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

OCTOBER 31, 2012

THE FLORIDA HOUSE OF REPRESENTATIVES; DEAN CANNON, in his capacity as Speaker of the Florida House of Representatives; THE FLORIDA SENATE; and MIKE HARIDOPOLOS, in his capacity as President of the Florida Senate,

Petitioners,

vs.

Case No.
L.T. Case Nos. 37 2012 CA 000412
37 2012 CA 000490

RENE ROMO; BENJAMIN WEAVER; WILLIAM EVERETT WARINNER; JESSICA BARRETT; JUNE KEENER; RICHARD QUINN BOYLAN; BONITA AGAN; THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; COMMON CAUSE FLORIDA; ROBERT ALLEN SCHAEFFER; BRENDA ANN HOLT; ROLAND SANCHEZ-MEDINA, JR.; JOHN STEELE OLMSTEAD; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; BILL NEGRON; ANTHONY SUAREZ; LUIS RODRIGUEZ; FATHER NELSON PINDER; N.Y. NATHIRI; MAYOR BRUCE B. MOUNT; PASTOR WILLIE BARNES; MABLE BUTLER; JUDITH A. WISE; KEN DETZNER, in his official capacity as Florida Secretary of State; and PAM BONDI, in her capacity as Florida Attorney General,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT

This petition seeks review of an unprecedented order that for the first time permits litigants to compel Florida legislators to answer questions under oath about laws on which they voted. In *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012), this Court recognized the legislative privilege. This case involves application of that privilege to the 2012 congressional redistricting legislation. The Florida House of Representatives; Dean Cannon, in his official capacity as Speaker of the Florida House of Representatives; the Florida Senate; and Mike Haridopolos, in his official capacity as President of the Florida Senate (collectively, the "Legislative Parties"), pursuant to Florida Rule of Appellate Procedure 9.100(c)(1), petition this Court to review by certiorari the circuit court's order partially denying their motion for protective order.

Plaintiffs' underlying lawsuit attacks the validity of the Florida Legislature's newly drawn congressional districts. Plaintiffs argue that the new districts were drawn with the impermissible intent to favor incumbents and political parties. But rather than discern legislative intent from the enactment itself and the vast and unprecedented legislative record that accompanied it, Plaintiffs seek to depose legislators to probe their personal thoughts and motivations in drafting the legislation, and then to infer the intent of the entire legislative body from individual legislators' post-enactment recollections. The circuit court recognized

the legislative privilege and prohibited questioning about legislators' subjective intent, but nevertheless permitted Plaintiffs to compel testimony about "objective" information or communications. The court thus defeated the purpose of the legislative privilege, which is to protect legislators from having to be deposed *at all*. The Legislative Parties therefore request that this Court quash the October 3, 2012 order granting in part and denying in part their motion for a protective order and remand with directions to enter an order declaring that (i) absent a waiver of the legislative privilege, no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable.

I.

BASIS FOR JURISDICTION

This Court has jurisdiction to issue writs of common law certiorari. Art. V, § 4(b), Fla. Const.; Fla. R. App. P. 9.030(b)(2)(A). Certiorari review of a discovery order is proper when "the trial court's order departs from the essential requirements of law, thereby causing material harm . . . for which there is no adequate remedy on final appeal." *Fla. E. Coast Ry., L.L.C. v. Jones*, 847 So. 2d 1118, 1118-19 (Fla. 1st DCA 2003); *see also Avante Villa at Jacksonville Beach, Inc. v. Breidert*, 958 So. 2d 1031, 1032 (Fla. 1st DCA 2007) ("Certiorari is the appropriate remedy where the trial court orders disclosure of privileged information, where such disclosure departs from the essential requirements of law

thereby causing irreparable injury which cannot be remedied on appeal following final judgment.").

This Court often has granted relief from improper orders compelling disclosure of privileged information. *See, e.g., Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 491 (Fla. 1st DCA 2011); *Hagans v. Gatorland Kubota, LLC*, 45 So. 3d 73, 78 (Fla. 1st DCA 2010); *Avante Villa at Jacksonville Beach*, 958 So. 2d at 1034; *Fla. E. Coast Ry.*, 847 So. 2d at 1119; *Eight Hundred, Inc. v. State Dep't of Rev.*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003). This is such a case.

II.

STATEMENT OF RELEVANT FACTS

On February 9, 2012, the Florida Legislature enacted Senate Bill 1174, which establishes new congressional districts for the State of Florida in accordance with the 2010 Census and Article III, Section 20 of the State Constitution.[1] *See* Ch. 2012-2, Laws of Fla.

