>> ALL RISE.
>> HEAR YE HEAR YE HEAR YE,
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR.
GIVE ATTENTION, AND YOU SHALL BE
HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
[BACKGROUND SOUNDS]
[BACKGROUND SOUNDS]
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING.
WELCOME TO THE FLORIDA
SUPREME COURT.
JUSTICE QUINCE WILL NOT BE
PRESENT FOR TODAY'S ARGUMENT
BECAUSE SHE'S HAD A VERY
PERSONAL LOSS IN HER FAMILY.
HOWEVER, SHE WILL BE
PARTICIPATING IN THIS DECISION.
THE ONLY CASE UP TODAY IS
BAINTER V. THE LEAGUE OF WOMEN
VOTERS OF FLORIDA.
COUNSEL, YOU MAY PROCEED.
>> MAY IT PLEASE THE COURT,
KENT SAMIER ON BEHALF OF PAT
BAINTER, MICHAEL SHEEHAN
AND MATT MITCHELL.
TO ILLUSTRATE THE IMPORTANCE OF
THE FIRST AMENDMENT RIGHTS AT
ISSUE IN THIS CASE, I POSE THE
FOLLOWING QUESTION: DO THE
PLAINTIFFS IN THIS CASE HAVE A
FIRST AMENDMENT RIGHT TO SUBMIT
CONGRESSIONAL REDISTRICTING MAPS
TO THE TRIAL COURT THAT E-MAILS
SHOW WERE DRAWN WITH THE INTENT
TO, AND I QUOTE: SCOOP AS MANY
JEWS OUT OF TAM RACK AND SUNRISE
AS THEY CAN, CLOSED QUOTE, TO
CREATE DISTRICTS THAT FAVOR THE
DEMOCRATIC PARTY.
ABSOLUTELY, YES, THEY DO.
THEY HAVE A FUNDAMENTAL FIRST
AMENDMENT L RIGHT TO PETITION
THE GOVERNMENT, TO FREE SPEECH,
TO POLITICAL SPEECH AND TO
ASSOCIATE TO DO SO.
AND THEY HAVE THE RIGHT TO DO

THAT ANONYMOUSLY.
>> I-- BEFORE WE GET INTO THE SUBSTANCE OF YOUR ARGUMENT, THERE ARE-- AS I UNDERSTAND IT, THERE ARE 538 DOCUMENTS THAT JUDGE LEWIS ORDERED TO BE PRODUCED.
THAT'S THE NUMBER AT LEAST.
OKAY.
ABOUT 35 OF THEM WERE USED AT THE TRIAL.
THERE WERE SOMEWHERE ABOUT 1800 TOTAL, AND SO FROM MY MATH, IT LOOKS LIKE THERE WERE ABOUT 1200 THAT THE JUDGE AFTER AN IN CAMERA INSPECTION ORDERED NOT TO BE PRODUCED.
IS THAT CORRECT?
>> THOSE ARE ROUND NUMBERS, YES.
>> ROUND NUMBERS.
>> AND THOSE ARE PAGES, NOT DOCUMENTS.
>> RIGHT, PAGES.
AND SO MY QUESTION IS UP UNTIL THE TIME THAT JUDGE LEWIS WHEN HE ORDERED THE 538 DOCUMENTS PRODUCED, HE SAID THAT THOSE COULD NOT AT THAT TIME BE DISTRIBUTED BEYOND THE PARTIES AND THAT HE WOULD, BUT HE WOULDN'T SEAL THE COURTROOM.
IS IT YOUR POSITION NOW THAT THE, AT SOME POINT IN THE LITIGATION I THOUGHT YOUR CLIENTS SAID, WELL, YOU CAN USE THE DOCUMENTS, JUST DON'T MAKE THEM PUBLIC.
IS IT YOUR POSITION NOW THAT NONE OF THOSE DOCUMENTS SHOULD HAVE BEEN PRODUCED OR USED AT TRIAL OR THAT IT'S OKAY AS LONG AS THEY REMAIN SEALED?
>> OUR POSITION NOW IS THOSE DOCUMENTS SHOULD HAVE NEVER BEEN USED BECAUSE WE APPEALED THE ORDER THAT ALLOWED THE UNSEALING, IF YOU WILL, OR THE PRODUCTION OF THE 538.
AT THE THE TIME BETWEEN THE MAY 2ND AND MAY 15TH ORDER, IT WAS UNCLEAR WHILE JUDGE LEWIS DECIDED THAT ISSUE.
ONCE HE DECIDED THEY WOULD NOT BE ALLOWED TO BE IN A CLOSED

COURTROOM, THAT'S WHEN WE
APPEALED AND SAID, ABSOLUTELY,
NONE OF THE DOCUMENTS SHOULD BE
USED AT ALL.
>> SO AS A PRACTICAL MATTER, THE
JUDGE USED THE 35 DOCUMENTS AND
THE TESTIMONY OF MR.BAINTER AS
PART OF HIS FINAL JUDGMENT IN
DETERMINING THAT THERE WAS AN
UNLAWFUL INTENT TO FAVOR THE
INCUMBENTS OR A POLITICAL PARTY.
HAS ANYONE THOUGHT ABOUT IF WE
WERE TO AGREE WITH YOU THAT
THOSE DOCUMENTS SHOULD NEVER
HAVE BEEN PRODUCED OR USED, AND
SINCE THAT PART OF THE FINAL
JUDGMENT IS NOT BEING APPEALED
APPARENTLY, WHAT IS THE,
WHAT WOULD BE THE POSTURE
OF THE CASE?
>> THAT'S A GOOD QUESTION, YOUR
HONOR, AND I THOUGHT ABOUT THAT.
WHAT HAPPENED IN THE CASE IS THE
DOCUMENTS WERE USED BY THE
PLAINTIFFS KNOWING THAT THERE
WAS AN APPEAL PENDING.
SO IF THEY PUT THE DOCUMENTS
IN EVIDENCE, IT COULD HAVE
SOME IMPACT.
BUT THE JUDGE AND, AGAIN, WHAT
THE JUDGE DID, JUDGE LEWIS DID
AFTER MAY 15TH, IT'S OUR
POSITION, IS EXTRARECORD
MATERIAL THAT THIS COURT CAN'T
CONSIDER AS OF MAY 15TH--
>> TO THE ISSUE OF WHETHER
THERE'S A FIRST AMENDMENT RIGHT,
BUT WHAT I'M ASKING YOU, WE
CAN'T IGNORE THE REALITY THAT
THE JUDGE, FIRST OF ALL, MADE
CERTAIN RULINGS AND CLARIFIED
HIS EARLIER RULING ON NO FURTHER
EVIDENCE.
BUT I'M ASKING, YOU DON'T TAKE
AN OPINION ON WHAT EFFECT IT HAS
ON THE FINAL JUDGMENT.
>> I DON'T REPRESENT ANYBODY
THERE, BUT IN READING JUDGE
LEWIS' ORDER, HE FOUND DISTRICTS
5 AND 10 INVALID FOR IMPROPER
INTENT OF THE LEGISLATURE AND
TIER II FOR CONTIGUITY.
HE FOUND ALTERNATIVELY THOSE
DISTRICTS WERE INVALID.

SO IF YOU WOULD REMOVE THE
DOCUMENTS AND SIDE WITH US, IT
WOULD HAVE NO IMPACT ON THE
IMPACT OF THAT RULING.
>> WE WOULDN'T MAKE ANY DECISION
REALLY ON THE FINAL JUDGMENT
BECAUSE THAT'S NOT BEFORE US.
THE OTHER QUESTION I HAVE, AND
IT REALLY GOES BACK TO BEFORE
YOU GET TO THE FIRST AMENDMENT
ARGUMENT, IT QUOS TO THE-- IT
GOES TO THE ISSUE OF WAIVER.
AND I REALIZE, I ASSUME YOU WERE
NOT COUNSEL FROM THE BEGINNING
OF WHEN THIS DISCOVERY DISPUTE
STARTED.
>> I WAS NOT COUNSEL AT THE VERY
BEGINNING, BUT SHORTLY
THEREAFTER I BECAME COUNSEL TO
MR. BAINTER.
>> SO WHAT WE KNOW AND WHAT IS
NOT CONFIDENTIAL IS THAT
MR. BAINTER GAVE A DEPOSITION IN
NOVEMBER OF, ACTUALLY, 2012,
ALMOST TWO YEARS AGO.
AND THERE WAS A SUBPOENA SERVED
ON HIM TO PRODUCE, IT WAS A
PRETTY BROAD SUBPOENA.
AND HE APPEARED-- THAT WAS
SERVED IN SEPTEMBER.
TWO MONTHS LATER HE COMES, AND
HE GIVES A DEPOSITION.
AND WHAT HE SAYS IS NOT WHAT
YOU'RE SAYING WHICH IS WE WERE,
LISTEN, YOU'RE ASKING ME ABOUT
WHAT MY CONSULTANTS DID WITH
OTHER REPUBLICAN CONSULTANTS.
THIS IS PART OF MY ASSOCIATIONAL
PRIVILEGE.
I HAVE A PERFECT RIGHT JUST LIKE
THE LEAGUE OF WOMEN VOTERS OR
ANY OTHER GROUP TO GET TOGETHER
AND SUBMIT MAPS.
BUT YOU CAN'T FIND OUT HOW I DID
IT WITH MY CONSULTANTS.
SO WHAT HE SAID INSTEAD OVER AND
AND OVER AGAIN, IN THE
DEPOSITION, WAS HE WAS LOOKING
AT THIS FOR INTRIGUE, FOR
INTEREST.
JUSTICE LEWIS-- JUDGE LEWIS
LATER SAID IT WAS AS A HOBBY.
HE REALIZED THAT HE SHOULDN'T
HAVE ANY IMPACT IN THE

REDISTRICTING LITIGATION.
NOT UNTIL-- AND I-- MAY.
MAYBE IT WAS MAY, IT WAS, NO, IT WAS RIGHT AFTER, IT WAS THE DAY AFTER THE JUDGE FOUND YOUR CLIENT IN CONTEMPT.
DID THE WORD FIRST AMENDMENT, ASSOCIATIONAL PRIVILEGE APPEAR?
AND NOT ONLY WAS IT THAT MANY MONTHS LATER, BUT IT WAS ALSO AFTER A PETITION FOR WRIT OF CERT WAS FILED IN THE FIRST DISTRICT IN WHICH THE BASIS OF THE OBJECTION WAS BURDENSOME.
SO I'D LIKE YOU TO ADDRESS, I'M VERY CONCERNED ABOUT THE WAFER ISSUE HERE-- THE WAIVER ISSUE HERE, THE TACTICS OF THESE NONPARTIES.
NOT THE LEGISLATURE, THESE NONPARTIES.
WHAT I SEE IS IT LOOKS LIKE AN OBFUSCATION OF LEGITIMATE DISCOVERY REQUESTS.
I SET IT OUT BECAUSE I WANT YOU TO KNOW I'VE LOOKED VERY CAREFULLY AT ALL THIS AND THIS IS, TO ME, YOU KNOW, MAYBE MORE IMPORTANT ABOUT HOW PARTIES OR NONPARTIES CONDUCT THEMSELVES IN LITIGATION AND WHETHER THEY'RE BEING FORTHRIGHT ABOUT WHAT PRIVILEGES THEY WANT TO ASSERT AND WHEN THEY ASSERT THEM.
>> THANK YOU, YOUR HONOR.
NOW I'LL TRY TO ADDRESS ALL THOSE ISSUES.
WITH RESPECT TO WAIVE, THE TRIAL COURT WAS TWICE ASKED TO FIND A WAIVER IN THIS CASE.
THE TRIAL COURT DECLINED.
THE PLAINTIFFS DON'T EVEN ARGUE JUDGE LEWIS ABUSES DISCRETION IN FINDING A WAIVER, THEY JUST SAID THE RECORD WOULD SUPPORT A FINDING OF WAIVER--
>> WAIT A MINUTE,
WAIT, WAIT, WAIT.
EXCUSE ME.
THE NON-APPEALING PARTY IN A PROCEEDING BECAUSE THEY DID OR DID NOT DO SOMETHING, THIS COURT CAN'T CONSIDER WHAT THE LAW IS ON IT?

>> THE COURT CAN--
>> HAVE YOU EVER HEARD OF THE TIPSY COACHMAN DOCTRINE?
>> THE COURT CAN CONSIDER IT, YOUR HONOR.
>> OKAY, WE CAN CONSIDER IT.
>> WITH THE QUESTION TO A WAIVER TO THE A FIST AMENDMENT RIGHT IN THIS QUESTION IS A CASE OF FEDERAL LAW, NOT STATE LAW.
I CITE BROOK HART V. JANICE, U.S. 1 1966, SO THE WAIVER OF A FIRST AMENDMENT RIGHT IS GOVERNED BY FEDERAL LAW.
THOSE STANDARDS FOR WAIVER SAY A WAIVER MUST BE VOLUNTARY, KNOWING HI AND INTELLIGENT.
IT MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.
THE WAIVER OF OR ACQUIESCENCE IN LOSS OF FUNDAMENTAL RIGHT CAN NEITHER BE PRESUMED OR INFERRED.
AGAINST A WAIVER OF--
>> I GUESS WHAT I WAS THINKING HERE, AND THOSE ARE ALL INTERESTING THOUGHTS, BUT WHAT YOU SAID AT THE BEGINNING WAS THIS WAS SO IMPORTANT THAT WE SHOULD NOT BE LOOKING BEHIND WHEN PARTIES OR NONPARTIES WANT TO PUT MAPS INTO THE LEGISLATURE AS TO HOW THEY DID IT.
BUT THE SEQUENCE-- AND IF THEY WERE REPRESENTED BY LAWYERS ALL ALONG, THAT IF THE ISSUE WAS FOR THEM THAT THIS WAS ASSOCIATIONAL PRIVILEGE, THIS ISN'T LIKE-- IT SEEMED LIKE IT WAS AN AFTERTHOUGHT, THAT MONTHS LATER SOMEONE SAYS, WELL, WAIT A SECOND, WE'VE GOT-- WE'RE GOING TO DO AWAY WITH THIS, THIS WAS AN INTEREST AND A HOBBY OF MINE KIND OF THING, AND NOW WE'RE GOING TO GO TO ANOTHER ARGUMENT.
THAT'S WHAT CONCERNS ME.
I DON'T KNOW WHAT YOU CALL THAT.
YOU CALL THAT DOUBLE DEALING.
BUT THAT'S WHAT CONCERNS ME ABOUT THE FACTS AS I'VE OUTLINED, AND YOU HAVEN'T GIVEN ME OR REFUTED THAT THAT OCCURRED.
>> I'M GOING TO TRY TO ADDRESS

