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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

THE FLORIDA HOUSE OF REPRESENTATIVES, et al.,

Respondents.

Case No.	SC13-949
DCA Case No.	1D12-5280
L.T. Case Nos.	37 2012 CA 00412 37 2012 CA 00490

RENE ROMO, et al.,

Petitioners,

v.

THE FLORIDA HOUSE OF REPRESENTATIVES, et al.,

Respondents.

/

Case No.	SC13-951
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ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Article III, section 20 of the Florida Constitution prohibits the Florida Legislature from drawing any congressional reapportionment plan or individual district "with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. This case was filed because Petitioners believe the Legislature violated that provision when it enacted a new voting map for United States congressional elections (the "2012 Plan"). The case is now in this Court because the Legislature has sought to prevent Petitioners from discovering direct evidence of the Legislature's unlawful intent by invoking a legislative privilege.

Relying on a legislative privilege of its own creation, the First District Court of Appeal reversed an order of the circuit court that allowed Petitioners to seek limited discovery from the Legislature. The effect of the First District's decision was to bar all discovery from the Legislature on the issue of its intent in the redistricting process. Embracing the broadest possible view of the legislative privilege, the First District held that the privilege shields the Legislature from all discovery in this case, and that article III, section 20 does not "abrogate or limit the legislative privilege in any way." Petitioners' Appendix ("A") 013. The First District therefore barred Petitioners from seeking the most direct evidence regarding the most important issue in this case: the Legislature's intent in enacting

the 2012 Plan. Petitioners ask this Court to reverse that decision and allow them to seek the discovery to which they are entitled under article III, section 20.

* * *

In 2010, an overwhelming majority of Floridians voted to approve Amendment 6 to the Florida Constitution.[1] Now incorporated into the Florida Constitution as article III, section 20, that provision outlaws partisan gerrymandering in Florida. The Legislature is prohibited from drawing any congressional reapportionment plan or individual district "with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const.

Article III, section 20 dramatically altered the law of redistricting in Florida, a state long plagued by gerrymandering. *See In re Senate Joint Resolution of Legislative Apportionment 1176* ("*In re Apportionment Law—2012*"), 83 So. 3d 597, 601-04 (Fla. 2012) (recounting history). Article III, section 20 imposes "stringent new standards" on the Legislature. *Id.* at 597 (interpreting identical constitutional amendment governing legislative redistricting). Importantly, those standards are stricter than standards imposed by federal law. *See, e.g., id.* at 598-

1. The voters approved two related amendments, known together as the "Fair District Amendments." Amendment 5 imposed restrictions on state legislative redistricting, and Amendment 6 imposed the same restrictions on congressional reapportionment. The underlying litigation concerns the Legislature's most recent congressional reapportionment plan, subject to Amendment 6. The parallel case challenging the Senate map is based on alleged violations of Amendment 5.

99 ("With the advent of the Fair Districts Amendment, the Florida Constitution now imposes more stringent requirements as to apportionment than the United States Constitution and prior versions of the state constitution."). "By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance." *Id*. at 607.

The leadership of the Florida Legislature actively opposed this reform from the beginning. For example, the leadership opposed this Court's approval of the ballot language for Amendments 5 and 6, *see Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 184-91 (Fla. 2009), and supported financial impact language that this Court found misleading, *see Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 161, 162-66 (Fla. 2009). The Legislature also put forth a "poison pill" amendment that was intended to nullify the impact of Amendments 5 and 6. The Legislature's amendment was given a ballot title almost identical to the ballot titles for Amendments 5 and 6, and was to be offered as "Amendment 7" so it would confuse the voters. Ultimately, this Court removed Amendment 7 from the ballot as misleading. *See Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662, 669 (Fla. 2010). In addition, before the 2010 elections,

the Legislature intervened in a repeat challenge to the validity of Amendments 5 and 6. This Court ordered that challenge dismissed as well. *See Roberts v. Brown*, 43 So. 3d 673, 684 (Fla. 2010).

After Amendment 6 was approved by Florida's voters, several elected officials (including the Florida House of Representatives, one of the respondents here) challenged the provision in federal court, arguing that it violated the Elections Clause of the United States Constitution. The United States Court of Appeals for the Eleventh Circuit rejected that challenge, squarely holding that article III, section 20 "is entirely consistent with the Elections Clause, both as to its substance and its manner of enactment." *Brown v. Sec'y of State*, 668 F.3d 1271, 1285 (11th Cir. 2012). Undeterred, the Legislature filed answers in this case arguing that "Article III, Section 20 is inconsistent with, and violates, [the Elections Clause] of the United States Constitution"—in essence, inviting Florida's courts to ignore the Eleventh Circuit's decision in *Brown*. A039 (Legislative Defendants' Answer and Affirmative Defenses to Romo Plaintiffs' Second Amended Complaint).

This appeal concerns the Legislature's latest attempt to avoid the new standards imposed by article III, section 20: invoking the "legislative privilege" to bar Petitioners from obtaining evidence of unlawful intent directly from the Legislature and its agents.

