

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

**CHRISTINE JENNINGS,**

*Petitioner,*

v.

1st DCA Case No. 1D07-11  
L.T. No. 2006-CA-2973

**ELECTIONS CANVASSING  
COMMISSION OF THE STATE  
OF FLORIDA, et al.,**

*Respondents.*

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**RESPONSE OF STATE RESPONDENTS TO  
EMERGENCY PETITION FOR A WRIT OF CERTIORARI**

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On Petition for a Writ of Certiorari to the Circuit Court  
of the Second Judicial Circuit, in and for Leon County  
Honorable William L. Gary

**PETER ANTONACCI**  
FLORIDA BAR NO. 280690  
**ALLEN WINSOR**  
FLORIDA BAR NO. 016295  
**GRAYROBINSON, P.A.**  
301 South Bronough Street  
Tallahassee, Florida 32301  
(850) 577-9090

*Attorneys for Kurt S. Browning, Secretary of State of the  
State of Florida; Amy K. Tuck, Director of the Division  
of Elections of the State of Florida; and the Elections  
Canvassing Commission of the State of Florida*

Respondents Kurt S. Browning, Secretary of State of the State of Florida; Amy K. Tuck, Director of the Division of Elections of the State of Florida<sup>1</sup>; and the Elections Canvassing Commission of the State of Florida, submit this response to Jennings's Emergency Petition for a Writ of Certiorari.

### **INTRODUCTION**

In the November 2006 general election, Petitioner Christine Jennings was a candidate for Representative of Florida's Thirteenth Congressional District. When the votes were tallied, Jennings narrowly lost. (A-3.)<sup>2</sup> Following a mandatory recount, the election results were confirmed and certified. (A-5.) Jennings then initiated the litigation below, contesting the election results and alleging pervasive voting system malfunction. (A-1.) Among her other discovery requests, Jennings sought production of computer source code and other materials, which she concedes are trade secrets owned by defendant Election Systems & Software, Inc., ("ES&S"). After finding that Jennings had failed to demonstrate a reasonable necessity for access to the protected materials, the circuit court entered an order denying the motion to compel. Jennings then petitioned this Court for a writ of

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<sup>1</sup> As of January 8, 2007, Amy K. Tuck became Director of the Division of Elections. She succeeded Dawn K. Roberts, who was the named defendant below. Under Florida Rule of Appellate Procedure 9.360(c)(2), Tuck is automatically substituted as a party.

<sup>2</sup> Citations to Petitioner's "Appendix to Emergency Petition for a Writ of Certiorari" will be made as (A-[page]).

certiorari, asking this Court to quash the circuit court's order.<sup>3</sup> At issue in this proceeding is whether that order constitutes a departure from the essential requirements of law. (Pet. at 26.) It does not.

### **ARGUMENT**

Trial courts enjoy broad discretion in overseeing the discovery process, including protection of those from whom discovery is sought. *See Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1270 (Fla. 4th DCA 2005). In a certiorari proceeding like this one, the trial court's decision on a discovery matter will be disturbed only if the order to be reviewed constitutes a departure from the essential requirements of law. *See Sheridan Healthcorp., Inc. v. Total Health Choice, Inc.*, 770 So. 2d 221, 222 (Fla. 3d DCA 2000). As explained below, the circuit court's denial of Jennings's motion was no such departure because Jennings failed to carry her burden of establishing a reasonable need for the requested materials.

The circuit court's denial of Jennings's motion to compel discovery is the sole issue before this Court. In her petition, Jennings takes issue with other decisions of the circuit court, arguing that it improperly refused to expedite her case and failed to enter her proposed scheduling order, (Pet. at 9-11). To the

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<sup>3</sup> After Jennings initiated her election contest, voter plaintiffs initiated a separate action. The two cases were consolidated in the circuit court, and the Voter Plaintiffs joined in Jennings's motion to compel. (A-372.) They have likewise joined in Jennings's emergency petition in this Court. *See* Voter Plaintiffs' Notice of Joinder.

contrary, the court has expedited Jennings's case considerably—scheduling the first hearing one day after the complaint was filed, (A-133), requiring defendants to respond to discovery requests in half the time allowed under the Florida Rules of Civil Procedure, (A-179), and ruling quickly on motions, (A-178, 806). Moreover, these complaints are improper in this certiorari case. The relief Jennings seeks is an order quashing the December 29 order denying her discovery motions. (Pet. at 24, 50.) Consideration of these other circuit court decisions is improper.

