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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA, *et al.*,

Plaintiffs,

vs. Case No. 2012-CA-002842

KENNETH W. DETZNER, *et al.*,

Defendants.
_____/

LEGISLATIVE PARTIES' MOTION FOR PROTECTIVE ORDER
TO PROHIBIT INQUIRY INTO PRIVILEGED MATTERS

Pursuant to Florida Rule of Civil Procedure 1.280(c), the Florida House of Representatives and the Florida Senate (together, the "Legislative Parties"), request a protective order prohibiting the parties from questioning any witness about a matter protected by legislative privilege, including a legislator's statements and conduct during the legislative process, unless expressly waived by the holder of the privilege. Plaintiffs intend to depose a former member of the Florida Senate, Paula Dockery, about the legislative process that led to the passage of the Senate reapportionment plan challenged in this case.[1] Although Senator Dockery may choose to waive the legislative privilege as to her own conduct and motivations during the reapportionment process, the legislative privilege continues to protect other individual legislators who have not waived the privilege. Absent an order from this Court, however, Plaintiffs may attempt to inquire about Senator Dockery's knowledge of actions or statements of other legislators and their staff, who continue to enjoy the protections of legislative privilege. The Legislative Parties

[1] Because Senator Dockery was ineligible to seek reelection under the Florida Constitution's term-limits provision, *see* Art. VI, § 4(b), Fla. Const., her tenure in the Senate concluded on November 6, 2012.

therefore seek an order prohibiting the parties from questioning any witness, including Senator Dockery, about a matter protected by legislative privilege, absent an express and unequivocal waiver by the holder of such privilege.

FACTS

This case concerns the constitutionality of Senate Joint Resolution 2-B, which establishes new electoral districts for the Florida Senate in accordance with the 2010 Census and Article III, Section 21 of the Florida Constitution. Among other claims, Plaintiffs allege that the new districts were "drawn with the intent to favor or disfavor a political party or an incumbent" in violation of Article III, Section 21(a) of the Florida Constitution.

Despite the abundance of information available through an unprecedented legislative record, in October 2012 Plaintiffs began to schedule depositions of the Legislative Parties. Several of the Plaintiffs took similar course of action in another redistricting case before this Court, *Romo, et al. v. Florida House of Representatives, et al.*, Case No. 2012-CA-000412. In that case, the Legislative Parties filed a motion for protective order seeking to prevent the plaintiffs from taking the depositions of legislators and their staff due to legislative privilege. On October 3, 2012, this Court granted in part and denied in part the Legislative Parties' motion for a protective order (the "Order"). The Court recognized that the legislative privilege is an "essential implied component of the separation of powers doctrine implicit in constitutional government" and held 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." (Order at 2, 10).[2]

[2] The Court also held that the plaintiffs may depose legislators and legislative staff about "'objective' information or communication which does not encroach into the thoughts or impressions enumerated above" (Order at 10). The Legislative Parties have filed a petition for

On October 30, 2012, Plaintiffs scheduled the deposition of State Senator Paula Dockery in this case. Senator Dockery has ostensibly agreed to waive her legislative privilege. Plaintiffs now intend to depose Senator Dockery about her recollections and impressions of the legislative process that led to the enactment of Senate Joint Resolution 2-B. Plaintiffs, however, cannot bypass the protections afforded by legislative privilege to the Legislature and its members simply by finding one legislator willing to provide testimony. Therefore, Defendants seek relief from this Court to ensure that Plaintiffs do not inquire into matters that invade the legislative privilege of the Legislature and any of its members who have not expressly waived the privilege.

ARGUMENT

Florida Rule of Civil Procedure 1.280(b)(1) ("Scope of Discovery") provides that "Parties may obtain discovery regarding any matter, *not privileged,* that is relevant to the subject matter of the pending action . . . ." (emphasis added). Rule 1.280(c) ("Protective Orders") permits that, upon motion and for good cause shown, a court may make "any order to protect a party or person from annoyance, embarrassment, oppression . . . that justice requires." Such an order may require that "discovery not be had, . . . that certain matters not be inquired into, or that the scope of discovery be limited to certain matters." *Id.* The Court's intervention is now required to prohibit Plaintiffs from invading the legislative privilege of the Legislative Parties.

B. This Court Should Prohibit Plaintiffs From Inquiring Into Matters Protected by Legislative Privilege Not Expressly Waived by the Holder of the Privilege

The Court should prohibit Plaintiffs from questioning witnesses, including Senator Dockery, about any matter protected by legislative privilege and not expressly waived by the holder of such privilege. Although Senator Dockery may choose to waive her personal

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writ of certiorari in the First District Court of Appeal, arguing that the Order violates the separation of powers by compelling Florida legislators to answer questions within the legislative sphere.

legislative privilege, this waiver is limited to her own actions and motivations during the legislative process that led to the passage of Senate Joint Resolution 2-B. The legislative privilege continues to protect the other members of the Legislature and legislative staff, as well as the institution.

