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IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC13-949, SC13-951

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

Petitioners,

vs.

THE FLORIDA HOUSE OF REPRESENTATIVES, *et al.*,

Respondents.

_____/

L.T. Case Nos.: 1D12-5280, 37 2012 CA 00412, 37 2012 CA 00490

RENE ROMO, *et al.*,

Petitioners,

vs.

THE FLORIDA HOUSE OF REPRESENTATIVES, *et al.*,

Respondents.

_____/

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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STATEMENT OF THE CASE AND FACTS

It is self-evident that judges should not have to answer questions under oath about their decisions. Nor should legislators have to answer questions under oath about the legislative process. In fact, no state or federal court ever—in Florida or any other of the 50 states—has ordered the depositions that Petitioners seek here.

To be clear: the relief Petitioners seek is unprecedented. The First DCA's conclusion that the legislative privilege protects legislators from being deposed in this case is consistent not only with Florida's strict separation of powers, but with well settled law throughout the United States. And *no* court has ever required state legislators to testify about their intent in drafting or voting on legislation. In fact, Petitioners fail to cite a single case anywhere requiring state legislators to testify about a matter within the legislative domain. The Florida House of Representatives; Will Weatherford, in his official capacity as Speaker of the House; the Florida Senate; and Don Gaetz, in his official capacity as President of the Senate (collectively, the "Legislative Parties") ask this Court to approve the First DCA's decision.

A. Facts Relevant to the Appeal

In February 2012, the Florida Legislature enacted Senate Bill 1174, establishing new congressional districts for the State of Florida in accordance with the 2010 Census and article III, section 20 of the Florida Constitution. *See* Ch.

2012-2, Laws of Fla. The bill resulted from many months of public meetings and input. Beginning in June 2011, the Legislature held 26 public hearings across the state, followed by 17 meetings of House and Senate committees where congressional redistricting plans were publicly discussed. The Legislature debated alternative proposals, including many received from the public (A. 68).[1] The redistricting process was the most open and inclusive in State history, producing a comprehensive legislative record with scores of alternative maps (including 86 congressional maps submitted by the public), extensive public comments, reports and transcripts from 26 public hearings, volumes of statistics and demographic data, and thousands of pages of transcripts from committee meetings and floor debates (*id*.).

B. Course of Proceedings and Disposition Below

Immediately after Senate Bill 1174 was enacted, seven individuals (the "Romo Plaintiffs") challenged the new districts in circuit court (A. 4). After the Governor signed the bill into law, the League of Women Voters of Florida, the National Council of La Raza, Common Cause Florida, and four individuals (the "LOWV Plaintiffs"), filed their own complaint challenging the districts (*id*.). The cases were later consolidated (*id*.). The complaints allege that the new

[1] "A. #" refers to the page number of Petitioners' appendix. "DCA #" refers to the page number of the Legislative Parties' First DCA appendix, which will be part of the record here. As of this date, the record had not yet been filed in this Court.

congressional districts violate the redistricting standards in article III, section 20 of the Florida Constitution because, among other reasons, they were "drawn with the intent to favor or disfavor a political party or an incumbent."

During discovery in this case, the Legislative Parties have produced more than 25,000 documents, including the State's entire submission to the United States Department of Justice establishing compliance with Section 5 of the federal Voting Rights Act (A. 17). These records constitute all of the Legislative Parties' relevant institutional public records, except those that section 11.0431, Florida Statutes expressly exempts from disclosure (such as draft maps and related supporting documents). The Legislative Parties did not assert legislative privilege regarding any documents subject to disclosure under Florida's broad Public Records Act. In addition, the parties have taken or scheduled over 20 depositions of fact and expert witnesses, many of them purportedly aimed at determining the legislative intent behind Senate Bill 1174.

Despite the unprecedented legislative record and abundance of information obtained through discovery, the LOWV Plaintiffs noticed the depositions of a state legislator and two legislative staff members (A. 6). The LOWV Plaintiffs indicated that more depositions would follow, and the Romo Plaintiffs stated their intent to compel depositions from legislators and legislative staff (A. 49).

The Legislative Parties filed a motion for protective order (A. 48). Relying on the First DCA's decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012), they argued that the legislative privilege protects legislators and staff from compelled deposition testimony concerning their official duties, and that documents exempt from disclosure under the Public Records Act are privileged from discovery (A. 50, 61).

The circuit court granted in part the Legislative Parties' motion and denied it in part (the "Order") (A. 73). The Order concluded that Petitioners may not depose legislators or their staff about their "'subjective' thoughts or impressions or . . . the thoughts or impressions shared with them by staff or other legislators," but that Petitioners may depose legislators and legislative staff with respect to "'objective' information or communication which does not encroach into the thoughts or impressions enumerated above" (A. 82). The court also ordered the Legislative Parties to produce documents that "do not contain 'subjective' information" and directed them to submit disputed documents for *in camera* review (A. 82).

On certiorari review, the First DCA quashed the Order. The court reiterated its holding in *Expedia* that "[t]he 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" (A. 10-11). It held that "the legislative privilege

broadly protects legislators and legislative staff members from being compelled to testify about any matter that is 'an essential part of the legislative process' or pertains to the performance of 'a legitimate legislative function'" (A. 11). The court found that the Order improperly "requires the Legislature to produce potentially privileged documents for an in camera review under an unworkable standard that the trial court itself described as 'difficult to determine'" (A. 8).

The First DCA held that the privilege could yield only to "interests outside of the legislative process and unrelated to the importance of the legislation at issue, such as criminal investigations and prosecutions" (A. 13). Although it agreed that "compliance with the standards in article III, section 20 is an important governmental interest, [it] reject[ed] the [circuit] court's determination that this interest is sufficient to outweigh the legislative privilege or to afford less protection to 'objective' information that falls within the scope of the privilege" (*id*.). The court quashed the Order "insofar as it permits Respondent to depose legislators and legislative staff members concerning the reapportionment process" (A. 24).

The First DCA also held that "the legislative privilege applies not only to compelled oral testimony but also to compelled production of written materials that fall within the scope of the privilege (A. 19). The court rejected Petitioners' argument that "all documents related to the reapportionment process are no longer exempt from public disclosure and must be produced" (A. 20). The court instead

found that documents supporting draft maps not filed as bills "remain exempt from public disclosure in perpetuity" and instructed the circuit court to "conduct an in camera review to determine whether . . . documents fall within the scope of the public records exemption in that statute and, if so, whether the documents fall within the scope of the legislative privilege" (A. 21-22, 24). Petitioners do not challenge the First DCA's interpretation of the public-records exemption for unfiled draft maps and supporting documents. Therefore, we do not address it here.

C. Standard of Review

Whether a legislative privilege exists in Florida is an issue of law, subject to *de novo* review. *See Rando v. Gov't Emps. Ins. Co.*, 39 So. 3d 244, 247 (Fla. 2010). The First DCA's grant of certiorari is reviewed for abuse of discretion. *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011).