**I. THE CIRCUIT COURT PROPERLY FOUND THAT JENNINGS FAILED TO DEMONSTRATE A REASONABLE NECESSITY FOR THE REQUESTED DISCOVERY.**

When a party asserts the trade secret privilege in resisting discovery efforts, a court must determine, first, whether the requested discovery constitutes a trade secret, and, if so, whether the party seeking production can show a reasonable necessity for the requested materials. *Ameritrust Ins. Corp. v. O'Donnell Landscapes*, 899 So. 2d 1205, 1207 (Fla. 2d DCA 2005). This two-step inquiry is well established. *See, e.g., Sheridan Healthcorp.*, 770 So. 2d at 222; *American Exp. Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206, 1209 (Fla. 4th DCA 2000); *Rare Coin-It, Inc. v. I.J.E., Inc.*, 625 So. 2d 1277, 1278 (Fla. 3d DCA 1993). In this case, the parties agree that the requested materials are protected trade secrets. (Pet. at 39.) Therefore, the circuit court correctly proceeded directly

to the second step of the inquiry—whether Jennings had demonstrated a reasonable necessity for the materials. The court properly concluded she had not.

**A. The Court Properly Found There Was an Absence of Evidence Demonstrating Reasonable Necessity.**

Jennings’s legal theory is that the voting machines malfunctioned, altering the outcome of her election. As evidence of this malfunction, Jennings presented the testimony of Professor Charles Stewart, III, an expert in electoral politics. Based on his statistical analysis, Stewart testified that the use of the voting machines likely caused Jennings’s electoral loss. (A-541.) Jennings also offered the testimony of Professor Dan Wallach, a computer expert who testified that a machine software malfunction could have caused the electoral loss and could not be ruled out as a possibility without analyzing the computer source code. (A-586.)

A court may not order disclosure of trade secrets without making factual findings of reasonable necessity. *See KPMG LLP v. State, Dept. of Ins.*, 833 So. 2d 285, 286 (Fla. 1st DCA 2002) (quashing discovery order because court failed to make factual findings supporting reasonable necessity). In this case, the circuit court properly concluded that there was no evidence upon which it could base such a factual finding. Jennings contends that such a finding should be based on the fact that she alleged a defect in the machines, and without access to the machines, she cannot prove her allegation. (Pet. at 27-28.) The problem with this logic is that it would require disclosure of trade secrets upon nothing more than allegations on the

face of a complaint. No trade secret would be immune from disclosure because a party can always frame allegations in a manner to make a trade secret a focal issue. As the circuit court noted, Jennings's theory "would result in destroying or at least gutting the protections afforded those who own the trade secrets." (A-808.)<sup>4</sup>

Because the Legislature has afforded substantial protection for trade secret owners, Jennings's logic cannot prevail. Instead, a showing of reasonable necessity demands something more than mere allegations. It must require a showing that the discovery sought would avoid what would otherwise amount to an injustice. *See* § 90.506, Fla. Stat. (2006) (a party may refuse to disclose a trade secret "if the allowance of the privilege will not conceal fraud or otherwise work injustice."). But no injustice results from disallowing a party's fishing expedition, and Jennings has not demonstrated that her discovery efforts are anything more than that.

Jennings accuses the circuit court of confusing the standard "reasonable necessity" with "reasonable likelihood of success on the merits." (Pet. at 32-35.) She argues that the circuit court erred by concluding that it could not allow the requested discovery without speculating as to the cause of the election results.

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<sup>4</sup> Indeed, although this election was close, Professor Wallach testified that his opinion regarding his need for a source code review would not change even if the margin were 50 points. (A-587.) Therefore, *any* election involving electronic machines would be subject to litigation including a full disclosure of trade secrets.

Jennings contends that the court improperly looked to the merits, rather than simply allowing her access to information she needs to prove her theory. *Id.* But the court had no obligation to ignore the absence of any evidence supporting Jennings's claim of machine malfunction. In *Winn-Dixie Stores, Inc. v. Miles*, 616 So. 2d 1108 (Fla. 5th DCA 1993), Winn-Dixie sought discovery of information to support a theory that lacked any basis other than conjecture:

[I]t is apparent that the type of information sought in the instant case could be highly relevant in that it might tend to establish bias on [a witness's] part if a significant part of his income is derived from plaintiffs' attorneys. However, the record contains no contention that Winn-Dixie has any information whatsoever that this is the case. Absent some sort of basis for suspecting that [the witness] is biased, Winn-Dixie should not be allowed to engage in an extensive fishing expedition which may prove worthless.