In February 2012, the Florida Legislature enacted the 2012 Plan. Notwithstanding the clear prohibitions of article III, section 20, the 2012 Plan is heavily biased in favor of Republican lawmakers and candidates. Thus, a group of Florida voters—including Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Agan—filed an action in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, alleging that the 2012 Plan was drawn "with the intent to favor or disfavor a political party or an incumbent" in violation of article III, section 20. Another suit challenging the 2012 Plan was filed by the League of Women Voters of Florida, Common Cause, and others, which was soon consolidated with the other challengers' lawsuit. The Florida House of Representatives and the Florida Senate are named as defendants in the consolidated action.

To obtain evidence of the Legislature's intent, Petitioners served discovery requests seeking draft maps and supporting documents related to the 2012 Plan. Petitioners also noticed depositions for one state legislator and two legislative staffers. A043-047. The Legislature objected, arguing that the requests were barred in their entirety by the legislative privilege. The Legislature therefore sought a blanket protective order "declaring that (i) no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting

documents are not discoverable." A049 (Legislative Defendants' Motion for Protective Order Based on Legislative Privilege).

The Legislature's request for a protective order relied heavily on *Florida House of Representatives v. Expedia, Inc*., 85 So. 3d 517 (Fla. 1st DCA 2012). At the time, *Expedia* was the only Florida case expressly recognizing the legislative privilege under Florida law. According to *Expedia*, Florida law recognizes a *qualified* legislative privilege. Thus, a court assessing a claim of legislative privilege under Florida law "will always have to make a preliminary inquiry to determine . . . whether the need for privacy is outweighed by a more important governmental interest." *Id*. at 525.

Applying *Expedia*'s balancing test to the facts of this case, the circuit court concluded that the important governmental interest in enforcing article III, section 20 required "the legislative privilege [to] bend somewhat to allow inquiry into certain areas" regarding the 2012 Plan. A078. As the circuit court explained:

> I find it difficult to imagine a more compelling, competing government interest than that represented by the plaintiffs' claim. It is based upon a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans. It seeks to protect the essential right of our citizens to have a fair opportunity to select those who will represent them. . . . Frankly, if the compelling government interest in this case does not justify some relaxing of the legislative privilege, then there's probably no other civil case which would.

A077-078. The circuit court therefore permitted Petitioners to proceed with the three noted depositions. At the same time, to protect "the legislative functions most in need of protection," the circuit court limited the scope of those depositions, allowing Petitioners to inquire into "routine transmittal communications between legislators, between legislators and their staff, and communications with outside consultants or constituents," but not "the subjective thought processes of legislators and the confidential communication between them and between legislators and their staff." A076, A077, A078. The circuit court described the former category as "objective" information regarding intent, and the latter category as "subjective" information regarding intent. A077.[2]

The circuit court held that the same distinction should apply to Petitioners' document requests. However, recognizing that access to public records "is a fundamental constitutional right in Florida" under article I, section 24(a) of the Florida Constitution and its implementing statutes, *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), the circuit court ordered the Legislature to disclose "any documents that qualify as public records" under Florida's public records laws and "do not fall under a specific [statutory]

2. The First District found the objective/subjective dichotomy "unworkable" and "nebulous." A008, A012. But that concern falls away if, as Petitioners argue here, there is no legislative privilege or if the privilege is abrogated by article III, section 20. In either case, the circuit court should permit discovery subject only to the limits set forth in Florida's rules of civil procedure.

exemption." A079. The circuit court then rejected the Legislature's "very broad interpretation" of the statutory exemption for draft reapportionment plans and "supporting documents," *see* § 11.0431(2)(e), Fla. Stat., and ordered the Legislature to produce nonexempt documents related to the 2012 Plan or submit them for in camera review. A079-80.

The Legislature filed a petition for writ of certiorari with the First District Court of Appeal. The First District granted the petition in a 2-1 decision.

In granting the Legislature's petition, the First District substantially expanded the legislative privilege that it had recognized for the first time in *Expedia*. Although the *Expedia* court had held that the privilege would always be subject to "a preliminary inquiry to determine whether . . . the need for [legislative] privacy is outweighed by a more important governmental interest," 85 So. 3d at 525, here the First District held that the privilege always applies, except in rare cases implicating "interests outside of the legislative process and unrelated to the importance of the legislation at issue, such as criminal investigations and prosecutions." A013. The First District further held that article III, section 20 does not "abrogate or limit the legislative privilege in any way." *Id*. The First District therefore quashed the circuit court's order to the extent that the order allowed Petitioners to seek discovery from "legislators and legislative staff

members on any matter pertaining to their activities in the reapportionment process." A012.

Turning to the issue of Florida's public records laws and their effect on Petitioners' document requests, the First District agreed with the circuit court that only certain categories of legislative records are exempt from inspection, and that records covered by the legislative privilege are not among them. Thus, to the extent Petitioners sought "public records" from the Legislature, the Legislature was obligated to produce those records unless it could show that the records both fell within the exemption for certain draft maps and related materials in § 11.0431(2)(e) *and* were covered by the legislative privilege. A021-024.

