* would have the court "invoke [Fed. R. Evid. 501] to fashion *a new privilege* that it claims is necessary to protect the integrity of the peer review process…." *Id.* at 189 (emphasis added); *see also id.* at 199 ("In essence, petitioner asks us to recognize an *expanded* right of academic freedom to protect confidential peer review materials from disclosure …. [W]e think the First Amendment cannot be extended to embrace petitioner's claim.") (emphasis in the original). Finally, *NAACP v. Alabama*, was only mentioned once and it was

to distinguish that case from *UPENN*. *Id.* at 199. Accordingly, *UPENN* is inapposite.

Second, Appellees return to their hackneyed refrain that because the RNC, NRCC, and Kincaid disclosed the documents publicly then there can be no *prima facie* harm. AAB 31. But as the affidavits demonstrate, public disclosure was not the sole concern. Disclosure to Appellants' litigation and political opponents was the concern. The district court's order required production of many documents, and provision of information through two depositions, and Appellants were unable to obtain a stay. For Appellants, the precise harm they feared and sought to avoid had already occurred. Public disclosure of the documents and information through two depositions did not impose any additional harm.

The district court was correct to find that Appellants established a *prima facie* harm. Order Granting Mot. to Compel, ECF 128 (PageID#3472-73); Order Den. Mot. for Protective Order, ECF 188 (PageID#1123, 1125). That holding should not be disturbed.

B. The Information Sought Was Not Crucial To Appellees' Case.

At the most fundamental level, the information that Appellees sought was not crucial because the information was sought to prove a theory that was never held valid by the Supreme Court. *See Gill v. Whitford*, 138 S. Ct.

1916, 1929 (2018) (stating that whether partisan gerrymandering claims were justiciable was an open question); *Rucho*, 139 S. Ct. at 2506-07; *see also* Opening Br. 40. Logically, if the theory for which the information was sought is not valid in federal court, then the information itself cannot be crucial.

Once again, Appellees pretend that the shoals of *Rucho* do not exist. But *Rucho* does exist and it dooms their case and their need for the RNC's, NRCC's, and Kincaid's documents and deposition testimony.

1. The Intent Of The Ohio Legislators, Legislative Staff And Their Retained Experts Is Intent That Is Relevant.

Appellees fail in their attempt to demonstrate that the information sought was crucial. Under Appellees' defunct theory, the intent that mattered was the intent of the Ohio legislature, the Ohio legislative staff, and their retained experts. *See, e.g, Whitford v. Gill*, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016) (three-judge court), *rev'd and vacated*, 138 S. Ct. 1916 (2018); Opening Br. 44. Appellees can cite no case for the proposition that the involvement of the national political parties was *crucial* to the finding of partisan intent. Opening Br. 48. Nor is it necessary. Courts have consistently held that so long as partisan legislative bodies are involved in drafting maps, proving legislative intent is not difficult. *See Davis v. Bandemer*, 478 U.S. 109, 128-29 (1986) (plurality opinion); *id.* at 175 (Powell, J., concurring in

part and dissenting in part); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

Appellees go to great lengths to highlight certain documents and testimony in the hopes that the mere appearance of impropriety contained in those documents would transform the documents from relevant to crucial. AAB 36-44[4]. But at the end of the day, Appellees had the enacted map, draft maps, legislative communications, and experts to analyze the maps and assist with their effort to prove partisan intent. With all of this direct evidence at their disposal, nothing from non-party Appellants could have been crucial. *See* Opening Br. 53-54; *see also* (*Ohio A. Philip Randolph Inst. v. Householder*, No. 18-357, ECF entry dated Aug. 31, 2019). This is especially true when partisan intent is susceptible to expert opinion. *Easley v. Cromartie*, 532 U.S. 234, 246-253 (2001); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Armed with both direct and indirect evidence, obtaining information from the RNC, NRCC, and Kincaid was not crucial meaning that without this evidence, they could have still prevailed. *See Larose*, 761 F. App'x at

[4] Contrary to Appellees' assertion, AAB 33, the fact that the district court relied upon evidence obtained from the RNC, NRCC, and Kincaid does not mean that the evidence was crucial.

516 (Nalbandian, J., concurring) ("While I have no doubt the contested documents are relevant to that issue, are they *crucial* to the plaintiffs' claim, such that the plaintiffs could not prevail without them?" (emphasis in original)).