SUMMARY OF THE ARGUMENT

The principle that a legislator cannot be forced to testify under oath about the legislative process is so well-settled that it predates the founding of the Republic. This principle was enshrined in English common law when our nation was founded, and it has endured to this day. No court in the history of the United States has required a state legislator to be deposed about the legislative process.

The First DCA, following its decision in *Expedia*, correctly held that the legislative privilege protected legislators and their staff from being deposed in this case.

Petitioners claim that section 90.501, Florida Statutes, abrogates the legislative privilege in Florida. But that section, by its own terms, recognizes privileges arising from the Florida Constitution and Florida Statutes. Here, as the First DCA found, the legislative privilege derives from Florida's strict separation-of-powers clause and from section 2.01, Florida Statutes, which codifies the common law of England. Moreover, section 90.501 did not abrogate the immunities afforded to the coordinate branches of government. Florida courts continue to recognize the privileges and immunities afforded to the legislative, judicial and executive branches even when they are not expressly codified.

This Court has recognized that Amendment Six had no effect on judicial functions; it merely added substantive criteria to be applied in drawing reapportionment plans. Petitioners also incorrectly assert that the legislative privilege must yield in light of the importance of article III, section 20. Finally, the First DCA did not abuse its discretion in concluding that the circuit court misapplied the binding precedent set forth in *Expedia*.

ARGUMENT

It is black letter law that a legislator has a privilege against submitting to compelled testimony about the legislative process. *See, e.g.*, *Florida v. United*

States, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012) (denying, in Voting Rights Act preclearance litigation, a motion to compel depositions of legislators and legislative staff members on the basis of legislative privilege) (Hinkle, J.); *Dittmer v. Cnty. of Suffolk*, 188 F. Supp. 2d 286, 291 (E.D.N.Y. 2002) (noting an order quashing deposition subpoenas of state legislators); *Mosby v. Texas*, 2004 WL 177549, at *2 (Tex. App. Ct. Jan. 29, 2004) (rejecting an argument that the trial court erred by quashing deposition subpoenas of state legislators); *Melvin v. Doe*, 2000 WL 33252882 (Pa. Ct. Comm. Pl. May 23, 2000) (quashing a deposition subpoena of a state senator on separation-of-powers grounds); *State v. Town of Lyndhurst*, 650 A.2d 840, 845 (N.J. Super. Ct. 1994) (quashing deposition subpoenas of state legislators); *Kerttula v. Abood*, 686 P.2d 1197, 1205 (Alaska 1984) (quashing a deposition subpoena of state senator because of legislative privilege); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984) (excluding the testimony of state legislators based on legislative privilege); *Bishop v. Montante*, 237 N.W.2d 465, 468 (Mich. 1976) (quashing a deposition subpoena of a state legislator because of constitutional privilege).

Indeed, no court anywhere has required a state legislator to be deposed about individual intentions or motivations behind enacted legislation. The First DCA, following its decision in *Expedia*, held that the legislative privilege protected legislators and their staff from being deposed in this case. This Court should

approve that decision because (I) the First DCA correctly recognized that the legislative privilege exists under Florida law; (II) it correctly held that article III, section 20 of the Florida Constitution does not abrogate the privilege; (III) it correctly determined that the privilege should not yield under the circumstances of this case; and (IV) it did not abuse its discretion in concluding that the Legislative Parties satisfied the criteria for certiorari relief.

I. THE FIRST DCA CORRECTLY FOUND THAT THE LEGISLATIVE PRIVILEGE EXISTS IN FLORIDA

Petitioners first argue (br. at 11-16) that the First DCA erred in holding that Florida law recognizes a legislative privilege. They claim that, because the privilege is not expressly codified in a statute or the Florida Constitution, it cannot exist. But as we explain below, (A) the privilege is implicit in the Florida Constitution's separation-of-powers clause; (B) the privilege was part of English common law on July 4, 1776 and therefore was codified in section 2.01; (C) the absence of a speech-or-debate clause does not preclude the privilege; and (D) section 90.501 did not abrogate the privileges and immunities of the coordinate branches of government.

A. The Legislative Privilege is Implicit in the Florida Constitution's Separation-of-Powers Clause

Petitioners first argue that no legislative privilege exists in Florida because under section 90.501, Florida Statutes, "no person in a legal proceeding has a

privilege" to refuse to be a witness or to produce documents "[e]xcept as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida" (br. at 11-12). Petitioners then assert that "there is no specific statute or constitutional provision creating a legislative privilege" (br. at 13). This argument ignores the clear language of the statute on which it rests. As the First DCA correctly held, the legislative privilege arises from the Florida Constitution's strict separation-of-powers provision (A. 10).

Article II, section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches" and that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Petitioners attempt to minimize the significance of this provision, arguing that it has "limited power and scope" (br. at 20). To the contrary, as the First DCA emphasized in *Expedia,* the "importance of [article II, section 3] cannot be overstated," and this Court has traditionally applied a strict separation of powers, which it has described as the "cornerstone of American democracy." 85 So. 3d at 524 (quoting *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)).

"Strict enforcement" of the separation of powers "is necessary in part to ensure that one branch of government does not encroach on powers vested exclusively in another." *Id.* The Legislature should not compel judges to testify

about the reasons for their decisions, their thought processes in chambers, or even the objective mechanics of rendering their opinions. *Id.* at 522-23. The legislative branch is entitled to this same protection: "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." *Id.* at 524; *see also Florida v. United States*, 886 F. Supp. 2d at 1303 ("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.") (Hinkle, J.).

Petitioners nonetheless argue that "the mere existence of a separation-of-powers provision does not necessarily imply a legislative privilege" (br. at 14-15). But the privilege promotes the separation of powers by protecting the integrity of the legislative process from encroachment by the other branches. Like the independence of the judiciary, which enables courts to render decisions freely and without coercion, the legislative privilege enables elected legislators to perform their duties with independence, according to their own convictions and consciences, free from intimidation, harassment, or fear of personal consequences. While Petitioners dismiss such concerns as "wholly speculative" (br. at 18), courts have steered a more prudent course. *See Tenney v. Brandhove*, 341 U.S. 367, 377

(1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators.") (Frankfurter, J.). Indeed, the threat to the integrity of the legislative process is far greater here than it was in *Expedia*: this case involves a core legislative function directly and expressly committed to the Florida Legislature under the United States Constitution. *See Florida v. United States*, 886 F. Supp. 2d at 1302 ("Florida state legislators have a privilege not to testify on matters at the core of their legislative functions.") (Hinkle, J.). To deny the privilege here would create a "chilling effect" by compelling legislators to testify about matters within their official functions. As the First DCA said, "the privilege guarantees the Legislature's independent judgment precisely when it is exposed most to external pressures—in the case of important legislation" (A. 16).

