1D22-3834; L.T. 2022-CA-666

IN THE DISTRICT COURT OF APPEAL
FOR THE 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.

APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellees precipitated this dispute months ago by seeking to depose non-party legislators and legislative staff regarding matters at the core of their legislative duties. Appellees opposed Appellants' motion for protective order, arguing to the trial court that neither the legislative privilege nor the apex doctrine should hinder their efforts to obtain "highly relevant and critical discovery" through compelled depositions of eleven state legislators and legislative staff members. App. 10. After persuading the trial court to allow the discovery they sought, Appellees suddenly and completely reversed course and, to avoid appellate review, now pledge not to depose *any* legislators or

legislative staff who assert the legislative privilege—at least not in this case.

This Court should reject Appellees' litigation-driven attempts to secure a favorable order but then circumvent appellate review. Their motion misconstrues the well-recognized exceptions to the mootness doctrine.[1] This appeal presents at least two significant and recurring issues: 1) the scope of the legislative privilege inherent in Florida's strong separation of powers provision; and 2) the protections afforded to high-level government officers under newly codified Florida Rule of Civil Procedure 1.280(h). This Court should exercise its discretion to

[1] Appellees also err in conflating the prudential principles surrounding mootness with the constitutional requirements of jurisdiction. *See* Mot. at 4 ("The Court has no jurisdiction over a moot case."). Under Florida law, of course, "the issue of mootness does not raise a question about [the Court's] jurisdiction to decide the case." *Merkle v. Guardianship of Jacoby*, 912 So. 2d 593, 594 (Fla. 2d DCA 2005). Accordingly, while the three strands of justiciability doctrine—standing, mootness, and ripeness—raise non-waivable, jurisdictional questions under federal law, *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000), the same is not true under Florida law, *see, e.g.*, *Merkle*, 912 So. 2d at 594; *Collins Asset Grp., LLC v. Prop. Asset Mgmt., Inc.*, 197 So. 3d 87, 89 (Fla. 1st DCA 2016) ("Standing is an affirmative defense which is waived if not raised in a responsive pleading.").

resolve these important questions after full merits briefing by the parties.

ARGUMENT

I. Three exceptions to the mootness doctrine warrant appellate review.

As Appellees concede, Florida law recognizes several exceptions to the mootness doctrine: (1) "when the questions raised are of great public importance," (2) "when the questions raised . . . are likely to recur," and (3) "if collateral legal consequences that affect the rights of a party flow from the issue to be determined." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). Although this Court need find only that one exception is met, this appeal satisfies them all.

A. The issues presented in this appeal are of great public importance.

This appeal presents questions of great public importance. First and foremost, it concerns the legislative privilege, and therefore the constitutional separation of powers and the integrity of the legislative process. Second, it concerns the newly codified apex doctrine, which protects the public from excessive litigation burdens on high-ranking government officers. And it presents these questions in the context of a constitutional challenge to the State's congressional districts,

which this Court has found to present a question of great public importance. *League of Women Voters of Fla. v. Detzner*, 178 So. 3d 6, 7 (Fla. 1st DCA 2014); *Non-Parties v. League of Women Voters of Fla.*, 150 So. 3d 221, 222 (Fla. 1st DCA 2014) (en banc). This appeal concerns no mere question of personal interest; it implicates bedrock principles of the Florida Constitution, the freedom of a coequal branch of government from external inhibitions on the conscientious discharge of its constitutionally assigned functions, and the electoral districts in which Floridians will exercise their fundamental right to elect representatives to Congress.