THAT RIGHT NOW.
WHEN MR. BAINTER WAS FIRST SUBPOENAED AND HE WENT TO HIS DEPOSITION-HIS UNDERSTANDING, AND HE TESTIFIED TO THIS, THAT THE DISCUSSION WAS AND THE EXCEPTION WAS ABOUT HIS--
DEPOSITION WAS ABOUT HIS PERSONAL INTERACTIONS WITH ANY LEGISLATORS REGARDING THE REDISTRICTING.
AND THAT'S WHAT HE WENT TO THE DEPOSITION TO TESTIFY ABOUT AND PRODUCE DOCUMENTS ABOUT.
IT BECAME APPARENTLY OF COURSE TO HIM DURING THE DESK THAT THE INQUIRY WAS GOING FAR BEYOND--
>> DMAWBL OUT OF THE BLOCKS INCLUDED WITHIN ITS SCOPE THE DOCUMENTS THAT ARE RELEVANT HERE TODAY FOR WHICH A PRIVILEGE WAS NOT ASSERTED?
>> I BELIEVE THE TEXT OF THE AMENDMENT IN THAT, THE TEXT IN THAT SUBPOENA WAS BROAD ENOUGH TO INCLUDE THOSE, BUT I DON'T KNOW WHAT AGREEMENTS WERE REACHED BETWEEN COUNSEL IN THAT CASE TO LIMIT THE SCOPE OF THAT.
SO, AGAIN--
>> THE REQUEST INCLUDED THESE DOCUMENTS, AND NONPARTY HERE DID NOT ASSERT A PRIVILEGE.
WHY ISN'T THAT A WAIVER?
>> BECAUSE HE DIDN'T PRODUCE THE DOCUMENTS EITHER.
HE PRODUCED I THINK ABOUT A HUNDRED OR SO DOCUMENTS AT THE TIME OF HIS DEPOSITION THAT DEALT WITH THE SCOPE OF HIS INTERACTIONS WITH THE LEGISLATURE.
IT DIDN'T DEAL WITH THE ASSOCIATION OR OTHER MEMBERS--
>> BUT JUST BECAUSE YOU DON'T PRODUCE SOMETHING DOESN'T AUTOMATICALLY GIVE YOU A PRIVILEGE.
>> THE PRIVILEGE--
>> YOU HAVE TO ASSERT THAT, RIGHT?
>> NO, THE PRIVILEGE IS THERE.
THE PRIVILEGE APPLIES--
>> WHEN IT'S BEEN REQUESTED,

RESPECT YOU REQUIRED AS--
AREN'T YOU REQUIRED AS A
RESPONDING PARTY TO A SUBPOENA
TO ASSERT ANY KIND OF PRIVILEGE
FOR REASON OF NONDISCLOSURE OF
THOSE DOCUMENTS?
>> AS A PARTY, YOU DO, BUT WE'RE
NOT A PARTY, YOUR HONOR.
>> ANYBODY RESPONDING TO A
SUBPOENA.
DON'T YOU HAVE TO SAY WHY IT IS
YOU'RE NOT RESPONDING IF YOU
HAVE A PRIVILEGE?
>> NO, I DON'T THINK SO, YOUR
HONOR, BECAUSE WE'RE A NONPARTY,
AND NONPARTIES ARE TREATED
DIFFERENTLY--
>> YEAH, WHAT CASE DRAWS A
DISTINCTION BETWEEN A WITNESS
WHO HAS BEEN SUBPOENAED TO
PRODUCE DOCUMENTS AND A NAMED
PARTY?
>> YOUR HONOR, I HAVE THAT CASE,
BUT I CANNOT LOCATE IT RIGHT
NOW--
>> IS IT IN THE BRIEF?
>> I DON'T THINK IT'S IN THE
BRIEF.
I HAVE IT, AND I CAN SUP ELEMENT
THE RECORD OR IS SUPPLEMENT THE
COURT WITH THAT.
BUT WITH RESPECT TO THAT, THE
NCAA CASE V. ALABAMA IS
INSTRUCTIVE ON THAT.
THERE THE NAACP ASSERTED
PRIVILEGE TO NUMEROUS DOCUMENTS
IN THIS CASE THAT WERE PROTECTED
BY THE ASSOCIATIONAL PRIVILEGE.
THEY ENDED UP PRODUCING SOME
SUCH AS BANK RECORDS AND OTHER
DOCUMENTS RELATING TOTAL
ASSOCIATION.
THEY WITHHELD THE MEMBERSHIP
LIST.
BUT THE PRODUCTION OF THE BANK
RECORDS AND OTHER DOCUMENTS
DOESN'T RESULT IN A WHOLESALE
WAIVER OF ALL DOCUMENTS FROM THE
ASSOCIATION.
>> BUT IN THE RESPONSE TYPICALLY
WHAT I WOULD EXPECT TO SEE IS A
RESPONSE OF DOCUMENTS AND THEN
TO ASSERT THAT THERE ARE OTHER
DOCUMENTS OUT THERE, BUT WE'RE

NOT GIVING THEM TO YOU BECAUSE
OF SOME PRIVILEGE THAT WE'RE
ASSERTING.
AND HOPEFULLY, YOU HAVE A
PRIVILEGE LOG, BUT EVEN IF
THERE'S NOT, AT LEAST THERE
OUGHT TO BE AN ASSERTION OF SOME
PRIVILEGE.
>> AND THERE WAS AT THE FIRST
OPPORTUNITY IT BECAME OBVIOUS TO
MR.PAINTER AND DATA TARGETING,
WHICH WAS AFTER HIS DEPOSITION
WHEN THE SCOPE OF THE INQUIRY
WENT FAR BEYOND HIS INDIVIDUAL
INTERACTIONS WITH THE
LEGISLATURE TO INTERACTIONS WITH
HIS EMPLOYEES AND WHAT HIS
EMPLOYEES WERE DOING AND OTHER
MEMBERS OF THE ASSOCIATION.
UPON THE ISSUANCE OF THAT
SUBPOENA, WE MADE AN OBJECTION,
WE MOVED FOR A PROTECTIVE ORDER.
>> AT THAT SUBPOENA, THAT WAS--
>> THE OBJECTION WAS RELEVANT,
YOUR HONOR, UNDULY BURDENSOME.
>> YES, BUT THAT-- AND NOT A
FIRST AMENDMENT PRIVILEGE.
THE FIRST TIME IT WAS ASSERTED,
AM I CORRECT THAT THE FIRST TIME
IT WAS ASSERTED WAS THE DAY
AFTER YOU, YOUR CLIMATE WAS HELD
IN CONTEMPT FOR NOT PRODUCING
THE DOCUMENTS?
>> I'M NOT SURE IF THAT'S THE
RIGHT DATE OR NOT TO, YOUR
HONOR.
>> IT'S PRETTY IMPORTANT HERE.
IT'S IMPORTANT BECAUSE WE'RE A
COURT OF LAW WHERE WHETHER THE
FEDERAL COURTS, YOU KNOW, DECIDE
THIS ISSUE OR WE DECIDE THIS
ISSUE.
IT IS FUNDAMENTAL TO HOW WE
CONDUCT OURSELVES BEFORE COURTS
IN LITIGATION.
SO I AM GOING TO TELL YOU THAT
IT WAS THE DAY AFTER, AND IF ON
REBUTTAL YOU-- AFTER YOU,
MONTHS AFTER, SIX MONTHS AFTER,
IF YO FIND IT WAS NOT, IT WAS
EARLIER, PLEASE, LET ME KNOW.
>> I JUST WANT TO NOTE FOR THE
RECORD, IT SEEMS LIKE THE COURT
IS SUGGESTING THAT LACK OF

OBJECTION EQUALS WAIVER, AND
THAT'S NOT WHAT THE FEDERAL LAW
GOVERNS IN THIS CASE.
THE WAIVER HAS TO BE KNOWINGLY,
VOLUNTARILY AND INTELLIGENT.
AND THAT DIDN'T OCCUR IN
THIS CASE.
WHEN IT BECAME AWARE THAT THESE
INQUIRIES WERE GOING FAR BEYOND
WHAT WE DEEM TO BE TOLERABLE,
THEN THE OBJECTIONS WERE MADE AT
THAT POINT.
>> SO HOW IS IT THAT THE
PETITION FOR WRIT OF CERT THAT
WAS FILED BEFORE THE FIRST
DISTRICT IN, WAS THAT APRIL?
>> I BELIEVE SO, YOUR HONOR.
>> OKAY.
ALLEGED IT WAS BURDENSOME AND
OVERLY BROAD, AND THAT WAS
DENIED IN JULY.
AND NORMALLY-- AND, AGAIN, I
DON'T KNOW IF WE HAVE A CASE
BECAUSE I'VE NEVER SEEN A
SITUATION WHERE IF THERE'S GOING
TO BE A PRIVILEGE, YOU CAN'T
KEEP ON FILING SEPARATE
PETITIONS FOR WRIT OF CERT ON
DOCUMENTS.
YOU, YOU KNEW BY THEN THAT THEY
WERE SEEKING EVERYTHING
BECAUSE-- AND IF YOU DIDN'T,
YOU KNEW IT BY THE TIME OF THE
JUDGE'S ORDER WHEN HE HELD YOU
IN CONTEMPT.
ARE YOU SAYING, ARE YOU TELLING
US THAT WHEN WAS THE FIRST TIME
YOU REALIZED THEY ACTUALLY
WANTED MORE THAN JUST
COMMUNICATIONS WITH THE
LEGISLATURE?
>> FOLLOWING THE FIRST
DEPOSITION.
BUT AT THAT TIME THEIR REQUEST
WAS SO BROAD, YOUR HONOR, WE HAD
30,000 POTENTIAL DOCUMENTS THAT
WOULD COME COME UP IN OUR SEARCH
TO RESPOND TO THEIR REQUEST.
WE DID NOT PRODUCE 30,000
DOCUMENTS.
WE SPENT A YEAR AND A HALF
TRYING TO NARROW THE SCOPE DOWN
TO A MANAGEABLE POOL OF
DOCUMENTS BECAUSE WE COULDN'T

ASCERTAIN WHAT PRIVILEGE ATTACH TODAY A DOCUMENT WE HADN'T REVIEWED.
WE SPENT A YEAR AND A HALF DWINDLING IT DOWN TO 1833, AND ONCE WE GOT TO THAT POINT, WE COULD ADDRESS TRADE SECRET PRIVILEGE, ASSOCIATIONAL PRIVILEGE AND ANY OTHER PRIVILEGE--
>> YOU KNOW, I DON'T KNOW, MAYBE THE JUDGE WHEN HE HELD YOUR CLIENT IN CONTEMPT THOUGHT OF THIS, BUT IT IS A LITTLE IRONIC THAT YOUR CLIENT'S COMPANY IS DATA TARGETING AND IN THIS DAY OF SEARCH TERMS THAT YOU WERE TELLING ME IT TOOK YOU 18 MONTHS TO DECIDE THAT THERE WAS ACTUALLY WITHIN THE SCOPE OF WHAT THEY WERE SEEKING WAS TO SEE IF MR. BAINTER WHO FIRST SAID-- CAN AGAIN, HE KNEW WHAT HE DID.
BUT HE DIDN'T TESTIFY TO THAT IN HIS DEPOSITION IN NOVEMBER.
SO I'M NOT SURE, YOU KNOW, WE CAN-- WE HAVE THE RECORD HERE, AND THAT RECORD IS ALL, EVERYTHING UP TO WHEN THE APPEAL WAS FILED.
SO WE CAN TAKE A LOOK BACK AT THE GOOD FAITH ASSERTION THAT WE DIDN'T KNOW E THEY WERE SEEKING ASSOCIATIONAL PRIVILEGE UNTIL THE TIME WE FINALLY ASSERTED IT A DAY AFTER THE CONTEMPT WAS--
>> YOUR HONOR, WE SPENT A YEAR AND A HALF ARGUING WITH THE PLAINTIFFS ON NARROWING THE SEARCH TERMS DOWN, NUMEROUS TRIPS BEFORE THE JUDGE TO GET THE DOCUMENTS DOWN TO A MANAGEABLE POOL SO WE COULD REVIEW THEM, PRODUCE THEM AND ASSESS THEM FOR PRIVILEGE.
WE CAN'T JUST TAKE A SUBPOENA AND SAY, OKAY, THIS IS GOING TO HAVE ATTORNEY/CLIENT PRIVILEGE, TRADE SECRET, WE CAN'T TELL THAT FROM THE FACE OF A SUBPOENA.
WE COULD ONLY TELL THAT ONCE WE ASCERTAIN WHAT THE RESPONSIVE DOCUMENTS WERE AND DO THAT, AND

THAT'S WHAT--
>> AND THE RULE OF HAW AND IT WOULD THROW DISCOVERY INTO CHAOS.
I CANNOT EVEN IMAGINE IN PRODUCTS LIGHT CASES, IN COMMERCIAL DISPUTES IF PEOPLE, IF LITIGANTS TOOK THE POSITION YOU'RE TAKING, PEOPLE ARE WORRIED ABOUT DELAYS IN LITIGATION, I MEAN, ARE YOU AS A LAWYER IN THE STATE, ARE YOU REALLY TELLING ME THAT THE PRIVILEGES HAVE TO WAIT UNTIL THE DISCOVERY REQUEST GETS NARROWER AND NARROWER AND NARROWER?
SO YOU SAY, OH, MAYBE THEY DO WANT SOMETHING THAT COULD BE PROTECTED.
>> HOW DO WE ASSERT A PRIVILEGE TO DOCUMENTS THAT WE DON'T KNOW WHAT THE DOCUMENTS ARE?
IF THERE'S 30,000 DOCUMENTS, WE HAVEN'T REVIEWED THEM--
>> DID MR. BAINTER NOT KNOW WHEN HE GAVE HIS DEPOSITION THAT HE WAS INVOLVED IN THIS ACTIVITY THAT JUDGE LEWIS FOUND WAS A SECRET PROCESS OF TRYING TO INFLUENCE THE LEGISLATURE?
HE DIDN'T KNOW WHAT HE WAS DOING?
>> I DISAGREE.
WHAT MR. BAINTER WAS DOING, HE WAS EXERCISING HIS FUNDAMENTAL FIRST AMENDMENT RIGHTS TO WE THE US THE GOVERNMENT AS A CITIZEN WITH POLITICAL SPEECH, WHICH IS PROTECTED, AND HIS RIGHT THE ASSOCIATE WITH OTHER PEOPLE TO EXPRESS POLITICAL EXPRESSION.
AND TO THE EXTENT THAT JUDGE LEWIS FOUND THAT THE AMENDMENTS 5 AND 6 WERE VIOLATED BY A CITIZEN'S INTENT OR CITIZEN'S EXERCISE OF THEIR ANONYMOUS FIRST AMENDMENT RIGHTS, AMENDMENTS 5 AND 6 ARE UNCONSTITUTIONAL--
>> IS THIS THE NEW-- WAIT, WAIT, WAIT.
WAIT.
ARE YOU, IS THIS SOMETHING

