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

SENATOR RAY RODRIGUES, et al.,

Non-Parties-Appellants,

v.

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,

Plaintiffs-Appellees.

Case No.: 1D22-3834
L.T. No.: 2022-ca-000666

MOTION TO DISMISS FOR LACK OF JURISDICTION

This Court should dismiss this appeal as moot because Appellees have already provided Appellants the relief they seek through this appeal. In early December, Appellees voluntarily withdrew with prejudice the deposition subpoenas from which this appeal arises. App. 5.[1] Appellees have also represented to Appellants, and represent to the Court, that Appellees will not depose any other legislator or legislative staff member who asserts legislative privilege or move to compel any discovery in the underlying litigation that the House or Senate have objected to on legislative privilege grounds.

[1] "App." refers to Appellees' Appendix filed contemporaneously with this motion.

App. 19-21. Under these circumstances, this appeal would needlessly waste this Court's and the parties' resources. Because this appeal is moot, and no exception to mootness applies, Appellees respectfully request that the Court grant their motion to dismiss this appeal for lack of jurisdiction.

BACKGROUND

This appeal arises from the circuit court's October 27, 2022 Order denying Appellants' motion to shield legislators and legislative staff from depositions in this redistricting case under the Fair Districts Amendments. App. 22-29. Guided by *Apportionment IV*'s controlling decision on the question, the circuit court held that Appellees may question Appellants—legislators and legislative staff members—in depositions on a limited set of topics. *Id.* Appellants subsequently appealed the Order to this Court and moved to certify the appeal directly to the Florida Supreme Court.

Seeking to avoid the needless expense and delay of a protracted discovery dispute, Appellees gave Appellants precisely the relief they seek through this appeal: Appellees withdrew the discovery requests at issue with prejudice and represented that they would not seek to depose *any* member of the Legislature or its staff who asserts

legislative privilege. App. 5-7, 19-21. In response, Appellants (appropriately) withdrew their motion to certify this appeal to the Florida Supreme Court, which had previously represented that the circuit court's ruling on legislative privilege presented a question of urgent public importance. App. 8-18.

After Appellants withdrew their certification motion, Appellees further represented to Appellants that they would not move to compel *any* discovery over which the House or Senate has asserted legislative privilege in the underlying litigation. App. 20-21. Appellees make the same representation to the Court. There is thus no longer a live issue—or even the threat of one—for the Court to resolve. Nevertheless, Appellants have refused to dismiss their appeal.

ARGUMENT

I. This appeal is moot because the Court has no relief to give.

This appeal is moot because it is "impossible for the court to grant a party any effectual relief." *Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). This appeal challenges the circuit court's October 27, 2022 Order applying *Apportionment IV* to allow Appellees to depose legislators and staff

involved in the 2022 congressional redistricting process.[2] App. 22-29. But Appellees have since withdrawn the deposition notices at issue with prejudice. And they will not seek to depose any legislator or staff member who asserts legislative privilege in the future or seek to compel any documents over which the House or Senate has asserted legislative privilege. There is accordingly no live issue to be resolved and no relief left to be granted. "[W]hen the issues presented are no longer 'live,'" "[m]ootness occurs." *Montgomery*, 468 So. 2d at 1016 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

The Court has no jurisdiction over a moot case. *See Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). "[T]he existence of judicial power depends upon the existence of a case or controversy." *Montgomery*, 468 So. 2d at 1016. Because a moot case "presents no actual controversy," "[a] moot case generally will be dismissed." *Godwin*, 593 So. 2d at 212. Indeed, as the Supreme Court has "repeatedly held," the Court has no authority to issue advisory

[2] The circuit court simultaneously ordered the Governor's office to comply with Appellees' discovery requests, given its unique role in drafting Florida's 2022 congressional plan. App. 30-40. The Governor's office has chosen not to appeal that order.

opinions. *See Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said Dist.*, 80 So. 2d 335, 336 (Fla. 1955).

