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

RENE ROMO, *et al*.,

Plaintiffs,

v. Case No. 2012-CA-000412

KEN DETZNER, in his official capacity as Florida Secretary of State, and PAMELA JO BONDI, in her official capacity as Attorney General,

Defendants.
_____/

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

Plaintiffs,

v. Case No. 2012-CA-000490

KEN DETZNER, in his official capacity as Florida Secretary of State, *et al*.,

Defendants.
_____/

THE FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO THE ROMO PLAINTIFFS' MOTION TO COMPEL

Defendants, the Florida House of Representatives and Will Weatherford, in his official capacity as Speaker of the Florida House of Representatives,[1] submit this response in opposition to the Romo Plaintiffs' Motion to Compel Materials Withheld by the Legislative Defendants on Grounds of Attorney-Client Privilege and Attorney Work Product, dated October 29, 2012.

[1] On November 20, 2012, Representative Will Weatherford succeeded Representative Dean Cannon as Speaker of the Florida House of Representatives. Pursuant to Florida Rule of Civil Procedure 1.260(c)(1), Speaker Weatherford, in his official capacity, is substituted as a party to this action.

INTRODUCTION

In 2011 and 2012, the Florida Legislature conducted the most open and transparent redistricting process in the history of the State. The Legislature held dozens of public hearings and committee meetings and published and deliberated on multiple proposals in the public eye.

In litigation, the Legislative Defendants have been equally unreserved. Unlike Plaintiffs, who have produced a total of ***38 pages*** in response to multiple requests for production, the Legislative Defendants have produced more than ***25,000 documents***, including non-privileged communications with their attorneys.[2] Consistent with the transparency that characterized the entire legislative process, the Legislative Defendants raised limited objections to production in the most exceptional cases, where the application of those objections was demonstrably proper.

In discovery, public entities may assert the same objections as other litigants. Courts have drawn a clear line of separation between discovery and public-records obligations, holding that discovery objections may not be asserted in response to public-records requests and, *vice versa*, that public-records exemptions may not be asserted in response to discovery requests. Plaintiffs' assumption that, in discovery, public entities are limited to asserting public-records exemptions is squarely at odds with these precedents, and deprives public entities of objections such as relevance and overbreadth, which are not grounds to refuse a public-records request.[3]

The two processes are separate and distinct. It is the unique prerogative of the Judicial Branch to establish rules of judicial procedure and to prescribe the conditions and limitations of the judicially created and judicially regulated discovery process. *See* Art. V, § 2(a), Fla. Const.

[2] Puzzlingly, Plaintiffs claim that the Legislative Defendants have "apparently" taken the position that "the attorney-client privilege protects from disclosure any document created or received in connection with the redistricting process that involves an attorney" (Mot. at 3), but the Legislative Defendants long ago produced hundreds of documents that meet this description.

[3] Public entities may charge a fee to process public-records requests. *See* Fla. H.R. Rule 14.2(e) (2012).

Nevertheless, the Legislative Defendants have not unnecessarily burdened Plaintiffs' access to documents, and have not insisted that Plaintiffs submit formal public-records requests to obtain documents privileged from discovery. They have recognized, moreover, that some discovery objections—such as the attorney-client privilege—protect only documents that were intended to remain confidential and undisclosed to third parties, and that such privileges would not protect documents that are accessible to third parties under the Public Records Act.[4]

Thus, the House has ***not*** asserted these privileges with respect to documents accessible under the Public Records Act. In facilitating Plaintiffs' access to documents, the House has claimed privilege with respect to two classes of documents: (1) documents that would reveal the identities of non-testifying experts, and (2) documents that are protected by the attorney-client privilege or work-product doctrine ***and*** exempt from disclosure under the Public Records Act.

The Legislative Defendants have faithfully complied with their discovery obligations. Plaintiffs' attempt to depict these limited assertions of privilege as shady and nefarious is unfortunate and flatly incorrect. In reality, while Plaintiffs have all but refused to acknowledge their own discovery obligations, the Legislative Defendants have made voluminous, good-faith document productions. Because the House's limited assertions of privilege are well founded both in law and fact, the Court should deny the Motion to Compel.