*Id.* at 1110. The same is true here. Jennings is not entitled to ES&S's trade secrets without some basis for suspecting that the source code is tainted. As the circuit court concluded, she had none. And as the court noted, granting Jennings's motion would require basing a reasonable necessity finding on "nothing more than speculation and conjecture." (A-808.)

Jennings will likely argue that the statistical evidence provided by Professor Stewart provides her basis.<sup>5</sup> But ES&S provided its own statistical expert who

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<sup>5</sup> Notably, if Jennings's legal standard were correct—that she demonstrated reasonable necessity by merely alleging equipment malfunction and offering computer expert testimony that her theory could not be disproven without the source code—she would have had no need for Professor Stewart's statistical

testified that voter confusion—not machine malfunction—likely caused the unusual undervote. (A-613, 620.) The circuit court weighed these competing explanations and concluded that the evidence did not support a finding of reasonable necessity. And a circuit court’s factual findings should not be disturbed absent clear error. *State v. Shaw*, 784 So. 2d 529, 530 (Fla. 1st DCA 2001) (“Deference is given to findings of fact unless they are clearly erroneous. . . .”). Accordingly, the circuit court did not depart from the essential requirements of the law.

**B. The Court Did Not Fail to Consider Harm to ES&S.**

Jennings next argues that the court presumed harm to ES&S and failed to balance her needs against any harm to ES&S. (Pet. at 38-40.) In doing so, Jennings suggests that a finding of harm is necessary before a court can deny access to trade secrets. This is simply not the case. Once the court concludes that the party seeking discovery has failed to demonstrate reasonable necessity, the court’s inquiry ends.

In arguing otherwise, Jennings relies on three federal decisions. (Pet. at 38.) Although one of those cases looked to state law to determine whether the materials

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evidence. Indeed, Jennings is in the awkward position of arguing both (i) she cannot prove her case without the access to the source code; and (ii) statistical evidence proves her case. The very fact that Jennings relies on statistical evidence to support her claim of machine malfunction undermines her argument that access to the privileged materials is necessary.

were protected trade secrets, they did *not* apply Florida law with respect to whether the trade secrets were subject to disclosure. Instead they properly applied the Federal Rules of Civil Procedure and federal decisions applying those rules. *See Cytodyne Tech., Inc. v. Biogenic Tech., Inc.*, 216 F.R.D. 533, 535-36 (M.D. Fla. 2003); *Kaiser Aluminum & Chem. Corp. v. Phosphate Eng'g & Constr. Co.*, 153 F.R.D. 686, 687 (M.D. Fla. 1994); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 325-26 (S.D. Fla. 1985). These cases, therefore, do not support Jennings's position. Perhaps even more telling is Jennings's reliance on *Sabol v. Bennett*, 672 So. 2d 93 (Fla. 3d DCA 1996), which Jennings cites for the proposition that a party resisting discovery must make an affirmative showing of harm. That case has nothing to do with trade secrets; it involved a dispute over a party's access to information about a witness's prior drug and alcohol use. *Id.* at 94.

Moreover, any trade secret, as a matter of law, has economic value. *See* § 688.002(4), Fla. Stat. (2006) (“‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives *independent economic value*, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its

secrecy.”) (emphasis added). By stipulating to trade secret status, the parties stipulated to the economic value of the materials to their owner.

Finally, a protective order is not sufficient to offset the potential harm of disclosure. “Production of the source code, without a showing and finding of reasonable necessity, would cause [the trade secret owner] irreparable harm. This is true even when the trial court orders production subject to a protective order.” *Rare Coin-it*, 625 So. 2d at 1278; *see also American Exp. Travel*, 761 So. 2d at 1209 (“The trial court’s endorsement of Petitioner’s use of a confidential agreement is not sufficient to override Petitioner’s concern. Nor would a protective order be sufficient.”). There was testimony that Jennings’s expert, the person who would review the materials if they are produced, advocates open access to all election machine source code, believes that no such materials should be granted trade secret protection, and is critical of all machines that do not provide paper trails. (A-584, 590.). Although he testified that he would comply with any court order regarding confidentiality, he cannot “unlearn” what he gleans from a detailed analysis of ES&S’s trade secrets. That information—consciously or otherwise—will support his future advocacy undertakings to the detriment of ES&S.