YOU'RE ASSERTING IN THIS, IS
THIS IN A BRIEF?
IS THIS IN-- IS IT?
>> NO, YOUR HONOR.
YOU'RE THE ONE THAT RAISED WHAT
JUDGE LEWIS FOUND.
WHAT'S AT ISSUE HERE IS WHETHER
JUDGE LEWIS ACTUALLY APPLIED THE
CLOSEST OF CUTENY UNDER THE
PERRY V. IS THAT RIGHT NEGATIVER
TEST.
THAT'S THE LIMIT OF THIS COURT'S
REVIEW.
WE HAVE NOW PROGRESSED TO WHAT
JUDGE LEWIS FOUND, AND WE
WEREN'T PARTIES TO THE TRIAL FOR
JUDGE LEWIS.
WE WEREN'T ABLE TO ASK
QUESTIONS.
WE WEREN'T ABLE TO FORM THE
RECORD.
AND IF THIS COURT'S RELYING ON
JUDGE LEWIS' FINDINGS AGAINST
US, THAT VIOLATES OUR DUE
PROCESS RIGHTS BECAUSE WE
WEREN'T THERE TO GIVE OUR SIDE
OF THE STORY, AND OUR SIDE OF
THE STORY TO THAT, YOUR HONOR,
IS OUR FOLKS, OUR PEOPLE WERE
EXERCISING THEIR FUNDAMENTAL
FIRST AMENDMENT RIGHTS TO
ANONYMOUS POLITICAL SPEECH JUST
LIKE THE COALITION PLAINTIFFS
WERE WHEN THEY SUBMITTED THE
MAPS THAT HAD THE INTENT TO
FAVOR DEMOCRATS AND ASK JUDGE
LEWIS TO ADOPT THEM.
THAT IS PROTECTED SPEECH, AND
THAT IS WHAT WE WERE DOING.
THERE WAS NO SECRET PROCESS.
WE WERE DOING THAT.
IF THE LEGISLATURE USED IMPROPER
INTENT, THAT'S THE LEGISLATURE'S
PROBLEM, NOT OURS.
AND THE LEGISLATURE--
>> GOING BACK TO THIS WAS ALL
IRRELEVANT AND THE JUDGE SHOULD
HAVE NOT ALLOWED THE DISCOVERY
BECAUSE IT WASN'T RELEVANT.
>> THAT'S EXACTLY RIGHT.
IT'S NOT RELEVANT TO LEGISLATIVE
INTELLIGENT.
WHAT'S RELEVANT IS WHAT THE
LEGISLATURE DID, WHICH WHAT

MEMBER OF THE BODY WAS THINKING
WHEN THEY VOTED FOR THE MAP.
THAT'S WHAT'S RELEVANT, NOT OUR
PUBLIC SPEECH.
>> AND YOU LOST ON THAT BEFORE
JUDGE LEWIS.
AND NOW THE ISSUE WAS WHEN YOU
APPEALED IT, DID HE-- AS A
MATTER OF LAW, WHEN HE FOUND
THESE DOCUMENTS TO BE RELEVANT?
>> I SEE MY TIME'S RUNNING OUT,
AND THAT'S WHERE HE ERRED, UNDER
THE FIRST PRONG OF THE PERRY V.
SCHWARZENEGGER TEST.
IT'S GOT TO BE HIGHLY RELEVANT.
AND WHAT MY CLIENT'S POLITICAL
EXERCISE OF HIS FREE SPEECH OR
HIS POLITICAL POSITIONS IS
WHOLLY IRRELEVANT TO WHAT ONE
MEMBER OF THE LEGISLATURE WAS
THINKING WHEN HE VOTED ON A MAP.
>> BEFORE YOU HAVE TO SIT DOWN,
LET ME CAN ASK YOU ABOUT THE
TRADE SECRET.
DID JUDGE LEWIS, HE RULED THERE
WERE NO TRADE SECRETS ON THE
DOCUMENTS ISSUED HERE, RIGHT?
>> A TWO-WORD STATEMENT IN A
HEARING, YES, YOUR HONOR.
>> NO TRADE SECRET.
BUT DIDN'T HE ALSO SAY HE HAS
CONDUCTED AN IN CAMERA REVIEW?
>> HE SAID HE DID, YOUR HONOR,
BUT HIS WRITTEN ORDER DOESN'T
SET FORTH SPECIFIC FINDINGS
WHICH ARE REQUIRED UNDER THE
RARE COIN CASE.
>> YOU DON'T DISPUTE THAT HE
DID--
>> I DON'T.
>> YOU ARE CONTESTING ON THE
BASIS THAT WE DON'T HAVE THE
ORDER THAT SETS THAT OUT.
>> THAT DOESN'T GIVE THIS COURT
THE ABILITY TO CONDUCT A PROPER
REVIEW.
625 72ND 1277, THE COURT MUST
SET FORTH ITS FINDINGS.
>> DID YOU EVER RAISE THAT
OBJECTION TO THE TRIAL COURT?
>> WE DIDN'T HAVE THE
OPPORTUNITY BECAUSE HE ISSUED
THAT ON HIS MAY 2ND ORDER, YOUR
HONOR.

WE APPEALED TO THE FIRST DCA.
THANK YOU.
I'LL RESERVE MY TIME.
>> IS THAT A SUBJECT OF ANY OF THE PROCEEDINGS AT THE FIRST DCA REGARDING THE FINAL JUDGMENT? IS THAT STILL OPEN AT THAT CASE OR NO?
IS THAT A CROSS-APPEAL OR ANYTHING GOING ON THERE?
>> NOT THAT I'M AWARE OF.
I DON'T THINK SO, YOUR HONOR.
>> OKAY.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, I'M JOHN MILLS ON BEHALF OF THE LEAGUE OF WOMEN VOTERS AND THE OTHER PLAINTIFFS IN THIS CASE.
DESPITE WHAT HAS BEEN SAID ABOUT THEM, THEY ARE NONPARTISAN ORGANIZATIONS AND NOT FUNDED BY ANY POLITICAL PARTY AND NOT SUPPORTING ANY POLITICAL PARTY.
THERE WAS REFERENCE MADE TO A MAP THAT WAS SUBMITTED BY OUR TEAM THAT HAD AN EXTREMELY TO OFFENSIVE E-MAIL WITH IT, AND IT WAS IMPROPER AND THERE WAS NO ASSERTION OF ANY FIRST AMENDMENT PRIVILEGE TO THAT.
IT WAS WITHDRAWN, AND THE PERSON WHO WAS RESPONSIBLE FOR IT IS NO LONGER INVOLVED IN THE CASE.
AS TO THE QUESTION OF THE IMPACT ON THE TRIAL, THE ADMISSIBILITY OF THE EVIDENCE, WHAT Y'ALL HAVE BEFORE YOU TODAY HAS NO IMPACT OP THAT.
NOT JUST BECAUSE MR.SAF FRITZ SAID THAT THE OTHER FINDINGS SUPPORT THE JUDGE'S RESULT, BUT BECAUSE THE RULE OF EVIDENCE PROVIDES IT'S SECTION 90.508, EVIDENCE OF A STATEMENT OR OTHER DISCLOSURE OF PRIVILEGED MATTER IS INADMISSIBLE AGAINST THE HOLDER OF THE PRIVILEGE IF THE STATEMENT OR DISCLOSURE WAS COMPELLED ERRONEOUSLY BY THE COURT.
SO EVEN IF THERE WERE ERROR HERE, THERE'S NO ERROR, BUT EVEN IF THERE WERE ERROR HERE, THAT DOESN'T MAKE IT INADMISSIBLE.

IT'S NOT THE LEGISLATURE'S
PRIVILEGE, IT'S THEIR CLAIM OF
PRIVILEGE.
>> WELL, AND THAT'S NOT AN ISSUE
IN THAT CASE, IS IT?
>> NO, IT'S NOT.
>> IT'S JUST NOT AN ISSUE IN
THAT CASE.
>> CORRECT.
>> NOW, IT COULD BE AN ISSUE IN
THE SENATE CASE.
>> I GUESS SOMEBODY COULD RAISE
IT.
I DON'T--
>> THAT'S NOT BEEN LITIGATED.
>> NO, NOT LITIGATED.
>> BUT THE POTENTIAL IMPACT THAT
WHAT WE DECIDE HERE WOULD AFFECT
WHAT WOULD, WHAT WOULD BE
INTRODUCED IN EVIDENCE IN THE
SENATE CASE.
>> I DON'T THINK SO.
I DON'T THINK SO.
THE DOCUMENTS HAVE ALREADY
BEEN PRODUCED.
WE HAVE THEM.
THAT CAT'S OUT OF THE BAG.
AND THE LEGISLATURE HAS NO
STANDING TO OBJECT TO THEIR
ADMISSION BASED ON PRIVILEGE
BECAUSE IT'S NOT THE
LEGISLATURE'S PRIVILEGE, AND
THEY DON'T HAVE STANDING BECAUSE
THEY'RE NOT A PARTY.
SO THEY COULD HAVE-- THEY HAD
THE SOLUTION TO THIS PROBLEM,
AND THEY RECOGNIZED IT.
THEY TOLD THE JUDGE THAT HERE'S
WHAT HAPPENS, AND THEY WERE
CORRECT.
WHEN YOU WANT TO PRESERVE A
PRIVILEGE AND A COURT ORDERS YOU
TO PRODUCE SOMETHING, YOU ASK
FOR A STAY, AND YOU FILE AN
EMERGENCY PETITION FOR WRIT OF
CERTIORARI.
>> THEY'VE TOLD YOU THIS MORNING
THAT THEY ASSERTED THIS AT THE
VERY FIRST OPPORTUNITY--
>> THAT'S FALSE.
>> WELL, THAT'S WHAT THEY'VE
STOOD HERE-- I MEAN, DID I
MISHEAR THAT?
>> I HEARD IT, TOO, AND IT'S

FALSE.
>> WELL, WHY DON'T YOU-- YOU'RE TALKING ABOUT MOOTNESS, AND I DON'T THINK THIS IS MOOT.
I THINK THIS IS AN IMPORTANT ISSUE BOTH ON THE WAIVER AND THE FIRST AMENDMENT ISSUE.
SO WHY DON'T YOU--
>> SURE.
>> DISCUSS WAIVER.
>> AND IT IS IMPORTANT FOR ONE MORE REASON, AND I'M GOING TO GET RIGHT INTO THAT, BUT THIS MIGHT BE A GOOD POINT TO ADDRESS A POINT THAT JUSTICE POLSTON WAS, WHETHER THERE WAS A CROSS-APPEAL GOING ON.
THERE'S NOT, AND THIS DOES IMPACT THE SENATE CASE.
WE HAVE FILED A MOTION FOR REHEARING OF THE ORDER TO THE EXTENT IT DID NOT ORDER DISCLOSURE OF THE OTHER DOCUMENTS BECAUSE WE BELIEVE THERE'S NO PRIVILEGE AT ALL, CLEAR WAIVER, ALL OF THOSE THINGS.
THAT MOTION FOR REHEARING, WE FILED IT IN THE TRIAL COURT TIMELY, ON THE 15TH DAY UNDER THE RULES.
IT WAS AFTER THE NOTICE OF APPEAL HAD BEEN FILED.
SO IT HAS NOT BEEN RULED ON.
>> YOU'RE TALKING ABOUT THE OTHER 1200 DOCUMENTS?
>> RIGHT.
WE WANT THE OTHER--
>> WELL, THAT'S NOT PART OF THIS.
IT'S 588 CASES, DOCUMENTS ARE.
>> THAT'S RIGHT.
>> AND YOU'RE--
>> BUT THE WAIVER ISSUE GOES TO IT, AND THAT'S WHY THE SENATE CASE IS RELEVANT.
>> BUT THE REASON THIS CAN'T BE MOOT IS BECAUSE THERE'S A PUBLIC INTEREST AS WELL THAT AS THE MEDIA HAS SAID THAT YOU'VE GOT DOCUMENTS, YOU HAD SECRET PROCEEDINGS ABOUT SOMETHING THAT NOW JUDGE LEWIS FOUND WAS DONE UNLAWFULLY.