Chief Judge Benton dissented. He disagreed with the majority's view that the legislative privilege applies absolutely in suits to enforce article III, section 20, and emphasized that "Legislators should not, and until today did not, enjoy any blanket immunity from discovery, by virtue of their status as Legislators." A032. Chief Judge Benton also recognized that article III, section 20 "makes plain that how and why the Legislature redistricts is a matter of paramount public concern," A030; that the majority's broad interpretation of the privilege would enable the Legislature to conceal "political shenanigans" which the voters of Florida had declared illegal, *id*.; and that allowing the Legislature to choose which evidence of its intent to reveal or conceal "'would render the Court's review of the new

constitutional standards, and whether the Legislature complied with the new standards, essentially meaningless,'" A031 (quoting *In re Apportionment Law—2012*, 83 So. 3d at 609).

SUMMARY OF ARGUMENT

The First District's decision effectively sanctions partisan machinations in redistricting so long as they remain hidden from public view, and it provides no mechanism for examining the internal workings of the Legislature's redistricting process. If allowed to stand, the First District's decision would allow—indeed, encourage—partisan gerrymandering to fester behind closed doors, thereby thwarting the will of the voters who overwhelmingly approved article III, section 20. This Court must not let that happen.

The First District's decision should be reversed on several grounds. As an initial matter, the First District assumed that Florida recognizes the legislative privilege. But this Court has never recognized that privilege, and for good reason: it has no basis in Florida law.

Even if the First District was right to hold that the legislative privilege exists, it was wrong to hold that article III, section 20 does not "abrogate or limit the legislative privilege in any way." A013. Nothing in Florida law supports that sweeping proposition. Moreover, eliminating partisan gerrymandering—the express purpose of article III, section 20—requires exposing partisan

gerrymandering, which in turn requires meaningful discovery. Thus, if the legislative privilege exists in Florida, then article III, section 20 must be construed to abrogate that privilege because "[c]onstitutional provisions must never be construed in such a manner as to make it possible for the will of the people to be frustrated or denied." *In re Apportionment Law—2012*, 83 So. 3d at 631 (internal quotation marks and citation omitted). The First District offered no persuasive reason for its contrary conclusion.

Finally, the circuit court's order did not depart from the essential requirements of the law—a necessary prerequisite for granting certiorari relief. The First District therefore erred in granting the petition.

ARGUMENT

I. No Legislative Privilege Exists In Florida

Relying on *Expedia*, the First District held that Florida law recognizes a legislative privilege based on "the common law and the separation of powers provision of the Florida Constitution." A010. *Expedia* erred in announcing that rule of law, and the First District erred in following it here.

The Evidence Code strictly limits privileges in Florida. Under section 90.501, Florida Statutes, "no person in a legal proceeding has a privilege" to refuse to provide testimony or 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." Thus, Florida courts will not recognize a privilege unless it is set forth in a statute or a constitutional provision. *See, e.g.*, *Marshall v. Anderson*, 459 So. 2d 384, 387 (Fla. 3d DCA 1984) (refusing to recognize an "academic privilege"); *Coralluzzo v. Fass*, 450 So. 2d 858, 859 (Fla. 1984) (refusing to recognize physician-patient privilege in absence of specific statutory provision); *Hope v. State*, 449 So. 2d 1319, 1320 (Fla. 2d DCA 1984) (refusing to recognize a son-father testimonial privilege because "the legislature has not created a son-father privilege").

Notably, Florida's reluctance to create new privileges is consistent with federal law, which recognizes that privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify . . . has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks and citation omitted). Thus, privileges "are not lightly created nor expansively construed," *United States v. Nixon*, 418 U.S. 683, 710 (1974), and federal courts evaluating a novel claim of privilege "start with the primary assumption that there is a general duty to give what testimony one is capable of giving." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (internal quotation marks and citation omitted).

Here, there is no specific statute or constitutional provision creating a legislative privilege. That should be the end of the matter. *See Marshall*, 459 So. 2d at 386-387 ("Since neither of the grounds [for recognizing a privilege] exclusively permitted under section 90.501 thus exists, the testimonial privilege enforced below may not, as a matter of law and under any circumstances, be recognized in our state."); *see also City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So. 2d 455, 457 (Fla. 4th DCA 2006) (expressing skepticism about the privilege because "[n]o Florida legislative testimonial privilege has been recognized in the Evidence Code, statutes, or Florida constitution"); *Girardeau v. State*, 403 So. 2d 513, 514-16 (Fla. 1st DCA 1981) (same); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 164 F.R.D. 257, 265-68 (N.D. Fla. 1995) (same).