[1] Article III, Section 20 establishes standards for drawing congressional districts. That section requires that no apportionment plan or individual district be drawn with the intent to favor or disfavor a political party or an incumbent; that districts not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; that districts consist of contiguous territory; that they be as nearly equal in population as practicable; that they be compact; and that where feasible, districts use existing political and geographical boundaries.

Senate Bill 1174 resulted from many months of public meetings and input. Beginning in June 2011, the Legislature held 26 public hearings across the state, followed by 17 meetings of House and Senate committees and subcommittees where congressional redistricting plans were discussed. The Legislature publicly debated alternative proposals, including many received from the public (A. 83, 184-85).[2] The redistricting process was the most open and inclusive in State history, producing a comprehensive legislative record with scores of alternative maps (including 86 congressional maps submitted by the public), extensive public comments, reports and transcripts from 26 public hearings, volumes of statistics and demographic data, and thousands of pages of transcripts from committee meetings and floor debates (A. 83).

Within hours after the Legislature enacted Senate Bill 1174, seven individuals (the "Romo Plaintiffs") filed a complaint in circuit court challenging the new districts under the redistricting standards in Article III, Section 20, Florida Constitution.[3] After Governor Rick Scott signed Senate Bill 1174 into law, the

[2] "A. #" refers to the page number of the appendix submitted with this petition.

[3] It is undisputed that the Romo Plaintiffs are proxies in this litigation for the Florida Democratic Party. *See* Press Release, Florida Democratic Party, Statement from FDP Chair on Legal Challenge of Congressional Map (Mar. 26, 2012), *available at* http://www.fladems.com/news/entry/statement-from-fdp-chair-on-legal-challenge-of-congressional-map (issuing a statement "on *the party's* filing, on behalf of concerned citizens, of a constitutionally valid map and legal challenge to the congressional map.") (emphasis added).

League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida, together with four individuals (the "LOWV Plaintiffs"), filed a separate complaint challenging the new districts. The cases were later consolidated. Among other claims, Plaintiffs allege that the new districts were "drawn with the intent to favor or disfavor a political party or an incumbent." *See* Art. III, § 20(a), Fla. Const.

During extensive discovery, the Legislative Parties have produced more than 25,000 files, including the State of Florida's entire submission to the United States Department of Justice establishing compliance with Section 5 of the federal Voting Rights Act (A. 83, 214).

Despite the unprecedented legislative record and abundance of information available through discovery, on July 11 the LOWV Plaintiffs noticed the depositions of one legislator (Senate Majority Leader Andy Gardiner) and two legislative staff members (J. Alex Kelly, Staff Director of the House Redistricting Committee, and Jay Ferrin, Administrative Assistant to the Senate Reapportionment Committee) (A. 58-59). The LOWV Plaintiffs indicated that more depositions would follow, and the Romo Plaintiffs indicated their intent to compel deposition testimony from legislators and legislative staff (A. 64).

In July 2012, the Legislative Parties filed a Motion for Protective Order Based on Legislative Privilege (A. 63-87). Relying on this Court's recent decision

in *Expedia*, 85 So. 3d 517, they argued that the legislative privilege, which is implicit in the strict separation of powers secured by the Florida Constitution, protects legislators and staff from compelled deposition testimony about matters within the scope of their official duties (A. 65-68). Plaintiffs responded that such testimony is necessary to prove their allegation of improper intent (A. 115-19, 157-59).

On October 3, 2012, the circuit court granted in part and denied in part the Legislative Parties' request for a protective order (the "Order") (A. 10). The Order concluded that Plaintiffs may not depose legislators or their staff about their "'subjective' thoughts or impressions or . . . the thoughts or impressions shared with them by staff or other legislators," but that Plaintiffs may depose legislators and legislative staff with respect to "'objective' information or communication which does not encroach into the thoughts or impressions enumerated above" (A. 10). The Order states that it is "difficult to imagine a more compelling, competing government interest" than the interest in valid congressional districts (A. 5). It looked for guidance to *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), which used a multi-factored balancing test to evaluate claims of legislative privilege under federal common law and concluded that the plaintiffs were entitled to certain documents—not that they could depose legislators (A. 3-4). Thus, the Order

sought to distinguish "between the legislative functions most in need of protection and those least in need of protection" (A. 4).

With respect to documents requested, the Legislative Parties argued that the privilege applies to documents exempted by statute from disclosure (A. 76). Specifically, the Legislative Parties argued that the exemption in section 11.0431(2)(e), Florida Statutes, for "supporting documents" associated with draft redistricting plans protects documents that relate to and were created in furtherance of draft redistricting maps (A. 192-93). But the Order found this interpretation too broad (A. 7) and refused to enter a protective order as to documents that "do not contain 'subjective' information" (A. 10). The Order further directed the parties to present any disputes *in camera*, with explanatory testimony (A. 7-8, 10).

