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

RENE ROMO, an individual; BENJAMIN WEAVER, an individual; et al.,

Plaintiffs,

vs.

CASE NO. 2012-CA-000412

KEN DETZNER, in his official capacity as Florida Secretary of State; PAMELA JO BONDI, in her official capacity as Attorney General; et al.,

Defendants.

_____/

THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; et al.,

Plaintiffs,

CASE NO. 2012-CA-000490

vs.

KEN DETZNER, in his official capacity as Florida Secretary of State; THE FLORIDA SENATE; et al.,

Defendants.

_____/

PLAINTIFFS' JOINT RESPONSE IN OPPOSITION
TO LEGISLATIVE DEFENDANTS' MOTION TO DETERMINE LEGAL STANDARD

In their Motion To Determine Legal Standard ("Motion"), Legislative Defendants ask the Court to draw a false dichotomy between the intent of individual legislators and legislative staff

members and the intent of the Florida Legislature so as to foreclose any claim that improper intent by the individuals should be imputed to the Legislature. The Motion should be denied.

ARGUMENT

The premise on which the Motion is based—that the intent of individual legislators and legislative staff members cannot be imputed to the Legislature and is irrelevant to the determination of the Legislature's intent, *see, e.g.*, Motion at 1-2—has been rejected by the Florida Supreme Court, draws a false dichotomy that is at odds with general principles of agency law, cannot be reconciled with the approaches taken by courts in analogous cases, and is contrary even to the assumption that necessarily underlay the Legislative Defendants' recent "fraud on the court" motion.

First, the Florida Supreme Court, in its decision regarding the legislative privilege issue in this case, resolved the question of whether evidence of the intent of individual legislators and legislative staff members is relevant to the assessment of intent under Article III, Section 20(a), of the Florida Constitution. The court wrote:

> [T]he Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. In this context, however, the "intent" standard in the specific constitutional mandate of article III, section 20(a), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.
>
> This Court has explained that the "intent" standard "applies to both the apportionment plan as a whole and to each district individually," and that "there is no acceptable level of improper intent." Thus, ***the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.***

League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 150 (Fla. 2013) (internal citation omitted) (emphasis added). The Florida Supreme Court thus considered and rejected the argument that the Legislative Defendants now make—that evidence of improper intent by individual legislators or legislative staffers is not relevant to the determination of whether the Legislature drew the Congressional Plan with unconstitutional intent. *See also id.* at 138 ("We therefore reject the Legislature's argument that requiring the testimony of individual legislators and legislative staff members will have a 'chilling effect' among legislators in discussion and participation in the reapportionment process, as this type of 'chilling effect' was the precise purpose of the constitutional amendment outlawing partisan political gerrymandering and improper discriminatory intent.").

Legislative Defendants' claim that the final sentence in the discussion quoted above establishes that the communications of legislators and legislative staff members were relevant "not as evidence of the subjective intent of individual legislators and legislative staff members" but rather "because they could provide evidence of the 'broader process' that led to the development of the map, and thus could be probative of the intent of the Legislative as a whole," is meritless. *See* Motion at 7. In context (included above but not in the Motion), it is clear that this sentence was part of the response to and rejection of the Legislature's argument that "intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, *rather than through the testimony of individual legislators regarding their subjective intentions* in proposing, amending, or voting for or against a particular piece of legislation." *League of Women Voters*, 132 So. 3d at 150 (emphasis added). In rejecting that argument, the Florida Supreme Court recognized that "the communications of individual

legislators or legislative staff members" could provide evidence of improper legislative intent. *Id.* at 150; *see also id.* ("There is no acceptable level of improper intent.").

Despite Legislative Defendants' best efforts to contort the holding of *League of Women Voters*, the Florida Supreme Court did not draw a false dichotomy between the communications of individual legislatures and the "Legislature as a whole." If the Florida Supreme Court had intended to say that individual communications have only marginal, if any, bearing on legislative intent, it surely would have followed a less circuitous path than obscurely referring to a "broader process" while emphasizing the relevancy of "the communications of individual legislators or legislative staff members," explaining that such communications can "directly relate" to legislative intent, and confirming that "[t]here is no acceptable level of improper intent." *Id.*; *see also id.* at 137 ("[T]he issue … is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory 'intent.'"). Thus, as the Florida Supreme Court has already considered and rejected the argument Legislative Defendants now raise, this Court should deny their Motion.