Because the circuit court concluded that Jennings failed to meet her burden to demonstrate reasonable necessity, its inquiry appropriately ended there.

Nevertheless, there is ample support in the record for a conclusion that ES&S would suffer harm if its trade secrets were disclosed.

**II. THE CIRCUIT COURT DID NOT ERR BY ADMITTING THE PARALLEL TEST SUMMARY.**

Jennings argues that the circuit court rested its ruling almost entirely on the “Parallel Test Summary Report,” (the “Report”), which she contends was inadmissible hearsay. (Pet. at 41.) To the contrary, the court’s decision to admit the evidence was entirely proper. Alternatively, even if the court should not have considered the Report, its ultimate decision—that Jennings failed to demonstrate a reasonable necessity for her requested discovery—would not have changed. Accordingly, whether or not the Report was inadmissible hearsay, the court’s denial of Jennings’s motion to compel did not constitute a departure from the essential requirements of law.

**A. The Court Properly Relied on the Public Records Exception to the Hearsay Rule.**

Section 90.803(8), Florida Statutes (2006) exempts from the hearsay rule records and reports of public offices or agencies “setting forth the activities of the office or agency.” The obvious purpose of this hearsay exception is “to embrace records of a simple factual nature which primarily focus upon the functions of a public agency.” *Dykes v. Quincy Telephone Co.*, 539 So. 2d 503, 505 n.3 (Fla. 1st

DCA 1989) (quoting C. Ehrhardt, Florida Evidence § 803.8, at 498 (2d ed. 1984)).

The Report fits squarely into this exception.

The nine-page Report succinctly details the Division of Elections' parallel tests conducted on the voting machines. (A-652-660.) It explains how the tests were conducted, what voting patterns were used, how votes were recorded, and—most importantly—how the machines reported accurate vote counts during the testing. *Id.* (“[T]he test results show that the iVotronic touchscreens accurately captures the voter’s selection as presented to the voter on the review screens. These tests did not identify any latent problems with respect to vote selection or the accuracy of the touchscreens’ tabulation of the votes as cast.”). The Report is an official report of the Division of Elections, and nothing about it suggests a lack of trustworthiness.<sup>6</sup> Indeed, Jennings’s own expert indicated that he did not “doubt its accuracy.” (A-600.)

In arguing that Section 90.803(8) should not apply, Jennings cites one case: *Lee v. Department of Health & Rehabilitative Services*, 698 So. 2d 1194 (Fla. 1997). That case, though, involved a document entirely different from the Report in this case. In *Lee*, a severely retarded woman became pregnant while in the care of the Department of Health and Rehabilitative Services (“HRS”), and her family

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<sup>6</sup> There is an exception to the exception. Section 90.803(8) does not except public records from the hearsay rule when “the sources of information or other circumstances show their lack of trustworthiness.” *Id.* The court did not find any lack of trustworthiness, nor is there any.

sued for damages. *Id.* at 1196. Following the tragic incident, HRS assigned an employee to investigate the matter. *Id.* In the course of the investigation, the HRS employee interviewed witnesses, including the victim, other patients, and other HRS employees. *Id.* The investigator then drafted a report, which included witness statements as well as his opinions and conclusions regarding the case. *Id.* The court concluded that this report was not admissible under Section 90.803(8) because “[r]ecords that rely on information supplied by outside sources or that contain evaluations or statements of opinion by a public official are inadmissible under this provision.” *Id.* at 1201.

In this case, the Report includes only facts discerned during official conduct—the Division of Elections’ parallel tests. *Cf. Claussen v. State, Dept. of Transp.*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999) (“The letter in this case contained no information compiled by the DOT in the course of its duties; rather, the letter described a prior property owner’s objection to the proposed highway expansion. Because the letter was based upon information *from an outside source* it was inadmissible as a DOT public record under section 90.803(8).”) (emphasis added). The Report is an official public record and was properly admitted under Section 90.803(8). *See Arthur v. State*, 818 So. 2d 589, 591 n.1 (Fla. 5th DCA 2002)

(driving records are admissible under Section 90.803(8) because they are “public records and reports of a public office or agency”).<sup>7</sup>