III.

NATURE OF THE RELIEF SOUGHT

The Legislative Parties request that this Court quash the Order and remand with directions to enter an order declaring that (i) absent a waiver of the legislative privilege, no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable.

IV.

ARGUMENT

This Court should quash the Order because (A) it departs from the essential requirements of law by compelling depositions of legislators and staff and requiring production of unfiled legislative draft maps and supporting documents; (B) the Legislative Parties will suffer material injury if such discovery proceeds; and (C) the Legislative Parties have no adequate remedy on post-judgment appeal.

A. The Order Departs from the Essential Requirements of Law Because It Permits Discovery Protected by Legislative Privilege

To obtain certiorari relief, a petitioner must first demonstrate that the order departs from the essential requirements of law. *Fla. E. Coast Ry.*, 847 So. 2d at 1118-19. The Order does so: it eviscerates the legislative privilege by permitting Plaintiffs to depose legislators and legislative staff about matters within their official functions and to obtain discovery of unfiled legislative draft maps and supporting documents.

As we demonstrate below, (1) the legislative privilege protects the Legislative Parties from plaintiffs' discovery requests; (2) the Order departs from the essential requirements of law in finding that the legislative privilege is outweighed by an ostensibly more important governmental interest; (3) the Order departs from the essential requirements of law by permitting discovery of

"objective" information; and (4) the requested documents are exempted from disclosure and protected by legislative privilege.

1. Legislative Privilege Protects the Legislative Parties from Plaintiffs' Discovery Requests

The Order permits Plaintiffs to compel legislators and their staff to testify under oath about congressional redistricting. In March, this Court held that the strict separation of powers guaranteed by the Florida Constitution affords legislators a privilege against compelled testimony with respect to legislative matters. *Expedia*, 85 So. 3d 517.[4] The Order undercuts this holding and infringes on the separation of powers by compelling legislators to testify.

As this Court has recognized, the legislative privilege is strictly enforced. In *Expedia*, a company subpoenaed a legislator and his aide to determine how the legislator had acquired the company's confidential documents. The company argued that the deposition was necessary to establish that the company had not waived a privilege that protected the documents. *See* 85 So. 3d at 520. The Florida House moved to quash the subpoenas, asserting legislative privilege. As happened here, the circuit court prohibited inquiry into "the thoughts, opinions, or

[4] Federal common law also grants a legislative privilege, as the Elections Clause of the United States Constitution commits congressional redistricting to state legislatures. *See* Art. I, § 4, cl. 1, U.S. Const. Even though a state court would not ordinarily apply federal common law, where, as here, "uniquely federal interests" are involved, federal common law applies. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

legislative activities of the witnesses," but allowed inquiries into actions taken with the documents. *Id*.

This Court reversed with instructions to quash the subpoena. Tracing the long history of the legislative privilege to centuries-old clashes between Parliament and the English Crown, this Court held that the privilege remains an enduring and essential feature both of the common law and of the separation of powers expressly guaranteed by the Florida Constitution. 85 So. 3d at 522. As the Court explained, the purpose of the legislative privilege is to "protect the independence of the Legislature" and "reinforce the separation of powers." *Id*. at 524.

This Court recognized that the separation of powers is mutual. *See* 85 So. 3d at 522-23. The Legislature cannot and should not compel judges to testify about the reasons for their decisions, their thought processes in chambers, or the objective mechanics of rendering their opinions. *Id*. Executive branch officials likewise are protected from testifying about their official functions. The legislative branch is entitled to this same protection: "The power vested in the Legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill." *Id*. at 524; *see also State of Florida v. United States*, __ F. Supp. 2d __, 2012 WL 3594322, at *3 (N.D. Fla. Aug. 10, 2012) ("Legislators ought not call unwilling judges to testify at legislative

hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes.") (Hinkle, J.).

As this Court emphasized in *Expedia,* the "importance of [Article II, Section 3] cannot be overstated," and the Florida Supreme Court has traditionally applied a strict separation of powers, which it has described as the "cornerstone of American democracy." 85 So. 3d at 524 (quoting *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)). "Strict enforcement of the provision is necessary in part to ensure that one branch of government does not encroach on powers vested exclusively in another." *Id*.