Instead, following *Expedia*, the First District sought to ground the legislative privilege in Florida's common law. That was error. The *Expedia* court reasoned that the privilege arises from common law; that § 2.01, Florida Statutes, adopts the common law to the extent "not inconsistent with . . . the acts of the Legislature of this state"; that there was "no law abrogating the common law on this point"; and thus that the privilege exists in Florida. *Expedia*, 85 So. 3d at 523-24. But in fact, there *is* a specific law "abrogating the common law" of privileges in Florida. Section 90.051, Florida Statutes, expressly declares that no privileges exist

"[e]xcept as . . . provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida." And as the Third District has observed, it is "obvious" that the plain language of section 90.051 "'*abolishes all common-law privileges existing in Florida* and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power.'" *Marshall*, 459 So. 2d at 386-387 (quoting Law Revision Council Note) (emphasis added). It follows that the legislative privilege cannot emanate from the common law of Florida.[3]

Like the *Expedia* court, the court below also sought to ground the privilege in the Florida Constitution, particularly the general separation-of-powers provision. That theory fares no better. The general language of that provision does not even hint at the notion of a legislative privilege—let alone the unqualified and unyielding privilege contemplated by the First District here. *See* Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). And the mere existence of a separation-of-powers provision does not

3. Even if section 90.051's plain language did not make it "obvious" that the statute abolishes common-law privileges, that result would follow from the rule that "'a specific statute covering a particular subject area [such as section 90.051] always controls over a statute covering the same and other subjects in more general terms [such as section 2.01].'" *Stoletz v. State*, 875 So. 2d 572, 575 (Fla. 2004) (quoting *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994)).

necessarily imply a legislative privilege. *See Girardeau*, 403 So. 2d at 515 n.3. Thus, contrary to *Expedia* and the First District's decision below, the legislative privilege does not fall within section 90.051's "exception for those privileges that 'arise from the Constitution of the United States or of the State of Florida.'" *Expedia*, 85 So. 3d at 524.

In fact, the language and history of the Florida Constitution undermine rather than support the First District's view. The legislative privilege is typically rooted in a constitutional speech-and-debate clause. *See City of Pompano*, 942 So. 2d at 457. But as Chief Judge Benton observed, "[u]nlike other state constitutions that contain speech and debate clauses, the Florida Constitution says nothing explicit about any legislative privilege." A033. *See also City of Pompano*, 942 So. 2d at 457 ("There is no counterpart to this clause in Florida's constitution or laws."). Nor is that an oversight or a quirk of history; Florida's speech-and-debate clause was purposely eliminated in the late nineteenth century. *See Girardeau*, 403 So. 2d at 515 n.3 ("Florida's 1865 Constitution contained a speech and debate clause in language substantially similar to that found in the United States Constitution; however, the clause was omitted from the 1868, 1885, and the current (1968) Florida Constitutions."). Thus, in relying almost exclusively on foreign and federal authorities, both the *Expedia* court and the court below failed to account for Florida's unique constitutional history—a history that is hostile to the privilege.

See Fla. Ass'n of Rehab. Facilities, 164 F.R.D. at 265 ("Of the 48 states in 1951, only Florida had no state constitutional legislative privilege. As of 1981, 43 states had speech or debate clauses, and 5 exempted legislative members from arrest during a legislative session; Florida and North Carolina legislators alone had no specific constitutional protection.").

II. If The Privilege Exists, Then It Is Abrogated By Article III, Section 20

Even if Florida law supports some form of the legislative privilege, the First District erred in holding that article III, section 20 does not "abrogate or limit the legislative privilege in any way." A013. That sweeping and unprecedented view has no basis in Florida law. And it threatens to thwart the will of the voters who demanded "more judicial scrutiny" of the redistricting process, "not less." *Florida House of Representatives v. League of Women Voters of Florida*, No. SC13-252, 2013 WL 3466819, at *6 (Fla. July 11, 2013).

A. Florida Law Does Not Support The First District's Sweeping Application Of The Legislative Privilege

The First District held that the legislative privilege applies in suits under article III, section 20 because the privilege is firmly rooted in Florida's common law and the constitutional separation-of-powers provision. Assuming those authorities support a legislative privilege of any kind (which they do not), they cannot justify the absolute and unyielding privilege contemplated by the First District in cases, like this one, that necessarily focus on the Legislature's intent.

The common law must yield if it conflicts with the laws of the state. *See, e.g.*, § 2.01, Fla. Stat. (adopting the common law, but only insofar as it is "not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state"); *Matthews v. McCain*, 170 So. 323, 327 (Fla. 1936) ("The Constitution and statutes of Florida must of course control, and take precedence over the common law when there are any inconsistencies between them."). Even where there is no direct conflict, the common law must yield if necessary "to vindicate fundamental rights." *Stone v. Wall*, 734 So. 2d 1038, 1043 (Fla. 1999) (internal quotation marks and citation omitted).