Appellees cite *Common Cause v. Lewis* for the proposition that partisan intent of the RNC, NRCC, and Kincaid can be imputed to the legislature. AAB 34-36. But *Common Cause* does not establish so broad a proposition. In *Common Cause*, the court imputed the intent of Dr. Hofeller to the legislature because the legislature had hired and retained Dr. Hofeller's services. Accordingly, Dr. Hofeller was acting at the North Carolina legislature's direction and control. *Common Cause v. Lewis*, 18-CVS-014001, 2019 N.C. Super. LEXIS 56, *14, 34-35 (N.C. Sept. 3, 2019). This is standard agency law and why, contrary to Appellees' belief, AAB 34, the outside expert's status as retained or not is relevant.

But here, there was no showing that the Ohio legislature had retained the services of Adam Kincaid, the RNC, or the NRCC. There was no showing that the RNC, NRCC, and Kincaid were acting at the direction of the Ohio legislature. Nor was there a showing that either the RNC, NRCC, or Kincaid or the Ohio legislators were agents of either. Accordingly, Appellees are wrong to conclude that the actions or intent of the RNC,

NRCC, and Kincaid can be imputed to Ohio legislators. Instead, the intent of Appellants is in fact attenuated from the intent of the Ohio legislators. *Perry*, 591 F.3d at 1165.

2. Appellees Could Have Impeached Appellants' VRA Defense Through Expert Testimony.

Appellees contend that the documents from the RNC, NRCC, and Kincaid were helpful in disproving the Appellants' claim that the map was drawn to satisfy the VRA. AAB 36. But this contention too is susceptible to expert opinion. *Easley*, 532 U.S. at 246-253 (utilizing expert opinion to determine that partisanship drove the district lines rather than race consciousness); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 175, 178-79 (E.D. Va. 2018) (three-judge court) (using expert testimony to determine that racial considerations, not partisan considerations, drove the district lines and using expert testimony to demonstrate that there was insufficient basis in fact to draw districts to satisfy Section 5 of the VRA). Appellees' assertion that they could not have prevailed without the RNC's, NRCC's, and Kincaid's documents, is simply wrong.[5] Similar to *Perry*'s rejection that the information sought there could

[5] Appellees are wrong in their assertion that this Court "held" that the information Appellees sought was "central to proving partisan intent in the redistricting of Ohio's congressional map." AAB 39 (quoting *LaRose*, 761 F. App'x at 514 n.5). This Court did not so hold. Instead, this Court was

have been relevant to impeach the proponents' assertion that Proposition 8 was adopted to support a legitimate state interest, this Court should also reject Appellees' assertion that the information sought was crucial to refute Appellants' VRA defense. *Perry*, 591 F.3d at 1164.

3. If The Information Sought From The Proposition 8 Proponents In *Perry* Was Too Attenuated, The Information Sought From Non-Parties Here Is Even More Attenuated.

The RNC, NRCC, and Kincaid are even further removed in this case than were the Proposition 8 proponents in *Perry*. 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. The information might be relevant to help identify the intent of Ohio legislators, or lead to evidence to impeach claims of legislative neutrality. *See Perry*, 591 F.3d at 1164-65. But that evidence is not *crucial* or highly relevant. *Id*. In fact, the information sought is too attenuated, just like the information sought by the plaintiffs in *Perry*. *Id*. at 1165; *see also* Opening Br. 41-43, 51-52.

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merely restating the district court's holding. *LaRose*, 761 F. App'x at 514 n.5.

Appellees contend incorrectly that communications to voters, including discrete subsets of voters, were highly relevant or crucial in *Perry*. AAB at 49. Appellees argue that because the Proposition 8 proponents had agreed to produce those documents, and because the only intent at issue was whether the voters adopted Proposition 8 with unconstitutional animus, that was the only intent that was highly relevant. AAB at 50. But this is rewriting *Perry*.

The plaintiffs in *Perry*, like Appellees here, alleged similar intents among those who allegedly drafted the legislation. *Compare* Second Am. Compl. ¶¶52-55, ECF No. 37 (PageID#302-03) (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). The information the *Perry* plaintiffs sought was whether campaign messages were designed by Proposition 8 proponents to appeal to unconstitutional biases. *See Perry*, 591 F.3d at 1164 (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (relying on proposition proponent

statements to determine whether voters acted with improper bias or purpose))[6]. The information was also relevant to impeach the proponents' claim that Proposition 8 served a legitimate state interest. *Id.* The court in *Perry* ruled however that the information sought was too attenuated and, in any event, whether the messages disseminated to voters were designed to appeal to improper biases was subject to expert analysis. *Perry*, 591 F.3d at 1164-65.

