Electronically Filed 06/21/2013 03:01:48 PM ET

RECEIVED, 6/21/2013 15:03:30, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-949

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

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

RESPONDENTS' BRIEF ON JURISDICTION

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INTRODUCTION

Petitioners seek review of a decision that, consistent with Florida's strict separation of powers, well-established common law, and the law of every other jurisdiction that has considered the issue, prevents Petitioners from compelling legislators and their staff to testify about how they do their jobs. This unremarkable holding requires no review.

The legislative privilege is an indispensable part of the bedrock principle of comity and respect among coordinate branches of government. Like the independence of the judiciary, the independence of the legislative branch from judicially compelled interrogation protects legislators from harassment and intimidation. *See Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) (Hinkle, J.) ("Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes."). Like courts across jurisdictions, the First DCA affirmed these time-honored principles.

In an effort to avoid this result, Petitioners argue that the Opinion expressly affects a class of constitutional or state officers. This argument fails, as any impact on individual legislators derives from the Legislature's freedom from encroachment on its powers. Petitioners also argue that the decision construes

article II, section 3 and article III, section 20 of the Florida Constitution. These arguments do not support review. The First DCA did not expressly attribute the privilege to either the common law or the Constitution, and therefore did not expressly construe the Constitution. Finally, even if the Court had jurisdiction, it should decline review because the First DCA merely applied well-settled principles that protect legislators from being deposed about their legislative work.

STATEMENT OF THE CASE AND FACTS

In February 2012, in accordance with the 2010 Census and article III, section 20 of the Florida Constitution, the Florida Legislature established new congressional districts for the state (Op. at 3-4). Within hours, seven individuals (the "Romo Plaintiffs")—who are admitted proxies for the Democratic Party—filed a complaint challenging the new districts (Op. at 4). After the Governor signed the bill into law, the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida, together with four individuals (the "LOWV Plaintiffs"), filed a separate complaint challenging the new districts (*id*.) The cases were later consolidated (*id.*) Among other claims, Plaintiffs allege that the new districts were "drawn with the intent to favor or disfavor a political party or an incumbent." *See* Art. III, § 20(a), Fla. Const.

Despite the unprecedented legislative record and abundance of information available through discovery, the LOWV Plaintiffs served a notice of taking

depositions of the Senate Majority Leader and two legislative staff members (Op. at 6). The Legislative Parties filed a motion for protective order (Op. at 7). Relying on *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 about their official duties.

The circuit court granted the Legislative Parties' motion in part and denied it in part (Op. at 6). The court distinguished between what it characterized as "subjective" and "objective" information – a distinction it recognized "may be difficult to determine in some instances" – and found that only the "subjective thought process of legislators and the confidential communication between them and between legislators and their staff" warranted the protection of the legislative privilege (Op. at 6-7). The court concluded that the subjective/objective dichotomy also applied to the draft maps and supporting documents the Legislature sought to protect from discovery based on the legislative privilege and the public-records exemption in section 11.0431(2)(e), Florida Statutes (Op. at 7).

The First DCA held that the trial court had departed from the essential requirements of law (Op. at 12). The First DCA concluded that the true purpose of the depositions "is to learn why these individuals did what they did, which is precisely the type of information the legislative privilege is intended to protect" (Op. at 12-13). The court quashed that part of the order permitting Petitioners to

depose legislators and legislative staff members (Op. at 19). It also "quash[ed] that portion of the trial court's order extending the unworkable objective/subjective dichotomy to the draft maps and supporting documents" (Op. at 20).

SUMMARY OF THE ARGUMENT

Petitioners seek review of the Opinion on the basis that is expressly affects a class of constitutional or state officers. But any impact on individual legislators derives from the Legislature's freedom from encroachment on its powers by the other branches. Petitioners also seek review on the basis that it expressly construes article II, section 3 and article III, section 20 of the Florida Constitution. But the Opinion does not expressly construe these provisions. Even if the Court had discretionary jurisdiction, it should decline to exercise it. The Opinion is entirely consistent with Florida's separation of powers as well as the common law doctrine of legislative privilege. Indeed, Petitioners do not cite a single case—in *any* jurisdiction—where a court has compelled state legislators to testify about legislative matters. There is no need to review the Opinion.

ARGUMENT

I. THE FIRST DCA'S DECISION DOES NOT AFFECT A CLASS OF CONSTITUTIONAL OFFICERS

Petitioners argue that the Opinion affects a class of constitutional or state officers (br. 5). But their own authority establishes the contrary. In *Florida State Board of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963), this Court defined a

"class" as "two or more constitutional or state officers who separately and independently exercise identical powers of government," and concluded that the Court is without jurisdiction to review a decision that affects "a single governmental entity such as a board or commission." The Court explained that jurisdiction did not exist where the Court is "confronted by the action of a single state entity rather than a potential class of state entities." *Id.* That is precisely the case here: as the First DCA found, Article III, Section 20(a) precludes the *Legislature* from drawing districts with improper intent (Op. at 14). The legislative privilege of legislators derives from the protection afforded to the Legislature as a single and separate branch of government. If the First DCA's decision affects a class of constitutional officers, then any decision affecting a legislative, executive, or judicial body could be construed as affecting a class of constitutional officers. This is exactly the argument this Court rejected in *Lewis*.