In the absence of a legislative privilege, Petitioners would be in a prime position to apply undue pressure to legislators if the Legislature were called upon to adopt a remedial redistricting plan. Under the threat of hostile depositions, few legislators will be found willing to serve on redistricting committees, while others, to escape reprisals and intimidation in subsequent litigation, would naturally be too ready to accede to Petitioners' demands, all to the detriment of the public good.

To support their argument that the separation of powers does not mandate a legislative privilege, Petitioners cite *Girardeau v. State*, 403 So. 2d 513 (Fla. 1st DCA 1981) (br. at 15). But rather than "expressing skepticism about the privilege" (br. at 13), *Girardeau* strongly suggested its existence. Although requiring a legislator who had received possible evidence of a crime to testify before a grand jury, the court noted that "[t]here is every reason to believe that all due deference will and should be extended by the judicial branch to any properly asserted legislative claim of privilege, and it is imperative that it be kept in mind that such claims of privilege are supported by substantial authority." *Id*. at 516.[2] *See also Expedia,* 85 So. 3d at 524 ("We suggested in *Girardeau* that the separation of powers provision in Article II, section 3 would support a claim of legislative privilege."). And *Girardeau* is consistent with the decision below, which recognized that the privilege might yield to "interests outside of the legislative process . . . , such as criminal investigations and prosecutions" (A. 13).

For these reasons, the legislative privilege follows from the separation-of-powers provision in the Florida Constitution.

[2] Petitioners also cite *City of Pompano Beach v. Swerdlow Lightspeed Management Co.*, 942 So. 2d 455 (Fla. 4th DCA 2006) (br. at 15), which rehashed the issues addressed in *Girardeau* but concluded that the privilege issue was not properly before the court. *Id*. at 457. *See also Fla. Assoc. of Rehab. Facilities v. Fla. Dept. of Health & Rehab. Serv.*, 164 F.R.D 257, 261 (N.D. Fla. 1995) (examining *Girardeau* but ultimately finding that the privilege asserted was "a matter of federal law").

B. The Legislative Privilege Existed at Common Law, as Codified by Section 2.01, and Section 90.501 Did Not Abrogate it

The legislative privilege was also enshrined in the common law of England long before the founding of the United States. As far back as 1689, the English Bill of Rights declared "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." *Tenney*, 341 U.S. at 372 (citations omitted).

This common law of legislative privilege was codified in section 2.01, Florida Statutes, providing that "[t]he common law and statute laws of England . . . down to the 4th day of July, 1776, are declared to be of force in this state; provided, [that they] be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." § 2.01, Fla. Stat. (2012). "It follows from this language that if legislative immunity existed under the common law of England, it continues to exist in Florida." *Expedia*, 85 So. 3d at 523.

In apparent recognition that their argument flies in the face of section 2.01, Petitioners argue—for the first time in this case—that section 90.501, Florida Statutes, which expressly retains all privileges that exist "as . . . provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida," somehow abrogated the common law legislative privilege. They cite *Marshall v. Anderson*, 459 So. 2d 384 (Fla. 3d DCA 1984), for the proposition that

section 90.501 abolished "all common-law privileges existing in Florida." Petitioners ignore the fact that the academic testimonial privilege at issue in *Marshall* was not part of the English common law at the founding of our Republic, and therefore was not codified by section 2.01. Unlike the academic testimonial privilege, the common law legislative privilege is now a statutory privilege.

None of the other cases Petitioners cite (br. at 12) involved a privilege rooted in either the common law as of 1776 or the Florida Constitution's separation-of-powers provision. *See Hope v. State*, 449 So. 2d 1319 (Fla. 2d DCA 1984) (rejecting a "son-father privilege" without any basis in statute, constitutional provision, or English common law); *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984) (addressing the propriety of a defendant's ex parte communications with the plaintiff's health care providers).[3]

Moreover, a former legislature would not have the authority to abrogate the constitutionally grounded privileges of current legislators, as one legislature cannot statutorily deprive future legislators of privileges grounded in the separation of

[3] Petitioners cite federal cases describing the reluctance of courts to create new privileges (br. at 12). But the legislative privilege is not new; federal courts have long recognized it, *see Gravel v. United States*, 408 U.S. 606 (1972), and one court recently applied it to Florida legislators in a voting-rights case. *Florida v. United States*, 886 F. Supp. 2d at 1302 ("Florida state legislators have a privilege not to testify on matters at the core of their legislative functions.") (Hinkle, J.).

powers. *See Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985) (upholding the maxim that one legislature cannot bind a future legislature).

Finally, Petitioners argue (br. at 14 n.3) that section 90.501 abrogated the common law because a specific statute controls over a general one. Again, Petitioners ignore the words of section 90.501. A specific statute controls over a general only when the two statutes hopelessly conflict. *See, e.g.*, *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 9 (Fla. 2004). Here, the plain language of section 90.501 clearly avoids any such conflict, as it expressly exempts from its scope privileges codified under other Florida statutes.

C. The Absence of a Speech-or-Debate Clause in the Florida Constitution Does Not Preclude the Legislative Privilege

Despite the clear relationship between the separation of powers and the legislative privilege, Petitioners assert that the Court should not infer a legislative privilege from the separation-of-powers provision because the privilege "is typically rooted in a constitutional speech-and-debate clause" (br. at 15). They argue that no legislative privilege exists because Florida is one of two states that lacks a speech-or-debate clause or a constitutional provision exempting legislators from arrest during a legislative session (br. at 15-16).

The lack of a speech-or-debate clause is irrelevant. Courts have grounded the legislative privilege on the separation-of-powers doctrine. *See Miller v. Transam. Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983) ("The privilege is rooted

in the separation-of-powers doctrine."); *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 52 (D.D.C. 2007) (finding that the legislative privilege "reinforc[es] the separation of powers so deliberately established by the Founders") (quoting *United States v. Johnson*, 383 U.S. 169, 178 (1966)); *Cafe 207, Inc. v. St. Johns Cnty.*, 856 F. Supp. 641, 645 n.4 (M.D. Fla. 1994) ("To permit legislators . . . to be subject in litigation to examination about their individual motives in voting or not voting for particular measures would pose serious constitutional questions concerning separation of powers."); *State v. Holton*, 997 A.2d 828, 834 (Md. Ct. Spec. App. 2010) (observing that the legislative privilege "reinforce[s] the separation of powers embodied in our tripartite form of government.") (*quoting Blondes v. State*, 294 A.2d 661 (Md. Ct. Spec. App. 1972)); *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1094 (Ariz. Ct. App. 2003) (finding that the legislative privilege "springs from common law and is embodied in the Speech or Debate Clause of the United States Constitution *and the principles underlying our government's separation of powers*.") (emphasis added).