Here, the First District erred by holding that a common law privilege trumps a constitutional provision requiring discovery into legislative intent. Article III, section 20 makes the Legislature's intent the central issue in this case, and the Legislature's intent must be subject to a "fact-finder's scrutiny." *League of Women Voters*, 2013 WL 3466819, at *12. Meaningful judicial scrutiny requires a meaningful opportunity to discover evidence of unlawful legislative intent. Thus, if Florida recognizes a legislative privilege rooted in the common law, then that privilege must yield to the constitutional imperatives of article III, section 20. *See id*. at *15 (explaining that it would "undermine the will of the voters in placing more stringent standards on the Legislature" to prevent plaintiffs from discovering and presenting "direct evidence of improper partisan or discriminatory intent"

outside the legislative record); *see also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (common law deliberative process privilege is applicable when cause of action "turns on the government's intent"); *Fla. Ass'n of Rehab. Facilities*, 164 F.R.D. at 268 (common law deliberative process privilege "may not be applicable" where "the subject matter of th[e] case, as defined by . . . law, is in part the legislative process itself").

Separation-of-powers principles carry the First District no further. Once again taking its cue from *Expedia*, the court below simply assumed that allowing direct discovery into the Legislature's intent would generate interbranch conflict, thereby violating the policies underlying article II, section 3: "'[t]he power vested in the legislature under the Florida Constitution would be severely compromised,'" suggested the First District, "'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.'" A010-011 (quoting *Expedia*, 85 So. 3d at 524). Apart from being wholly speculative, that line of reasoning fails for at least three reasons.

First, and most importantly, the First District's reasoning focuses entirely on the prerogatives and preferences of the Legislature. But that is not the focus of article III, section 20. Rather, the "stringent new standards" set forth in article III, section 20 "are directed not to the Legislature's right to draw districts, but to the

people's right to elect representatives in a fair manner." *In re Apportionment Law—2012*, 83 So. 3d at 597, 600. 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. *See id*. at 607 ("The new requirements dramatically alter the landscape with respect to redistricting . . . . [T]he parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance."). Thus, it does no violence to the separation of powers to hold that the legislative privilege (if it exists) is abrogated by article III, section 20. To the contrary: The new constitutional arrangement *requires* the judiciary to enforce article III, section 20's strict new standards, which in turn *requires* meaningful discovery and judicial fact-finding. Courts may not shirk those duties based on nebulous fears about potential interbranch conflicts. *See, e.g.*, *id*. ("It is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements."); *T.M.H. v. D.M.T.*, 79 So. 3d 787, 799 (Fla. 5th DCA 2011) (holding that "the Legislature's undeniably important role" in shaping policy "does not relieve the courts from the solemn duty to ensure the protection of constitutional rights"); *Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) ("[W]e do

not violate the separation of powers doctrine by determining whether a legislative enactment was constitutionally adopted.") .

Second, the First District's reasoning ignores controlling precedent about the limited power and scope of the separation-of-powers provision. Article II, section 3 requires only that the judiciary "refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution." *Chiles*, 714 So. 2d at 456 (internal quotation marks and citation omitted). Here, the text of the Florida Constitution does not commit to the Legislature sole discretion to determine what factors to consider in redistricting. It also does not commit to the Legislature sole discretion to determine what evidence is discoverable under article III, section 20. To the contrary, article III, section 20 outlaws redistricting for partisan purposes, and requires this Court to engage in a "more expanded judicial analysis of legislative compliance" to enforce that prohibition. *In re Apportionment Law—2012*, 83 So. 3d at 607. "Simply put, the framers and voters clearly desired more judicial scrutiny of the [legislature's] apportionment plan, not less." *League of Women Voters*, 2013 WL 3466819, at *6. Thus, the separation-of-powers provision neither excuses the Legislature from participating in discovery under article III, section 20 nor bars the judiciary from ordering the Legislature to participate in discovery.

Third, the First District's view that article II, section 3 trumps article III, section 20 violates established canons of constitutional interpretation. When interpreting the Florida Constitution, specific provisions control over general provisions. *See Roberts*, 43 So. 3d at 679. While article III, section 20 explicitly places legislative intent at issue, article II, section 3 does not explicitly forbid discovery into legislative intent. The general separation-of-powers provision therefore cannot be construed to block the discovery contemplated by article III, section 20.

B. The First District's Decision Undermines The Will Of The Voters

In addition to being wholly unsupported by Florida law, the First District's decision impermissibly undermines the will of the voters who approved article III, section 20 to stamp out partisan gerrymandering in Florida.

The plain language of article III, section 20 prohibits the Legislature from drawing any congressional reapportionment plan or individual district "with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. This Court must interpret article III, section 20 in a manner that preserves the intent of the voters. *See, e.g.*, *In re Apportionment Law—2012*, 83 So. 3d at 631 ("Constitutional provisions must never be construed in such a manner as to make it possible for the will of the people to be frustrated or denied.") (internal quotation marks and citation omitted). The purpose of article III, section 20 is to

eliminate partisan gerrymandering in Florida. *See Adv. Op.*, 2 So. 3d at 181. Again, eliminating partisan gerrymandering requires exposing it. It follows that if the legislative privilege exists in Florida, then article III, section 20 must be construed to abrogate or limit the privilege, at least in part.