II. THE FIRST DCA'S DECISION DOES NOT EXPRESSLY CONSTRUE ANY PROVISION OF THE FLORIDA CONSTITUTION

Petitioners argue that jurisdiction exists because the Opinion construes article III, section 20's standards for congressional redistricting and article II, section 3's general separation-of-powers provision (br. 10). This Court has long held that the mere application of a constitutional principle is insufficient to confer jurisdiction. *See Page v. State*, 113 So. 2d 557, 557 (Fla. 1959) ("[T]he application of the facts in a case to a recognized clearcut provision of the Constitution does not

amount to a decision upon which this Court could entertain a direct appeal."); *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973) ("Applying is not synonymous with Construing"). Further, to vest this Court with jurisdiction, a decision must construe a constitutional provision *expressly*. Art. V, § 3(b)(3), Fla. Const.

Here, while the First DCA may have implicitly *applied* the separation-of-powers provision in article II, section 3, it did not expressly *construe* it. The Opinion's only mention of that provision is in the Court's background discussion of *Expedia*: "The Court explained that the legislative privilege has its roots in both the common law and the separation of powers provision of the Florida Constitution . . . ." (Op. at 10). The Opinion's analysis does not mention the separation of powers provision. Therefore, the First DCA did not, "expressly" rely on the separation of powers provision; it applied the long-recognized principle prohibiting one branch of government from encroaching upon the powers of another.

Petitioners also claim that the Opinion construed article III, section 20. But the First DCA's discussion of that provision was limited to confirming that article III, section 20 did not abrogate or limit the legislative privilege in any way" (Op. at 14). This statement flows directly from this Court's own conclusion that article III, sections 20 and 21 "address a single function of a single branch of government-establishing additional guidelines for the Legislature to apply when it redistricts legislative and congressional boundaries." *Adv. Opinion to Att'y Gen. re Standards*

For Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 181 (Fla. 2009); *see also id*. at 183 ("The proposed amendments do not alter the functions of the judiciary. They merely change the standard of review to be applied."). Thus, the First DCA did not construe article III, section 20, but merely applied undisputed propositions of law. *See Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973) (noting that the lower court did not "expressly construe, define or overtly explain the meaning of any constitutional provision" and instead "merely applied undisputed propositions of law to the facts it found to exist in the instant case.").

III. THIS FIRST DCA PROPERLY DECIDED THAT PETITIONERS CANNOT COMPEL LEGISLATORS TO TESTIFY ABOUT THE LEGISLATIVE PROCESS

Even if the Court had discretionary jurisdiction to review the Opinion, it should decline to exercise it. The Opinion is consistent both with Florida's strict separation of powers and with decades (indeed, centuries) of precedent recognizing the legislative privilege. The relief Petitioners sought in this case—to compel state legislators to sit for a deposition and answer questions about their legislative functions—was unprecedented in the history of this State. Indeed, Petitioners failed to cite a single case, from any jurisdiction, that compelled testimony from state legislators about the legislative process. *See Florida*, 886 F. Supp. 2d at 1303 (Hinkle, J.) (noting the lack of cases in any 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"). No reason exists to review a decision consistent with well-settled law.

Petitioners state that the Legislative Parties have enjoyed a blanket immunity from discovery in this case. To the contrary, the Legislative Parties have produced more than 25,000 files (many containing multiple pages), including transcripts of the 26 hearings held across the state and the 17 meetings of House and Senate committees and subcommittees discussing congressional redistricting plans and alternative proposals. These files included emails from legislators and legislative staff about the congressional reapportionment plans filed during the Legislature's deliberations on the proposed congressional maps and supporting documents associated with these filed plans. Petitioners have also had ample time to obtain records under Florida's broad Public Records Act. The question is not whether the Legislative Parties may refuse to participate in discovery, but whether legislators and their staff may be deposed about their legislative functions, and whether the legislative privilege applies to the narrow class of documents exempt from disclosure under the public-records law. *See* § 11.0431(1)(e), Fla. Stat. (2012) (providing that draft redistricting plans and, until an implementing bill is filed, supporting documents associated with draft plans are exempt from disclosure).

Petitioners assert that their unprecedented discovery requests are necessary to establish improper intent under article III, section 20 (br. 11-12). But courts

across jurisdictions have rejected the contention that judicial evaluation of legislative motivation authorizes compelled legislator testimony. *See, e.g.*, *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 & n.18 (1977) (Equal Protection Clause); *Florida*, 886 F. Supp. 2d at 1303 (Hinkle, J.) (Voting Rights Act). And in its recent review of state legislative districts, this Court determined legislative intent from ascertainable facts alone, without any legislator testimony. In *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 617 (Fla. 2012), the Court looked to "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. The Court emphasized that the Legislature's level of compliance with the redistricting standards in Article I, Section 21(b) of the Florida Constitution were highly probative of legislative intent. *Id*. at 618. Strict compliance with standards such as compactness and adherence to political and geographical boundaries might undercut an allegation of improper intent, while "disregard for these principles can serve as indicia of improper intent." *Id*. In evaluating the Legislature's intent with respect to political parties, the Court also considered "the shapes of districts together with undisputed objective data, such as the relevant voter registration and elections data, incumbents' addresses, and demographics." *Id*. In evaluating the Legislature's intent with respect to

incumbents, the Court considered "the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence of intent," such as "the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district." *Id*. at 618-19. Based on this analysis, the Court found that Senate Districts 6, 9, 29, and 34 were drawn with an intent to favor incumbents and a political party, *id*. at 669, 678; and that Senate Districts 10 and 30 were drawn with an intent to favor incumbents, *id*. at 672. No deposition testimony was necessary. Nor is any necessary now.

Under Florida's constitutional system, the district courts of appeal are intended to be the final courts of review in the vast majority of circumstances. As this Court stated in *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice . . . [t]o fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

CONCLUSION

For the reasons stated above, this Court should decline review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 21, 2013, a copy of this brief was served by e-mail to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

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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