The Court should therefore dismiss this appeal. "[C]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk Cnty. v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *W. 132 Feet v. City of Orlando*, 86 So. 197, 198-99 (Fla. 1920)). This is true no matter "the substantial interest in this case" that may exist within "the bench and bar." *Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015) (leaving "constitutional question" "for another day . . . because [the] case lack[ed] a justiciable controversy"). Where a jurisdictional defect arises, the Court is "constrained to leave for another day the resolution of" the appeal. *Id.*

II. No exception to mootness applies.

No exception to the mootness doctrine allows the Court to retain jurisdiction. Florida courts have recognized two exceptions to mootness: (1) "when the questions raised are of great public importance," *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984); and

(2) when the issue "is capable of repetition, and otherwise might evade review," *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993).[3] Neither exception applies here.

A. The issue on appeal is not one of great public importance in need of resolution.

Florida courts may decide a question "irrespective of the controversy before the parties" where it presents a question "of great public importance . . . *in need of resolution*." *Pino v. Bank of N.Y.*, 76 So. 3d 927, 928 (Fla. 2011) (emphasis added) (applying the exception because "Florida's trial courts and litigants need guidance"). The exception is meant to allow Florida's courts to "transcend" the interests of the "individual parties" to an action, *see id.* at 927-28, in

[3] Florida courts also have recognized an exception to mootness when "collateral legal consequences" may flow from the mooted issue. *Godwin*, 593 So. 2d at 212. In *Godwin*, for example, the court maintained an appeal concerning appellant's civil commitment even though the appeal was mooted by appellant's release. *Id.* at 212. Because the appellant still faced a lien for costs and fees associated with commitment, the Florida Supreme Court held that the courts could have and should have kept jurisdiction. *Id.* at 213-14; *see also Fonte v. Dep't of Envt'l Reg.*, 634 So. 2d 663 (Fla. 2d DCA 1994) (finding that dispute over waste tire site was not moot because, although the state had removed the tires and closed the site, it could still impose a lien for the costs incurred). Here no such consequences are threatened. Dismissing this appeal will return Appellants to the status quo.

service of providing "guidance" to "trial and appellate courts" on unresolved questions of great public import, *see Banks v. Jones*, 232 So. 3d 963, 965-66 (Fla. 2017).

This appeal presents no open question in need of resolution. In *Apportionment IV*, the Supreme Court answered the very same question presented here: Whether the legislative privilege shields legislators and their staff from depositions in a redistricting case under the Fair Districts Amendments. The Supreme Court's answer was no. 132 So. 3d 135, 154 (Fla. 2013). "[I]n order to fully effectuate the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering," the Supreme Court explained, "it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent" even if it might otherwise be protected by legislative privilege. *Id.* at 148.[4]

[4] In their now withdrawn motion to certify this appeal to the Florida Supreme Court, Appellants only argued that the legislative privilege issue raised by their appeal presents a question of great public importance. To the extent they now attempt to argue that the apex doctrine issue also is a matter of great public importance, Appellants are wrong: The lower court's order does not raise an apex doctrine question separate from the question *Apportionment IV* already

While Appellants may disagree with *Apportionment IV*, their disagreement with controlling Supreme Court precedent is not enough to trigger appellate jurisdiction over a moot case. First, "[t]he question must be of great importance to the *public*." *See R.C. v. Dep't of Agric. & Consumer Servs.*, 323 So. 3d 366, 368 (Fla. 1st DCA 2021) (Long. J., concurring) (emphasis in the original). Mere judicial or private interest won't do. *See Apthorp*, 162 So. 3d at 240. Second, as explained above, this exception only applies to questions "in need of resolution." *Pino*, 76 So. 3d at 928. The question of legislative privilege under the Fair Districts Amendments has already been decided by the Florida Supreme Court, providing lower courts with the guidance they need. *See* App. 23-24. Appellants' desire to have the Supreme Court revisit its precedent neither equates to the

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decided. In rejecting Appellants' apex doctrine argument in part, the lower court reasoned that because the Supreme Court in *Apportionment IV* permitted the depositions of legislators and their staff, applying the apex doctrine to block such depositions would contravene that precedent. *See* App. 25-27. The legislative privilege and the apex doctrine questions thus both turn on the same question: are legislators and staff shielded from depositions in a redistricting challenge. *Apportionment IV*, as the lower court recognized, already answers that question.

public's interest nor renders the underlying question of legislative privilege unresolved.