[4] In Florida, the "Sunshine Act" (or, more commonly, the "Sunshine Law") is the open-meetings law. In referring to the "Sunshine Act," Plaintiffs presumably mean the Public Records Act.

ARGUMENT

I. THE ROMO PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY RELATED TO NON-TESTIFYING EXPERTS.

Nineteen documents sought by Plaintiffs are documents (such as *curricula vitae*, law-review articles, and expert reports prepared in other cases) that identify experts retained by the House.[5] The Florida Rules of Civil Procedure restrict discovery related to non-testifying experts, permitting it only in "extraordinary circumstances." Plaintiffs have not suggested any extraordinary circumstances, and, accordingly, their requests are beyond the scope of discovery.

Florida Rule of Civil Procedure 1.280(b)(5)(B) limits discovery of experts that are "retained or specially employed . . . in anticipation of litigation or preparation for trial," but are not expected to be called as witnesses at trial. This protection shields not only facts known and opinions held by non-testifying experts, but also their identities. *See Taylor v. Penske Truck Leasing Corp.*, 975 So. 2d 588, 589 (Fla. 1st DCA 2008) (quashing trial-court order compelling disclosure of names and opinions of non-testifying experts); *Carrero v. Engle Homes, Inc.*, 667 So. 2d 1011, 1012 (Fla. 4th DCA 1996) (quashing trial-court order compelling disclosure of identities of non-witness experts); *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1187 (Fla. 4th DCA 1995); *Lift Sys., Inc. v. Costco Wholesale Corp.*, 636 So. 2d 569, 569 (Fla. 3d DCA 1994); *Ruiz ex rel. Ruiz v. Brea*, 489 So. 2d 1136, 1137-38 (Fla. 3d DCA 1986) (opinion on rehearing).

Importantly, Rule 1.280(b)(5)(B) bars discovery until the party that retained the expert affirmatively decides that the expert *will* testify at trial. Thus, as long as the expert's status as a testifying or non-testifying expert remains in legitimate doubt, Rule 1.280(b)(5)(B) precludes discovery. *Carrero*, 667 So. 2d at 1012 (per Pariente, J.) ("[W]here a party has legitimately not yet decided which retained experts will be called at trial, disclosure should be protected . . . .").

[5] Exhibit A: 3, 5, 9, 13, 15-17, 70, 72, 73, 75, 80, 83-86. Exhibit B: 7, 12, 13.

With one exception, the experts at issue have been consulted directly in connection with and since the commencement of this litigation. Of these, one will not testify, and the House has not made a final decision with respect to the others. If the House decides that these experts will testify, it will disclose them at the appropriate time, and Plaintiffs will have every opportunity to conduct discovery consistent with Florida Rule of Civil Procedure 1.280(b)(5).

The House retained the other expert during the redistricting process with the specific purpose of ensuring that the redistricting maps enacted by the House are upheld by the courts in inevitable litigation. The expert assisted the House in developing its understanding of the new constitutional standards and enabling the House to draw compliant maps that would withstand court challenges. Because litigation was foreseeable, the expert was retained "in anticipation of litigation." *See Orange Park Christian Acad. v. Russell*, 899 So. 2d 1215, 1215 (Fla. 1st DCA 2005) (concluding that, where litigation was "foreseeable," actions were taken in "anticipation of litigation"); *Wal-Mart Stores, Inc. v. Ballasso*, 789 So. 2d 519, 520 (Fla. 1st DCA 2001) (same).