AND SO THE PUBLIC HAS, YOU KNOW, WE CAN'T JUST SAY JUST BECAUSE TWO PARTIES AGREE WE'RE GOING TO KEEP A SECRET IN A CASE LIKE THIS TO AGREE THEY CAN STAY SECRET--
>> I COMPLETELY AGREE, AND THE ONLY REASON WE AGREED, WE ASKED THIS COURT TO ENTER INTO EMERGENCY RELIEF WAS BECAUSE WE WANTED TO COMPLETE OUR TRIAL. WE DON'T WANT THEM TO STAY SECRET.
THE PRESS AND THE PUBLIC CAN ASSERT THEIR OWN RIGHTS, BUT THERE'S ZERO REASON TO KEEP THESE DOCUMENTS SECRET.
AND I'LL START WITH WAIVER. FIRST OFF, IT'S NOT A FEDERAL ISSUE, IT'S NOT A DUE PROCESS ISSUE.
ALL THESE THINGS ABOUT KNOWING AND INTELLIGENT WAIVER, THAT'S ABOUT THINGS OUTSIDE OF COURT WHEN YOU WAIVE A PRIVILEGE ABOUT YOUR CONFLICT OUTSIDE OF COURT.
THE RULES FOR WHEN AND HOW YOU ASSERT PRIVILEGE IN CASE ARE RULES OF COURT PROCEDURE.
THEY'RE STATE LAW ISSUES.
AND THEY'RE ISSUES THAT ARE WELL SETTLED IN THIS STATE.
WHEN SOMEBODY ASKS YOU TO PRODUCE DOCUMENTS OR TO ANSWER QUESTIONS THAT YOU THINK YOU HAVE A RIGHT TO NOT DO BECAUSE YOU HAVE A PRIVILEGE, YOU MUST ASSERT IT.
OR YOU WAIVE IT AS A MATTER OF COURT PROCEDURE.
IT'S NOT A CONSTITUTIONAL ISSUE, IT'S REGULATION OF COURT PROCEDURE.
AND SO THIS WAS--
>> IT DOESN'T, IT DOESN'T MATTER AT ALL IF THE PRIVILEGE IS A CONSTITUTIONAL PRIVILEGE.
>> NO.
NO.
>> THAT--
>> IT'S THE SAME--
>> THAT DOESN'T ENTER INTO THE ANALYSIS OF WHETHER THE WAIVER WILL BE ENFORCED STRICTLY OR

THERE'LL BE, YOU KNOW, WE'VE GOT
RULES ABOUT LIBERAL AMENDMENT OF
PLEADINGS AND, YOU KNOW,
THINGS-- PEOPLE SOMETIMES MISS
A FIRST OPPORTUNITY, THEY DON'T
DO IT, AND THE COURT WILL GIVE
THEM AN OPPORTUNITY TO STILL
RAISE SOMETHING SUBSTANTIVELY.
>> THAT'S RIGHT.
>> AND SO AS THE COURT IS
EXERCISING ITS DISCRETION IN
THAT CONTEXT, YOU'RE SAYING THAT
THE FACT THAT THE PRIVILEGE IS,
THE ASSERTED PRIVILEGE IS
ASSERTED TO BE CONSTITUTIONAL
WOULD HAVE NOTHING TO DO WITH
THE WAY THE COURT WOULD EXERCISE
ITS DISCRETION.
>> IT HAS-- YEAH, ON THE WAIVER
ISSUE, CORRECT.
IF YOU GET PAST THE WAIVER AND
GET TO THE MERITS, THEN, SURE,
IT'S A CONSTITUTIONAL ISSUE.
>> BUT COUNSEL STOOD HERE THIS
MORNING AND TOLD US HIS CLIENT
HAD NO IDEA--
>> YEAH, THAT'S RIDICULOUS.
>> WHAT THE DOCUMENTS WERE.
>> THAT'S RIDICULOUS.
THE SUBPOENA LANGUAGE WE'RE
TALKING ABOUT TODAY IS THE SAME
LANGUAGE IN THE SUBPOENA THAT HE
ATTENDED THE DEPOSITION TOO.
IN THE BEGINNING HE SAYS I'VE
READ THIS, I'VE SEARCHED
EVERYWHERE TO FIND ALL THE
DOCUMENTS THAT COULD RESPONSIVE,
AND I'VE GIVEN THEM ALL.
AND HE WAS ASKED QUESTIONS, AND
THEY WEREN'T JUST ABOUT DIRECT
COMMUNICATIONSES WITH THE
LEGISLATURE.
THEY WERE ABOUT WHAT WERE YOU
DOING WITH MAPS AND HOW DID THEY
END UP IN THE LEGISLATURE?
AND HE SAID, HE DIDN'T ASSERT
PRIVILEGE.
HE DIDN'T SAY REFUSE TO ANSWER
ANY QUESTIONS.
HE DIDN'T SAY I'M NOT GIVING
CERTAIN DOCUMENTS BECAUSE
THEY'RE PRIVILEGED.
HE ANSWERED THE QUESTIONS.
AND HIS ANSWERS TO THE QUESTIONS

WERE I JUST DID IT FOR FUN, AND
I DIDN'T SUBMIT ANYTHING TO THE
LEGISLATURE.
>> WELL, HE DIDN'T, BUT THAT WAS
TRUE.
HE DIDN'T SUBMIT ANYTHING TO
THE--
>> WELL, HE DIDN'T DIRECTLY
SUBMIT ANYTHING TO THE
LEGISLATURE, BUT WHAT WE NOW
KNOW FROM THESE VERY DOCUMENTS
THAT HE WAS WITHHOLDING, IT WAS
A SCAM BECAUSE HE WAS TOLD AHEAD
OF TIME.
THEY ALL MET IN SECRET BEFORE
THIS PROCESS BEGAN AND SAID YOU
GUYS, THE LEGISLATORS AND THEIR
LAWYERS TOLD THE POLITICAL
OPERATIVES YOU CAN'T BE INVOLVED
IN THE PROCESS.
YOU DON'T HAVE A SEAT AT THE
TABLE.
IF YOU'RE INVOLVED, WE HAVE BAD
INTENT PROBLEMS.
YOU'VE GOT TO STAY OUT.
AND THE CONVERSATION, WE KNOW
FROM DEPOSITIONS, WENT BEYOND
THAT.
HOW CAN WE HIDE OR INVOLVEMENT?
>> WHEN DID THAT HAPPEN?
>> THAT HAPPENED BEFORE THE
REDISTRICTING PROCESS BEGAN.
>> BEFORE--
>> AFTER THE AMENDMENTS WERE
PASSED.
>> AFTER THE AMENDMENTS WERE
PASSED BUT BEFORE THE PROCESS
ACTUALLY BEGAN.
>> RIGHT.
BEFORE THE LEGISLATIVE HEARINGS
AND ALL OF THAT AND HOW THEY
WERE GOING TO GO ABOUT IT.
AND SO WE KNOW THAT THERE WERE
DISCUSSIONS ABOUT HOW DO WE HIDE
THIS.
WE CAN'T DO IT OPENLY, HOW DO WE
HIDE IT.
AND WE KNOW THAT THE RECORDS OF
ALL OF THAT HAVE BEEN DESTROYED.
THE LEGISLATURE HAS DESTROYED
THE RECORDS THAT IT KEPT ABOUT
ALL OF THIS, SO WE DON'T KNOW
WHAT'S IN THOSE RECORDS.
SO WE'RE FORCED TO GO WITH

CIRCUMSTANTIAL EVIDENCE.
>> COULD I GO BACK TO THE WAIVER ISSUE?
>> SURE.
>> IS IT CORRECT THAT THE WAIVER ISSUE WAS RAISED BEFORE JUDGE I LEWIS, AND HE DECIDED THAT THERE WASN'T A WAIVER?
>> UM, HE REJECTED-- HE NEVER MADE A FINDING THERE WASN'T WAIVER, AND I THINK HE GAVE THEM EVERY BENEFIT OF THE DOUBT--
>> HE AT LEAST IMPLICITLY REJECTED--
>> THAT'S RIGHT.
>> YOU AGREE WE WOULD HAVE TO FIND THAT WAS AN ABUSE OF DISCRETION ON JUDGE LEWIS' PART, TO DECIDE THIS CASE ON THE BASIS OF THE WAIVER.
>> YEAH, I-- NOW, THAT MAY BE.
>> IS THAT CORRECT?
>> I THINK, ULTIMATELY, IF HE DENIES OUR MOTION FOR REHEARING AND WE APPEAL AND WE'RE UP THERE, THE ANSWER IS CORRECT.
I THINK-- AND YOU MAY BE, I DON'T WANT TO SPLIT HAIRS HERE, BUT IT'S THE TIPSY COACHMAN RULE.
>> I UNDERSTAND.
>> I THINK THE QUESTION BEFORE YOU IS DOES THE RECORD ESTABLISH AS A MATTER OF LAW WAIVER.
IF IT ESTABLISHES IT AS A MATTER OF LAW, THEN IT IS AN ABUSE OF DISCRETION BECAUSE NO REASONABLE TRIAL JUDGE COULD DO SOMETHING THAT THE LAW SAYS YOU CAN'T DO.
>> WELL, BUT TO THE EXTEMPT THAT THE LAW DOESN'T HAVE SOME TOTALLY INFLEXIBLE RULE ABOUT WAIVER, AND IF THERE WAS A TOTALLY INFLEXIBLE RULE, I DON'T UNDERSTAND WHY WE WOULD HAVE AN ABUSIVE DISCRETION STANDARD.
THAT WOULDN'T MAKE SENSE.
SO I THINK WE'D HAVE TO CONCLUDE THAT BASED ON ALL THE CIRCUMSTANCES THAT JUDGE LEWIS WAS LOOKING AT, THAT NO REASONABLE TRIAL COURT JUDGE, NO RATIONAL TRIAL COURT JUDGE COULD HAVE MADE THE DECISION THAT HE

MADE TO THE FIND THAT THERE WAS
NOT A WAIVER.
IS THAT CORRECT?
>> I THINK SO.
I DON'T WANT TO GO SO FAR AS TO
SAY THAT BECAUSE I THINK WHAT HE
DID WAS NOT REASONABLE IN THE
SENSE OF FINDING THE WAIVER, BUT
IT WAS REASONABLE IN THE SENSE
OF THIS IS AN EXTREMELY
IMPORTANT CASE WITH EXTREMELY
IMPORTANT ISSUES, AND SO HE'S
GIVEN THEM A FEW EXTRA CHANCES.
AND HE SAID, OH, I COULD HOLD
YOU FOR WAIVER, I'M GOING TO LET
YOU GO.
BUT IT KEPT GOING.
IF THAT'S ALL WE HAD WAS JUST
THAT DEPOSITION, I DON'T THINK
THAT WOULD BE AN ABUSE OF
DISCRETION.
>> BUT AT THE END OF THE DAY,
YOUR POSITION-- I DON'T THINK
YOU'VE ARGUED IN YOUR BRIEF, BUT
YOUR POSITION IF YOU'RE GOING TO
PREVAIL ON THIS WAIVER ISSUE--
>> YES.
>> IT WOULD HAVE TO BE THAT
HE DID ABUSE HIS DISCRETION,
ULTIMATELY.
>> WELL, HIS ULTIMATE RULING WAS
IN OUR FAVOR, SO--
>> BUT ON THE WAIVER ISSUE--
>> YES, YES.
>> ON THE WAIVER ISSUE--
>> YES, HE SHOULD HAVE FOUND
WAFER IMMEDIATELY, ABSOLUTELY.
AND IF HE SHOULD HAVE FOUND
WAIVER AT THE END OF THE
DEPOSITION--
>> AT THE END OF WHAT
DEPOSITION?
>> OR AT THE-- PRIOR TO THE
DEPOSITION.
SO OKAY.
HERE'S THE TIMELINE.
THEY GET A SUBPOENA.
THAT'S WHEN THEY SHOULD HAVE
ASSERTED THE PRIVILEGE.
THEY DON'T.
>> THAT'S BACK IN SEPTEMBER OF
2012.
>> RIGHT.
>> AND THAT WAS CLEARLY WITHIN

THE SCOPE.
>> CLEARLY WITHIN THE SCOPE.
IT'S THE SAME LANGUAGE WE'RE
ARGUING OVER TODAY.
IT HASN'T CHANGED.
SECOND OPPORTUNITY AT THE
DEPOSITION, IF HE SAYS, OH, I
DIDN'T UNDERSTAND WHAT YOU WERE
TALKING ABOUT, THE QUESTIONS
WERE ASKED OF HIM.
IT BECAME CLEAR AT THE
DEPOSITION.
THEY HAD A LAWYER SITTING THERE.
THE LAWYER SAID SOMETHING ABOUT
BE SURE YOU DON'T GIVE ANY TRADE
SECRETS AWAY OR BUSINESS
SECRETS.
DIDN'T SAY ANYTHING ABOUT I
INSTRUCT YOU NOT TO ANSWER
PRIVILEGE CLAIMS.
HE ANSWERED.
HE ANSWERED QUESTIONS.
NOT ONLY DID HE ANSWER ABOUT THE
SUBJECT MATTER, BUT HE ANSWERED
IN A FALSE MANNER.
HE SAID IT WAS JUST FOR FUN.
AND NOW WE'VE SEEN THE DOCUMENT,
AND IT WASN'T JUST FOR FUN.
IT WAS FOR PARTISAN INTENT TO
GET THESE MAPS TO FAVOR HIS
CLIENTS, TO THE GET THEM IN THE
HANDS OF STRAW PEOPLE.
THEY CALL THIS GRASSROOTS.
IT'S A JOKE.
TO GET THIS IN THE HANDS OF
STRAW PEOPLE WHO WOULD THEN SAY,
OH, I'M AN INTERESTED CITIZEN,
HERE'S MY MAP.
>> WELL, IN THE RESPONSE TO THE
SUBPOENA, WHAT OBJECTIONS WERE
MADE, IF ANY, TO THE PRODUCTION
OF DOCUMENTS?
>> SO NONE WERE MADE TO THE
SUBPOENA TO MR. BAINTER, AND HE
TESTIFIED AT HIS DEPOSITION, AND
HE SAID, OH, I DIDN'T BRING ALL
THE DOCUMENTS, I ONLY PRINTED UP
E-MAILS AND WE'RE SHOWING HIM E
E-MAILS THAT SHOW THERE'S AN
ATTACHMENT, HE DIDN'T PRODUCE
THE ATTACHMENT.
HE SAID, OH, I DIDN'T GET THE
ATTACHMENTS, AND I DIDN'T ASK
EVERYBODY TO SEARCH.

HE SAID I'VE SEARCHED MY
COMPUTER, THE SERVER FOR MY
BUSINESS AND MY HOME COMPUTER,
BUT THERE'S SOME OTHER COMPUTER
PEOPLE WHO KNOW MORE.
>> WHAT LEGAL OBJECTIONS
WERE MADE?
>> NONE.
NONE AT THAT TIME.
>> NO OBJECTION ON THE BASIS
OF BURDENSOME?
NO PRIVILEGE, NO NOTHING?
>> NOT TO THAT ONE.
SO WE DO A FOLLOW-UP--
>> AND THAT INCLUDED DISCOVERY
OF THESE DOCUMENTS.
>> YES.
CORRECT.
THEN AFTER THAT WE DID NEW
SUBPOENAS TO DATA TARGETING
DIRECTLY, THE CORPORATION, AND
TO THE OTHER NONPARTY EMPLOYEES
HERE WITH THE SAME DOCUMENT
REQUEST.
THAT'S WHEN THE FIRST TIME ANY
OBJECTION IS MADE, AND IT'S AN
OBJECTION ON RELEVANCE
AND BURDEN.
NOTHING ABOUT THE FIRST
AMENDMENT, NOTHING ABOUT TRADE
SECRETS.
AND SO THEY ASSERT THAT, THEY
LITIGATE IT IN FRONT OF JUDGE
LEWIS, AND HE SAYS, NO, THIS IS
RELEVANT, YOU NEED TO
PRODUCE IT.
I'LL HEAR YOU IF YOU WANT TO
TALK ABOUT THE COSTS OF IT, BUT
YOU'RE GOING TO HAVE TO
PRODUCE IT.
THEY SAID, BECAUSE THEY
RECOGNIZED WHAT OF TO DO TO PRI
SERVE A PRIVILEGE AND NOT WAIVE
IT, THEY SAID, JUDGE, WILL YOU
PLEASE STAY THIS RULING SO WE
CAN GO TO THE FIRST DCA AND
SECRETER?
AND JUDGE LEWIS SAID, NO, I'M
NOT GOING TO.
YOU CAN ASK THE FIRST DCA TO DO
THAT.
SO THEY FILE THEIR CERT POSITION
BEFORE PRODUCING DOCUMENTS TO
THE FIRST DCA.