B. The issue presented is not likely to evade review.

Drawing from federal appellate practice, Florida's appellate courts have held that they may hear a moot appeal where the issue presented "would otherwise escape the normal appellate process." 2 Philip J. Padovano, *Florida Appellate Practice* § 1:4 (2015). This appeal presents the exact opposite circumstance: Rather than evade appellate review, the legislative privilege question posed here has already been resolved by the Florida Supreme Court in *Apportionment IV*. Appellants can hardly claim that an issue that was fully litigated over a period of 15 months and resulted in an extensive opinion from the state's highest court has somehow "escape[d]" the appellate process.

Nor are Appellants in any danger of not having another opportunity to seek to overturn *Apportionment IV*. Whenever any plaintiff seeks depositions of legislators, those legislators remain free to object and appeal a court order allowing those depositions to take place. And, as demonstrated in this case, there is no threat that

legislators will have to sit for depositions before their appeal is resolved. *See* Fla. R. App. P. 9.310(b)(2) (providing for automatic stays "when the state, any public officer in an official capacity, board, commission, or other public body seeks review"). The mere fact that Appellees have chosen not to pursue legislative depositions is not evidence that Appellants would be precluded from seeking review in a future case where such depositions were actually sought.

Finally, the issue presented is not likely to recur in this case. As already explained, Appellees will not seek to depose any member of the Legislature or its staff who asserts legislative privilege or seek to discover any documents over which the House or Senate have asserted legislative privilege. Not even a "remote possibility that an event might recur is . . . enough to overcome mootness." *Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1297 (11th Cir. 2018). Here there is *no* possibility.

Appellants—legislators and legislative staff—seek to avoid discovery that they believe should be protected by the legislative privilege. There is no danger of such discovery in this case. If and when the issue arises in another case, they will have every opportunity to advance the same arguments they seek to advance

here. The Court should not entertain Appellants' attempt to have it resolve a hypothetical issue over hypothetical depositions that, though they may arise in a hypothetical case, has no bearing on this case.

CONCLUSION

Appellants have already obtained the relief they seek in an appeal that presents a question already decided by the Florida Supreme Court. This appeal is quintessentially moot. For these reasons, Appellees respectfully request that the Court grant their motion to dismiss for lack of jurisdiction.

CERTIFICATE OF CONFERRAL

Under Florida Rule of Appellate Procedure 9.300(a), Appellees certify that they have consulted Appellants' counsel regarding this motion and can represent that Appellants oppose the relief sought.

Dated: December 29, 2022

Respectfully submitted,

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111
Thomas A. Zehnder
Florida Bar No. 0063274
Quinn B. Ritter
Florida Bar No. 1018135

Christina A. Ford
Florida Bar No. 1011634
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW,
Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490

KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com
qritter@kbzwlaw.com

Facsimile: (202) 968-4498
cford@elias.law

Counsel for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111

Counsel for Appellees

SERVICE LIST

Andy Bardos, Esq.
GrayRobinson, P.A.
301 S. Bronough Street, Suite 600
Tallahassee, FL 32302
andy.bardos@gray-robinson.com

Counsel Chris Sprowls and Thomas J. Leek

Daniel E. Nordby
Shutts & Bowen LLP
215 S. Monroe Street, Suite 804
Tallahassee, FL 32301
ndordby@shutts.com

Counsel for Florida Senate, Ray Rodrigues, and Wilton Simpson

Bradley R. McVay
Ashley Davis
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
brad.mcvay@dos.myflorida.com
ashley.davis@dos.myflorida.com
stephanie.buse@dos.myflorida.com

Counsel for Defendant
Secretary of State

Mohammad O. Jazil
Gary V. Perko
Michael Beato
Holtzman Vogel Baran
Torchinsky Josefiak LLC
119 South Monroe Street
Suite 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com
zbennington@holtzmanvogel.com

Counsel for Defendant
Secretary of State