Here, litigation was more than foreseeable. In fact, it was a foregone conclusion that litigation would follow the redistricting process. Litigation has long been a familiar feature of redistricting. Between 1962 and 2003, state legislative and congressional redistricting in Florida alone has produced at least forty-four reported decisions,[6] and in this redistricting cycle, with the adoption of untried and complex constitutional standards, litigation became inevitable.[7]

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[6] *See Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Kirk v. Gong*, 389 U.S. 574 (1968); *Swann v. Adams*, 385 U.S. 440 (1967); *Swann v. Adams*, 383 U.S. 210 (1966); *Swann v. Adams*, 378 U.S. 553 (1964); *Gong v. Kirk*, 375 F.2d 728 (5th Cir. 1967); *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002); *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002); *Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999); *Johnson v. Mortham*, 950 F. Supp. 1117 (N.D. Fla. 1996); *Johnson v. Mortham*, 926 F. Supp. 1540 (N.D. Fla. 1996); *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996); *Scott v. U.S. Dep't of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996); *Johnson v. Mortham*, 915 F. Supp. 1574 (N.D. Fla. 1996); *Johnson v. Mortham*, 164 F.R.D. 571 (N.D. Fla. 1996); *Johnson v. Mortham*,

In these circumstances, it is clear that litigation was foreseeable, and that the steps taken by the House to ensure compliance with the new constitutional standards were taken in anticipation of litigation. Because the documents sought by the Romo Plaintiffs relate to experts retained by the House during or in anticipation of litigation, and because the Romo Plaintiffs cannot assert "exceptional circumstances," the Romo Plaintiffs are not entitled to discovery.

II. THE REMAINING DOCUMENTS ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE.

The remaining documents identified by the Romo Plaintiffs are textbook examples of documents protected by the attorney-client privilege and work-product doctrine. They include attorney-client memoranda prepared by the House's counsel, GrayRobinson, and documents prepared by House staff at the direction of counsel in preparation for the summary-judgment

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164 F.R.D. 268 (N.D. Fla. 1995); *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995); *De Grandy v. Wetherell*, 815 F. Supp. 1550 (N.D. Fla. 1992); *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992); *Wendler v. Stone*, 350 F. Supp. 838 (S.D. Fla. 1972); *Wolfson v. Nearing*, 346 F. Supp. 799 (M.D. Fla. 1972); *Gunderson v. Adams*, 328 F. Supp. 584 (S.D. Fla. 1970); *Gong v. Kirk*, 278 F. Supp. 133 (S.D. Fla. 1967); *Swann v. Adams*, 263 F. Supp. 225 (S.D. Fla. 1967); *Swann v. Adams*, 258 F. Supp. 819 (S.D. Fla. 1965); *Gong v. Bryant*, 230 F. Supp. 917 (S.D. Fla. 1964); *Sobel v. Adams*, 214 F. Supp. 811 (S.D. Fla. 1963); *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962); *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176 (Fla. 2003); *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002); *Fla. Senate v. Forman*, 826 So. 2d 279 (Fla. 2002); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002); *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543 (Fla. 1992); *In re Senate Joint Resolution 2G*, 597 So. 2d 276 (Fla. 1992); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session*, 414 So. 2d 1040 (Fla. 1982); *Fla. Senate v. Graham*, 412 So. 2d 360 (Fla. 1982); *Milton v. Smathers*, 389 So. 2d 978 (Fla. 1980); *Milton v. Smathers*, 351 So. 2d 24 (Fla. 1977); *Cardenas v. Smathers*, 351 So. 2d 21 (Fla. 1977); *In re Apportionment Law*, 281 So. 2d 484 (Fla. 1973); *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 279 So. 2d 14 (Fla. 1973); *In re Apportionment Law Senate Joint Resolution No. 1305, 2*63 So. 2d 797 (Fla. 1972); *Lund v. Mathas*, 145 So. 2d 871 (Fla. 1962).

[7] In this redistricting cycle, more than in any other, litigation was more than merely foreseeable. As discussed below, the Chairman of the Florida Democratic Party, which is participating in this litigation through the Romo Plaintiffs, announced in September 2011—two months before the Legislature published its first draft redistricting plan—that redistricting "will be determined by the courts." Mary Ellen Klas, *Rod Smith Predicts Courts Will Decide District Maps, Legislature Will Create Court Record*, TAMPA BAY TIMES, Sept. 28, 2011.

hearing in this case. These documents, moreover, are exempt from disclosure under the Public Records Act and were therefore created and maintained with the expectation of confidentiality that the attorney-client and work-product doctrines require. Such documents fall comfortably within the scope of those protections. *See* § 90.502, Fla. Stat. (2012); Fla. R. Civ. P. 1.280(b)(4).