THAT DOESN'T SAY ANYTHING ABOUT
PRIVILEGE, FIRST AMENDMENT--
ANY PRIVILEGE.
>> OR TRADE SECRETS.
>> NOR TRADE SECRETS.
>> COULD YOU JUST ON THAT ONE
BECAUSE THAT'S SOMETHING MAYBE
JUDGE LEWIS WOULDN'T NECESSARILY
BE LOOKING AT.
AS, YOU KNOW, AS THE APPELLATE
COURT.
I, AND I'M NOT SURE I CAN FIND A
CASE ON IT, BUT WHEN YOU NOW
HAVE A BROAD SUBPOENA AND YOU'RE
NOW TRYING NOT TO PRODUCE IT AND
YOU'RE GOING TO GIVE THE
APPELLATE COURT THAT THIS IS A
DEPARTURE FROM THE ESSENTIAL
REQUIREMENTS OF LAW AND
IRREPARABLE HARM, SHOULDN'T--
AND I KNOW THIS IS A FRIENDLY
QUESTION, BUT I WANT TO
UNDERSTAND.
SHOULDN'T THAT, ANY PRIVILEGE
THEN BE AT LEAST PUT IN--
>> ABSOLUTELY.
AND THAT'S WHY IT WAS AN ABUSIVE
DISCRETION BY THIS TIME.
EVEN IF IT WASN'T--
>> THAT'S ALMOST NOT, IT'S LIKE
IT'S WAIVER BECAUSE OUR LAW ON
CERT IS A LITTLE BIT, IT MIGHT
BE HARD FOR A TRIAL COURT TO--
BECAUSE THE DENIAL DIDN'T OCCUR
UNTIL JULY.
SO I'M NOT REALLY, TO ME,
LEGALLY IT'S AT THAT POINT OR
JUST CIRCUMSTANTIALLY WHAT IS
THE POSSIBLE REASON THAT THAT
PRIVILEGE IS NOT ASSERTED THIS
THAT PETITION?
>> THERE'S NO POSSIBLE REASON.
HE'D ALREADY BEEN DEPOSED.
HE KNEW WHAT THE QUESTIONS WERE
ABOUT.
>> BUT COUNSEL STOOD HERE THIS
MORNING AND TOLD US THAT THEY
STILL DIDN'T KNOW WHAT THE
DOCUMENTS WERE.
>> I KNOW HE TOLD YOU THAT, AND
I DON'T KNOW WHAT'S IN HIS HEART
WHEN HE TOLD YOU THAT, BUT HIS
CLIENT SURE KNEW.
LOOK AT THESE, LOOK AT THESE

E-MAILS.
HIS CLIENT TESTIFIED UNDER
DEPOSITION UNDER OATH PRIOR TO
AND IN THE TRIAL I DON'T
REMEMBER ANY OF THIS, I DON'T
KNOW WHY I DID ANY OF THIS.
I DON'T KNOW WHY I SAID THIS.
I DON'T KNOW WHO I WAS SAYING
WHEN I SAID SUBMIT IT TO THE
FOLKS IN TALLAHASSEE.
THAT'S NOT CREDIBLE.
IT'S NOT CREDIBLE.
JUDGE LEWIS FOUND IT WASN'T
CREDIBLE WHEN HE SAW THESE
DOCUMENTS, AND HE CLEARLY FOUND
IT WASN'T CREDIBLE AT TRIAL WHEN
HE ENTERED HIS FINAL JUDGMENT.
>> YOU PROBABLY WANT-- SINCE
YOU HAVE A SHORTENED TIME, TEN
MINUTES FOR THE-- I JUST WANT
TO MAKE SURE, AGAIN, THE FIRST
AMENDMENT.
>> YEAH.
I DO WANT TO GET INTO IT, BUT
I'VE GOT TO FINISH THE WAIVER.
IF THE OPINION IS DECIDED ON
FIRST AMENDMENT GROUNDS, THEY'VE
TAKEN US TO THE SUPREME COURT OF
THE UNITED STATES, AND WE'VE GOT
MORE DELAY.
AND THERE'S NO NEED.
YOUR OWN PRECEDENT SAYS FIRST
RULE OF JUDICIAL RESTRAINT,
DON'T DECIDE A CONSTITUTIONAL
QUESTION IF YOU DON'T HAVE TO.
YOU DON'T HAVE TO BECAUSE YOUR
PROCEDURAL LAW ARES MAKE CLEAR
THERE WAS WAIVER.
AND THE WAIVER WASN'T JUST FROM
THE CERT PETITION.
SO THE FIRST DCA DENIED A STAY
AND ULTIMATELY DENIED CERT.
>> NOW, YOU DO AGREE THAT OUR
APPELLATE JURISDICTION,
JURISPRUDENCE ESTABLISHES THAT A
DENIAL OF CERT IS NOT RACE
JUDICATA ON ANYTHING.
>> CORRECT.
>> AND IT STANDS FOR NOTHING.
>> RIGHT.
I THINK THAT'S RIGHT.
>> WELL, IT WOULD DEPEND ON
WHETHER IT SAYS SOMETHING ON THE
MERITS.

>> WELL, I'M SAYING-- AGREEING ASSUMING IT SAYS NOTHING ON THE MERITS, IT'S A DENIAL 6789.
>> YOU'RE RIGHT.
>> IT'S NOTHING.
>> I DON'T KNOW THAT IT'S NOTHING.
>> WELL--
>> THAT WAS YOUR CHANCE TO LITIGATE YOUR PRIVILEGE.
>> WELL, IS THERE A CASE THAT SAYS THAT IS SOMETHING?
>> I THINK THERE ARE CASES THAT SAY SAY IF YOU DON'T ASSERT PRIVILEGE WHEN YOU'RE-- I THINK IT'S JUST A BASIC PRINCIPLE OF LAW.
BUT EVEN THEN, STAY WAS DENIED, THEY WERE ORDERED TO PRODUCE THESE DOCUMENTS BY, I THINK, APRIL 24TH, AND ON THE DAY IT WAS DUE, THEY DIDN'T PRODUCE THEM.
THEY FILED SOMETHING SAYING WE HAVE THEM, WE'VE REVIEWED THEM FOR PRIVILEGE.
A FEW PAGES OF THE DOCUMENTS ARE PRIVILEGED.
WE'RE WORKING ON A PRIVILEGE LOG, BUT WE'RE NOT GOING TO GIVE ET TO YOU BECAUSE WE THINK THAT JUDGE LEWIS SHOULD ORDER YOU TO PAY US $50,000 FIRST.
SO WE MOVED FOR CONTEMPT, AND THEY WERE HELD IN CONTEMPT.
AND THEY WERE SAID YOU'VE GOT TO PRODUCE THOSE.
AND IN 24 HOURS WE WENT FROM WE'VE BEEN WORKING ON THIS PRIVILEGE LAW OF ALL THIS TIME SEARCHING ALL THESE DOCUMENTS AND A FEW PAGES OF THESE DOCUMENTS ARE GOING TO BE PRIVILEGED, AND WE'RE GOING TO PRODUCE A BUNCH OF DOCUMENTS.
WE WENT FROM THAT TO THEY GAVE US A FEW PAGES OF DOCUMENTS, AND THEY GAVE US THE MOST RIDICULOUS PRIVILEGE LOG YOU'LL EVER SEE.
IT DOESN'T IDENTIFY ANYTHING.
IT'S JUST ONE PAGE, AND IT JUST SAYS NOW FOR THE FIRST TIME EVER THEY'VE RAISED FIRST AMENDMENT.
THEY DIDN'T RAISE IT WHEN WE HAD

THE CONTEMPT HEARING.
THEY JUST SAID WE HAD SOME PRIVILEGES, AND JUDGE LEWIS PUSHED THEM, AND HE SAID IT'S NOT RELEVANT.
I'VE ALREADY RULED ON THAT.
BUSINESS SECRETS.
THE NEXT DAY THEY FILED SOMETHING, THEY WITHHOLD ALMOST ALL OF THE DOCUMENTS, AND THEY SAY IT'S FIRST AMENDMENT PRIVILEGE FOR THE FIRST TIME.
THEY DON'T EXPLAIN WHAT IT IS, THEY NEVER DID.
WE MOVED FOR CONTEMPT AGAIN.
THEY SAID WE DON'T HAVE TO PRODUCE A PRIVILEGE LOG.
HE SAYS THEY DIDN'T PUTS THE CASE IN THE BRIEF, HE DID.
IT'S 620.
THEY RELY ON A FOURTH DCA CASE WHICH INTERPRETS THE RULES OF CIVIL PROCEDURE TO NOT REQUIRE A PRIVILEGE LOG.
WE THINK THAT'S WRONG.
WHEN IT SAYS PARTY THERE, IT MEANS PARTY TO THE DISCOVERY REQUEST.
BUT REGARDLESS, EVEN IF IT'S RIGHT, IT WAS JUDGE LEWIS.
HE SAYS IF YOU WANT TO ASSERT THIS, YOU'VE GOT TO GIVE A PRIVILEGE LOG.
AND SO THEY DID AN AMENDED PRIVILEGE LOG WHICH WAS NO BETTER.
IT WENT A LITTLE BIT INTO MORE DETAIL ON TRADE SECRETS DOCUMENT BY DOCUMENT, BUT ON THE FIRST AMENDMENT IT JUST SAID WE TALKED TO SOME PEOPLE.
YOU ALREADY KNOW THESE NAMES, YOU DON'T KNOW THE OTHER NAMES, AND WE'RE NOT GOING TO TELL YOU.
DOESN'T SAY ANYTHING ABOUT THE SUBSTANCE OF THE COMMUNICATIONS.
A CORRECT PRIVILEGE LOG WOULD HAVE SAID AND WOULD HAVE OBVIATED PROBABLY EVEN THE NEED TO GET THE DOCUMENTS.
IF THEY FILED A PRIVILEGE LOG THAT SAYS WE'RE WITHHOLDING THE DOCUMENTS THAT SHOW HOW WE CREATED OUR MAPS AND SENT THEM

TO THE LEGISLATURE THROUGH SHELL
PEOPLE OR THROUGH PUBLIC PEOPLE,
IF THEY HAD SAID THAT, THEN WE
DON'T EVEN REALLY NEED TO GET
INTO THE DETAILS SO MUCH.
BUT THEY DENIED THAT.
AND THEY DIDN'T PUT ANY OF THAT
IN THE PRIVILEGE LOG.
AND IT TOOK SOMEBODY GOING
THROUGH THE DOCUMENTS.
NOW, THERE WAS A SPECIAL MASTER.
OBVIOUSLY, A LEARNED, FORMER
JUSTICE OF THIS COURT WAS THE
SPECIAL MASTER.
HE DECIDED THE ISSUE ON THE
LEGAL ARGUMENTS, THE GENERIC
LEGAL ARGUMENTINGS.
HE DEPARTMENT REALLY GET INTO
THE DOCUMENTS.
HE SAID HE ONLY GAVE THEM A
CURSORY REVIEW, AND IN FAIRNESS
TO HIM, HE DIDN'T HAVE THE SAME
BACKGROUND ABOUT THE NATURE OF
OUR CLAIMS AND WHAT WAS GOING ON
HERE.
SO WHEN JUDGE HUE BYES LOOKED AT
THESE DOCUMENTS IN CAMERA, I
MEAN, JUST LOOK AT THE
DOCUMENTS.
WE GO TOO MUCH ABOUT THE
SUBSTANCE IN OUR BRIEFS, AND I'M
NOT GOING TO SAY ANYTHING ABOUT
IT HERE BECAUSE WE HAVE THIS
ORDER IN PLACE, BUT IT'S
LAUGHABLE.
IT'S LAUGHABLE.
THESE DOCUMENTS, THESE ARE
E-MAILS THAT SHOW EXACTLY WHAT
WE SAID THEY WOULD SHOW.
AND IT WAS, YOU KNOW, READ
THE-- IF YOU WANT TO SEE
EXACTLY HOW IT WAS RELEVANT,
READ HOW IT CAME OUT AT TRIAL.
IT WAS ABSOLUTELY DEVASTATING.
>> MR. MILLS, TIME IS UP.
>> COULD I JUST HAVE AN EXTRA
MINUTE JUST TO ADDRESS THE--
OKAY.
I DON'T THINK YOU NEED TO GET
THERE, AND, OBVIOUSLY, THE
BALANCING WEIGHS IN OUR FAVOR.
BUT THERE CAN'T BE A FIRST
AMENDMENT RIGHT TO PETITION THE
GOVERNMENT IN A CORRUPT MANNER.