The Florida Supreme Court has recognized the deep importance of the legislative privilege. The purpose of the legislative privilege is to protect the legislative branch from interference with the discharge of legislative duties and thus to protect the integrity of the legislative process, safeguard the separation of powers, and ensure that "the Legislature can accomplish its role of enacting legislation in the public interest without undue interference." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 146 (Fla. 2013) ("*Apportionment IV*"); *see also Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012) ("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."). By securing lawmakers and their staff from personal entanglement in litigation, the legislative privilege removes personal considerations from the lawmaking calculus and promotes the "uninhibited discharge" of legislative duties. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The privilege also assures that the prospect of compelled testimony will not chill the freedom of speech and action in legislative deliberations. *Id.* at 372. It protects lawmakers from the burdens that civil litigation imposes on their time, energy, and attention, permitting them to "focus on their public duties." *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015). And "perhaps most importantly," the privilege embodies "the respect due to a coordinate branch of government." *Florida v. United States*, 886 F. Supp. 2d 1301 (N.D. Fla. 2012) (Hinkle, J.) ("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."); *see also United States v. Gillock*, 445 U.S. 360, 373

(1980) (discussing the "principles of comity" that undergird the legislative privilege). The fact that the legislative privilege inheres in the Florida Constitution's separation-of-powers clause underscores the privilege's central importance to the integrity of the lawmaking process in a republican government. *Apportionment IV*, 132 So. 3d at 145–46.

The proper application of Florida's newly codified apex doctrine also raises questions of great public importance. The apex doctrine protects the ability of high-ranking government officers to attend to their public duties without unnecessary entanglement in litigation and thus protects "the efficient operation of the agency in particular and state government as a whole." *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002); *accord Miami-Dade Cnty. v. Dade Cnty. Police Benev. Ass'n*, 103 So. 3d 236, 238 (Fla. 3d DCA 2012) (explaining that routine depositions of state legislators would "detrimentally affect the efficient operation of the legislative branch and government as a whole"). Like the legislative privilege, Florida's apex doctrine is "rooted in separation of powers considerations." *Fla. Off. of Ins. Regul. v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 950 (Fla. 1st DCA 2015). It also ensures that litigation

burdens do not "discourage people from accepting positions as public servants." *Id.*

This appeal seeks review of the trial court's determination that the legislative privilege and the apex doctrine do not protect eleven legislators and legislative staff members from compelled depositions. The legislators and legislative staff members intend to argue (as they did below) that (1) the legislative privilege is absolute in civil cases, contrary to the Florida Supreme Court's holding in *Apportionment IV*; (2) even if the privilege is qualified, it protects Appellants here from compelled depositions because Appellees did not make (nor could they) the factual showing of wrongdoing necessary to overcome the legislative privilege under *Apportionment IV*'s "balancing approach"; and (3) the apex doctrine protects some of the Appellants—including the Speaker of the House of Representatives and the Senate President Pro Tempore—from deposition as high-ranking government officers. The questions raised in this appeal therefore implicate constitutional principles of separation of powers and the integrity and operation of the legislative branch—and are questions of great public importance.

Appellees offer two flawed arguments in response. First, Appellees attempt to argue that this appeal concerns only private

interests and is not of great importance to the public. Mot. at 8–9. As explained above, this appeal raises questions of constitutional import that affect the integrity of the lawmaking process. *Apportionment IV*, 132 So. 3d at 146. The interests implicated here are not personal to legislators or legislative staff; it is in the public interest to protect lawmakers so they can focus on enacting legislation "without undue interference." *Id.* No case supports the idea that deposing legislators and legislative staff regarding their official duties raises only private interests. To the contrary, the Florida Supreme Court has made clear that exceptions to the mootness doctrine may require an appellate court to hear the merits of an appeal involving "the duties and authority of public officials in the administration of the law [that are] of general interest to the people." *Ervin v. Capital Weekly Post, Inc.*, 97 So. 2d 464, 466 (Fla. 1957). And this Court has recognized that orders addressing constitutional privileges involve questions of great public importance. *Non-Parties*, 150 So. 3d at 221 (First Amendment associational privilege); *Morris Commc'ns Corp. v. Frangie*, 704 So. 2d 1143, 1143 (Fla. 1st DCA 1998) (First Amendment reporter's privilege).