A. Public Entities Are Entitled to the Same Discovery Privileges as Other Litigants.

As a preliminary matter, to the extent Plaintiffs suggest that public entities are not entitled to claim any discovery objections other than public-records exemptions, Plaintiffs are wrong: the scope of discovery is defined by the rules of discovery, not the Public Records Act. Courts have long distinguished between the judicially created discovery process and the Public Records Act, holding that public-records exemptions are *not* valid discovery objections. *See Delaurentos v. Peguero*, 47 So. 3d 879, 881 (Fla. 3d DCA 2010) ("The cited statute simply provides an exemption in the event that a citizen makes a public records request for medical records. That statutory provision does not create a privilege which would insulate such records from discovery in litigation."); *Dep't of Health v. Poss*, 45 So. 3d 510, 512 (Fla. 1st DCA 2010) ("Exemption from disclosure under section 119.07(1) does not also exempt a public record from discovery in administrative proceedings."); *Dep't of Prof'l Regulation v. Spiva*, 478 So. 2d 382, 383 (Fla. 1st DCA 1985) ("[A] document's exemption from disclosure under the Public Records Act does not render it automatically privileged for the purposes of discovery pursuant to the Florida Rules of Civil Procedure."); *State, Dep't of Highway Safety & Motor Vehicles, Div. of Highway Patrol v. Kropff*, 445 So. 2d 1068, 1069 n.1 (Fla. 3d DCA 1984) ("Although the Rules of Civil Procedure and the Public Records Act may overlap in certain areas, they are not coextensive in scope."). Indeed, if the Romo Plaintiffs are correct that public entities may not assert discovery objections, then public entities have no available objections to discovery at all.

The case on which Plaintiffs rely—*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)—is not to the contrary. *Wait* was a public-records case. It was not a discovery case. Although the parties were engaged in litigation, the dispute arose from a separate public-records request made pursuant to Chapter 119. *See Henderson v. State*, 745 So. 2d 319, 323 (Fla. 1999). The Court held that public entities may not invoke discovery objections to deny public-records requests—not that public entities may not make discovery objections in discovery.

In *Spiva*, the Court rejected the argument that Plaintiffs advance here—that public-records exemptions shield documents from discovery. The Court explained that "although the rules of civil procedure and the Public Records Act may overlap in certain areas, they are not coextensive in scope," and that "a document's exemption from disclosure under the Public Records Act does not render it automatically privileged for the purposes of discovery pursuant to the Florida Rules of Civil Procedure." *See* 478 So. 2d at 383. The Court refused to "equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure." *Id*. (quoting *Wait*, 372 So. 2d at 425). To determine whether the documents were discoverable, the Court looked to the rules of discovery—not, as Plaintiffs ask this Court to do, to the Public Records Act. The Court observed that Rule 1.280(b) permits discovery of relevant matter, not privileged, and that the documents "are relevant and material" and "not subject to any recognized privilege of exclusion from discovery." *Id*.

Similarly, in *Kropff*, the Court questioned a litigant's efforts to characterize its request for production as a public-records request, and made clear that the Florida Rules of Civil Procedure determine the scope of discovery directed to public entities. The Court noted that requests for production are served "pursuant to Florida Rule of Civil Procedure 1.310(b)(5)":

> which requires that production of documents be controlled by the procedures of Florida Rule of Civil Procedure 1.350. Rule 1.350 in turn limits the scope of such a request to documents constituting or containing matters within the scope of Florida Rule of Civil Procedure 1.280(b). Rule 1.280(b) delineates in some detail the scope of discovery. Although the Rules of Civil Procedure and the Public Records Act may overlap in certain areas, they are not coextensive in scope. Just as the supreme court did not in *Wait*, "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure . . . ," *id*. at 425.