This Court's decision in *Expedia* is consistent with a long line of cases recognizing the privilege's critical importance. The United States Supreme Court, for example, has held the privilege necessary "to protect the integrity of the legislative process by insuring the independence of individual legislators," *United States v. Brewster*, 408 U.S. 501, 507 (1972), and "to prevent intimidation by the [e]xecutive and accountability before a possibly hostile judiciary," *Gravel v. United States*, 408 U.S. 606, 617 (1972). The United States District Court for the Northern District of Florida recently applied this principle, holding that the "considerations that support [the privilege] include the burden on state legislators, the chilling effect the prospect of having to testify might impose on legislators

when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due to a coordinate branch of government." *Florida v. United States*, 2012 WL 3594322, at *3 (Hinkle, J.).[5]

The privilege protects the very integrity of the legislative process. It enables elected representatives to perform their duties with independence, according to their own convictions and consciences, unhampered by external pressures or fear of personal consequences. The Order undermines such independence by permitting legislators to be deposed about legislative matters. The threat is even greater here than it was in *Expedia* because this case involves a legislative function directly and expressly committed to the Florida Legislature under the United States Constitution. *See Florida v. United States*, 2012 WL 3594322, at *1 (Hinkle, J.) ("Florida state legislators have a privilege not to testify on matters at the core of their legislative functions."). The Order therefore creates a "chilling effect" by permitting Plaintiffs to compel legislators to testify about matters within their official functions. Because the Order strikes at the very core of the separation-of-powers guarantee, it should be quashed.

[5] The Florida Supreme Court has recognized the legislative privilege in an unpublished order granting a writ of prohibition. *See Fla. Legislature v. Sauls*, No. 80,834 (Fla. Feb. 3, 1993) (directing that the "Circuit Judge in and for Leon County, Florida, desist from compelling testimony from Ms. Wendy Westling, a legislative assistant of the Florida Legislature").

2. The Order Departs from the Essential Requirements of Law by Finding that the Legislative Privilege is Outweighed by an Ostensibly More Important Governmental Interest

While the Order recognizes the legislative privilege, it concludes that this civil case presents an overriding governmental interest sufficient to overcome it (A. 5-6). But the privilege's application does not depend on the importance of the competing interest. Judges are not subject to deposition about their decisions when the case is sufficiently important. Certainly nothing is more important than whether a criminal defendant guilty of murder receives the death penalty, yet neither judges nor juries can be questioned about how they reached their decision.

Like the executive and judicial privileges against testimony, the legislative privilege recognizes that *every* piece of legislation is important and that the legislative process itself cannot succumb to countervailing interests depending on the circumstances.

To be sure, in *Expedia*, this Court acknowledged that the legislative privilege can be overcome when "the need for privacy is outweighed by a more important governmental interest." 85 So. 3d at 525. But the Order misinterprets this language as referring to the importance of the legislation at issue (A. 5-6). That is not what this Court meant when it recognized that the legislative privilege could be outweighed by an important interest arising *outside* the legislative

process. The Court noted, for example, that "the privilege could not be used to withhold evidence of a crime." 85 So. 3d at 525.

In explaining the governmental-interest exception, *Expedia* highlighted two criminal cases: *United States v. Nixon*, 418 U.S. 683 (1974), and *Girardeau v. State*, 403 So. 2d 513 (Fla. 1st DCA 1981). In *Nixon*, a grand jury subpoenaed materials in the possession of the President of the United States, who asserted executive privilege. The Court rejected the claim, finding that the importance of criminal justice and the rule of law overcame the privilege. 418 U.S. at 708-09 (explaining that the "privilege must be considered in light of our historic commitment to the rule of law," which is most manifest in the view that, in criminal justice, "guilt shall not escape or innocence suffer"). Similarly, in *Girardeau*, a member of the Florida Legislature who had received possible evidence of a crime refused to testify before a grand jury. This Court did not decide whether the privilege existed, holding that it "cannot override or defeat the pressing need of the criminal justice system . . . for evidence of a crime alleged to have been committed in the state." *See* 403 So. 2d at 517.[6]

[6] After *Nixon* and before *Girardeau*, the Supreme Court decided *United States v. Gillock*, 445 U.S. 360 (1980). In *Gillock*, a state legislator indicted for a federal crime argued that the legislative privilege barred introduction of evidence about legislative activities. The Court rejected the claim, explaining that, "in protecting the independence of state legislators, [*Tenney v. Brandhove*, 341 U.S. 367 (1951),] and subsequent cases *have drawn the line at civil actions*." 445 U.S. at 373 (emphasis added). Thus, the Court distinguished civil and criminal cases and held

In *Expedia*, this Court stressed the criminal aspect of these and similar cases. *See* 85 So. 3d at 521 (noting, as to *Girardeau*, that the privilege "could not be asserted in any event to withhold information from a grand jury investigating a crime"); *id*. at 522 (noting, as to *Gravel v. United States*, 408 U.S. 606 (1972), that the privilege cannot be used as a shield against the commission of a crime); *id*. at 523 (noting that *Nixon* recognized the executive privilege but held that cannot be asserted to shield evidence of a crime).