Federal courts, too, reject the idea that the privilege must be based on a speech-or-debate clause. The United States Constitution's Speech or Debate Clause applies to Congress, yet the Supreme Court applied the underlying principles to conclude that members of the California Legislature were immune

from liability in a civil suit. *Tenney*, 341 U.S. 367. The Court's decision in *Tenney* "did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the 'public good.'" *Lakeland Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404-405 (1979). The Supreme Court has since extended legislative immunity to local legislative officials, *see Bogan v. Scott–Harris*, 523 U.S. 44 (1998), and to non-legislators engaged in a legislative function, *see Supreme Court of Va. v. Consumers Union of the United States*, 446 U.S. 719 (1980). Other federal courts have recognized a federal common-law privilege that protects state legislators from compelled testimony. *See, e.g.*, *2BD Assocs. Ltd. P'ship v. Cnty. Comm'rs for Queen Anne's Cnty.*, 896 F. Supp. 528, 531 (D. Md. 1995) ("[T]he doctrine . . . protects legislators from civil liability, and it also functions as an evidentiary and testimonial privilege.").

Moreover, in North Carolina—the only other state Petitioners identify as lacking a speech-or-debate clause (br. at 16)—legislators nonetheless enjoy immunity. *See Vereen v. Holden*, 468 S.E.2d 471, 473-74 (N.C. Ct. App. 1996) (recognizing legislative immunity and observing the "deep roots of legislative immunity in American and English common law"). Therefore, the lack of a speech-or-debate clause in the Florida Constitution is irrelevant.

D. Section 90.501 Did Not Abrogate the Privileges and Immunities of the Coordinate Branches of Government

Even if section 90.501 was intended to abrogate all common law evidentiary privileges, it did not abrogate the immunities afforded to the coordinate branches of government. Under Petitioners' interpretation, it is not only legislators who would lack a testimonial privilege; so would members of the judiciary and the executive. But courts continue to grant privileges to officials of all three branches.

Expedia, of course, found a legislative privilege. The First DCA found that "[b]ecause the right to assert a legislative privilege arises from the state constitution as well as the common law, it is among those privileges that exist independently of the Florida Evidence Code." 85 So. 3d at 524. Therefore, the privilege is derived not from the Evidence Code itself but from the common law doctrine of legislative immunity. *Id*. at 521; *see also EEOC v. Wash. Suburban Sanitary Comm'n,* 631 F.3d 174, 181 (4th Cir. 2011) ("Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes.").

Petitioners present no evidence that when the Florida Legislature codified the evidentiary privileges in 1976, it intended to abrogate legislative immunity and its attendant privileges. To the contrary, Florida courts continue to recognize it. This Court implicitly recognized the privilege in an unpublished order granting a writ of prohibition. *See Fla. Legislature v. Sauls*, No. 80,834 (Fla. Feb. 3, 1993)

(directing that the "Circuit Judge in and for Leon County, Florida, desist from compelling testimony from Ms. Wendy Westling, a legislative assistant of the Florida Legislature"). And many trial courts have barred depositions of legislators and their staff. *See, e.g.*, *Billie v. State*, No. 02-499-CA (Fla. 17th Jud. Cir. Feb. 7, 2003) (precluding plaintiff from deposing any member or staff of the Florida Senate and noting that "[t]he testimony of legislators or their aides is not admissible regarding their motives, or intent, or statements made pertaining to their intent or purpose for a particular enactment."); *Leon Cnty. Research & Dev. Auth. v. State*, Case No. 88-3273 (Fla. 2d Jud. Cir. Feb. 20, 1989) (holding that "[t]o coerce the testimony" of three legislative aides would be an "overly intrusive encroachment by the judicial branch."); *Sea Club Assocs., IV, Ltd. v. Interval Marketing Assocs., Ltd.*, No. 84-1747-CA-01 (Fla. 12th Jud. Cir. July 31, 1987) (finding that parties are "precluded from . . . deposing any member or employee of the Florida House of Representatives" as to legislative intent); *Mengedoht v. Burch*, No. 85-5671 CA-T (Fla. 18th Jud. Cir. Sept. 12, 1986) (quashing an order compelling the testimony of two senators on grounds of separation of powers, legislative privilege and relevance); *State v. Billie*, Case No. 83-202 (Fla. 20th Jud. Cir. Nov. 8, 1984) (quashing subpoena of a legislative aide); *Sanphil Corp. v. City of Pompano Beach*, No. 83-18017 (Fla. 17th Jud. Cir. Oct. 24, 1983) (quashing subpoenas of senator and representative); *Delta Airlines v. State*, No. 83-761 (Fla.

2d Jud. Cir. May 5, 1983) (quashing an order compelling testimony from legislative aide and observing that "the opinions of individual legislators as to what legislative intent was, is inadmissible").[4]

Despite section 90.501, Florida courts also continue to recognize privileges based on judicial and executive immunity as well. Indeed, this Court has held that a judge may not be compelled to testify about the thought processes involved in deciding a case. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994). The genesis of that rule is not found in a statute, but in the common law doctrine of judicial immunity, because "[i]f judicial immunity bars a lawsuit against a judge or official acting in a quasi-judicial capacity, then such judge or official may not be deposed." *Dep't of Highway Safety & Motor Vehicles v. Marks*, 898 So. 2d 1063, 1065 (Fla. 5th DCA 2005). Just as these privileges survive after the enactment of section 90.501, so does the legislative privilege. *Cf. Florida v. United States*, 886 F. Supp. 2d at 1304 ("Florida does recognize a state legislative privilege. This is confirmed by [*Expedia*]. . . . If faced with the issue, the Florida Supreme Court almost surely would agree") (Hinkle, J.).

II. ARTICLE III, SECTION 20 DOES NOT ABROGATE THE LITIGATION PRIVILEGE

Petitioners next argue (br. at 16-22) that if the privilege exists, article III,

[4] The Legislative Parties have filed have filed a motion asking the Court to take judicial notice of these orders. *See* § 90.202(6), Fla. Stat. (2012) (allowing a court to take judicial notice of "[r]ecords of any court of this state . . .").

section 20 somehow silently abrogates it. This is wrong for three reasons: (A) that provision does not alter judicial functions, but merely imposes new substantive standards for reapportionment plans; (B) the ballot summary for Amendment Six did not disclose any effect on existing constitutional provisions; and (C) article III, section 20 may be implemented without compelling legislators to testify.

A. This Court Has Found that Amendment Six Did Not Alter the Functions of the Judiciary

According to Petitioners, "Article III, section 20 *revised the balance of powers* in the redistricting context, and the *new arrangement* assumes an active and indispensable role for private plaintiffs and the judiciary" (br. at 19) (emphasis added). In other words, Petitioners suggest that by adding article III, section 20 to the Florida Constitution, the voters intended to alter the functions of the judiciary and to compel, for the first time, state legislators to testify about the legislative process. This Court expressly rejected that premise, holding that "[t]he proposed amendments do not alter the functions of the judiciary." *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 183 (Fla. 2009) (plurality op.). The amendment "merely change[d] the standard of review to be applied when either the attorney general seeks a 'declaratory judgment' with regard to the validity of a legislative apportionment, or a redistricting plan is challenged." *Id. Accord Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 161, 165 (Fla. 2009) ("The current

amendments . . . only implement additional guidelines that the Legislature must follow when conducting reapportionment." (emphasis omitted)).