See 445 So. 2d at 1069 n.1. The Court noted that the Rules of Civil Procedure impose more stringent restrictions on access to work product than the Public Records Act, and that the Public Records Act "provides its own procedures for making a public records request." *Id*. It observed that neither the Rules of Civil Procedure not the Public Records Act contemplated the "highly unusual hybrid procedure" of treating a request for production as a public-records request. *Id*.

The rules of discovery and the Public Records Act are separate and distinct, and must not be confused or hybridized. Each operates within its own sphere. Discovery is a judicial process created and regulated by judicial rules of procedure. It is the constitutional prerogative of the Judicial Branch to regulate its processes and establish the conditions and limitations of discovery. *See* Art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."). In discovery, the Florida Rules of Civil Procedure and the Evidence Code, which the Supreme Court has periodically adopted, *see, e.g.*, *In re Amendments to the Fla. Evidence Code*, 53 So. 3d 1019 (Fla. 2011), determine the rights and obligations of litigants, including public entities. The Public Records Act neither modifies nor supplants those rules, and the same discovery objections available to other parties are available to public entities.

In application, however, the Public Records Act is relevant to at least some discovery objections. Some discovery objections are limited in scope to documents that parties intended to maintain as confidential. For example, the attorney-client privilege in Section 90.502 applies only to "confidential" communications—*i.e.*, communications "not intended to be disclosed" to

third persons. *See* § 90.502(1)(c), Fla. Stat. (2012). Similarly, the work-product exemption in Florida Rule of Civil Procedure 1.280(b)(4) is inapplicable to documents treated in a manner "inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So. 2d 437, 442 (Fla. 3d DCA 1987). Clearly, records that are accessible under the Public Records Act cannot have been created with an expectation of confidentiality, and are therefore not protected by the attorney-client and work-product doctrines. In this respect, the Public Records Act is relevant to whether particular documents are protected by the attorney-client and work-product privileges. On the other hand, discovery objections not founded on the expectation of confidentiality—objections such as relevance and overbreadth—are unaffected by the Public Records Act, and are available to public and private litigants alike.

B. The Remaining Documents Are Exempt From the Public Records Act and Are Therefore Protected by the Attorney-Client Privilege and Work-Product Doctrine.

The remaining documents on the House's privilege log satisfy Section 119.071(1)(d), Florida Statutes, which exempts from public disclosure, until the conclusion of litigation, any public record that (1) was prepared by or at the express direction of an attorney employed or retained by the agency; (2) reflects a mental impression, conclusion, litigation strategy, or legal theory of the agency or attorney; and (3) was prepared in anticipation of "imminent" litigation or exclusively for litigation.[8] Those documents are held in confidence and are protected by the attorney-client privilege in Section 90.502 and the work-product doctrine in Rule 1.280(b)(4).

Plaintiffs ask the Court to construe the word "imminent" to mean a temporal restriction of a fixed number of days, weeks, or months before the formal commencement of litigation. The Legislature might have enacted a uniform, numerical limitation, but did not. That the Legislature

[8] Although Chapter 119 applies solely to executive agencies, Section 11.0431, Florida Statutes, which governs the Legislature's public-records obligations, incorporates by reference the exemptions contained in Chapter 119. *See* § 11.0431(2)(a), Fla. Stat. (2012).

did not prescribe an overtly temporal limitation is compelling evidence that the word "imminent" embraces more than narrow, temporal considerations. Whether litigation is "imminent" depends on an examination of the surrounding circumstances in the light of logic, experience, and reason.

In the redistricting process, litigation was "imminent" long before the days preceding the filing of Plaintiffs' Complaints. Litigation was more than a bare, foreseeable possibility—it was a moral certainty. From start to finish, *this* redistricting process, more than any other, was conducted in an atmosphere charged with litigation. The Legislature retained attorneys in 2010 for the overarching purpose of ensuring the validation of redistricting plans in eventual litigation. And political opponents were engaged and prepared for battle from the outset.