It is clear from these cases that to override the legislative privilege, the "governmental interest" must implicate criminal conduct. While other interests (such as an imminent threat to human life) might also conceivably outweigh the privilege, the interest involved would be—as in criminal cases—outside the legislative process.

The Order adopts a much broader, much more vague definition of a governmental interest sufficient to overcome the legislative privilege, considering whether Plaintiffs' claims were sufficiently "compelling" (A. 5-6). This view of the exception undermines the public policy underlying the legislative privilege. To disregard the privilege outside of the criminal context simply because a legislative enactment is "important," or affects important interests, would stand the privilege

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that, in criminal matters, "an evidentiary privilege for state legislators would impair the legitimate interest of the Federal Government in enforcing its criminal statutes." *Id*.

on its head. *See Florida v. United States*, 2012 WL 3594322, at *3 ("Voting Rights Act cases are important, but . . . there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.") (Hinkle, J.). The privilege guarantees the Legislature's independent judgment precisely when it is most exposed to external pressures—in the case of important legislation.

The Order also transforms an objective, bright-line test (whether the issue involves the legislative function) into a vague, subjective one (whether the governmental interest embodied in the legislation at issue is compelling enough to override the privilege) with no guiding standards. Every party that files suit asserting the invalidity of legislation believes that the governmental interest it asserts (such as freedom from unconstitutional laws) is important. If Plaintiffs can depose legislators here, then any party who attacks a statute's constitutionality may claim entitlement to depose the legislators who drafted it, or voted for or against it, thus undermining centuries of well-established law protecting legislators from interference precisely when it is needed most, in cases involving important and controversial legislation. *See Expedia*, 85 So. 3d at 822.

Courts have enforced the privilege in similar circumstances. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 & n.18 (1977), the Court recognized the legislative privilege in race-discrimination cases under the federal Equal Protection Clause. In *Florida v.*

United States, 2012 WL 3594322, at *3 (Hinkle, J.), the Court, noting *Expedia*, concluded that the privilege is not abrogated in litigation under the federal Voting Rights Act, which Congress enacted to implement the Civil War Amendments to the United States Constitution. And state courts have consistently applied the legislative privilege in the context of redistricting. *See Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1095 (Ariz. Ct. App. 2003) ("[A] state legislator engaging in legitimate legislative activity may not be made to testify about those activities, including the motivation for his or her decisions."); *In re Perry*, 60 S.W.3d 857, 858 (Tex. 2001) ("[I]n apportioning legislative districts pursuant to constitutional mandate, [members of the redistricting board] were acting in a legislative capacity and are cloaked, as are their aides, with legislative immunity."); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984) ("Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation . . . falls clearly within the most basic elements of the legislative privilege."). Ten years ago, a federal court in this State entered a protective order prohibiting the depositions of five state legislators in a challenge to Florida's congressional districts under the federal Voting Rights Act. *See* Omnibus Order, *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 30, 2002) (D.E. 201). In contrast, until now no Florida court had ordered that a legislator could be deposed about legislative matters.

The Order also found that "some relaxing of the legislative privilege" was appropriate because "the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan" (A. 6). But courts repeatedly have found that the legislative privilege applies even where the cause of action is based on improper legislative intent. *See Vill. of Arlington Heights*, 429 U.S. at 268 (recognizing the legislative privilege in race-discrimination cases that require proof of "racially discriminatory intent or purpose"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The claim of an unworthy purpose does not destroy the privilege."); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) ("Even where a plaintiff must prove invidious purpose or intent, . . . the Court has indicated [in *Arlington Heights*] that only in extraordinary circumstances might members of the Legislature be called to testify, and even in these circumstances the testimony may be barred by privilege."); *Florida v. United States*, 2012 WL 3594322, at *3 (finding that, despite the "discriminatory purpose" element of Section 5 of the Voting Rights Act, the legislative privilege protects legislators and staff from deposition) (Hinkle, J.); *Orange v. Cnty. of Suffolk*, 855 F. Supp. 620, 623 (E.D.N.Y. 1994) ("Notwithstanding Plaintiffs' contention that what is at issue in this case is the purpose and motive of legislators in enacting challenged

legislation . . . legislative privilege prevents compelling [a legislator] to answer questions within the scope" of the privilege).

This is not the only constitutional case in which legislative motive is relevant. Cases implicating the freedom of speech and religion, due process, and equal protection—cherished rights secured by Florida's Declaration of Rights—are all important, and each might at times require investigation into legislative purpose or motive.[7] If the legislative privilege can be overridden in this case, then it will routinely yield to enforce these and other important constitutional rights.