**B. Even Without the Report, the Court Would Have Found that Jennings Failed to Establish Reasonable Necessity of Access to the Trade Secret Materials.**

Jennings contends not only that the Report was inadmissible hearsay evidence, but also that the court’s conclusion was based almost entirely on it. (Pet. at 41.) Instead, the court based its conclusion on Jennings’s failure to provide sufficient evidence of reasonable need for the trade-secret materials. That failure existed with or without the Report. Therefore, even if the admission of the Report was error, it was harmless error. Improper admission of hearsay evidence does not warrant reversal when the entire record demonstrates an absence of harm. *See Division of Corrections v. Wynn*, 438 So. 2d 446, 449 (Fla. 1st DCA 1983).

**C. The Court Was Not Obligated to Rely on Jennings’s Evidence of Inadequacy of the Division of Elections’ Parallel Tests.**

Jennings also argues that the circuit court ignored evidence of flaws in the Division of Elections’ parallel testing. (Pet. at 46-50.) But the court was not obligated to rely on the testimony of Jennings’s expert that the parallel tests were incomplete or otherwise flawed. It is up to the trial court to determine what

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<sup>7</sup> Jennings also suggests that the court confused issues of authentication and hearsay. (Pet. at 46.) It is clear from the record, though, that the court understood that distinction. The court’s inquiry into the origin of the Report, (A-604) (“This was issued by the Department of State, correct?”), was appropriate because Section 90.803(8) applies only to records and reports of “public offices or agencies.”

evidence to accept in making its fact-findings. “[I]t is for the trial court who heard the testimony below, not this court, to evaluate and weigh the credibility of witness testimony and other evidence adduced at trial.” *Adkins v. Adkins*, 650 So. 2d 61, 62 (Fla. 3d DCA 1994).<sup>8</sup>

### CONCLUSION

In this original jurisdiction proceeding, the issue before this Court is whether the circuit court’s order constituted a departure from the essential requirements of law. As explained above, it did not. The circuit court’s order was legally and factually correct, and this Court should deny Jennings’s emergency petition.

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<sup>8</sup> Furthermore, Jennings’s specific complaints about the parallel testing undermine her argument that the voting machine’s software is to blame. For example, Jennings’s expert testified that the testing was flawed because the twelve test voters’ demographics did not match the demographic composition of Sarasota. (A-601.) He further testified that the test voters lacked the diversity appropriate for a proper test. (A-595.) Because software inside a voting machine cannot know the race, age, or gender of the voter using it, these complaints point toward some cause for the election results other than software or equipment malfunction.

Respectfully submitted this 29th day of January, 2007.



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**PETER ANTONACCI**

Florida Bar No. 280690

**ALLEN WINSOR**

Florida Bar No. 016295

**GRAYROBINSON, P.A.**

301 South Bronough Street

Suite 600 (32301)

Post Office Box 11189

Tallahassee, Florida 32302

Telephone (850) 577-9090

Facsimile (850) 577-3311

pva@gray-robinson.com

awinsor@gray-robinson.com

*Attorneys for State Respondents*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Transmission and United States Mail this 29 day of January, 2007, to the following:

Mark Herron  
Messer, Caparello & Self, P.A.  
2618 Centennial Place  
Tallahassee, Florida 32308  
Telephone (850) 222-0720  
Facsimile (850) 558-0659  
E-Mail: mherron@lawfla.com  
*Attorney for Plaintiff Jennings*

Kendall Coffey  
Coffey & Wright, LLP  
2665 South Bayshore Drive  
PH-2, Grand Bay Plaza  
Miami, Florida 33133  
Telephone (305) 857-9797  
Facsimile (305) 859-9919  
E-Mail: kcoffey@coffeywright.com  
*Attorney for Plaintiff Jennings*

Donald B. Verrilli, Jr.  
Jessica Ring Amunson  
Sam Hirsch  
Jenner & Block, LLP  
601 Thirteenth Street N.W.  
Washington, DC 20005-3823  
Telephone (202) 693-6095  
*Attorneys for Plaintiff Jennings*

Glenn T. Burhans, Jr.  
Hayden R. Dempsey  
Greenberg Traurig, P.A.  
101 East College Avenue  
Tallahassee, Florida 32301  
Telephone (850) 222-6891  
Facsimile (850) 681-0207  
E-Mail Burhansg@gtlaw.com  
Dempseyh@gtlaw.com  
*Attorney for Vern Buchanan*