As early as 2009, the sponsor of the new amendments—a coalition that included the LOWV Plaintiffs—circulated a paid political advertisement that eagerly raised the prospect of litigation, explaining that if the Legislature ignores public criticisms of its redistricting map, there will be "evidence on the record" to support allegations of an impermissible partisan intent:

- "Any deficiencies in the districting that are not corrected after public debate can be challenged in court and the courts will be able to enforce the constitutional standards."
- "Courts will enforce the new constitutional requirements."
- "There will be a constitutional framework for court challenges on the basis of unfair political gerrymandering."

See Exhibit A. These political opponents engaged attorneys at an early period. In December 2009, Jenner & Block—Plaintiffs' Washington-based counsel—circulated a legal opinion setting forth its construction of the new standards. In December 2010, weeks after voters approved the redistricting amendments, a coalition that included the LOWV Plaintiffs formed a tax-exempt organization that, according to their deposition testimony,[9] was created to enforce the standards

[9] The final deposition transcripts have not been completed. If necessary, the House will supplement this response with the transcripts when available.

and raise funds to pay their attorney's fees. In April 2011, Jenner & Block submitted a comment to the United States Department of Justice in support of preclearance of the new amendments.

In the meantime, it became evident that Plaintiffs had determinedly prejudged the Legislature's redistricting efforts. While actively raising money for litigation, long before the Legislature ever published a redistricting map, Plaintiffs spared no pains to encourage public disillusionment with Florida's redistricting process. The LOWV Plaintiffs condemned the public hearings as a "sham" before a single hearing was held, and refused to speak at public hearings and committee meetings—though repeatedly invited to do so. Plaintiff Common Cause Florida's representative testified at deposition that he wanted to testify but was advised by counsel not to do so. And in September 2011, a full two months before the Legislature published a draft plan, the Chairman of the Florida Democratic Party (represented here by the Romo Plaintiffs) warned that redistricting "will be determined by the courts," and explained his litigation strategy: "it will all be about getting things into the record." Mary Ellen Klas, *Rod Smith Predicts Courts Will Decide District Maps, Legislature Will Create Court Record*, TAMPA BAY TIMES, Sept. 28, 2011.

In this poisoned atmosphere, with well-financed political opponents in pursuit of a carefully coordinated litigation strategy, it was clear throughout the redistricting process that litigation was inevitable, and that any redistricting plan the Legislature might adopt would be attacked in court. For Plaintiffs, the redistricting process was a *legal* process. Attorneys so controlled Plaintiffs' every move that, according to the testimony of the LOWV Plaintiffs' representatives, their attorneys provided them with their alternative maps and prohibited them from speaking before the Legislature. In fact, the LOWV Plaintiffs conducted *no* independent assessment of the alternative maps handed down to them by their Washington, D.C., attorneys.

The Legislature prepared accordingly, retaining attorneys to prepare for litigation. The fact that redistricting does not transpire in days or weeks, but requires time and occurs in stages (beginning with the Census), does not change the fact that litigation was *morally certain*, *near at hand*, and *threatening*, and therefore "imminent." *See* Black's Law Dictionary (6th ed. 1990) (defining "imminent" to mean "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous.").

All remaining documents on the House's privilege log were created under this impending threat. Accordingly, these documents are exempt from disclosure under the Public Records Act, were created and maintained in confidence, and are protected by the attorney-client privilege and work-product doctrines. Below are summaries of the documents sought by the Romo Plaintiffs:

- Memoranda prepared by GrayRobinson for the House in anticipation of litigation, regarding aspects of redistricting law and practice. Such attorney-client memoranda prepared are classic examples of work product and attorney-client communications.[10]

- Statistical reports and visual representations prepared by House staff at the direction of GrayRobinson in preparation for the summary-judgment hearing in this case. The visual representations are maps of districts in the benchmark plan, the enacted plan, and the alternative plans filed with the Court by Plaintiffs in this case. Again, these documents are textbook work product materials, and were prepared exclusively for this litigation.[11]

- Documents prepared by House staff at GrayRobinson's direction to assist the firm in its defense of this case. These documents include House staff's evaluation of the written submissions, affidavits, and alternative plans filed by Plaintiffs in this litigation, and information regarding the process used by the House in drafting the enacted districts.[12]

- Emails among Defendants and Defendant-Intervenors in this case regarding scheduling, and from House staff to counsel for Defendant-Intervenors, transmitting data. The parties sent these emails pursuant to a joint-defense agreement. The work-product exemption in

[10] Exhibit A: 68, 79, 81, 82, 87, 124, 125.