Under the First District's contrary holding, plaintiffs could not obtain discovery of the very misconduct that article III, section 20 prohibits from the very body that article III, section 20 purports to constrain. That, in turn, would undermine the "in-depth review" required by article III, section 20, *League of Women Voters*, 2013 WL 3466819, at *2, and allow the Legislature to gerrymander Florida's voting districts so long as it keeps its "partisan shenanigans" behind closed doors, A030 (Benton, C.J., dissenting). That is not what the voters intended when they overwhelmingly amended the Florida Constitution to "to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination." *Adv. Op.*, 2 So. 3d at 181. To the contrary, as this Court recently explained, the voters who approved the Fair District Amendments demanded "more judicial scrutiny" of the redistricting process, "not less." *League of Women Voters*, 2013 WL 3466819, at *6.

III. The First District Failed To Offer A Persuasive Justification For Its Unprecedented Holding

In addition to its misguided reliance on the common law and separation-of-powers principles, the First District offered a laundry list of other reasons for

holding that Florida's legislative privilege is absolute and unyielding, even in suits under article III, section 20. None of those reasons is persuasive.

A. *Expedia*'s Balancing Test

The First District relied heavily on *Expedia*'s balancing test to justify its unprecedented holding. *See Expedia*, 85 So. 3d at 525. Under that balancing test, the First District concluded that although "the Legislature's compliance with the standards in article III, section 20 is an important governmental interest, [it is not] sufficient to outweigh the legislative privilege." A013. Assuming *Expedia*'s balancing test or a similar balancing test is the right way to establish the scope of the privilege, the First District failed to apply the test properly because it failed to appreciate the compelling interest in enforcing the fundamental rights protected by article III, section 20.

The overarching purpose of article III, section 20 is to protect "the basic rights of citizens to vote for the representatives of their choice." *In re Apportionment Law—2012*, 83 So. 3d at 604. This Court and many other courts have held that those rights are "fundamental" and "the very bedrock of our democracy." *See id.* at 600, 604; *see also, e.g.*, *id*. at 604 (noting that redistricting "is fundamental to ensuring that citizens choose their elected officials in an equitable manner"); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 716 (Pa. 2012) (redistricting "involves the basic rights of the citizens of

Pennsylvania in the election of their state lawmakers") (internal quotation marks and citation omitted); *In re Reapportionment of Col. Gen. Assembly*, 45 P.3d 1237, 1241 (Colo. 2002) ("The basic purpose of the constitutional standards for reapportionment is to assure equal protection for the right to participate in the Colorado political process and the right to vote.").

The circuit court was therefore correct to hold that it is "difficult to imagine a more compelling, competing government interest than that represented by the plaintiffs' claim," because that claim "seeks to protect the essential right of our citizens to have a fair opportunity to select those who will represent them." A077, A078. The circuit court was also correct to hold that the Legislature's desire to keep its dealings under wraps must yield in light of the "compelling, competing" interests represented by article III, section 20.

The First District's contrary view—that is, that the fundamental rights protected by article III, section 20 are important but not *that* important—simply cannot be squared with this Court's "recognition of the critical importance of redistricting in ensuring the basic rights of citizens to vote for the representatives of their choice." *In re Apportionment Law—2012*, 83 So. 3d at 604. Nor can it be squared with the weight of authority in other jurisdictions. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) ("Voting rights cases, although brought by

private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions."); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 102 (S.D.N.Y. 2003) ("[T]here can be no question that [this redistricting case] raises serious charges about the fairness and impartiality of some of the central institutions of our state government," which "suggests that the qualified legislative or deliberative process privilege should be accorded only limited deference."), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

It is no answer to say, as the First District did, that "the governmental interests embodied in article III, section 20 are no more compelling than the interests embodied in the constitutional provisions guaranteeing equal protection, due process, access to courts, etc." A015-016. For one thing, claims of legislative privilege have been rejected or limited in light of those very interests. *See, e.g.*, *E. End Ventures, LLC v. Inc. Vill. of Sag Harbor*, No. CV 09-3967 (LDW) (AKT), 2011 WL 6337708, at *3-4 (E.D.N.Y. Dec. 19, 2011) ("The [legislative] privilege, however, may be inapplicable where the legislative deliberations are among the central issues in the case. . . . Because the subject matter on which Plaintiffs seek testimony is one of the central issues in this case, the legislative privilege is inapplicable."); *Baldus v. Members of Wis. Gov't Accountability Bd.*, Nos. 11-CV-562, 11-CV-1011, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) ("[G]iven the serious nature of the issues in this case and the government's role in crafting the

challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued."); *Rodriguez*, 280 F. Supp. 2d at 102-03 (granting motion to compel documents pertaining to redistricting advisory board's operations and deliberations); *United States v. Irvin*, 127 F.R.D. 169, 173-74 (C.D. Cal. 1989) (county board that prepared a redistricting plan could not claim a deliberative process privilege in an action under the Voting Rights Act).