Indeed, when this Court reviewed Amendment Six's ballot summary, the amendment's sponsor, FairDistrictsFlorida.org, Inc., emphatically denied that the amendment affected the judicial branch.[5] FairDistrictsFlorida.org stated that the amendment "only establishes standards for the legislature to follow when drawing the district lines" and "*changes no judicial function whatsoever*," Am. Answer Br. of Sponsor FairDistrictsFlorida at 7, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, No. SC08-1149, filed on August 4, 2008 (emphasis added), and that Amendment Six "*makes no changes to the judicial functions* or structure of this State," *id*. at 15 (emphasis added), "does not modify any portions of the Constitution that apply specifically to the court system," *id*., and has "no effects on judicial functions," *id*. at 15 n.2; *see also* Init. Br. of Sponsor FairDistrictsFlorida.org at 5, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, No. SC08-1149, filed on July 15, 2008 ("It affects a function of only the legislative branch of state government and has a single purpose accomplished by a single plan. It creates standards for the drawing of congressional districts *and nothing more*." (Emphasis added)). The sponsor

[5] A successor organization to FairDistrictsFlorida, FairDistricts Now, Inc. (acting through the "Fair Districts Coalition" comprised of the League of Women Voters of Florida and Common Cause Florida), is one of the Plaintiffs/Petitioners in this case. *See, e.g.*, http://www.fairdistrictsnow.org/redistricting/is-it-over.

never suggested that Amendment Six "revised the balance of powers," established a "new arrangement" between the branches, or abrogated any privileges. The Court relied on the sponsor's less revolutionary statements and found that the amendment does "not alter the functions of the judiciary." *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 183. This Court should not now interpret Amendment Six in a way that conflicts with the interpretation the sponsor disclosed, and this Court approved, before the voters adopted the amendment.

Petitioners cite (br. at 20) this Court's statement in *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012) ("*Apportionment I*") that the amendments require a "more expanded judicial analysis of legislative compliance." But that statement merely acknowledges the additional standards the amendment creates. Indeed, the Court recently clarified this point in *Florida House of Representatives v. League of Women Voters of Florida*, __ So. 3d __, 38 Fla. L. Weekly S565a (Fla. July 11, 2013), stating that "the mere fact that we engaged in a detailed examination of objective and undisputed evidence to give meaning to the new state constitutional standards in the 2012 apportionment decisions does not lead to the conclusion that the fundamental nature of our review . . . was altered by the 2010 amendment introducing express new redistricting standards into the Florida Constitution."

Petitioners cite cases discussing the deliberative-process privilege (br. at 18). But that unrelated privilege protects only government decision-making "collateral" to the litigation; courts have not so limited the legislative privilege. *See, e.g., City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (recognizing the legislative privilege "[e]ven where a plaintiff must prove invidious purpose or intent."). The two privileges differ in origin, purpose, and scope. The deliberative-process privilege protects the executive branch and is rooted in policy considerations, while the legislative privilege enjoys a longstanding historical and constitutional lineage. *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 295 (D.P.R. 1989) ("[T]he main justification for the deliberative process privilege has little to do with the separation of powers, as opposed to the legislative privilege, and much to do with the public policy of protecting confidential exchanges of opinions and advice within the executive branch.").[6]

Petitioners' reliance on canons of constitutional and statutory interpretation is similarly flawed. They assert that the common law must yield if it conflicts with the state law (br. at 17), but nothing in article III, section 20 addresses discovery, much less shows that the voters intended that legislators and their staff would be compelled to testify about their legislative activities. An intent to abrogate the

[6] Petitioners also cite cases noting that "[c]ourts may not shirk [their] duties based on nebulous fears about potential interbranch conflicts" (br. at 19-20). But those cases hold that courts must assess the validity of legislative enactments, not that they should disregard the constitutional separation of powers.

common law must be explicit. *Cf. Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1048 (Fla. 2008) ("A statute . . . designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.") (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977)).

Petitioners also suggest that specific provisions control over general ones, and that article III, section 20 controls over the general separation-of-powers provision (br. at 21). But again, Petitioners' argument is based on finding conflict where none exists. *See Knowles*, 898 So. 2d at 9. Article III, section 20 does not address the legislative privilege. Like claims under the Equal Protection Clause and the Voting Rights Act, *see infra* Part III.A, claims under article III, section 20 can be decided without compelled legislator testimony.

B. The Ballot Summary for Amendment Six Did Not Disclose Any Effect on Existing Constitutional Provisions

Constitutional amendments proposed by citizen initiative must "embrace but one subject and matter directly connected therewith," art. XI, § 3, Fla. Const., and their ballot summaries "must advise the electorate of the true meaning and ramifications of the amendment," *Adv. Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994). Under these principles, "the electorate must be advised of the effect a proposal has on existing sections of the constitution." *Id*. at 494. Here, the ballot summary disclosed no change to judicial functions. This fact

was central to this Court's holding that Amendment Six addressed a single subject and was therefore entitled to a place on the ballot. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 165.[7]

Petitioners argue that the ballot summary did not disclose Amendment Six's effect on the separation of powers because "*Expedia* was the first Florida case to recognize the legislative privilege" and was decided "more than one year after article III, section 20 became law" (br. at 27). But as shown above, *Expedia* was not the first Florida decision to recognize the privilege. By arguing that Amendment Six "revised the balance of powers" and established a "new arrangement" between the branches (br. at 18), Petitioners concede that the legislative privilege *preceded* Amendment Six.

Petitioners' about-face interpretation of Amendment Six also fails because constitutional amendments proposed by citizen initiative may only abrogate existing constitutional provisions explicitly. Because citizen initiatives are unaccompanied by an "official record of legislative history or debate" to guide courts interpreting it, the ballot summaries of citizen initiatives must expressly

[7] This Court has used ballot summaries and the rules governing them to interpret constitutional amendments. *See Graham v. Haridopolos*, 108 So. 3d 597 (Fla. 2013) (construing an amendment to confer no authority on the Board of Governors to determine tuition rates, in part because its summary made no mention of the purported power); *id*. at 605-06 ("We also review the ballot summary, because it is indicative of voter intent. . . . If the framers intended that the Board would have expansive authority over the setting of and appropriating for the expenditure of tuition and fees, neither the ballot summary nor the title indicated such an intent.").

identify any effect on existing constitutional provisions. *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). Otherwise, the Court would be "placed in the position of redrafting substantial portions of the constitution by judicial construction," which would confer on the Court "broad discretionary authority in determining the effect of a proposed amendment" and establish a "dangerous precedent." *Id*. at 989; *accord Adv. Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565-66 (Fla. 1998).

Thus, this Court rejected a contention that Amendment Six repealed a constitutional provision authorizing multi-member districts, concluding that the amendment can—and therefore *must*—be harmonized with the existing constitutional provision authorizing multi-member districts. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 191. Likewise, the Court must refuse Petitioners' invitation to find that the amendment implicitly limited the separation of powers.