Finally, even if Plaintiff had identified an important governmental interest, the marginal probative value of a particular legislator's testimony militates against disregarding the legislative privilege. Courts have long doubted the probative value of an individual legislator's testimony in determining the intent of the Legislature as a whole. *See Sec. Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939) ("The law appears settled that [legislator] testimony is of doubtful verity if at all admissible to show what was intended by the Act."); *McLellan v. State Farm*

[7] *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (noting that the First Amendment prohibits actions taken with a "purpose to suppress speech"); *City of Lauderhill v. Rhames*, 864 So. 2d 432, 438 (Fla. 4th DCA 2003) (noting that substantive due process prohibits the deprivation of fundamental rights if the state action is "tainted by improper motive"); *Jackson v. N. Broward Cnty. Hosp. Dist.*, 766 So. 2d 256, 257 (Fla. 4th DCA 2000) (noting that the Equal Protection Clause prohibits race discrimination in cases of "discriminatory intent or purpose"); *Hobby v. State*, 761 So. 2d 1234, 1238 (Fla. 2d DCA 2000) (noting that the Establishment Clause requires that statutes have a "secular purpose").

Mut. Auto Ins. Co., 366 So. 2d 811, 813 (Fla. 4th DCA 1979) (finding that "such proof is generally not accepted as admissible evidence to demonstrate legislative intent."), *overruled on other grounds by S.C. Ins. Co. v. Kokay*, 398 So. 2d 1355 (Fla. 1981); *see also Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (refusing to "give probative weight" to legislator testimony "because such statements represent only the personal views of this legislator," and "post hoc observations by a single member of Congress carry little if any weight" (marks omitted)). Intent must be inferred primarily from the enactment itself and the legislative record—not a skewed sample of post-enactment recollections. *See Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME*, 784 So. 2d 404, 409 (Fla. 2001) ("Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of that body."); *Tamiami Trail Tours v. City of Tampa*, 31 So. 2d 468, 470-71 (Fla. 1947) ("[W]e should, if possible, determine from the legislative record what was the legislative intent.").

The Legislative Parties already have produced 25,000 files relevant to the 2012 congressional redistricting process—including the bills, amendments, and votes recorded in the House and Senate Journals, the recordings and transcripts of meetings, and floor debates. To permit further inquiries into legislative motive through depositions of legislators and legislative staff would "represent a

substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights*, 429 U.S. at 268 n.18.

Indeed, in its recent review of state legislative districts, the Florida Supreme Court determined legislative intent from ascertainable facts alone, without any legislator testimony. In *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 617 (Fla. 2012), the Court looked to "objective indicators of intent," such as the "effects of the plan, the shape of district lines, and the demographics of an area," to determine whether redistricting plans were drawn with an impermissible intent. 83 So. 3d at 617. The Court emphasized that the Legislature's "level of compliance" with the redistricting standards in Article I, Section 21(b) of the Florida Constitution were highly probative of legislative intent. *Id*. at 618. Strict compliance with standards such as compactness and adherence to political and geographical boundaries might "undercut" an allegation of improper intent, while "disregard for these principles can serve as indicia of improper intent." *Id*. In evaluating the Legislature's intent with respect to political parties, the Court also considered "the shapes of districts together with undisputed objective data, such as the relevant voter registration and elections data, incumbents' addresses, and demographics." *Id*. In evaluating the Legislature's intent with respect to incumbents, the Court considered "the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence of

intent," such as "the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district." *Id*. at 618-19. Based on this analysis, the Court found that Senate Districts 6, 9, 29, and 34 were drawn with an intent to favor incumbents and a political party, *id*. at 669, 678, and that Senate Districts 10 and 30 were drawn with an intent to favor incumbents, *id*. at 672. No deposition testimony was necessary to support the Court's conclusions.

Given the limited probative value of any testimony from legislators and their staff, no basis exists to disregard the legislative privilege and encroach on Florida's strict separation of powers guarantee.

3. The Order Departs from the Essential Requirements of Law By Permitting Discovery Disclosure of "Objective" Information

The Order purports to "balance" the policy behind the legislative privilege with Plaintiffs' interest in discovery by barring inquiries into the "subjective" thoughts or impressions of legislators and their staff but permitting inquiry into "objective" information and communications (A. 6). But such an artificial distinction all but defeats the fundamental purpose of the legislative privilege, which is to protect legislators and legislative staff from having to be deposed at all about their legislative functions.