Moreover, whether "the interests embodied in the constitutional provisions guaranteeing equal protection, due process, access to courts, etc." are more or less important than the interests embodied in article III, section 20 is beside the point. A015-016. Putting aside its relative *importance* in the constitutional hierarchy, article III, section 20 undeniably imposes *different and more exacting* limits on the Legislature's redistricting activities than other federal and state requirements. "Florida's express constitutional standard . . . differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions." *In re Apportionment Law—2012*, 83 So. 3d at 616. "In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent." *Id*. at 617. Thus, the mere fact that claims of legislative privilege have

been upheld in cases under the federal Equal Protection Clause, the Voting Rights Act, and other comparable provisions says little about whether such claims should be upheld (and if so, to what extent) in cases under article III, section 20.

B. Legislative History

The First District also purported to rely on legislative history to hold that article III, section 20 does not abrogate or limit the legislative privilege in any way. According to the First District, it would have been "a dramatic change in the law if Amendment 6 abrogated or limited the legislative privilege." Thus, the fact that "the amendment's ballot title and summary were silent on the issue is a good indication that such a change was not intended." A015.

The First District simply misread or misunderstood the relevant history. *Expedia* was the first Florida case to recognize the legislative privilege. *See Expedia*, 85 So. 3d at 524 (acknowledging that "there is no judicial precedent in Florida for legislative immunity"). And *Expedia* was decided in 2012—more than one year *after* article III, section 20 became law. Thus, article III, section 20's legislative history is silent with respect to the legislative privilege not because Florida's voters assumed article III, section 20 would yield to the legislative privilege. The legislative history is silent on that score because the voters had no reason to ponder the significance of a nonexistent privilege, nor to expect that a future court would attach significance to their failure to do so.

C. Relevance And Necessity

Lastly, the First District resorted to a no-harm, no-foul argument to justify its unprecedented holding. Compelling the requested discovery would be futile, according to the First District, because the intent of individual legislators and others involved in the redistricting process is irrelevant; all that matters is the intent of the Legislature as a whole. A014. Moreover, according to the First District, the Petitioners have already received "tens of thousands of files from which legislative intent can be gleaned, including the extensive legislative record of the reapportionment process and the materials submitted by the State to the U.S. Department of Justice under the Voting Rights Act." A017. Thus, reasoned the First District, "[w]e are confident that [the Petitioners] will be able to make their case that the [2012 Plan] was drawn with improper intent—if, indeed, that was what happened—with the evidence in the legislative record and their experts' analysis of the [2012 Plan] and its underlying demographic data." A018.

That line of reasoning fails. To begin, it defies common sense to say that evidence in the hands of individual legislators and others involved in the redistricting process is irrelevant to the intent of the Legislature as a whole. Several courts have rightly rejected that argument. *See, e.g.*, *Baldus*, 2011 WL 6122542, at *1 ("Thus, any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs'

claims as proof of discriminatory intent."); *ACORN v. Cnty. of Nassau*, No. CV 05-2301 (JFB) (WDW), 2007 WL 2815810, at *3 (E.D.N.Y. Sept. 25, 2007) (observing that "testimony regarding a legislator's stated motivation might be the most direct form of evidence" of intent). As one judge explained in a federal redistricting case, "the statements of legislators involved in the process, especially leaders and committee chairmen, as well as the authors of the legislation involved, may in some instances be the best available evidence as to legislative motive," because "[m]otive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of [unlawful] intent." *Cano v. Davis*, 193 F. Supp. 2d 1177, 1181-82 (C.D. Cal. 2002) (Reinhardt, J., concurring in part).

Furthermore, as the First District was forced to acknowledge, this Court has made clear that "the focus of the analysis must be on both direct and circumstantial evidence of intent." *In re Apportionment Law—2012*, 83 So. 3d at 617. "Direct evidence includes statements made by the decision making body or members thereto." *Fair & Balanced Map*, 2011 WL 4837508, at *3. And circumstantial evidence of intent could be gleaned from draft maps or legislators' "unguarded acts and statements" during the map-drawing process. *Cano*, 193 F. Supp. 2d at 1182 (Reinhardt, J., concurring in part).

The First District's related argument—that the Petitioners are not entitled to direct evidence of unlawful intent because they have sufficient indirect evidence to prove their case—is a non sequitur. It may be true that the Petitioners could prove their case with indirect evidence alone. But it certainly does not follow that the Petitioners *must* prove their case with indirect evidence alone. The Petitioners, like all other litigants, are entitled to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action." Fla. R. Civ. P. 1.280(b)(1). This Court has declared that the Petitioners may rely on both "direct and circumstantial evidence of intent," *In re Apportionment Law—2012*, 83 So. 3d at 617 (emphasis added), including evidence outside of the legislative record, *see League of Women Voters*, 2013 WL 3466819, at *15. The Petitioners are therefore entitled to all direct and circumstantial evidence that supports their case, not just the evidence that the Legislature chooses to disclose. *See* A031 (Benton, C.J., dissenting) (allowing the Legislature to choose which evidence of intent to reveal or conceal "'would render the Court's review of the new constitutional standards, and whether the Legislature complied with the new standards, essentially meaningless'") (quoting *In re Apportionment Law—2012*, 83 So. 3d at 609).