Ronald A. Labasky  
Young Van Assenderp, P.A.  
225 South Adams Street  
Tallahassee, Florida 32302  
Telephone (850) 222-7206  
Facsimile (850) 561-6834  
E-Mail rlabasky@yvlaw.net  
*Attorney for Supervisor Dent*

Frederick J. Elbrecht  
Deputy County Attorney  
Sarasota County Attorney's Office  
1660 Ringling Boulevard, Second Floor  
Sarasota, Florida 34236  
Telephone (941) 861-7272  
Facsimile (941) 861-7267  
E-Mail RElbrecht@scgov.net  
*Attorney for Sarasota Defendants*

Lowell Finley  
Voter Action  
1604 Solano Avenue  
Berkeley, California 94707  
Telephone (510) 318-2248  
Facsimile (415) 723-7141  
*Attorney for Fedder Plaintiffs*

Muslima Lewis, Director  
Voting Rights Project  
Randall C. Marshall, Legal Director  
Aziza Naa-Kaa Botchway  
ACLU Foundation of Florida, Inc.  
4500 Biscayne Boulevard, Suite 340  
Miami, Florida 33137-3227  
Telephone (786) 273-2729  
Facsimile (786) 363-1448  
*Attorneys for Fedder Plaintiffs*

David J. Becker  
Judith E. Schaeffer  
People for the American Way  
Foundation  
2000 M Street N.W. #400  
Washington, DC 20036  
Telephone (202) 467-4999  
Facsimile (202) 293-2672  
*Attorneys for Fedder Plaintiffs*

Richard T. Donelan, Jr.  
Julie C. Miller  
M. Drew Parker  
Florida Dept. of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4247  
Telephone (850) 413-3010  
Facsimile (850) 413-3029  
*Attorneys for Tom Gallagher*

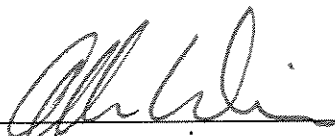
Reginald J. Mitchell  
People for the American Way Foundation  
1550 Melvin Street  
Tallahassee, Florida 32301  
Telephone (850) 877-0307  
Facsimile (850) 402-1999  
*Attorney for Fedder Plaintiffs*

Rebecca Harrison Steele  
Zeina N. Salam  
ACLU Foundation of Florida, Inc.  
West Central Florida Office  
Post Office Box 18245  
Tampa, Florida 33679-8245  
Telephone (813) 254-0925  
Facsimile (813) 254-0926  
*Attorneys for Fedder Plaintiffs*

Cindy A. Cohn  
Matthew J. Zimmerman  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, California 94110  
Telephone (415) 436-9333 x 127  
Facsimile (415) 436-9993  
*Attorneys for Fedder Plaintiffs*

Harry O. Thomas  
Radey Thomas Yon & Clark, P.A.  
301 South Bronough Street  
Suite 200  
Tallahassee, Florida 32301  
Telephone (850) 425-6654  
Facsimile (850) 425-6694  
*Attorneys for ES&S*

Miguel A. DeGrandy  
Miguel DeGrandy, P.A.  
800 S. Douglas Road, Suite 850  
Coral Gables, Florida 33134-2088  
Telephone (305) 444-7737  
Facsimile (305) 443-2616  
*Attorneys for ES&S*

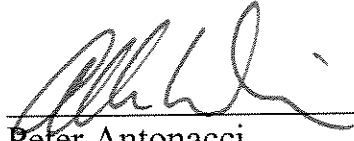


---

Peter Antonacci  
Florida Bar No. 280690  
Allen Winsor  
Florida Bar No. 016295  
GrayRobinson, P.A.  
301 South Bronough Street  
Suite 600 (32301)  
Post Office Box 11189  
Tallahassee, Florida 32302  
Telephone (850) 577-9090  
Facsimile (850) 577-3311  
E-Mail [pva@gray-robinson.com](mailto:pva@gray-robinson.com)  
[awinsor@gray-robinson.com](mailto:awinsor@gray-robinson.com)  
*Attorneys for State Defendants*

## **CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT**

I certify that the font used in this response is Times New Roman 14 point  
and in compliance with the Florida Rules of Appellate Procedure.



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Peter Antonacci  
Florida Bar No. 280690  
Allen Winsor  
Florida Bar No. 016295