The Order's "subjective" versus "objective" distinction finds no support in the law. The Order relies on *Committee for a Fair and Balanced Map*, 2011 WL

4837508. But that case does not support the far-reaching discovery the Order authorizes. In that case, which also involved a challenge to a redistricting plan, the court found that the legislative privilege protected "documents containing the (1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 Map prior to the passage of the Redistricting Act; or (2) identities of persons who participated in decisions regarding the 2011 Map." *Id*. at *11. The court permitted limited discovery only concerning "documents available to members of the General Assembly at the time the Redistricting Act was passed" which did not contain information protected by legislative privilege. *Id*. At best, *Committee for a Fair and Balanced Map* supports allowing limited discovery of *documents* not protected by legislative privilege; it does not justify compelling legislators to submit to depositions addressing legislative functions. *See Florida v. United States*, 2012 WL 3594322, at *2 (noting the lack of cases in any context "in which a state legislator who has not agreed to testify at a trial has been compelled to sit for a deposition addressing legislative functions") (Hinkle, J.). And it is distinguishable from this case on several grounds:

First, it applied the federal common law, not the strict separation-of-powers provision of the Florida Constitution. The courts of this State have consistently embraced a "strict adherence to the separation of powers doctrine." *State v. Fla. Police Benevolent Ass'n, Inc.*, 613 So. 2d 415, 419 (Fla. 1992).

Second, the facts found to be discoverable in *Committee for a Fair and Balanced Map* were facts "such as United States Census reports and election returns." *See* 2012 WL 3594322, at *4. Here, the Legislative Parties produced all such objective data long ago. Indeed, these data have long been available on the Legislature's website. *See*, *e.g.*, http://www.flsenate.gov/Session/Redistricting/; http://mydistrictbuilder.wordpress.com/opendata/.

Third, *Committee for a Fair and Balanced Map* concerned documents, not depositions. The chilling effect of producing documents not specifically exempted from disclosure pales in comparison to the chilling effect of a deposition. In Florida, legislators are accustomed to broad public access to almost all documents generated in the legislative process. *See* Art. I, § 24, Fla. Const. But legislators are *not* accustomed to being subpoenaed for hostile depositions in matters within the legislative sphere. Plaintiffs did not cite a single case in which a Florida legislator has ever been compelled to testify on such subjects. Indeed, because the court in *Committee for a Fair and Balanced Map* considered the chilling effect as a relevant factor, *see* 2011 WL 4837508, at *7 (weighing "the possibility of future timidity by government employees"), the Court likely would have decided differently (even under federal common law) had the case involved depositions.

Far more persuasive than *Committee for a Fair and Balanced Map* is United States District Judge Hinkle's recent decision in *Florida v. United States*, 2012 WL

3594322. While that case was based on federal common law, Judge Hinkle recognized that a state's recognition of the privilege for its own legislators affects the federal analysis, and cited *Expedia* in concluding that "Florida *does* recognize a state legislative privilege," and that, if "faced with the issue, the Florida Supreme Court almost surely would agree." 2012 WL 3594322, at *3 (emphasis in original). The Order does not mention Judge Hinkle's opinion.

The Order's distinction between objective and subjective information also proves unworkable. This nebulous standard invites objections, disagreement, refusals to answer questions, hostile depositions, and constant court intervention in discovery disputes—just the sort of time-consuming, oppressive intrusion into legislative decision-making that the privilege is designed to prevent. Indeed, the avowed purpose of the depositions is to establish what is purportedly off limits—the subjective motivation of individual legislators. As Plaintiffs press deponents for evidence of subjective motives, disagreements involving the broad, undefined zone between clearly impermissible subjective information and permissible objective information will abound, requiring frequent Court intervention.

An unworkable balancing test also denies legislators any ability to predict the privilege's scope and applicability in the future conduct of their legislative responsibilities. As a result, legislators will perform all legislative business under the specter of harassing subpoenas, and litigious parties will be empowered to

intimidate legislators and exercise undue power over the legislative process. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (Frankfurter, J.); *accord Girardeau*, 403 So. 2d at 516.

The Order undercuts the purpose of the legislative privilege by requiring the Legislative Parties to testify about matters at the core of their legislative functions, whether or not the inquiries are limited to "objective" information about the legislative process. *See Florida v. United States*, 2012 WL 3594322, at *1 ("Florida state legislators have a privilege not to testify on matters at the core of their legislative functions.") (Hinkle, J.).

4. The Documents Requested by Plaintiffs Are Exempted from Disclosure under the Public Records Act and Are Protected by Legislative Privilege

The Order recognizes that the legislative privilege extends to documentary evidence, but it rejects the Legislative Parties' interpretation of the exemption for draft reapportionment plans and supporting documents under section 11.0431(2)(e), Florida Statutes. The Order requires the Legislative Parties "[to] produce all documents requested which do not contain 'subjective' information as described above" and offers to review *in camera* any disputed documents. (A. 10).