THIS ISN'T PETITIONING THE
GOVERNMENT TO REPEAL THESE
AMENDMENTS, IT'S TO VIOLATE
THEM.
NO, THERE'S NO FIRST AMENDMENT
PRIVILEGE TO BRIBE A PUBLIC
OFFICIAL.
>> WELL, BUT CAN THERE BE A
FIRST AMENDMENT PRIVILEGE TO
PETITION ANONYMOUSLY?
>> TO PETITION LEGIT MAY TALLY,
YES.
NOT TO SOLICIT A BRIBE
ANONYMOUSLY.
>> OBVIOUSLY NOT.
WHAT WENT ON HERE ACCORDING TO
WHAT THEY'VE ALLEGED-- AND,
AGAIN, WE DON'T HAVE THE WHOLE
RECORD IN A LOT OF THIS.
A LOT OF THINGS YOU ASSERT IN
THE BRIEF THERE ARE NO RECORD
CITATIONS, SO WE'RE SOMEWHAT
HAMPERED BECAUSE WE'RE LOOKING
AT THIS IN ISOLATION TO SOME
EXTENT.
BUT PEOPLE DON'T HAVE A FIRST
AMENDMENT RIGHT TO ANONYMOUSLY
PETITION?
>> THEY DO.
IT DEPENDS ON WHAT IT IS.
YOU DON'T HAVE ANONYMOUS RIGHT
TO PETITION TO ACCEPT A BRIBE,
YOU AGREE WITH ME THERE.
AND I WOULD SUBMIT YOU DON'T
HAVE A FIRST AMENDMENT RIGHT TO
PETITION THE GOVERNMENT TO DO A
POLITICAL GERRYMANDER, TO PUT A
MAP WHOSE SOLE PURPOSE IS TO
FAVOR A PARTY, SOMETHING THAT IS
PROHIBITED BY CONSTITUTION.
>> WELL, YOU WOULDN'T HAVE--
YOU'VE GOT A FIRST AMENDMENT
RIGHT TO-- SO THERE'S A
CONTENT-BASED ELEMENT TO THAT.
THE DEMOCRATIC PARTY, THE
REPUBLICAN PARTY WOULD HAVE A
RIGHT OR REPUBLICAN OR
DEMOCRATIC INDIVIDUALS,
INDEPENDENT, THEY'VE GOT A RIGHT
TO ADVOCATE FOR SOMETHING THAT
WOULD REACH A PARTISAN RESULT.
FIRST AMENDMENT WOULD GIVE THEM
THAT RIGHT, WOULDN'T IT?
>> NOT, NOT IN AN ILLEGAL

MANNER--
>> THAT'S THE WHOLE--
>> WHAT DO YOU MEAN "ILLEGAL MANNER"?
I DON'T UNDERSTAND THAT.
WHAT'S THE ILLEGAL MANNER?
>> REASONABLE PEOPLE CAN DISAGREE, AND I THINK JUSTICE HARDING AND JUDGE LEWIS AGREED WITH YOU.
I WOULD RESPECTFULLY SUBMIT THAT THE PRIVILEGE, FOR THERE TO BE A PRIVILEGE, YOU HAVE TO LOOK AT IT NOT JUST PETITIONING BROADLY, BUT PETITIONING TO DO WHAT?
>> BUT HERE'S THE CONCEPTUAL PROBLEM I'M STRUGGLING WITH.
THE AMENDMENT TO THE CONSTITUTION THAT IS THE SOURCE OF ALL THIS CONTROVERSY HAS TO DO WITH THE INTENTION OF THE LEGISLATURE.
CORRECT?
>> RIGHT.
>> AND, BUT YOUR THEORY ABOUT ALL OF THIS THAT I'M SEEING HERE NOW HAS TO DO WITH THE INTENT OF INDIVIDUALS WHO SECRETLY OR ANONYMOUSLY OR SURREPTITIOUSLY OR MAYBE UNDER FALSE PRETENSES SUBMITTED SOMETHING TO THE LEGISLATURE.
>> PURSUANT TO TO A PLAN TO DO THAT WHICH IS PROHIBITED, WHICH THEY KNOW THEY CANNOT DO.
THE CONSTITUTION SAYS YOU CAN'T DO IT.
>> WHO'S PLAN THOUGH?
>> THE PLAN OF THE LEGISLATORS AND THE POLITICAL OPERATIVES WHO MET BEFORE THIS PROCESS BEGAN.
>> SO YOU TIE THIS TO APRE-MEETING WHERE THIS PLAN WAS ESTABLISHED.
>> YES.
>> THIS IS CARRYING OUT THAT PLAN THAT IS ILLEGAL.
>> YES.
>> AND WHERE IS THAT IN TO OUR RECORD?
>>S ARE THAT IN-- MR.HEFFLEY'S DEPOSITION, IT'S THE DEPOSITION, IT'S IN-- WE CITE IN OUR CORRECTED ANSWER BRIEF-- I

BELIEVE WE GO THROUGH IT ON
GETTING ON PAGES 19, AND I THINK
IT'S GOT CITATIONS TO THE
RECORD.
KELLY DEPOSITION, PAGES 19-24
WHAT I WOULD--
>> 19-24 OF YOUR--
>> OF OUR ANSWER BRIEF WHICH WAS
FILED BEFORE THE TRIAL BEFORE
ANY OF THIS TESTIMONY CAME IN.
I THINK WE DID DROP A FOOTNOTE.
A LITTLE BIT HAD COME IN AS
TESTIMONY, AND WE DROPPED A
FOOTNOTE AND SAID NOW IT'S BEEN
CROP CORROBORATED BY--
>> IN THOSE PAGES OF YOUR BRIEF,
YOU WILL SHOW RECORD.
THAT CITES TO THE PORTIONS OF
THE RECORD THAT WOULD
SUBSTANTIATE THAT.
>> YES, DEPOSITION.
IT'S AN PRESENCE.
THEY DON'T SAY, OH, YES, WE
AGREED-- THEY GET PRETTY CLOSE
TO SAYING.
THEY SAID WE KNEW WE COULDN'T DO
IT, AND WE WANTED TO-- BUT,
YEAH, WE'RE DRAWING SOME
INTRENDS FOR INSTANCES.
THEY DESTROYED THE EVIDENCE OF
WHAT HAPPENED.
THIS ISN'T A FISHING EXPEDITION.
THIS ISN'T, OH, WE BET THERE'S
SOMETHING THERE.
WE HAD GOOD REASON.
THE JUDGE KNEW IT.
HE HAD THESE DEPOSITIONS, AND
WHEN HE LOOKED AT THESE E-MAILS,
LOOK AT THE E-MAILS.
THEY SHOW THAT THAT'S EXACTLY
WHAT HAPPENED.
>> OKAY.
>> THANK YOU.
>> I'LL GIVE YOU SOME EXTRA
TIME, OBVIOUSLY.
>> GOOD MORNING, YOUR HONORS, MY
NAME IS DEANNA SHULMAN, I'M HERE
TODAY ON BEHALF OF THE AMICUS
CURIAE, STATE AND LOCAL MEDIA
ORGANIZATION, THANKING THIS
COURT FOR ALLOWING THEM TO
PARTICIPATE IN ORAL ARGUMENT
TODAY.
THEY APPEAR TODAY, YOUR

HONORS, AND IN OUR BRIEF TO
ADDRESS A VERY SMALL SUBSET THE
PARTIES ARE DISPUTING, AND THAT
IS THE 31 PAGES OF DOCUMENTS
ADMITTED INTO EVIDENCE BEFORE
THE TRIAL COURT.
THEY HAVE AN INTEREST IN
ASSERTING FOR THEMSELVES AS WELL
AS SURROGATES FOR THE PUBLIC THE
RIGHT OF ACCESS TO EVIDENCE AND
PROCEEDINGS IN THE TRIALS OF
THIS STATE.
THOSE RIGHTS OF ACCESS ARE
DEEPLY INGRAINED, OBVIOUSLY, IN
THE JURISPRUDENCE OF THIS COURT.
FORTY YEARS AGO A MIAMI HERALD
PUBLISHING COMPANY VERSUS
McINTOSH, THIS COURT
ACKNOWLEDGED THE VITAL ROLE THAT
THE PRESS PLAYS IN INSURING AND
SECURING FOR THE PUBLIC THE
RIGHT TO THE KNOW WHAT GOES ON
IN A COURTROOM, WHETHER THAT
PROCEEDING BE CIVIL OR CRIMINAL.
THOUGH THE McINTOSH COURT WAS
ADDRESSING A PRIOR RESTRAINT,
THE COURT NOTED A FUNDAMENTAL
RIGHT OF ACCESS TO JUDICIAL
PROCEEDINGS.
IN THE WORDS OF THIS COURT, STAR
CHAMBER JUSTICE IS TO BE
AVOIDED.
PROCEEDINGS SHOULD BE OPEN AND
ACCESS LARGELY UNRESTRICT ARED.
IN BARRON V. FLORIDA FREEDOM
NEWSPAPERS, THIS COURT CONFIRMED
ITS COMMITMENT TO ACCESS TO
CIVIL PROCEEDINGS FOR ALL THE
SAME REASONS THAT HISTORICALLY
CRIMINAL TRIALS HAD BEEN OPENED.
FIRST, ACCESS IMPROVINGS THE
QUALITY OF THE TESTIMONY.
IN THIS VERY CASE THERE IS AN
EXAMPLE IN JUDGE LEWIS' JULY
10TH FINAL JUDGMENT WHERE HE
SAYS THAT EVEN UNDER PRESSURE
THE TESTIMONY GIVEN BY THESE
NONPARTIES IN THE CLOSED
PROCEEDING, THEY EVADED THE
QUESTIONS, THEY AVOIDED
ANSWERING, THEY DIDN'T WANT TO
ANYTIME WHAT THEY HAD DONE--
ADMIT WHAT THEY HAD DONE.
THOSE PROCEEDINGS WERE HEARD IN

SECRET, SO WE DON'T KNOW WHETHER
THE SUNSHINE WOULD HAVE
DISCOURAGED THAT KIND OF HEARING
JUDGE LEWIS SAID HE FACED.
THE LAWYERS, THE JURORS, THE
WITNESSES AND EACH THE JUDGES
WHEN SUBJECT TO PUBLIC SCRUTINY
ARE DISINCLINED TO MISBEHAVE.
>> DOES THIS CASE SEEM TO HAVE A
LITTLE UNUSUAL TWIST, AND THAT
IS WE HAVE ALMOST PARALLEL
PROCEEDINGS.
AND WE'RE TALKING THIS MORNING
ABOUT WHAT IF WHATEVER'S GOING
ON WITH THIS ISSUE REALLY HAS
NOTHING TO DO WITH THE FINAL
JUDGMENT THAT'S BEEN ENTERED IN
THE CASE?
AND A JUDICIAL TRIBUNAL WOULD
DECIDE, YES, THESE ARE
PRIVILEGED DOCUMENTS.
WHERE WOULD THAT LEAVE US?
WOULD THE NEWS MEDIA BE ENTITLED
TO PRIVILEGED DOCUMENTS THAT
WILL NOT IN SOME WAY AVOID OR
AFFECT OR IMPACT A FINAL
JUDGMENT?
>> NO, YOUR HONOR.
THE CITIZENS HAVE A RIGHT TO
DETERMINE FOR THEMSELVES, TO
MONITOR THE LEGISLATURE AND THE
JUDICIARY IN THE PERFORMANCE OF
ITS DUTIES.
>> SO THEY WOULD HAVE THE RIGHT,
I MEAN, YOU HAVE THE RIGHT TO
CLAIM-- YOU STILL HAVE TO GIVE
US THOSE DOCUMENTS EVEN THOUGH
THE LAW SAYS THEY'RE PRIVILEGED.
>> THAT'S RIGHT, AND THIS
COURT--
>> AND WHAT'S THAT BASED ON,
JUST THE POLICY THAT EVERYONE
SHOULD KNOW?
>> WELL, THE CAT IS OUT OF THE
BAG, SO TO SPEAK--
>> WELL, NOT TO THE WHOLE WORLD.
I MEAN, THAT'S WHY THIS IS
UNUSUAL.
>> WELL, AS THIS COURT SAID IN
BARON, THE RIGHT ONCE IT
ATTACHES CONTINUES THROUGHOUT
TRIALS AND JUST AS THE PUBLIC
HAS A RIGHT TO DETERMINE WHETHER
THE TRIAL COURT WAS CORRECT IN

ADMITTING THE EVIDENCE, IT HAS A
RIGHT TO DETERMINE WHETHER THE
TRIAL COURT WAS WRONG.
AND IN THIS PARTICULAR CASE--
>> WELL, THAT WOULD BE THE CASE
IN IN ANY PRIVILEGE CASE.
I'M NOT SO, I'M NOT
UNDERSTANDING THIS BROAD
ARGUMENT THAT YOU'RE MAKING.
THERE WOULD BE NO PRIVILEGE
THEN, IF A PRIVILEGE MATTER IS
EVER RULED UPON BY A TRIAL
COURT, THEN THE NEWS MEDIA SO IT
COULD DISTRIBUTE IT TO PUBLIC IS
ENTITLE TODAY THAT INFORMATION.
THAT'S WHAT YOUR ARGUMENT'S
SAYING.
>> THIS COURT MUST ALWAYS
BALANCE UNDER BARRON, SO WHAT
THIS COURT WOULD DO-- I'M NOT
ARGUING FOR AN ABSOLUTE RIGHT OF
ACCESS TO THESE RECORDS SIMPLY
BECAUSE THEY WERE ADMITTED INTO
EVIDENCE, BUT WHAT THIS COURT
HAS TO DO IS BALANCE THE
INTEREST ASSERTED AS SET FORTH
WITH BARRON AND MAKE A
DETERMINATION WHETHER UNDER THE
FACTS OF THIS CASE THAT BALANCE
TIPS IN FAVOR OF ACCESS--
>> SO YOU'RE NOT ARGUING FOR
JUST A BLANKET PRINCIPLE.
>> NO, ABSOLUTELY NOT, YOUR
HONOR.
THE PRINCIPLES THAT SUPPORT
ACCESS ARE NOT ABSOLUTE.
THEY ALWAYS REQUIRE THE
BALANCING THAT THIS COURT
ESTABLISHED IN BARRON AND LATER
IN 2.420 WHICH REFLECTS THE
BARRON STANDARD.
>> HAS THAT COURT EVER ORDERED
RELEASE OF PRIVILEGED DOCUMENTS
IN A CASE THAT, UNDER THE THEORY
THAT THE PUBLIC'S ENTITLED TO
EVALUATE THE JUDGMENT OF THAT
JUDGE?
>> NOT IN THE CONTEXT OF A
DISCOVERY DISPUTE, YOUR HONOR,
WITH RESPECT TO WHETHER
DOCUMENTS WERE PRIVILEGED, BUT
CERTAINLY PRIVILEGED DOCUMENTS
HAVE BEEN RELEASED TO THE PUBLIC
BECAUSE THEY'VE BEEN ADMITTED IN