Second, Legislative Defendants' argument is based on the faulty premise that the intent of the Legislature is a concept completely separate and apart from the intent of individual legislators and legislative staff members. The Legislature is a body comprised of individuals; its acts and intent cannot be wholly separated from the acts and intent of its members and staff any more than the acts and intent of a corporation can be wholly separated from the acts and intent of its employees. *See Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003) ("As a general rule, a principal may be held liable for the acts of its agent that are within the course and scope of the agency."); *accord* Eleventh Circuit Civil Pattern Jury Instructions § 3.2.2 (2013) ("When a

corporation is involved, of course, it may act only through people as its employees ...."); *id.* § 3.2.3 (same for "governmental agency"); *see also United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585, 591 (7th Cir. 2006) (stating that the judge "gave the jury the Seventh Circuit Pattern Jury Instruction explaining that a corporation acts only through its agents and employees who are authorized or employed to act for the corporation"); *United States v. Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984) (upholding instruction stating in part that, "[t]o find a corporate defendant guilty, you must find beyond a reasonable doubt that all the essential elements in the offense as set forth in these instructions are present to the corporation in the form of acts or omissions of its agents, which were performed within the scope of their employment"); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) ("The corporations can be found guilty, therefore, only if the evidence shows that each, acting through its human agents, deliberately did these acts, that is, with the corporation 'knowing' that they were being done for it."); *cf. O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007) ("Where a corporation is wholly dominated by persons engaged in wrongdoing, the corporation has itself become the instrument of wrongdoing."). Thus, to the extent that individual legislators or staff members drew—or were part of the broader process of drawing—the Congressional Plan, or parts thereof, with partisan or incumbent-protecting intent, the Legislature, under principles of agency law, must be found to have acted with improper intent.

Indeed, the Florida Supreme Court expressly held that "if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent [reapportionment] effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *League of Women Voters*, 132 So. 3d at 149. *Accord id.* ("The existence of a separate process to draw the maps with the intent

to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits."); *id.* at 151 ("To the extent the Legislature and the former presiding officers assert that there will be a 'chilling effect' among legislators in discussion and participation as to future apportionment plans, this type of 'chilling effect' was the explicit purpose of the constitutional amendment imposing the article III, section 20(a), redistricting standards—to prevent partisan political gerrymandering and improper discriminatory intent. Indeed, if in fact there was a separate, secret process undertaken by the Legislature to create the 2012 congressional apportionment plan in violation of the article III, section 20(a), standards, the voters clearly intended for the Legislature to be held accountable for violating the Florida Constitution and to curb unconstitutional legislative intent in this and future reapportionment processes.").

Legislative Defendants' contention that Plaintiffs "have not offered any evidence that the Legislature as a whole acted with improper intent" because their "entire case is based on alleged communications between certain legislators, legislative staff and political consultants during the redistricting process," Motion at 2, therefore, misses the point. What the deposition testimony of certain legislators and their staffers has revealed—and what Plaintiffs will prove at trial—is that there was in fact a parallel redistricting process taking place behind closed doors, and that it was this process that resulted in the Congressional Plan that the Legislature ultimately enacted. Legislative Defendants' argument that the communications of these individual legislators and their staffers is irrelevant to establishing that the Legislature acted with improper intent is squarely contrary to both the law of agency and the Florida Supreme Court's clear rulings in this case.

Third, courts routinely look to evidence relating to staff members and individual legislators in cases in which the central question at issue was the intent of a legislative body. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 254 (2001) (stating that "some support" for district court's conclusion that racial considerations predominated in the drawing of a district's boundaries was provided by email sent from legislative staff member responsible for drafting districting plans to two senators that stated "I have moved Greensboro Black community into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this."); *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013) (stating that court's "skepticism about the legislative process that created enacted SD 10 [wa]s further fueled by an email sent between staff members on the eve of the Senate Redistricting Committee's markup of the proposed map" that showed that a plan was in place, at least at the staff level, such that no new proposals or amendments to the district map would be entertained at the markup"); *Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (looking to the intent of two staff members to whom the Reapportionment Subcommittee delegated the responsibility of drawing the district lines at issue); *see generally Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977) (in determination whether invidious discriminatory purpose was a motivating factor for a decision, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements *by members* of the decision making body, minutes of its meetings, or reports") (emphasis added).

The cases cited by Legislative Defendants, *see* Motion at 5-7, are readily distinguishable for a variety of reasons. In particular, only one of these cases was a redistricting case. That case involved the application of a provision under the California Constitution that, unlike Article III,

Section 20, did not put intent directly at issue. *See Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 94 (Cal. Ct. App. 2006) (involving alleged violation of provision stating that "[t]he geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section").