The Order departs from the essential requirements of the law because section 11.0431(2)(e), Florida Statutes, exempts draft maps regardless of whether a reapportionment plan has been filed or adopted. It also exempts "supporting documents" associated with draft maps until the associated map is filed as a bill. But the statute does not provide that earlier or unrelated draft maps *ever* become public. The statute exempts from disclosure:

> A draft, and a request for a draft, of a reapportionment plan or redistricting plan and an amendment thereto. Any supporting documents associated with such plan or amendment until a bill implementing the plan, or the amendment, is filed.

§ 11.0431(2)(e), Fla. Stat. (2012).[8] Thus, the limiting words "until a bill . . . is filed" appear only in the second sentence of section 11.0431(2)(e), which addresses "supporting documents." In other words, draft maps remain exempt and protected by legislative privilege indefinitely, while the filed bill itself reveals the final product. Indeed, if non-public drafts were subject to discovery, the Legislature would be deterred from continually improving early drafts, or from preparing them at all—precisely the type of chilling effect that the privilege exists to prevent.

The circuit court should have deferred to the Legislature's reasonable interpretation because the exemption is the Legislature's to enforce. *See, e.g.*, *Escambia Cnty. v. Trans Pac, Inc.*, 584 So. 2d 603, 605 (Fla. 1st DCA 1991). And

[8] Drafts of bills and bill analyses also are exempt from disclosure until filed. *See* § 11.0431(2)(c) and (d), Fla. Stat. (2012).

even if Plaintiffs had the right of access to exempt documents, such access is governed by legislative rule, *see* Art. I., § 24(c), Fla. Const. *See also* Fla. H. Rep. R. 14.1 ("Any person who is denied access to a legislative record . . . may appeal to the Speaker the decision to deny access."). Because draft maps are exempt from public disclosure and subject to legislative privilege, they should be protected.

B. The Legislative Parties Will Be Materially Injured If They Are Compelled to Produce Privileged Information

The second requirement for certiorari is that the order causes "material" or "irreparable" injury to the petitioner. *Wal-Mart Stores E., L.P.*, 81 So. 3d at 488; *Fla. E. Coast Ry.*, 847 So. 2d at 1118-19. Certiorari is proper when an order requires disclosure of information that is alleged to be privileged; in such circumstances, the harm is irreparable because "when confidential information is ordered disclosed . . . the information cannot be 'taken back.'" *Eight Hundred, Inc. v. State Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003).

That is precisely the case here. Compelling legislators and legislative staff to testify about matters within their legislative function, in contravention of the legislative privilege, will cause both those particular individuals as well as the legislative branch as a whole immediate and irreparable harm. The entire point of the legislative privilege is to protect legislators from having to discuss issues involving their legislative function. Once the depositions occur, these protections are destroyed forever and cannot be recovered. As far as we can determine, no

such deposition—touching on matters central to the legislative function—ever has occurred in this state.

The Legislative Parties also will be irreparably harmed by having to produce documents exempt from public disclosure. The compelled production of protected documents "is known as 'cat out of the bag' harm because once the documents are disseminated, a privacy . . . interest has been invaded which cannot be remedied on direct appeal." *Wal-Mart Stores E., L.P.*, 81 So. 3d at 491.

C. If the Legislative Parties Are Forced to Produce Privileged Information, They Will Have No Adequate Remedy on Appeal of the Final Judgment

The third requirement for certiorari is that petitioner has no adequate remedy on post-judgment appeal. *Fla. E. Coast Ry.*, 847 So. 2d at 1118-19. Privileged information is classic "cat out of the bag" material that, once produced, cannot be un-produced, thereby causing irreparable harm. *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987); *Eight Hundred*, 837 So. 2d at 576 ("[O]nce disclosed, [privileged] information cannot be 'taken back.'"). Indeed, if "cat out of the bag" material is disclosed, an "interest has been invaded which cannot be remedied on direct appeal." *Wal-Mart Stores E., L.P.*, 81 So. 3d at 491; *see also Avante Villa at Jacksonville Beach*, 958 So. 2d at 1034 ("[E]rroneous production of . . . privileged and/or protected documents cannot be remedied on appeal, and thus may result in a miscarriage of justice.")

Such is the case here. As shown above, the Order permits Plaintiffs to obtain discovery of privileged information that, once disclosed, cannot be retrieved. And the Legislative Parties would have no remedy for such harm on any post-judgment appeal.

V.

CONCLUSION

Defendants satisfy the three requirements for certiorari relief. The circuit court's order should be quashed and the case remanded with directions to enter an order declaring that (i) absent a waiver of the legislative privilege, no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 31, 2012, a copy of this petition was served by mail and email to all counsel on the attached service list.

/s/ Raoul G. Cantero
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CERTIFICATE OF COMPLIANCE

I certify that this petition is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(l).

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