Petitioners rely on two decisions of this Court that expressly *rejected* the idea that Amendment Six was intended to alter judicial functions (br. at 21-22). *See League of Women Voters of Fla.*, 38 Fla. L. Weekly S565a ("[T]he fundamental nature of our review . . . was [not] altered by the 2010 amendment introducing express new redistricting standards into the Florida Constitution."); *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*,

2 So. 3d at 183 ("The proposed amendments do not alter the functions of the judiciary").

C. Article III, Section 20 May Be Implemented Without Requiring Legislators to Testify

Petitioners next contend (br. at 21) that applying the legislative privilege would render article III, section 20 meaningless. Until now, the parties have never suggested that compelled legislator testimony was indispensable to effective enforcement of that provision. In *Apportionment I*, the Florida Democratic Party argued that, while a "personal confession from a majority of the Legislature" would obviously suffice, "intent can be shown in many other ways." Br. of Fla. Democratic Party in Opp'n to Joint Resolution of Apportionment at 10, *In re Senate Joint Resolution of Legislative Apportionment 1176*, No. SC12-1, filed on February 17, 2012. Likewise, the LOWV Plaintiffs did not argue that legislator depositions were indispensable; rather, they urged the Court to "look to the plans themselves, the statistics about those plans, and the plans' legislative history to determine their validity." Reply Br. of the LOWV Plaintiffs at 15, *In re Senate Joint Resolution of Legislative Apportionment 1176*, No. SC12-1, filed on Feb. 22, 2012. And the amendment's sponsor, FairDistrictsFlorida.org, predicted in legislative testimony that challenges would be founded on objective indicia, not inquisitions:

> REPRESENTATIVE WEATHERFORD: [I]f there is litigation, which is probable, you would agree that the only way that you could prove intent would be to actually have a legislator on the stand being examined and cross-examined about what was going on in their mind at the time they made a certain decision?
>
> MS. FREIDIN: No, I think if you had—you would have information about what data was used to draw a particular district. You would also have exactly—take a look at the district . . . if the districts make sense and are understandable to the people geographically, there shouldn't be—there would be very little or no reason to challenge them on the basis of what somebody might have said about them—about their intent in drawing them I should say.

Fla. H.R. Select Pol'y Council on Strategic & Econ. Planning and Fla. S. Comm. on Reapp. (Feb. 11, 2010) (statement of E. Freidin, Campaign Chair, FairDistrictsFlorida.org, Inc.).

Petitioners rely on *Apportionment I* (br. at 21), but there this Court concluded that it could determine the validity of reapportionment plans solely through the legislative record and objective data. 83 So. 3d at 686. In this case, Petitioners have had even broader access to information than in *Apportionment I*: the Legislative Parties have already produced more than 25,000 documents, and Plaintiffs have obtained both testimony and documents from nonparties.

The mere fact that article III, section 20 prohibits drawing districts "with the intent to favor or disfavor a political party or an incumbent" does not mean that Amendment Six permits legislators to be deposed about their intent. Several other states have enacted similar prohibitions. *See* Cal. Const., Art. 21, § 2(e) ("Districts

shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party."); Del. Code tit. 29, § 804 ("Each district shall, insofar as is possible . . . [n]ot be created so as to unduly favor any person or political party."); Haw. Const., Art. IV, § 6 ("No district shall be so drawn as to unduly favor a person or political faction."); Idaho Code § 72-1506(7) ("Counties shall not be divided to protect a particular political party or a particular incumbent."); Iowa Code § 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group"); Mont. Code § 5-1-115(3) ("A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or a member of congress."); Or. Rev. Stat. § 188.010(2) ("No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Wash. Const., Art. II, § 43 (providing that a redistricting plan "shall not be drawn purposely to favor or discriminate against any political party or group."). Yet no court in these states has compelled depositions of state legislators to discern legislative intent.

In sum, nothing in the ballot summary of Amendment Six, in this Court's opinion approving the ballot summary, or in the nature of the amendment itself provides for a radical shift in the balance of power so that, for the first time in

history, state legislators would be required to testify under oath about the legislative process.

III. THE FIRST DCA CORRECTLY FOUND THAT THE PRIVILEGE APPLIES IN THE CIRCUMSTANCES OF THIS CASE

Petitioners next argue (br. 22-30) that even if Amendment Six did not abrogate the legislative privilege, the First DCA "failed to offer a persuasive justification for its unprecedented holding." Far from being "unprecedented," the First DCA's opinion is consistent with over 350 years of the common law and the decision of every American court to have examined the issue. Indeed, it is Petitioners—who fail to cite a single case, in *any* jurisdiction, compelling state legislators to testify—whose position is unprecedented. They argue that the First DCA misapplied *Expedia* because it failed to consider the importance of article III, section 20 and the relevance of legislator testimony to their claims. Not true: (A) the legislative privilege does not depend on the importance of the legislation at issue; and (B) the limited probative value of legislator testimony does not warrant invasion of the legislative privilege.

A. The Legislative Privilege Does Not Depend on the Importance of the Legislation at Issue

Petitioners argue (br. at 23-24) that in applying *Expedia*, the First DCA failed to correctly balance the privilege against the importance of the legislation at issue. This argument misreads *Expedia* and the nature of the privilege. *Expedia*

did not create a balancing test. In fact, as the First DCA recognized, "a balancing of interests that focuses on the importance of the governmental interest or legislative enactment at issue is not workable" (A. 16). Instead, the legislative privilege recognizes that *every* piece of legislation is important and that the legislative process itself cannot succumb to countervailing interests depending on the circumstances. "[D]isregard[ing] the privilege outside of the criminal context simply because a legislative enactment is 'important,' or affects important interests, would stand the privilege on its head" (A. 16). *See also Florida v. United States*, 886 F. Supp. 2d at 1304 ("Voting Rights Act cases are important, but . . . there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.") (Hinkle, J.).

The legislative privilege guarantees legislators' independent judgment precisely when it is most exposed to external pressures—in the case of important and contentious legislation. If Petitioners can depose legislators here, then any party who attacks a statute's constitutionality or disputes its interpretation may claim the right to depose the legislators who drafted it, or who voted for or against it, thus undermining centuries of well-established law protecting legislators from interference precisely when it is needed most—when controversial legislation is involved. *Expedia*, 85 So. 3d at 522. *Expedia* identified narrow circumstances when the privilege would yield, which involve "interests outside of the legislative

process and unrelated to the importance of the legislation at issue, such as criminal investigations and prosecutions" (A. 13).

To ignore the privilege in "important" cases would undermine legislative independence at the most critical junctures. It would also require courts to make unwelcome distinctions between "important" constitutional rights and those not so important; and the same for litigation. The Legislature would be in continual doubt about its institutional rights, while courts would discriminate between cases sufficiently important to require legislator depositions and those deemed not so important.