As for the non-redistricting cases cited in the Motion, the Florida Supreme Court has squarely held that the posture of this case "is completely distinguishable from the various circuit court orders and cases *outside the reapportionment context* from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case." *League of Women Voters*, 132 So. 3d at 150 (emphasis added). This will, of course, come as no surprise to Legislative Defendants, considering that many of the cases cited in their Motion are the *exact same cases* they cited, and the Florida Supreme Court distinguished, in *League of Women Voters* for not involving redistricting—a point that the Motion conveniently fails to mention.

Legislative Defendants' cases primarily involve the interpretation of legislation.[1] In redistricting litigation, unlike cases involving mere statutory construction, "the decision making process itself is the case." *League of Women Voters*, 132 So. 3d at 150 (citation, emphasis, and

[1] *See Bread Pol. Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Sec. Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939); *State v. Patterson*, 694 So. 2d 55, 58 n.3 (Fla. 5th DCA 1997); *Fields v. Zinman*, 394 So. 2d 1133, 1135 (Fla. 4th DCA 1981); *McLellan v. State Farm Mut. Auto Ins. Co.*, 366 So. 2d 811, 813 (Fla. 4th DCA 1979), *overruled on other grounds by S.C. Ins. Co. v. Kokay*, 398 So. 2d 1355 (Fla. 1981); *In re Blair*, 408 S.W.3d 843, 859 (Tex. 2013); *State ex rel. Lute v. Mo. Bd. of Probation & Parole*, 218 S.W.3d 431, 436 n.5 (Mo. 2007); *Cave City Nursing Home, Inc. v. Ark. Dep't of Human Servs.*, 89 S.W.3d 884, 890 (Ark. 2002); *City of Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 818 P.2d 1076, 1087 (Wash. 1991); *Jackson v. Delk*, 361 S.E.2d 370, 372 (Ga. 1987); *Styers v. Phillips*, 178 S.E.2d 583, 590 (N.C. 1971); *Tamiami Trail Tours v. City of Tampa*, 31 So. 2d 468, 470-71 (Fla. 1947).

alteration omitted); *see also id.* ("[T]he Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. In this context, however, the 'intent' standard in the specific constitutional mandate of article III, section 20(a), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.") (internal citation omitted); *id.* at 151 ("[W]e emphasize that this case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction ….").

In addition, *Florida Senate v. Florida Public Employees Council 79* is inapposite because it involved the question of whether a circuit court had the authority to enjoin a public legislative hearing. 784 So. 2d 404, 408-09 (Fla. 2001). Neither does *Tinsley Media, LLC v. Pickens County*, 203 Fed. App'x 268, 273 (11th Cir. 2006) (per curiam) (unpub.), support Legislative Defendants' argument, because the court in that case, which involved an assessment of whether a restriction on commercial speech was motivated by a substantial government purpose, was concerned with the post-hoc nature of an affidavit submitted by a county commissioner as evidence of legislative intent. And, while the Supreme Court of the United States stated in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission* that "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it," 461 U.S. 190, 216 (1983), it does not follow that the motivations of individual legislators are irrelevant to a determination of a legislative body's intent. *Pacific Gas* is distinguishable, moreover, because the Court in that case was explaining why it "should not become embroiled in attempting to ascertain California's true motive," *id.*;

here, intent is the central issue to be resolved, and partisan intent need not be the singular or even predominant purpose for there to be a violation of the Florida Constitution. *League of Women Voters*, 132 So. 3d at 150 ("There is no acceptable level of improper intent."). The approach taken by courts in cases in which the central question at issue was the intent of a legislative body (discussed *supra*) demonstrates that evidence regarding the intent of individual legislators and legislative staff members is relevant to the intent of the Legislature as a whole.

Finally, Legislative Defendants' position in the instant Motion is contrary to the position they just took in their Motion for Sanctions for Fraud on the Court, in which they argued that evidence of partisan or incumbent-favoring intent by *anyone*—even those outside of the Legislature who had no part in the actual legislative map drawing process—in relation to congressional map drawing in Florida, renders a map unconstitutional. *See* Motion for Fraud on the Court at 5, 9, 39. For the Legislative Defendants to now do an abrupt about-face and claim that the intent of individual legislators and legislative staff members who *were* involved in the greater map drawing process that resulted in the enacted plan is irrelevant to the ultimate questions in this litigation requires a leap of logic that cannot be sustained by the Fair District Amendments, the Florida Supreme Court's recent interpretation of the same, or any of the law discussed in this response.

CONCLUSION

For each of the reasons set forth above, Legislative Defendants' Motion should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail this 8 May 2014 to each of the following parties on the attached service list:

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