[11] Exhibit A: 51, 52, 54, 55, 61,

[12] Exhibit A: 92, 107-09, 111-13.

the Public Records Act is "not waived by the release of [work-product records] to . . . any person consulted by the agency attorney." § 119.071(1)(d)2., Fla. Stat. (2012).[13]

- An email from House staff to the House General Counsel two weeks before the commencement of this litigation, containing a thorough evaluation of (1) the many defects in the alternative maps submitted by the LOWV Plaintiffs to the Legislature, including the congressional map later submitted to this Court, and (2) the letter sent by the LOWV Plaintiffs to the Legislature on the same day with their alternative maps.[14]

- An email from House staff to counsel regarding arguments to be made in this litigation.[15]

- A compilation of public statements made about the redistricting amendments by its sponsor, supporters, and editorial boards, prepared in anticipation of litigation.[16]

- A table of incumbents in Florida who have been defeated for reelection since 2002.[17]

- An email from House staff to House counsel Miguel De Grandy, in response to a question from De Grandy regarding a meeting of the House Redistricting Committee.[18]

- An email from House staff to outside counsel after the Legislature enacted the redistricting plans, and during the Supreme Court's review of the state legislative plans, attaching newspaper articles that discussed the effect of redistricting on incumbents.[19]

- An email among House staff and outside counsel regarding a draft brief in *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012). *Brown* concerned an argument that Article III, Section 20 of the Florida Constitution violates the Elections Clause of the United States Constitution—an affirmative defense raised in their Answers in this case by the Legislative Defendants.[20]

- An email from House staff to outside counsel dated February 14, 2012, containing a narrative of the committee and subcommittee process in the House.[21]

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[13] Exhibit A: 33, 41, 42, 45, 67.

[14] Exhibit B: 4.

[15] Exhibit A: 122.

[16] Exhibit A: 71, 74.

[17] Exhibit A: 77.

[18] Exhibit A: 21.

[19] Exhibit B: 1.

[20] Exhibit B: 28.

[21] Exhibit B: 29. In their Motion, Plaintiffs also identify Document 24 on Exhibit A as a document that the House has withheld. In fact, the House produced this document to the Romo Plaintiffs on October 24, 2012. Plaintiffs also seek production of six additional documents that

The documents described above satisfy the work-product exemption of the Public Records Act. Each was created by or at the direction of an attorney employed or retained by the House. Each reflects a mental impression, conclusion, litigation strategy, or legal theory of either the agency or the attorney. And each was prepared exclusively for litigation, or in anticipation of litigation that was rendered certain and imminent by the history of redistricting and Plaintiffs' aggressive preparations and sustained litigation posturing throughout the legislative redistricting process.

CONCLUSION

The Legislative Defendants have faithfully complied with their obligations both in the redistricting process and in subsequent litigation. The recent redistricting process was the most open and transparent in the history of the State. In litigation, the Legislative Defendants have produced more than 25,000 documents in response to Plaintiffs' requests.

The documents identified on the House's privilege logs present no close questions. They either relate to non-testifying witnesses, or are attorney-client communications or work product under both the rules of discovery and the Public Records Act. Contrary to Plaintiffs' litigation narrative, the Legislative Defendants did not retain attorneys as a "tactic" or "pretext" to "conceal" evidence of unlawful motives (Mot. at 16), but because litigation was certain to follow redistricting—and was made all the more certain by Plaintiffs' predetermination to sue. Because the documents sought by Plaintiffs are privileged, the Court should deny the Motion.