If the internal communications regarding the design and strategy of the official Proposition 8 campaign's messages to voters were not crucial to proving that the voters acted with illicit intent, then the documents and testimony of the RNC, NRCC, and Kincaid are even more attenuated and not crucial to proving the Ohio legislature acted with illicit intent. Just as the actual messages that were disseminated to voters is subject to expert analysis, so too are the maps and the draft maps that were disseminated in this litigation.

[6] Contrary to Appellees' implication, AAB 51, the Proposition 8 proponents were anything but "operating at a distance." They had intervened in the litigation, *Perry*, 591 F.3d at 1152, and led the campaign to pass Proposition 8 through California's referendum process. This is not operating at a distance from the voters. *See* Cal. Elec. Code § 342 (defining proponents of a ballot initiative as those who submit the text of the proposed initiative).

4. The RNC, NRCC, and Kincaid Can Determine The Limits Of Their Association.

Appellees fault the RNC, NRCC, and Kincaid for having too broad an association. AAB at 51 n.16. But this association is no broader than the one recognized by courts in other cases. *AFL-CIO*, 333 F.3d at 171, 176-78 (protecting communications between the DNC and its state affiliates and between DNC and labor unions); *see also FEC v. Machinists Non- Partisan Political League*, 655 F.2d 380, 388 (1981).[7] *See* Opening Brief 22-24.

5. In The End Appellees Resort To Hyperbole.

Finally, Appellees once again resort to hyperbole stating that if this Court upholds the privilege, "then there will be few, if any, instances where the First Amendment privilege will not apply, and political organizations will be exempt from civil discovery." AAB 53. This assertion is proven false by Appellees' own admission. As Appellees said in their affidavit below, the NRCC produced a total of 36 documents and the RNC produced a total of 35

[7] Appellees attempt to distinguish *AFL-CIO*, but it is unclear what their distinction is. AAB 49 n.15. Although true that the case did not involve a discovery request, it also did not involve a public records request. *Id.* Instead, at issue there was whether the FEC's regulation requiring the public disclosure of all investigative materials that were not exempt from FOIA violated the First Amendment rights of the DNC and the AFL-CIO. *AFL-CIO*, 333 F.3d at 170. The Court analyzed the issue under a substantially similar balancing test as is used here. *Id.* at 175-79. Accordingly, other courts have relied upon it in First Amendment privilege decisions. *Perry*, 591 F.3d at 1160; *In re Braden*, 344 F. Supp. 3d 83, 93 (D.D.C. 2018). The factual distinction in *AFL-CIO* is without a legal difference.

documents. Lee Aff. ¶¶14-16, 1:18-mc-31, ECF 1-2 (PageID#33-34). This production occurred after the NRCC and Kincaid reviewed 23,687 documents based upon search terms the Appellees provided. Sheehy Aff. ¶¶5, 12-13, 1:18-mc-31, ECF 11-1 (PageID#443-44). If this Court sustains the First Amendment privilege, political parties will still be very much subject to the Rules of Civil Procedure. *See Perry*, 591 F.3d at 1164-65 (noting that the Proposition 8 proponents agreed to produce all documents disseminated to voters, including those documents targeted to discrete subsets of voters).

Appellees are also beyond hyperbolic when they assert that a ruling in Appellants' favor would "doom all state citizens to be kept in the dark as their government farmed out its functions to third parties …." AAB 55. Of course, one email Appellees have consistently cited in this litigation is the email from Senator Niehaus stating that he is "still committed to ending up with a map that Speaker Boehner fully supports." *See, e.g.*, Pls.' Mot. to Compel at 6, 1:18-mc-31, ECF 1-1 (PageID#8). Another email has Senator Niehaus asking if Tom Whatman had signed off on a redistricting plan. Both emails were obtained in 2011 from a public records request, not from an intrusive subpoena to a non-party. *See* Opening Br. 54 n.8. Granting

Appellants' requested relief will not leave citizens in the dark about their legislature.

CONCLUSION

Accordingly, the RNC, NRCC, and Kincaid request that this Court vacate the district court's orders, ECF 128 and 188, order that the Appellees, their counsel, and their counsel's agents and employees destroy all documents and deposition testimony in their possession, and send proof of this destruction to Appellants; and that this Court issue an order prohibiting the future use of the disclosed documents. *See* Opening Br. 16-17, 20.

October 4, 2019

Respectfully submitted,

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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 the table of contents; table of citations; certificate of compliance and the certificate of service, this Reply Brief of Appellant contains 6,468 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.

October 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, an electronic copy of the foregoing Reply 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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