Petitioners nonetheless claim that the privilege must yield here because article III, section 20 addresses "fundamental" concerns (br. at 23). But as Petitioners acknowledge (br. at 27), courts have enforced the privilege in similar contexts. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 & n.18 (1977), the United States Supreme Court recognized the legislative privilege in race-discrimination cases under the federal Equal Protection Clause—even though that case required proof of racially discriminatory intent or purpose. And in *Florida v. United States*, 886 F. Supp. 2d at 1304 (Hinkle, J.), the court, noting *Expedia*, concluded that the privilege is not abrogated in litigation under the federal Voting Rights Act. These courts recognized the privilege even though the prohibitions on race discrimination in the

Equal Protection Clause and the Voting Rights Act are supremely important and implicate individual constitutional rights.

State courts—even those with constitutional standards similar to article III, section 20—have applied the legislative privilege in the redistricting context. *See Fields*, 75 P.3d at 1095 ("[A] state legislator engaging in legitimate legislative activity may not be made to testify about those activities, including the motivation for his or her decisions."); *Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1337 (2006) (holding that a trial court did not err in ruling that plaintiffs could not compel the deposition of a senior consultant to the state assembly speaker because of the legislative privilege); *In re Perry*, 60 S.W.3d 857, 858 (Tex. 2001) ("[I]n apportioning legislative districts pursuant to constitutional mandate, [members of the redistricting board] were acting in a legislative capacity and are cloaked, as are their aides, with legislative immunity."); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984) ("Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation . . . falls clearly within the most basic elements of the legislative privilege."). Likewise, ten years ago a federal court in this State prohibited the depositions of five state legislators in a Voting Rights Act challenge to Florida's congressional districts. *See* Omnibus Order, *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 30, 2002) (D.E. 201).

Courts apply the legislative privilege even when the legislature's intent is at issue. *See Vill. of Arlington Heights*, 429 U.S. at 268 (recognizing the privilege in race-discrimination cases that require proof of "racially discriminatory intent or purpose"); *Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege."); *Foley*, 747 F.2d at 1298 ("Even where a plaintiff must prove invidious purpose or intent, . . . the Court has indicated [in *Arlington Heights*] that only in extraordinary circumstances might members of the Legislature be called to testify, and even in these circumstances the testimony may be barred by privilege."); *Florida v. United States*, 886 F. Supp. 2d at 1303 (finding that, despite the "discriminatory purpose" element of Section 5 of the Voting Rights Act, the legislative privilege protects legislators and staff from deposition) (Hinkle, J.); *Orange v. Cnty. of Suffolk*, 855 F. Supp. 620, 623 (E.D.N.Y. 1994) ("Notwithstanding Plaintiffs' contention that what is at issue in this case is the purpose and motive of legislators in enacting challenged legislation . . . legislative privilege prevents compelling [a legislator] to answer questions within the scope" of the privilege). The privilege would be of little use if it applied only where the legislature's intent was irrelevant.[8]

[8] Amendment Six is not the only constitutional mandate that requires consideration of legislative intent or purpose. Equal Protection Clause claims require proof of "discriminatory intent," *Washington v. Davis*, 426 U.S. 229, 248 (1976), and Establishment Clause claims require proof of "secular legislative purpose," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Dormant Commerce Clause claims

Petitioners attempt to distinguish these cases by claiming that a "different and more exacting" intent standard applies under article III, section 20 (br. at 26), but Petitioners cannot show that the "intent" standard in *Arlington Heights* or *Florida v. United States* was less "exacting" than that in the Florida Constitution.[9] In fact, in *Village of Arlington Heights*, the Court rejected the contention that some degree of improper intent is acceptable. *See* 429 U.S. at 265-66 (explaining that discriminatory intent is fatal, though not "primary" or "dominant"). The "purpose" standard at issue in *Florida v. United States* was also interpreted to tolerate *no* degree of discriminatory purpose. *See Texas v. United States*, 887 F. Supp. 2d 133, 151 (D.D.C. 2012) (concluding that the federal Voting Rights Act prohibits "*any* discriminatory purpose" (emphasis added)), *quashed on other grounds*, 133 S. Ct. 2885 (2013); U.S. Department of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470-71 (Feb. 9, 2011) (same). Nor, as shown above, can Petitioners cite any case from any state

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require proof of "discriminatory effect" or "discriminatory purpose," *Minnesota v. Clover Leaf Creamer Co.*, 449 U.S. 456, 471 n.15 (1981), and the Free Speech Clause prohibits legislation enacted with a "purpose to suppress speech," *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

[9] A partisan gerrymandering claim requires a showing that partisan intent "has gone too far," *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). But neither *Arlington Heights* nor *Florida v. United States* involved that issue. As under the Florida Constitution, no level of improper intent would have been acceptable in those cases, and yet those courts upheld the privilege.

with similar reapportionment standards compelling legislators to testify about legislative intent.

Although Petitioners argue that their position is consistent with cases from other jurisdictions (br. at 25-26), none of those cases compelled the deposition of legislators. *See E. End Ventures, LLC v. Inc. Vill. of Sag Harbor*, 2011 WL 6337708, at *3-4 (E.D.N.Y. Dec. 19, 2011) (ordering the deposition of a local government official); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011) (ordering the deposition of an outside consultant and aide); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003) (ordering limited document production and noting (at 96) that plaintiffs were *not* seeking depositions); *United States v. Irvin*, 127 F.R.D. 169 (C.D. Cal. 1989) (ordering local officials to respond to discovery requests).

Petitioners also rely on *Committee for a Fair and Balanced Map*, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) (br. at 24). But that case does not support their argument, either. In that case, also involving a challenge to a redistricting plan, the court found that the legislative privilege protected "documents containing the (1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 Map prior to the passage of the Redistricting Act; [and] (2) identities of persons who participated in decisions regarding the 2011 Map." *Id*. at *11. The court permitted limited discovery only of "documents

available to members of the General Assembly at the time the Redistricting Act was passed" that did not contain information protected by legislative privilege. *Id*. The court did *not* address depositions.

The bottom line is that Petitioners can cite no case in any jurisdiction compelling state legislators to testify about their legislative functions. *See Florida v. United States*, 886 F. Supp. 2d at 1302-03 ("The parties have cited no case—under the Voting Rights Act or in any other context—in which a state legislator who has not agreed to testify at a trial has been compelled to sit for a deposition addressing legislative functions") (Hinkle, J.). Essentially, Petitioners urge this Court to establish itself as a lonesome outlier in American jurisprudence. The Court should decline the invitation.

B. The Limited Probative Value of Legislator Testimony Does Not Warrant Invasion of the Legislative Privilege

Like the judicial privilege and the attorney-client privilege, the legislative privilege applies regardless of the purported need for the information sought. But even if it were otherwise, the legislative privilege would bar compelling legislators to testify in this case. Petitioners acknowledge that they have received extensive discovery (br. at 28), and they admit that depositions of legislators are not necessary to prove their claims (br. at 30) ("It may be true that Petitioners could prove their case through indirect evidence alone").