Second, Appellees argue that this appeal is not "in need of resolution," citing *Pino v. Bank of New York*, 76 So. 3d 927, 928 (Fla. 2011), and that, in *Apportionment IV*, "the Supreme Court answered the very same questions presented here." Mot. at 7. But Appellees oversimplify the issues and misconstrue both the law and Appellants' arguments.

Pino did not engraft a "need" requirement on the great-public-importance exception to the mootness doctrine. Rather, *Pino* includes the phrase "in need of resolution" only once, in the introductory paragraph, where the Court explained why, in that appeal, it would exercise its discretion under Florida Rule of Appellate Procedure 9.350 to reject a stipulation of dismissal. Thus, the Court wrote that the issue *in that particular case* was "indeed one of great public importance *and in need of resolution*." 76 So. 3d at 928 (emphasis added). Although this appeal is also "in need of resolution," the *Pino* court merely provided the rationale for its exercise of discretion in that appeal and did not establish, as a rule of law, that an appellate court may not review a question of great public importance absent a demonstrated "need" for resolution.

Even so, this appeal presents a sufficient need for resolution. Whether *Apportionment IV* was correctly decided is a question that needs resolution—given the importance of the legislative privilege to Florida's separation of powers and Justice Canady's observation that no case "in the recorded history of our Republic" had ever permitted the interrogations that *Apportionment IV* authorized. 132 So. 3d at 156 (Canady, J., dissenting). As importantly, even if *Apportionment IV* was correctly decided, there is a pressing need to resolve the scope and meaning of that decision. *Apportionment IV* did not decide that legislators and legislative staff could be deposed in the absence of any preliminary factual showing of misconduct. Rather, it sanctioned a "balancing approach" and authorized depositions based upon a threshold showing by the plaintiffs in that case of "direct, secret communications between legislators, legislatives staff members, partisan organizations, and political consultants." 132 So. 3d at 148–49.[2] Here, Appellees have made *no* such showing (nor could they) and instead maintain that *Apportionment IV* affords *anyone* who files a

[2] While Appellants recognized that this Court may not recede from *Apportionment IV*, they preserve their argument that *Apportionment IV* was wrongly decided and should be overruled.

complaint in circuit court carte blanche to depose legislators and legislative staff at will. The trial court also misconstrued the scope of *Apportionment IV*, concluding it was "constrained by the holding in *Apportionment IV*" to allow eleven non-party legislators and legislative staff members to be deposed without a scintilla of evidence that any one of them had engaged in any improper conduct. App. 39. Whether *Apportionment IV* permits legislators and legislative staff members to be deposed on demand—or whether it affords greater protection to the legislative branch—is a question that needs resolution. After all, the privilege exists in part to insulate legislators and legislative staff from the chilling effect of potential involvement in future litigation—a chilling effect that will persist and inhibit the discharge of legislative duties as long as the scope and meaning of the privilege are unclear.

Moreover, despite Appellees' footnote on the apex doctrine, Mot. at 7–8 n.4, *Apportionment IV* did *not* address the common-law apex doctrine and could not have addressed the later-codified rule now found in Rule 1.280(h). The trial court here made numerous rulings involving the apex doctrine that are both in need of resolution and of great public importance, such as its refusal to apply the apex doctrine to shield the former Speaker of the Florida House of

Representatives, President Pro Tempore of the Florida Senate, and three committee chairs from depositions relating to matters within the sphere of their legislative responsibilities. App. 37–39. The court also concluded that the apex doctrine did not prevent any individual legislator from being "subject to deposition as to legislation they introduce or vote on." App. 38. Such a ruling finds no support in the text of Rule 1.280(h) and would authorize a deposition of the House Speaker or the Senate President simply because he or she had voted on one of the thousands of bills that are considered each legislative session. There can be no doubt these are issues of great importance to the discharge of public business, the proper interpretation of new Rule 1.280(h), and the interoperation of two coordinate branches of state government.