MANY TRIALS N. CRIMINAL TRIALS
ALL THE MEDICAL RECORDS THAT
RELATE TO THE INJURIES OR THE
DAMAGES IN A MALPRACTICE CASE.
IN LEGAL MALPRACTICE, THE
ATTORNEY/CLIENT PRIVILEGE
DOCUMENTS.
IF THE COURT WERE TO SAY IF WE
FIND ERROR IN ADMITTING THAT
EVIDENCE INTO TRIAL, THEN WE CAN
PUT A CLOUD OVER ACCESS, THEN I
THINK TRIAL COURTS WOULD BE--
PREMISED ON THE IDEA THEY MAY
GET IT WRONG.
>> ISN'T THE ISSUE-- LET'S JUST
GO BACK TO WHAT'S AT ISSUE HERE.
WE HAVE BOTH TRADE SECRETS,
WAIVER-- TRADE SECRETS, FIRST
AMENDMENT.
ON THE TRADE SECRET, IF-- AND
WE DIDN'T REALLY SPEND ANY TIME
ON THIS TRADE SECRET, BUT LET'S
JUST SAY THAT WHAT WAS AT ISSUE
HERE WAS SOME SOFTWARE THEY HAD
DEVELOPED TO DRAW A MAP.
AND THE JUDGE HAD SAID, OKAY, IT
IS TRADE SECRET, BUT IT'S
RELEVANT.
I'M GOING TO LET IT IN.
BUT IT'S GOING TO BE UNDER SEAL.
IN THAT SITUATION BECAUSE THE
RISK IS THE HARM TO THEIR
BUSINESS, THAT WOULD-- YOU
WOULD LOOK AT THAT, WOULDN'T
YOU, AND SAY THAT INTEREST AND
HARM TO YOUR BUSINESS IS,
SUPERSEDES THE RIGHT OF ACCESS.
BUT I THINK THAT'S WHY WE CAN'T
LOOK AT BLANKET RULES.
HERE THIS COURT CLOSED THE
COURTROOM ON THAT BECAUSE WE
WERE TRYING TO PRESERVE THE
STATUS QUO.
BECAUSE WHAT WE HAD UNDERSTOOD
IS THAT THE NONPARTIES HAD SAID
IF THESE DOCUMENTS, THEY WERE
OKAY WITH HAVING THEM, THEY JUST
WANTED IT SEALED, AND JUDGE
LEWIS WOULDN'T SEAL IT.
SO WE WERE COMPLETELY KEEPING
THE STATUS QUO.
BUT NOW WE HAVE TO LOOK AT THAT
TO SAY, WELL, IF IT'S-- FIRST
OF ALL, THE FIRST AMENDMENT

PRIVILEGE THEY'RE ASSERTING EVEN
IF IT'S QUALIFIED-- IT'S NOT AN
ABSOLUTE PRIVILEGE.
AND SO WHAT WOULD YOU SAY WOULD
BE THE TEST IF WE GO-- THERE IS
A FIRST AMENDMENT PRIVILEGE, BUT
WE IN TERMS OF THE NECESSITY FOR
PRODUCTION, THERE WAS A GREATER
REASON BECAUSE OF THE NATURE OF
THIS LAWSUIT TO PRODUCE THEM.
BUT HOW DO WE SAY, YES, THEY
WERE PROPERLY PRODUCED, BUT NOW
WE HAVE TO GO TO-- YOU'RE
SAYING 31.
I THINK WE'RE TALKING 538
DOCUMENTS.
>> YOU HAVE THE RECORD.
THE 31 ADMITTED INTO EVIDENCE.
>> REALLY, IT'S THE 538 THAT
WERE ORDERED PRODUCED.
WHAT IS THE CALCULUS THEN FOR
THE PUBLIC'S VIEW OF TRIALS
VERSUS THE FIRST AMENDMENT AND
THE WAY THAT PERRY WOULD SAY YOU
WOULD DO?
PERRY CASE AS THE NINTH CIRCUIT?
DO YOU UNDERSTAND WHAT I'M
SAYING?
>> YEAH.
YOUR HONOR, IF THE FINDING OF
THIS COURT IS THAT THE FIRST
AMENDMENT RIGHTS OF THE
NONPARTIES DID, THERE IS NOTHING
TO BALANCE AGAINST THE PUBLIC'S
RIGHT OF ACCESS.
THEY HAD A PRIVILEGE, THE
PRIVILEGE YIELDS UNDER PERRY TO
THE GREATER GOOD.
>> SO IN THAT SITUATION FINISH.
>> WHAT'S THE GREATER GOOD.
LET'S MAKE SURE WE'RE NOT
TALKING ABOUT A RUN OF THE MILL
LAWSUIT ABOUT BUSINESS DEALINGS
BECAUSE IT SEEMED TO ME, AND
THIS IS SMACK THAT CAN BE
RESPONDED TO THAT THERE WAS,
THAT KIND OF THE NATURE OF THE
TRADE SECRET WAS I DON'T WANT TO
HAVE TO DO THIS BECAUSE I WANT
TO TO BE INVOLVED IN LITIGATION.
IT WASN'T LIKE THIS WAS EVER
GOING TO BE SOME BUSINESS
PROCESS THAT WE'RE INVOLVED IN.
CAN YOU RELATE HOW THE NATURE OF

THIS LAWSUIT RELATES TO HOW WE
BALANCE THE--
>> SURE.
AS THE TRIAL COURT NOTED.
THIS LAWSUIT GOES TO THE VERY
FOUNDATION OF REPRESENTATIVE
DEMOCRACY.
REGARDLESS OF THE JULY 10TH
JUDGMENT, THE CHARGE MADE WAS
THAT THE PUBLIC'S CONSTITUTIONAL
RIGHT TOSS A FAIR DISTRICTING
PROCESS WERE CIRCUMVENTED BY A
SECRET PARALLEL PROCESS.
NO IRONY LOST IN THE SECRECY
WITH WHICH THAT DETERMINATION
WAS MADE.
BUT WITH RESPECT TO A
TRADITIONAL TRADE SECRET, YOUR
HONOR, THAT IS THE CUSTOMER
LIST, THE BUSINESS FORMULA.
IT'S HARD TO IMAGINE HOW A COURT
AND PROBABLY UNDERSTANDABLE THAT
THE TRIAL COURT DIDN'T
UNDERSTAND THAT IN THE CONTEXT
WHERE THIS DOCUMENT, THE TRIAL
HELD EVIDENCE OF CONSPIRACY.
SO IN THE CIVIL CONTEXT THE
PUBLIC INTEREST IN THIS
PROCEEDING, AS THIS COURT
ACTUALLY NOTED IN ITS MAY 27TH
ORDER, COULD NOT BE GREATER.
THE CHARGE MADE IN THE TRIAL
COURT WAS THAT THE PUBLIC'S
RIGHT TO VOTE HAVE BEEN
UNCONSTITUTIONALLY HINDERED BY
THE ACTS OF THESE NONPARTIES
THROUGH STRAW MEN AND, OF
COURSE, THE PARTIES ARE BETTER.
THEY SEE THE RECORD, I CAN'T SEE
THE RECORD, ARE BETTER ABLE TO
DISCUSS HOW THAT OCCURRED.
AND WITH RESPECT TO THE FIRST
AMENDMENT PRIVILEGE, YOUR HONOR,
THERE IS A BALANCING UNDER
BARRON, JUSTICE LEWIS, AS YOU
AND I HAVE DISCUSSED.
BUT IF A PRIVILEGE HAD YIELD,
THERE IS IN ESSENCE NOTHING TO
BALANCE AGAINST THE STRONG
PRESUMPTION OF ACCESS THAT
REPRESENTATIVES OF THE MEDIA
HAVE AND THE ENTER OF THE PUBLIC
IN THESE VERY IMPORTANT
PROCEEDINGS.

MY TIME HAS EXPIRED, YOUR
HONORS.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENT.
>> COUNSEL, I'M GOING TO GIVE
YOU AN EXTRA FIVE MINUTES.
ABOUT WHAT HE GOT.
>> GREAT, THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT.
LET ME JUST CORRECT ONE
STATEMENT FOR THE RECORD, AND
I'LL READ FROM BROOK HART V.
JANICE, QUOTE: THE QUESTION OF A
WAIVER OF A FEDERALLY-GUARANTEED
CONSTITUTIONAL RIGHT IS, OF
COURSE, A FEDERAL QUESTION
CONTROLLED BY FEDERAL LAW.
STATE PROCEDURAL LAW WOULD NOT
SUPPLEMENT THAT.
IT'S A FEDERAL QUESTION.
SECOND, IT'S BEING THROWN AROUND
WITH GENERALIZATIONS, AND THE
IMMY CASE IS HE MADE FALSE
STATEMENTS, AND IT'S ABSOLUTELY
NOT WHEN YOU LOOK AT THE TEXT.
HE WAS ASKED IF HE DREW MAPS.
HE STARTED DRAWING ONE MAP, HE
NEVER FINISHED.
HE NEVER DREW A MAP TO
COMPLETION.
THAT'S WHAT HE TESTIFIED TO.
HE WASN'T ASKED ABOUT WHAT OTHER
PEOPLE DID OR WHAT OTHER PEOPLE
SUBMITTED.
SO THESE INSINUATIONS THAT HE
MADE FALSE STATEMENTS THROUGH
HIS TESTIMONY ARE
GENERALIZATIONS PUT INTO THIS
GRAND CONSPIRACY CASE BY THE
PLAINTIFFS.
THE SECOND THING I WANT TO POINT
OUT IS MOST OF THE DISCUSSION
WE'VE HAD HERE TODAY IS
EXTRA-RECORD MATERIAL THAT
OCCURRED AFTER MAY 15TH.
NONPARTIES WERE NOT PART OF THE
TRIAL.
THEY WERE NOT BEFORE LEWIS.
AND THE USE OF HIS ORDER AGAINST
THE NONPARTIES IN THIS CASE IS
HIGHLY INAPPROPRIATE.
AND I CITE THE CASE WHERE JUDGE
LEWIS OR JUSTICE LEWIS, 3-D 206
SAID EXPLICITLY THE U.S. OF

EXTRA-RECORD MATERIAL IS
INAPPROPRIATE.
SO INAPPROPRIATE IT'S
SANCTIONABLE CONDUCT AGAINST
ATTORNEYS.
MOREOVER, IN THAT CASE AN AMY
KEY INSERTED NEW EVIDENCE IN
THIS APPEAL.
AND I--
>> WAIT JUST A SECOND--
>> MY CLIENT'S RIGHTS ARE BEING
VIOLATED BY THE CURT LOOKING AT
THAT MATERIAL.
>> EXTRA-RECORD IN THAT CASE
WAS, WHAT WAS THE OPINION
REFERRING TO--
>> REFERRING TO MATERIALS THAT
OCCURRED AFTER THE SECOND DCA
RULING--
>> SO IT WAS NOT, IT WAS IN A
COURT RECORD?
>> IT WAS NOT.
IT WAS AFTER THE SECOND DCA--
>> THAT'S WHAT I'M ASKING YOU,
WAS IT IN A COURT RECORD OR
OUTSIDE THE RECORD?
>> I BELIEVE IT WAS-- I'M NOT
SURE WHERE IT WAS AT-- IT
WASN'T IN THE RECORD BEFORE THE
COURT.
SO IT MIGHT HAVE BEEN IN SOME
SUPPLEMENTARY PROCEEDINGS, BUT
THAT DOESN'T MATTER BECAUSE IN
THIS CASE MAY 15TH IS THE CUTOFF
DEADLINE.
WE DID NOT HAVE RIGHTS TO SHAPE
THE RECORD, TO ASK QUESTIONS, TO
OBJECT, TO COUNTERACT ALL THESE
ACCUSATIONS AND
CHARACTERIZATIONS OF THE SECRET
PROCESS THAT WAS GOING ON.
WE WENT BEFORE JUDGE LEWIS TO
ADVOCATE FOR OUR FIRST AMENDMENT
RIGHTS TO ANONYMOUSLY PETITION
GOVERNMENT.
AND THAT'S WHAT OCCURRED IN THIS
CASE.
I SUBMIT TO THIS COURT IF THE
EXERCISE OF ANONYMOUS POLITICAL
SPEECH BY THE CITIZEN OF THE
STATE OF FLORIDA RESULTS IN THE
LEGISLATURE VIOLATING AMENDMENTS
5 AND 6, AMENDMENTS 5 AND 6 ARE
UNCONSTITUTIONAL UNDER THE U.S.

SUPREMACY CLAUSE BECAUSE THERE'S
NO WAY WHEN 5 AND 6 WAS ADOPTED
THAT THE CITIZENS OF THE STATE
OF FLORIDA OR THAT THIS COURT
INTENDED FOR CITIZENS TO LOSE
THEIR FIRST AMENDMENT RIGHTS TO
ANONYMOUS POLITICAL SPEECH
WHETHER IT BE DEMOCRAT,
REPUBLICAN OR OTHERWISE.
AND THAT'S WHERE WE GET BACK TO
THE CENTRAL ISSUE IN THIS CASE,
LEGISLATIVE INTENT.
IT DOESN'T MATTER THAT THESE
PLAINTIFFS ASKED JUDGE LEWIS,
BASICALLY FRAUD ON THE COURT,
HERE'S A MAP.
IT COMPLIES WITH THE
CONSTITUTION, AND IT WAS DRAWN
WITH DISTRICTS DOWN IN SOUTH
FLORIDA TO FAVOR THE DEMOCRATS.
APPROVE THIS--
>> AND HOW WOULD THIS COME DOWN,
YOUR ARGUMENT?
I'M STRUGGLING WITH THIS CONCEPT
OF IF WE ASSUME THAT, A, IT WAS
A PARTY IN LITIGATION MEETS WITH
B AND THEY HAVE AGREED TO DO
SOMETHING THAT'S-- LET'S ASSUME
IT'S ILLEGAL.
THAT UNDERMINES, IT'S A CRIME.
WHATEVER.
AND SIMPLY BECAUSE B IS NOT A
PARTY THAT B HAS CONSTITUTIONAL
RIGHTS THAT CAN KEEP SECRET THE
CONDUCT THAT IS, THAT
CONSTITUTIONS THE CRIME?
>> THAT'S THE PROBLEM.
WHAT IS THE CRIME IN THIS CASE?
WE HAVEN'T DEFINED THAT.
WHAT'S AT ISSUE IN THIS CASE?
AMENDMENTS 5 AND 6 PREVENT--
>> WELL, IT SEEMS STRANGE THAT
WE ARE ALL AFTER FIVE YEARS OR
WHATEVER OF-- I THOUGHT WE ALL
UNDERSTOOD THAT IT'S A VIOLATION
OF THE CONSTITUTIONAL FROM
VISION THAT PROHIBITS CERTAIN
ACTIVITY.
WE DON'T KNOW THAT NOW?
>> WE DO.
THE CRIME, IF YOU WILL, UNDER
AMENDMENT 5 OR 6 IS FOR A
LEGISLATURE--
>> I UNDERSTAND.