Even if the testimony of individual legislators were relevant to determining the entire Legislature's intent, the marginal probative value of such testimony is insufficient to override the legislative privilege. As this Court recognized, it is the intent of the Legislature as whole—not the diverse and unique motivations of individual legislators—that controls. *See, e.g.*, *Apportionment I*, 83 So. 3d at 641 (referring to "the Legislature's intent"); *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 892 (Fla. 2012) (referring to "the Legislature's 'intent'") (Pariente, J., concurring).

Courts have long doubted the probative value of an individual legislator's testimony in determining the Legislature's collective intent. *See Sec. Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939) ("The law appears settled that [legislator] testimony is of doubtful verity if at all admissible to show what was intended by the Act."); *McLellan v. State Farm Mut. Auto Ins. Co.*, 366 So. 2d 811, 813 (Fla. 4th DCA 1979) (finding that "such proof is generally not accepted as admissible evidence to demonstrate legislative intent."), *overruled on other grounds by S.C. Ins. Co. v. Kokay*, 398 So. 2d 1355 (Fla. 1981); *see also Bread Pol. Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (refusing to "give probative weight" to legislator testimony "because such statements represent only the personal views of this legislator," and "post hoc observations by a single member of Congress carry little if any weight" (marks omitted)). Intent must be

inferred primarily from the enactment itself and the legislative record—not a skewed sample of post-enactment recollections of subjective motivation. *See Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME*, 784 So. 2d 404, 409 (Fla. 2001) ("Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of that body."); *Tamiami Trail Tours v. City of Tampa*, 31 So. 2d 468, 470-71 (Fla. 1947) ("[W]e should, if possible, determine from the legislative record what was the legislative intent.").

Intent can be gleaned from many sources without deposing legislators. As routinely occurs in cases interpreting statutes, courts may determine legislative intent from a statute's plain language, its legislative history, and even committee notes and floor debates. *See Vill. of Arlington Heights*, 429 U.S. at 266-68; *Apportionment I,* 83 So. 3d at 617, 657 n.40. In this case, no party contends that the circuit court is confined to the same record this Court analyzed in reviewing state legislative redistricting plans. The Legislative Parties have produced more than 25,000 documents and have answered many interrogatories (DCA 83, 214). Petitioners have deposed numerous non-parties, and they have had ample time to obtain records under Florida's broad Public Records Act. Petitioners also have access to transcripts of the 26 hearings held across the state and the 17 meetings of

House and Senate committees, as well as floor debates in each chamber, discussing congressional redistricting plans and alternative proposals.

Indeed, in its recent review of state legislative districts, this Court determined legislative intent from objective facts alone. In *Apportionment I*, the Court considered "objective indicators of intent," such as the "effects of the plan, the shape of district lines, and the demographics of an area," to determine whether redistricting plans were drawn with an impermissible intent. 83 So. 3d at 617. The Court found that several Senate districts were drawn with the intent to favor incumbents and a political party, *id*. at 669, 678, and that others were drawn with an intent to favor incumbents, *id*. at 672.

The authorities Petitioners cite establish why their argument fails. Petitioners selectively quote (br. at 29) from *ACORN v. County of Nassau*, 2007 WL 2815810, at *3 (E.D.N.Y. Sept. 25, 2007). The entire quote states that "[a]lthough testimony regarding a legislator's stated motivation might be the most direct form of evidence, there are other paths of discovery available to plaintiffs." The court added that "[s]ubstantial documentary evidence has [ ] been made available to plaintiffs"—as it was here—and in light of "the possible chilling effect on legislators," the court concluded that "legislative privilege may be asserted in this case." *Id*. at *3-4. Petitioners also rely on *Cano v. Davis*, 193 F. Supp. 2d 1177 (C.D. Cal. 2002), but there the court found that even a legislator who waived

the privilege "may not testify to the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege." *Id.* at 1179.

Thus, even when courts consider legislator testimony relevant, the privilege still applies. Given the limited probative value of any testimony from legislators and their staff, no compelling basis exists to disregard the privilege.

IV. THE FIRST DCA DID NOT ABUSE ITS DISCRETION IN GRANTING CERTIORARI RELIEF BECAUSE THE LEGISLATIVE PARTIES SATISFIED ALL THE REQUIREMENTS

Finally, Petitioners argue (br. at 31-34) that the Legislative Parties have not satisfied the requirements for certiorari relief. They do not dispute, however, that the Legislative Parties will be materially injured if they are compelled to testify, or that they lack an adequate remedy on appeal. If this Court allows depositions to proceed, there is no way to "un-do" such discovery later. *See Eight Hundred, Inc. v. State Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) ("[O]nce disclosed, [privileged] information cannot be 'taken back.'").

Petitioners nonetheless assert (br. at 32) that the Order did not depart from the "essential requirements of the law" because *Expedia* "does not address the novel issues presented by this case and therefore cannot serve as controlling precedent." This "novel issue" is "whether the legislative privilege bars discovery from legislators and others associated with redistricting . . . in suits to enforce

article III, section 20" (br. at 33). *Expedia* directly addresses that issue: the legislative privilege protects legislators from testifying under oath about the legislative process. Petitioners sought to depose legislators about the legislative process. Their argument that *Expedia* is not binding because it did not involve redistricting is like saying that *Marbury v. Madison* was limited to whether a court could force the Secretary of State to issue commissions. If each new application of a general rule created a novel issue, then *every case* would create a novel issue. *Expedia* established binding precedent holding that the legislative privilege protects legislators and legislative staff from compulsory testimony about matters within their legislative function. 85 So. 3d at 525. The circuit court's failure to follow that precedent departed from the essential requirements of the law.

Petitioners also argue (br. at 33) that the Order is "entirely consistent with *Expedia*" because the First DCA had not previously held that only "interests outside of the legislative process and unrelated to the importance of the legislation at issue" may abrogate the privilege. To the contrary, the only exceptions to the privilege that *Expedia* identified involved criminal investigations. *See* 85 So. 3d at 521 (noting, as to *Girardeau*, that the privilege "could not be asserted in any event to withhold information from a grand jury investigating a crime"); *id*. at 522 (noting, as to *Gravel v. United States*, 408 U.S. 606 (1972), that the privilege cannot be used as a shield against the commission of a crime); *id*. at 523 (noting

that *United States v. Nixon*, 418 U.S. 683 (1974) recognized the executive privilege but held that it cannot be asserted to shield evidence of a crime).

Expedia never instructed courts to disregard the privilege when legislation affects important interests (A. 13). *See Florida v. United States*, 886 F. Supp. 2d at 1304 ("Voting Rights Act cases are important, but . . . there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.") (Hinkle, J.). The First DCA did not abuse its discretion in awarding certiorari relief.

CONCLUSION

For the reasons stated, the Court should either dismiss review or expressly approve the First DCA's decision.

Respectfully submitted,

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I certify that on August 1, 2013, a copy of this brief was served by e-mail to all counsel on the attached service list.

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I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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