B. The issues presented in this appeal are likely to recur.

In the alternative, this Court should hear this appeal because the issues presented are "likely to recur." *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984), *abrogated on other grounds by Conage v. United States*, 346 So. 3d 594 (Fla. 2022). Indeed, they continually recur, as private litigants—including one of the Appellees here—have *repeatedly* sought to depose legislators and legislative staff in

redistricting and other cases. *See*, *e.g.*, *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446 (N.D. Fla. 2021); *Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. Aug. 10, 2012); *Apportionment IV*, 132 So. 3d 135; *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012).

In response, Appellees argue that the issues in this appeal are not likely to recur "in this case" because of their own post-appeal efforts to withdraw the notices of deposition that initiated this dispute and their representations that they will not seek to depose any other legislators or legislative staff members who assert the legislative privilege. Mot. at 1, 10–11. But Appellees' eleventh-hour voluntary cessation—done for the ostensible purpose of avoiding "the needless expense and delay of a protracted discovery dispute," *id.* at 2—is insufficient. *See*, *e.g.*, *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1355–57 (11th Cir. 2019) (noting that courts will not allow a litigant's actions to voluntarily cease its conduct to moot a case where the case involved continuing and deliberate actions and the litigant's cessation was "timed to anticipate suit").

Courts "require more than a private party's assertion that its challenged conduct will not recur." *Id.* at 1356.[3]

Even more importantly, the likely-to-recur exception does not require recurrence *in the same case*. *See Enters. Leasing Co. v. Jones*, 789 So. 2d 964, 965 (Fla. 2001) ("Although the issue presented in this appeal may be moot *as it relates to these parties*, the mootness doctrine does not destroy our jurisdiction when the question before us is of great public importance or is likely to recur." (emphasis added)); *Holly*, 450 So. 2d at 218 n.1 (noting that, although one of the litigants had settled his case, "this situation will occur again"); *see also Pino*, 76 So. 3d at 929 (citing and explaining *Holly*). Indeed, by the time a case becomes moot on appeal (which usually follows a final judgment), the moot question will rarely recur in the same case. For example, the issue in *Jones*—"whether the disclosure of confidential mediation information to the trial judge is in and of itself sufficient to disqualify the trial judge"—could not possibly have

[3] Appellees also sidestep the fact that they cannot promise that *no party* in this case will seek to depose legislators, as the Secretary of State in this litigation has already issued discovery requests to certain legislators and sought to identify which ones would be raising legislative privilege.

recurred *in that case* because the parties had settled the case during the appeal. 789 So. 2d at 965–66.

Questions regarding the scope of the legislative privilege under Florida law are likely to recur even in federal court. In federal court, state law governs assertions of privilege when state law supplies the rule of decision. Fed. R. Evid. 501. Some federal courts have looked to state privilege law even where the claims are founded on federal law . *See Florida*, 886 F. Supp. 2d at 1304 ("[I]f a state indeed did not recognize a privilege for its own legislators, the case for recognizing a federal privilege would be weaker."). To that end, Appellants note that a three-judge federal district court in the Northern District of Florida is currently considering a parallel federal-law challenge to the same congressional redistricting map that Appellees have challenged below on state-law grounds. *Common Cause Fla. v. Byrd*, No. 4:22-cv-109-AW (N.D. Fla.). Just this week, the plaintiffs in the federal case noticed their intent to serve document subpoenas on eight current and former Florida legislators, including four of the Appellants here. App. 43–45. Contrary to Appellees' assurances, the issues raised in this appeal have and will continue to recur in the absence of clear guidance from Florida's appellate courts.

Appellees also argue that jurisdiction should not be exercised here because the issues in this appeal are not likely to evade appellate review when they occur in the future. Mot. at 9–11. But unlike the mootness exception that applies in trial-court proceedings and other original actions, which requires a showing that the moot question evaded review, *see Waters v. Dep't of Corr.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020), the exception that permits an appellate court to review a moot but recurring question does not require the question to evade review. Thus, courts often complete appellate review of moot cases where the issues presented are likely to recur—even though appellate review would likely be available in future cases. *See, e.g.*, *Pino*, 76 So. 3d at 928–29; *Holly*, 450 So. 2d at 218 n.1.