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the House will produce. (Exhibit A: 22, 23, 121. Exhibit B: 8, 11, 14.)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail on December 6, 2012, to the persons listed on the attached Service List.

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How will the FairDistrictsFlorida.org Amendments Work?

Jon Mills, Dean Emeritus, University of Florida Levin College of Law; Florida House of Representatives (1978-1988); Speaker (1987-88); Professor of Florida Constitutional Law; Style and Drafting Chair of the 1998 Florida Constitution Revision Commission

What do the amendments say?

- Legislative and Congressional districts may not be drawn with intent to favor a party or incumbent.
- Districts must maintain the equal opportunity of minority communities to elect representatives of their choice and participate fully in the political process.
- Districts must be contiguous and to the extent possible must be compact and adhere to existing local boundaries.
- Districts must be roughly equal in population.

How will the amendments work to prevent political gerrymandering while preserving minority voting rights?

- They establish rules the legislature must follow when it draws Congressional and Legislative district lines.
- The public, the press and non-governmental organizations will have the opportunity to publicly comment before and after the Legislature draws the initial maps and will be able to notify the Legislature of any failure to comply with the standards before the maps are finalized. (The notices will be part of the public record.)
- Then the legislature will have two choices: either ignore the deficiencies or correct them.
    - ° If the Legislature corrects them, then the constitutional provisions will have worked.
    - ° If the Legislature ignores the deficiencies, then there is evidence on the record that the Legislature was on notice of the defects and nevertheless it drew the district(s) with intent to favor a party or incumbent.
- Any deficiencies in the districting that are not corrected after public debate can be challenged in court and the courts will be able to enforce the constitutional standards.

How will the standards prevent political gerrymandering?

- It is difficult or impossible for a drafter to draw districts to achieve a particular political result if the districts have to be compact and adhere to local boundaries.
- Districts that are not compact or community based – ones that are bizarrely shaped – will have to be justified. An odd looking district that favors a particular party should be presumed to be unconstitutional.

- The use of registration or performance data when drawing the district lines would be discoverable and could be evidence of a violation of the standards.

How are the proposed standards different from the existing law?

- There is presently no prohibition in the Florida law against political gerrymandering.
- There is presently no requirement that districts be compact or that they adhere to existing local boundaries.
- While minority voting rights are presently guaranteed by federal statute, the new standards will enshrine them in the Florida Constitution and they will be difficult to repeal. These standards will not change current law but they will ensure that the law is permanent in Florida.
- In the 2002 redistricting litigation, there was a political gerrymandering challenge to the plan on the basis that the districts were not compact or community based. The Florida Supreme Court rejected the challenge because compactness and adherence to community boundaries "**are not constitutionally required**." *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 832 (Fla. 2002) (emphasis added). The 2002 challengers would have had strong grounds for their challenges if the proposed standards had been in the Florida Constitution.

Won't the Legislators just ignore the standards or find a way around them?

- Legislators will, because of public scrutiny and pressure, find it necessary to acknowledge and honor the new constitutional requirements.
- If, after notice of non-compliance from the public, they ignore the standards, that will provide evidence that the resulting political favoritism was intended.
- Courts will enforce the new constitutional requirements.

Will there be any other advantages?

- The standards will increase the role and effectiveness of public comment.
- The enhanced public involvement will provide a very potent incentive for following the rules.
- Public comment and debate of redistricting plans will now have real meaning. In fact the new standards will define the debate on redistricting.

In summary, the standards proposed in the two FairDistrictsFlorida.org amendments will have a real and substantial impact in bringing fairness and partisan equity to redistricting in Florida. They are far more than litigation standards. They will be drafting guidelines. They will be the basis for public comment and objections. If legislators fail to follow the rules after of the public has pointed out violations of those standards, that failure will provide evidence that the districts or plans have been drawn with intent to favor a party or incumbent. There will be a constitutional framework for court challenges on the basis of unfair political gerrymandering.