In March, the First DCA held that Florida's strict separation of powers affords legislators a privilege against compelled testimony about legislative matters. *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012). Legislative privilege also prevents third parties, including other legislators, from testifying about a legislator's conduct during the legislative process. As the Seventh Circuit has recognized, the privilege "is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself." *United States v. Craig*, 528 F.2d 773, 780 (7th Cir. 1976), *modified on reh'g on other grounds,* 537 F.2d 957 (7th Cir. 1976). While the privilege can be waived by a legislator's "free choice," this waiver allows inquiry to the extent that it "impugns only the personal independence of the legislator and does not call into question the independence of other members of the body." *Id.* at 780-81. Because the privilege "embodies institutional as well as personal protection, the scope of the waiver must be carefully limited." *Id.* at 781 n.7. The Seventh Circuit observed that an "individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole." *Id.* As a result, "any waiver must be strictly limited to the conduct of the individual representative." *Id.*

This important limitation on waiver of the legislative privilege was recently applied in *Cano v. Davis*, 193 F. Supp. 2d 1177 (C.D. Cal. 2002), a case involving a challenge under the Voting Rights Act to redistricting of federal and state legislative districts. The plaintiffs alleged that the state legislature acted with improper discriminatory intent when drawing the maps and

sought to depose legislators about the legislative process. *Id.* at 1179. The defendants asserted that legislative privilege barred such testimony and sought a protective order. *Id.* The district court found that "the legislative privilege applies in constitutional litigation alleging discriminatory motivation just as it does in other contexts." *Id.* at 1180. The court also recognized that state legislators could waive the privilege and testify about the redistricting process. *Id.* at 1179. The district court limited this waiver, however, by holding that legislators who waive the privilege "may not give unfettered testimony regarding the legislative acts of other members." *Id.* Citing *Craig*, the court noted that a legislator's testimony must be "carefully limited" so that it does not invade the privilege of another legislator. *Id.* at 1180. While a legislator "may testify to his own legislative acts and statements, [he] may not testify as to the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege." *Id.* at 1179.

Other cases have adopted this limitation. For example, in *United States Football League v. National Football League*, 842 F.2d 1335, 1376 (2d Cir. 1988), a senator elected to waive the legislative privilege to testify at trial about the defendant's use of "pressure" tactics in Congress, including threats to fellow legislators. The Second Circuit concluded that the senator's statements about such tactics were properly excluded because, among other things, "the testimonial privilege that members of Congress enjoy . . . cannot be waived by another member." *Id.* at 1375-76. It explicitly adopted the reasoning of the district court that "the underlying purpose" of the privilege "to 'protect the integrity of the legislative process by insuring the independence of the individual legislators,' would be 'ill-served' if such waivers were permitted." *Id.* at 1375 (internal citation omitted).

Taken together, these precedents establish that while a legislator may waive the legislative privilege as to her own thoughts, motivations, and legislative acts, she may not testify about the legislative acts of fellow legislators. Indeed, as the First DCA recognized, information "shar[ed] with colleagues is an essential part of the legislative process" and protected from discovery. *Expedia*, 85 So. 3d at 525. To permit testimony by one member of the legislature about the actions or statements of other members would have a chilling effect on the freedom of communication between legislators, and pressure legislators to waive the privilege in order to rebut or elucidate the testimony of their colleagues. As a result, it would undermine both the Florida Constitution's strict separation of powers and the independence of the Legislature, which the legislative privilege is designed to foster. *See id.* at 524.

Here, Plaintiffs plan to depose a state senator about the legislative process that led to the reapportioned districts. While Senator Dockery may waive her personal legislative privilege and testify about her own actions and motivations during the legislative process, she may not testify about the conduct and statements of other legislators or legislative staff. Without a protective order from this Court, however, Plaintiffs may elicit testimony that concerns not only Senator Dockery's "conduct but also that of the body as a whole." *See Craig*, 537 F.2d at 781 n.7. As this Court has recognized, the legislative privilege is an "essential implied component of the separation of powers doctrine implicit in constitutional government" (Order at 2). To allow Plaintiffs to elicit testimony from one legislator about the conduct of other legislators or their staff would undermine the legislative privilege itself. *See U.S. Football League*, 842 F.2d at 1375 (noting that the purpose of the legislative privilege would be "ill-served" if one member could waive the privilege belonging to another). This Court should therefore prohibit any questioning of witnesses about matters within the scope of legislative privilege, including the

actions and statements of legislators involved in the legislative process, unless expressly waived by the legislator holding that privilege.

CONCLUSION

For the reasons stated above, the Legislative Defendants request a protective order prohibiting the Plaintiffs from questioning any witness about any matter protected by legislative privilege, including a legislator's statements and conduct during the legislative process, unless the privilege is expressly waived by the particular legislator or legislative staff member whose comments are discussed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 16, 2012, a copy of this motion was served by email to all counsel on the attached service list.

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