Notably, the likely-to-recur exception is properly found where a lower court's "incorrect resolution of the question will only cause more problems in the future." *Holly*, 450 So. 2d at 218 n.1. As Appellees concede, albeit under the "great importance" exception, Mot. at 6–7, appellate courts consider whether resolution of the issue "is necessary for guidance to our trial and appellate courts." *Banks v. Jones*, 232 So. 3d 963, 965 (Fla. 2017); *see also Pino*, 76 So. 3d at

928 (noting that the issue "is one on which Florida's trial courts and litigants need guidance" and has implications beyond the subject matter of the litigation). Indeed, no guidance would ever be necessary unless the situation were likely to recur *in another case*, wherein different or even the same parties would have appellate rights. And yet courts routinely exercise their discretion to review moot questions even though appellate review would be available on appeal from any future recurrence.

Appellate-court guidance is necessary here as to the correctness of *Apportionment IV* and the application of both *Apportionment IV*'s "balancing approach" and the apex doctrine. The *Apportionment IV* dissent correctly forecasted the unpredictable future the majority's holding has now created:

> The majority's balancing approach boils down to the exercise of unfettered judicial discretion: the legislative privilege inherent in the separation of powers will give way to the extent that an entirely subjective judicial determination requires that the privilege must give way. This is not the way that one branch of government should approach the acknowledged constitutional privilege of an equal and coordinate branch of government.

132 So. 3d at 159–60 (Canady, J. dissenting). Appellees invited this dispute, the parties briefed it below, the trial court issued an order,

and the issues presented have recurred and will continue to recur. This Court is well-positioned to address these issues of fundamental importance now. This exception to the mootness doctrine is met here.

C. Collateral legal consequences will result from the trial court's order on appeal.

Finally, the trial court's order requiring eleven legislators and legislative staff to sit for depositions without any predicate showing of wrongdoing has collateral legal consequences not only for these Appellants in this litigation, but also for all 160 legislators and the hundreds of legislative staff in the Legislature. Where the "rights of a party" have been impacted by collateral legal consequences that "flow from the issue to be determined," Florida's appellate courts have exercised their discretion to hear moot appeals. *Godwin*, 593 So. 2d at 212.

Indeed, Appellees' efforts to depose non-party legislators and their legislative staff forces (and has already forced) the voters' elected representatives and their staff to spend time away from their legislative duties and has required the expenditure of resources to resist those efforts. And the trial court's ruling directly affects how current and future legislators and staff will approach their duties, as

the trial court concluded that legislators and high-ranking legislative staff are not shielded by the apex doctrine with regard to any bills they introduce *or vote upon*. Because the trial court felt "constrained" by *Apportionment IV*, App. 39, it authorized depositions about certain topics relating to legislative duties without any predicate showing of wrongdoing.

These are not mere inconveniences but injuries to the public and to the constitutional rights of legislators and legislative staff to "accomplish [their] role of enacting legislation in the public interest without undue interference." *Apportionment IV*, 132 So. 3d at 146; *see also EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (discussing how the related concept of legislative immunity "shields [legislators] from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box" and the importance of freeing legislators from the burdens of defending themselves and the intrusive distraction of discovery requests).

Appellees cannot reverse the impact of the trial court's order—which *they purposefully requested and pursued*—by withdrawing their deposition notices two weeks after Appellants sought review by

this Court. This Court should address the merits of the weighty and looming constitutional and procedural questions properly preserved in this appeal.

CONCLUSION

Appellees' tactical withdrawal of their deposition notices—done to moot this appeal—does not divest this Court of its jurisdiction to decide the dispute that Appellees initiated below. Because this appeal satisfies each exception to the mootness doctrine, this Court should deny Appellees' Motion to Dismiss for Lack of Jurisdiction and proceed to consider this appeal on the merits following briefing by the parties.

Respectfully submitted this thirteenth day of January 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2023, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on all counsel identified on the Service List that follows.

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