IV. The Circuit Court's Order Does Not Depart From The Essential Requirements Of The Law

Alternatively, this Court could reverse the First District's decision because the First District erred in holding that the circuit court departed from the essential requirements of the law—a prerequisite for granting certiorari relief.

"Time and again, Florida courts have reiterated that certiorari relief is an 'extremely rare' remedy that will be provided in 'very few cases.'" *Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 454 (Fla. 2012) (quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098-99 (Fla. 1987)). To obtain that extraordinary remedy, a petitioning party must demonstrate that the contested order meets all of the following elements: "(1) [it is] a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on postjudgment appeal." *Id*. at 454 (internal quotation marks and citation omitted).

The "essential requirements of the law" standard is demanding. "It is not enough for a court of appeal to "disagree[] with the circuit court's interpretation of the applicable law," *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683 (Fla. 2000), because certiorari relief "never was intended to redress mere legal error," *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001). Thus, to justify certiorari relief, a circuit court's order must violate "a clearly established principle of law." *Ivey*, 774 So. 2d at 682 (internal quotation marks and citation omitted).

By definition, a circuit court order cannot violate a clearly established principle of law in the absence of clearly controlling authority. This Court reiterated that principle just last year, emphasizing that "[t]here is an important difference between a departure from the essential requirements of law where there has been a violation of a clearly established principle of law and *a case that involves an issue of law where the law is not yet settled*." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 355 (Fla. 2012) (emphasis added). This Court found that it would be "improper[]" to "expand certiorari jurisdiction by applying it to all cases where a party asserts only that the trial court erred . . . without regard to the higher threshold of whether the ruling departed from the essential requirements of law." *Id.* at 356.

Here, the First District viewed *Expedia* as controlling precedent, and held that the Circuit Court departed from the essential requirements of the law by authorizing discovery barred by *Expedia*. That was error for at least two reasons.

First, *Expedia* does not address the novel issues presented by this case and therefore cannot serve as controlling precedent. *Expedia* has virtually nothing in common with this case. This case is brought to enforce article III, section 20, which guarantees fundamental constitutional rights. *Expedia*, in contrast, involved no fundamental constitutional rights or competing constitutional provisions. Moreover, in *Expedia*, the Legislature's intent was wholly irrelevant. Here, article

III, section 20 makes the Legislature's intent the central issue in the case. And in *Expedia*, the legislator and his aide from whom discovery was sought were nonparties. Here, the House and Senate are named defendants, and the conduct of their membership and staff is directly at issue. Thus, *Expedia* did not "squarely discuss[]" the novel question presented by this case: whether the legislative privilege bars discovery from legislators and others associated with redistricting "on any matter pertaining to their activities in the reapportionment process" in suits to enforce article III, section 20. A012. The First District therefore erred by treating *Expedia* as controlling precedent. *See Citizens Prop. Ins.*, 104 So. 3d at 356 ("[It] would improperly expand certiorari [to apply] it to all cases where a party asserts only that the trial court erred . . . without regard to the higher threshold of whether the ruling departed from the essential requirements of law.").

Second, even if *Expedia* is rightly viewed as "controlling precedent," which it is not, the circuit court's order is entirely consistent with *Expedia*. In reviewing the circuit court's order, the First District asserted for the first time that under *Expedia* only "interests outside of the legislative process and unrelated to the importance of the legislation at issue, such as criminal investigations and proceedings," may abrogate the privilege. A013. But that reads into *Expedia* words that are not there. *Expedia*, after all, was itself a civil case. Nevertheless, the *Expedia* court did not simply assume that the legislative privilege applied.

Rather, it balanced the competing interests and determined that the privilege should prevail under the unique facts of that case.

In sum, it is clear that the First District merely disagreed with the circuit court's application of *Expedia* to the novel facts of this case. But as this Court has stated repeatedly, that is "an improper basis for common law certiorari," and appellate courts must resist the "great temptation" to grant certiorari relief "simply to provide precedent where precedent is needed." *Ivey*, 774 So. 2d at 683 (internal quotation marks and citation omitted).

CONCLUSION

The First District's decision should be reversed. This Court should hold that no legislative privilege bars the taking of deposition or document discovery from the Legislature and others involved in the redistricting process. Discovery should proceed in this redistricting challenge as it would in any case where no privilege applies, limited only by the Florida Rules of Civil Procedure.

Dated: July 17, 2013

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I certify that on July 17, 2013, a copy of this motion was served by mail and email to all counsel of record on the attached service list.

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CERTIFICATE OF COMPLIANCE

I certify that this response is submitted in Times New Roman 14-point font, which complies with the font requirement of the Florida Rules of Appellate Procedure. *See* Fla. R. App. P. 9.100(l).

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