I'M ASSUMING THAT A IS A
LEGISLATOR--
>> IT'S NOT A CRIME--
>>-- AND B MEETS WITH A, AND
THEY COME UP WITH A PLAN, AND B
EXECUTES THE PLAN, THAT THAT IS
VIEWED DIFFERENTLY BECAUSE B DID
NOT ACTUALLY PULL THE TRIGGER
AND CAN'T ENTER THE ACTUAL--
>> THAT ASSUMES IN THIS CASE B
MET WITH A.
AND IN THIS CASE THE DOCUMENTS
CLEARLY SHOW--
>> THEY NEVER MET.
>> MR. BAINTER NEVER HAD ANY
INTERACTIONS WITH THE
LEGISLATURE IN REDISTRICTING.
>> THERE WAS NEVER A MEETING--
>> EVERYTHING WAS SUBMITTED--
>> IT HELPS IF WE CAN GET THE
QUESTION OUT.
>> I'M SORRY, YOUR HONOR.
>> I CAN'T GET AN ANSWER UNLESS
I GET THE QUESTION OUT.
YOU'RE SAYING THERE'S ABSOLUTELY
NO EVIDENCE, NOR IS THERE AN
INFERENCE THAT ANY KIND OF
MEETING OCCURRED BETWEEN ANY
LEGISLATORS, MEMBERS OF THE
LEGISLATURE, AND A PARTISAN
PARTY WITH REGARD TO THIS X NO
EVIDENCE THAT WHAT OCCURRED AND
WHAT WE'RE FIGHTING ABOUT TODAY
WAS PART OF THAT MEETING OR
PURSUANT TO THAT MEETING?
>> NOT WITH MR. BAINTER OR MY
CLIENTS, YOUR HONOR.
MY CLIENTS PARTICIPATED IN THIS
PROCESS JUST AS THEY TOLD HIM IN
THE INITIAL MEETING, THROUGH THE
PUBLIC PORTAL.
GOING TO PUBLIC MEETINGS,
SUBMITTING MAPS THROUGH THE
PUBLIC PORTAL IS JUST LIKE ANY
OTHER CITIZEN.
THAT'S A FIRST AMENDMENT RIGHT.
>> OKAY.
SO WHAT WE'RE ARGUING THEN IS
REALLY THE FINAL JUDGMENT
ITSELF.
>> THAT'S EXACTLY RIGHT WHICH IS
IMPROPER IN THIS CASE.
>> IS AND SO THERE'S NEVER BEEN
AN APPEAL TO THAT FINAL

JUDGMENT--
>> AND WE CAN'T APPEAL IT.
>> I UNDERSTAND.
I'M JUST TRYING TO SEE HOW THIS ALL FITS TOGETHER.
BUT THERE IS A JUDICIAL DETERMINATION THAT SOMETHING ILLEGAL OCCURRED.
>> I DISAGREE ANYTHING ILLEGAL OCCURRED.
>> WELL, I KNOW YOU DISAGREE.
IF ANYTHING ILLEGAL OCCURRED, IT WAS THE LEGISLATORS--
>> I UNDERSTAND IT'S BEEN FOUND WHAT THEY DID, IT'S BEEN DETERMINED THAT THE PEOPLE WHO ARE HERE TALKING TO US TODAY PARTICIPATED IN IT.
>> WE PARTICIPATED IN A PUBLIC PROCESS, EXERCISING FIRST AMENDMENTS THAT TRUMP AMENDMENTS 5 AND 6.
THAT'S THE SUPREMACY ISSUE.
>> HERE'S THE THING AND, AGAIN, I APPRECIATE YOUR ADVOCACY FOR YOUR CLIMATE, AND I DON'T-- I'M TRYING TO FIGURE OUT WHICH ONES, WHICH TESTIMONY WAS IN THE RECORD BEFORE MAY.
BUT THE MAPS THAT ULTIMATELY WERE ADOPTED APPARENTLY WERE SUBSTANTIALLY IDENTICAL.
NOW, YOU'RE SAYING NO, BUT LET ME FINISH.
THE MAPS THAT WERE DRAWN MAYBE NOT PHYSICALLY BY YOUR CLIENT, BUT BY PEOPLE THAT THEY GOT TO SUBMIT THIS.
NOW, THE ARGUMENT HERE-- AND SO WE UNDERSTAND WHAT WE'RE TALKING ABOUT-- NO, EVERY CITIZEN HAS A RIGHT, HAD A RIGHT TO THE SUBMIT MAPS.
AND THE WHOLE IDEA WAS WE SAID, WELL, THIS IS GREAT.
THIS IS A TRANSPARENT PROCESS.
BUT NOW WE FIND OUT THAT SOMEBODY HAS SUBMITTED A MAP, I MEAN, IN SOMEONE'S NAME, AND HE DIDN'T EVEN KNOW THAT THAT MAP-- WHICH ENDED UP BEING THE MAP ADOPTED-- WAS, HAD BEEN SUBMITTED ON HIS BEHALF?
AND THEY ARE PIECING TOGETHER

BECAUSE THE LEGISLATURE AND
OTHER POLITICAL CONSULTANTS
DESTROYED DOCUMENTS.
WHAT HAPPENED?
SO NOW YOU'RE SAYING THAT, NO,
FROM THE OUTSET ALL WE WERE WERE
JUST LIKE THE LEAGUE OF WOMEN
VOTERS AND JUST LIKE EVERY, THE
NAACP, WE HAD A RIGHT TO SUBMIT
MAPS.
BUT WE DECIDED THAT WE DIDN'T
WANT TO SUBMIT THOSE MAPS IN OUR
OWN NAME BECAUSE PEOPLE WOULD
FEEL WE WERE BEING PARTISAN.
SO WE SET SOMETHING UP.
BUT WE'LL ALL HAVE THE
DEPOSITION OF WHAT YOUR CLIENT
FIRST SAID ABOUT WHAT HIS
PARTICIPATION WAS.
AND I THINK THAT'S REALLY WHERE
MY CONCERN COMES, IS THAT I
APPRECIATE HOW YOU'RE NOW
PUTTING THE GLOSS ON THIS, BUT
IT DOESN'T LOOK FOR MONTHS AND
MONTHS AND MONTHS AND MONTHS
BEFORE COURTS OF LAW THAT THAT
WAS WHAT WAS BEING THE CONCERN,
THAT YOU WERE TRYING TO TRAMPLE
ON OUR FIRST AMENDMENT RIGHTS.
SO THAT'S WHY I'LL LOOK
AT THE CASE THAT SAYS IT'S A
MATTER OF FEDERAL LAW.
BUT, TO ME, THAT'S WHERE
MR. BAINTER AND
THE COMPANY, IF THEY
WERE REALLY LEGITIMATE CITIZENS
THAT WERE JUST TRYING TO SUBMIT
A MAP, THEN IT SURE LOOKS LIKE
THEIR CONDUCT EVEN IN DISCOVERY
BELIED THAT THAT'S WHAT WAS
HAPPENING.
>> YOUR HONOR, MR. BAINTER IS A
LEGITIMATE CITIZEN--
>> NO, I THOUGH HE'S, OF COURSE
HE'S A LEGITIMATE CITIZEN.
HE FELT SOMEWHERE THAT HE-- HE
SAID SOMEWHERE THAT HE FELT LIKE
LESS OF A CITIZEN BECAUSE HE
SUBMITTED IT, AND THAT'S ONE
ARGUMENT, THAT'S ALL HE WAS
GOING.
>> EXACTLY.
HE WAS NOT ABLE TO ARGUE TO THE
TRIAL COURT BECAUSE WE WEREN'T

PARTIES TO THE CASE.
THAT'S WHY WE'VE BEEN DENIED DUE PROCESS.
WE WEREN'T ABLE TO TESTIFY, OBJECT, ASK QUESTIONS.
UNANIMITY MATTERS.
IT'S THE FOUNDATION UPON WHICH THIS COUNTRY WAS BORN.
IT MATTERS FOR THE MEDIA AND THEIR CONFIDENTIAL SOURCES, IT MATTERS FOR COURTS WHEN THEY ISSUE OPINIONS ON ISSUES.
>> BUT THERE IS NOT A PRIVILEGE TO BE ANONYMOUS TO IMPROPERLY CONSPIRE WITH OTHERS THAT ARE IN THE LEGISLATURE TO TAKE A PROCESS THAT WAS SUPPOSED TO BE TRANSPARENT AND MAKE IT SECRET.
>> NOTHING WAS IMPROPER, YOUR HONOR.
THERE'S NOTHING IMPROPER ABOUT ANONYMOUS POLITICAL SPEECH FROM A POLITICAL CITIZEN ADVOCATING THEIR EXPRESSIONS.
THERE'S NOTHING IMPROPER ABOUT THAT.
ABSOLUTELY NOTHING.
IF THERE IS, AMENDMENTS 5 AND 6 ARE UNCONSTITUTIONAL BECAUSE THEY OVERTAKE THE SUPREMACY OF THE FIRST AMENDMENT RIGHT.
AMENDMENTS 5 AND 6 CANNOT--
>> I-- OF RIGHTS TO--
>> WAS THIS ARGUMENT, I KNOW--
DID YOU NOT THINK THIS WAS COMING UP?
IS IN THIS YOUR BRIEF THAT AMENDMENTS 5 AND 6 AS APPLIED WOULD BE UNCONSTITUTIONAL?
>> THAT OCCURRED AS A RESULT OF THE JUDGE FINDING OUR INFORMATION HIGHLY RELEVANT TO LEGISLATIVE INTELLIGENT.
>> DID YOU AMEND THE BRIEF TO, HERE TO MAKE THAT ARGUMENT?
>> WE MOVED TO STRIKE THIS EXTRA-RECORD MATERIAL THAT WE'VE BEEN ARGUING ABOUT ALL DAY, AND THAT HAS NOT BEEN RULED UPON BY COURT.
I WOULD LOVE THE OPPORTUNITY TO SUPPLEMENTALLY BRIEF THAT IF THE COURT CONSIDERS IT.
BUT IT'S NOT MY FINAL JUDGMENT

ON JULY 10TH FROM JUDGE LEWIS TO
THE APPEAL, BUT I FEEL LIKE I'M
AT A DISADVANTAGE BECAUSE I
WASN'T ABLE AT THAT TRIAL TO
PARTICIPATE AND SHAPE THE RECORD
AND SHAPE THE EVIDENCE.
AND THAT EVIDENCE ISING WITH
GENERALIZED AND USED AGAINST MY
CLIENT INAPPROPRIATELY AND
IMPROPERLY IN THIS CASE.
AND IT BRINGS US BACK TO THE
WAIVER ISSUE.
YOU CAN CONCLUDE
MR. BAINTER WAIVED ANY KIND OF
OR PRIVILEGE, HE CERTAINLY
DIDN'T WAIVE IT ON BEHALF OF ALL
THE OTHER ASSOCIATION MEMBERS.
HE WAIVEED IT ON BEHALF OF
HIMSELF.
IF YOU EVEN GET THERE.
HE CAN'T WAIVE IT ON BEHALF OF
ALL MEMBERS.
>> WHO'S THE OTHER MEMBERS?
WAIT, WAIT, WHO ARE YOU TALKING
ABOUT?
HIS COMPANY?
AS I UNDERSTAND IT, OTHER
POLITICAL CONSULTANTS TESTIFIED,
EITHER PRODUCED DOCUMENTS OR
DIDN'T.
HE'S THE ONLY ONE THAT IS THE
SUBJECT OF THIS.
SO HE'S NOT ASSERTING IT ON
BEHALF OF SOMEBODY THAT'S OTHER
THAN HIS EMPLOYEES, IS THAT WHAT
YOU'RE TALKING--
>> IF YOU LOOK IN THE RECORD,
THERE WAS NUMEROUS GRASSROOTS
NETWORK THAT WAS UTILIZED TO GET
OUT THE POLITICAL SPEECH AND THE
POLITICAL MESSAGE OF THE
REPUBLICAN, OF THE--
>> YOU'RE ASSERTING IT ON BEHALF
OF OTHER--
>> ABSOLUTELY, YOUR HONOR.
>>-- IN THIS LAWSUIT?
>> WITH ABSOLUTELY.
>> IS THERE A DISTINCTION
BETWEEN THE DOCUMENTS THAT YOUR
CLIMATE, MR. BAINTER, WOULD HAVE
COMPARED TO THE OTHER
NONPARTIES?
>> ABSOLUTELY, YOUR HONOR.
THE DOCUMENTS MR. BAINTER

PROVIDED WERE DOCUMENTS
REGARDING HIMSELF AND HIS
INTERACTION.
THE DOCUMENTS THAT ARE
CONFIDENTIAL, THE 548 THAT THE
FIRST DCA REVIEWED IN DEPTH,
INDICATE NAMES OF OTHER
CITIZENS, THIRD PARTY CITIZENS
THAT ADVOCATED POLITICAL SPEECH
IN FAVOR OF THEIR POLITICAL
EXPRESSIONS, AND THOSE ARE
ANONYMOUSLY PROTECTED.
IF THEIR NAMES COME OUT, THEY'RE
GOING TO BE DRAGGED INTO THIS--
>> WELL, WERE LEGAL OBJECTIONS
MADE FOR PRIVILEGE WHEN THOSE
NONPARTIES WERE SERVED?
>> THOSE NONPARTIES WEREN'T
SERVED BECAUSE THOSE NAMES ARE
CONFIDENTIAL IN THE 538 PAGES.
>> NO.
THE OTHER NONPARTIES IN THIS
CASE.
>> I THINK SOME OF DID, YES.
MR. TERRA FIRMA OBJECTED.
MR. TERRA FIRMA ACTUALLY
ASSOCIATED PRIVILEGE TOO WITH
RESPECT TO SOME ISSUES WHICH WAS
UPHELD BY THE SPECIAL MASTER AND
JUDGE LEWIS IN THIS CASE.
>> YOUR TIME IS UP, COUNSEL, IF
YOU'D JUST WRAP IT UP.
30 SECONDS OR SO.
>> GREAT, THANK YOU, YOUR HONOR.
AND, AGAIN, WITH RESPECT TO THE
ISSUE AT HAND, IT'S NOT THE
INTELLIGENT OF THE PARTIES, IT'S
THE INTENT OF THE LEGISLATURE.
IN THIS CASE THE LEGISLATURE
TESTIFIED WHAT THEIR INTENT WAS,
AND THAT'S WHAT GOVERNS IN
THIS CASE.
IF THE EXERCISE OF ANONYMOUS
POLITICAL SPEECH BY CITIZENS CAN
RESULT IN A VIOLATION OF
AMENDMENTS 5 AND 6, THOSE STATE
AMENDMENTS ARE UNCONSTITUTIONAL
UNDER THE U.S. SUPREME COURT.
SUPREMACY CLAUSE, AND I WOULD
ASK THAT THIS COURT REVERSE THE
MAY 2ND AND MAY 15TH ORDER
BECAUSE JUDGE LEWIS DID NOT
APPLY THE SCRUTINY REQUIRED
UNDER THE PERRY V.SOME WARTS

NEGATIVER TEST.
THANK YOU.
>> THANK YOU, COUNSEL.
THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS.