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

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Citing a purported privilege never recognized by this Court, Respondents insist that the Legislature is immune from all discovery aimed at revealing the legislative intent behind the 2012 Plan. If adopted here, Respondents' extreme and unprecedented position would thwart the will of the voters who enacted article III, section 20 to stamp out partisan gerrymandering once and for all.

Respondents say Petitioners' discovery requests are unnecessary, arguing that Petitioners should be satisfied with the "unprecedented legislative record" created by "the most open and inclusive" redistricting process in state history. Answer Brief at 2, 3. But discovery has shown that the Legislature undertook a parallel, secret process in which partisan organizations and consultants guided legislators and even vetted draft maps. Barring full discovery from the Legislature would effectively sanction that misconduct, allowing the Legislature to sidestep the stringent new redistricting standards imposed by Florida's voters.

Simply stated, Petitioners seek deposition and document discovery to uncover the relevant facts about the legislative process that led to the 2012 Plan—facts the trial court needs to determine whether the 2012 Plan was motivated by unlawful partisan intent or incumbency protection. Respondents claim that is "unprecedented." Answer Brief at 1. In fact, it is Respondents' uncompromising position that finds no support in Florida law or the law of any other jurisdiction.

Florida's unique Constitution and statutory law do not support a legislative privilege. But even if this Court holds otherwise, it should hold—like the majority of courts to confront the issue—that the privilege is a qualified privilege, and further hold that the privilege is limited in Florida by the necessity of enforcing article III, section 20.

What *is* truly unprecedented is Respondents' attempt to frustrate the purpose of article III, section 20. To hear Respondents tell it, the enactment of article III, section 20, means nothing; legislators may continue gerrymandering without fear of scrutiny or consequence, knowing their backroom dealings will remain forever hidden from public view. That is wrong. As this Court has explained, article III, section 20 "dramatically alter[s] the landscape with respect to redistricting," *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012) ("*In re Apportionment—2012*"), requires "more judicial scrutiny" of the Legislature's conduct, "not less," and allows plaintiffs to develop "direct evidence of improper partisan or discriminatory intent," *Fla. House of Reps. v. League of Women Voters of Fla.*, No. SC13-252, 2013 WL 3466819, at *6 (Fla. July 11, 2013). The First District's decision should be reversed.

ARGUMENT

I. Florida's Constitution Does Not Establish A Legislative Privilege

Unlike virtually all other states, Florida lacks a constitutional speech-and-debate clause, and therefore lacks a clear foundation for a legislative privilege. Florida eliminated its speech-and-debate clause more than one hundred years ago at a time when many states sought to limit legislative power. *See Girardeau v. State*, 403 So. 2d 513, 515 n.3 (Fla. 1st DCA 1981); Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 241 (2003). Respondents cite several federal and out-of-state cases for the proposition that Florida's "lack of a speech-or-debate clause is irrelevant." Answer Brief at 16. But many of those cases deal with legislative *immunity*, not *privilege*, and immunity is not at issue here. And all of the cases allowing state legislators to assert a privilege rely on federal common law (not applicable in this state-law action), or a state speech-and-debate clause (which Florida lacks).

Because Florida lacks a speech-and-debate clause, Respondents are forced to argue that article II, section 3 of the Florida Constitution—the general separation-of-powers provision—gives rise to an "implicit" legislative privilege. Answer Brief at 9. But the mere presence of a separation-of-powers clause does not create a legislative privilege. That is one reason Florida courts have expressed deep skepticism about Respondents' "implicit privilege" argument. *See City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So. 2d 455, 457 (Fla. 4th DCA 2006) ("No Florida legislative testimonial privilege has been recognized in

the Evidence Code, statutes, or Florida constitution."). Indeed, Respondents fail to cite a single case holding that a general separation-of-powers provision, standing alone, is enough to give rise to a legislative privilege.

To bolster their "implicit privilege" argument, Respondents insist that future deliberations will be chilled unless this Court adopts an absolute privilege. *See* Answer Brief at 11-12. That claim rings hollow. For one thing, article III, section 20 was *meant to* deter partisan communications in the redistricting context. For another, Respondents concede that shielding legislative deliberations is justifiable only to the extent it promotes the "public good" and "the integrity of the legislative process." *Id*. at 12. Allowing the Legislature to hide its "[p]artisan political shenanigans" serves neither purpose. A030 (Benton, C.J., dissenting).

II. Common Law Cannot Support A Legislative Privilege in Florida

Respondents also argue that the common law of Florida supports the legislative privilege. That, too, is incorrect. Section 2.01, Florida Statutes, adopts English common law to the extent "not inconsistent with . . . the acts of the Legislature of this state." But section 90.501, Florida Statutes, which was enacted *after* section 2.01, declares that no privileges exist in Florida "[e]xcept as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida[.]" This Court must assume that the Legislature was aware of section 2.01 when it enacted section 90.501. *See Williams*

v. Jones, 326 So. 2d 425, 435 (Fla. 1975). Thus, section 90.501 "'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 v. Anderson*, 459 So. 2d 384, 387 (Fla. 3d DCA 1984) (emphasis added) (quoting Law Revision Council Note). It follows that the legislative privilege cannot emanate from the common law.[1]

Respondents argue that the privilege survives section 90.501 because "a former legislature would not have the authority to abrogate the constitutionally grounded privileges of current legislators[.]" Answer Brief at 15. But section 90.501 does not alter "constitutionally grounded" privileges; it abolishes common-law privileges. And section 90.501 does not bind current legislators. They may

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1. There is also no validity to Respondents' claim that a few unpublished summary orders establish an absolute common-law privilege. *See* Answer Brief at 19-21. For example, Respondents cite a one-page order from this Court in *Florida Legislature v. Sauls*, No. 80,834 (Fla. 1993). The *Sauls* order bars the deposition of a legislative assistant, but it contains no reasoning. In fact, it is not even clear that the *Sauls* order is based on the legislative privilege. In the *Sauls* briefing, the Legislature urged at least three grounds for barring the deposition: legislative privilege, rules limiting expert testimony, and relevance. *See* Petition for Writ of Prohibition, *Fla. Legislature v. Sauls*, No. 80,834 (Fla. Dec. 1, 1992). Tellingly, this Court declined to base its ruling on the legislative privilege. (cont.)

As for the trial court orders, all but two are based on relevancy, not privilege, and the two orders that do invoke the privilege do so only indirectly. Moreover, all of these orders predate article III, section 20, and therefore say nothing about whether the privilege, if it exists, is limited by that provision. In short, these orders do not aid Respondents. *See Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 265 (N.D. Fla. 1995) (rejecting Legislature's attempt to rely on "a number of circuit court decisions [that] have, without significant opinion, sustained the privilege sought here").

revise section 90.501 or enact some form of the privilege under that section. Indeed, as if to illustrate Petitioners' point, the Legislature *has* enacted a limited privilege applicable only under the Administrative Procedure Act, but not here. *See* § 120.569, Fla. Stat. Obviously, the Legislature, in practice, has recognized that the legislative privilege survives only to the extent it is codified.

III. Respondents' References To The Judicial Privilege Are Irrelevant

Because there is no basis in Florida law for a legislative privilege, Respondents change the subject and argue that Florida must recognize an absolute privilege for legislators because it recognizes an absolute privilege for judges. *See* Answer Brief at 1, 21. That argument fails. Respondents rely on *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994), but *Lewis* does not establish an absolute judicial privilege. In *Lewis*, this Court unanimously *affirmed* an order compelling a judge to testify in a post-conviction proceeding. *See id*. at 1250. Thus, *Lewis* shows that it may be appropriate to compel government officials to testify in matters related to important constitutional rights if "necessary to establish factual circumstances not in the record." *Id*. That is precisely what Petitioners seek to do here.

Perhaps Respondents mean to suggest that intrusive depositions of judges will follow if this Court declines to endorse an absolute legislative privilege. But *Lewis*'s holding has not resulted in an endless parade of judicial depositions. And

Florida law does not include any provision that puts the judiciary's intent squarely at issue like article III, section 20 puts the Legislature's intent squarely at issue.

IV. If The Legislative Privilege Exists, Then It Is Outweighed And Limited By The Necessity Of Enforcing Article III, Section 20

Petitioners steadfastly maintain that Florida does not recognize the legislative privilege. But this Court could permit the discovery sought here without deciding that issue. Even if the privilege exists, it "is not absolute," and it must give way when "the need for privacy is outweighed by a more important governmental interest." *Fla. House of Reps. v. Expedia, Inc.*, 85 So. 3d 51, 525 (Fla. 1st DCA 2012). Here, the need to enforce the fundamental rights protected by article III, section 20 outweighs and therefore limits any applicable privilege.

The plain language of article III, section 20 prohibits the Legislature from redistricting "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 voters' intent, which was to eliminate all partisan gerrymandering in Florida—including the surreptitious, backroom dealing that plagued Florida for so long. *See In re Apportionment Law—2012*, 83 So. 3d at 617 (under article III, section 20 "there is no acceptable level of improper intent"). It follows that if the legislative privilege exists in Florida, then article III, section 20 must be held to limit the privilege. Otherwise, plaintiffs would be unable to expose the very conduct article III, section 20 proscribes. That, in turn, would undermine

the "in-depth" and "fact-intensive" judicial review required by article III, section 20, *League of Women Voters*, 2013 WL 3466819, at *2, and allow the Legislature to continue gerrymandering so long as it keeps its "[p]artisan political shenanigans" behind closed doors, A030 (Benton, C.J., dissenting).

Nevertheless, after holding that the legislative privilege arises from the common law and article II, section 3, the First District went on to hold that article III, section 20 does not "abrogate or limit the legislative privilege in any way." A013. That was error. The common law must give way when necessary "to vindicate fundamental rights," *Stone v. Wall*, 734 So. 2d 1038, 1043 (Fla. 1999) (internal quotation marks and citation omitted), including the rights protected by article III, section 20. Furthermore, contrary to Respondents' arguments, the separation-of-powers principle does not create a general right of privacy for legislators. *See Chiles v. Phelps*, 714 So. 2d 453, 455-56 (Fla. 1998) (rejecting the argument "that the separation of powers doctrine precludes any attempt by the . . . judicial branch[] to direct or prohibit actions by the legislature or its officers in the exercise of their legislative duties"). Rather, it requires courts to "refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution." *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981). Florida's Constitution does not commit to the Legislature sole discretion to determine what factors to consider in redistricting or to determine the

scope of discovery under article III, section 20. To the contrary, Florida's Constitution requires the Legislature to comply with "stringent new standards" for redistricting, *In re Apportionment Law—2012*, 83 So. 3d at 597, and requires the judiciary to perform a "fact-intensive" review of the Legislature's compliance, *League of Women Voters*, 2013 WL 3466819, at *2. Nothing about that arrangement raises separation-of-powers concerns. *See Chiles*, 714 So. 2d at 456 ("[W]e do not violate the separation of powers doctrine by determining whether a legislative enactment was constitutionally adopted.")

V. Respondents Cannot Justify The First District's Decision

Respondents counter with a laundry list of justifications for the First District's decision. Not one of those justifications is persuasive.

First, Respondents argue that permitting the depositions of legislative officials or agents would make this Court a "lonesome outlier in American jurisprudence." Answer Brief at 39. But "Respondents' suggestion that a litigant may *never* seek (and that a court may never order) a legislator's deposition is untenable." *In re Kent Cnty. Adequate Public Facilities Ordinances Litig.*, No. 2921-VCN, 2008 WL 859342, at *1 (Del. Ch. Mar. 19, 2008). In fact, many courts have ordered depositions of legislative officials and staff members, both in the redistricting context and elsewhere. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, Nos. 11-CV-562, 11-CV-1011, 2011 WL 6122542, at *3 (E.D.

Wis. Dec. 8, 2011) (in voting rights case, ordering depositions of consultant for the Wisconsin Legislature and aide to Wisconsin Senate Majority Leader); *Loesel v. City of Frankenmuth*, No. 08-11131-BC, 2010 WL 456931, at *6 (E.D. Mich. Feb. 4, 2010) (ordering trial testimony of commissioners and city council members); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304-05 (D. Md. 1992) (Murnaghan and Motz, JJ., concurring) (ordering depositions of citizen members of redistricting committee in light of the "unique nature of legislative redistricting"). Thus, Respondents are simply wrong when they argue that "no state or federal court ever . . . has ordered the depositions that Petitioners seek here." Answer Brief at 1.[2] What the case law actually shows is that courts routinely apply the legislative privilege in a way that balances legislators' need for privacy with countervailing interests, including voters' fundamental rights. *See Marylanders*, 144 F.R.D. at 304 (legislative privilege does not "necessarily prohibit judicial

2. Much of Respondents' brief depends on hyperbole of that sort. For example, Respondents claim that the absolute privilege embraced by the First District below is a matter of "black letter law." Answer Brief at 7. But just last year, a federal court observed that the "issue of legislative privilege in this context is one of first impression." *Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012). Similarly, one year ago, the First District acknowledged that "there is no judicial precedent in Florida" for a legislative privilege. *Expedia*, 85 So. 3d at 524. Thus, declining to recognize an absolute privilege would hardly make this Court an outlier. To the contrary, "where state court interpretations of the legislative privilege diverge from federal court jurisprudence, the trend appears to be primarily in the direction of giving state legislators less protection[.]" Huefner, *Legislative Privilege*, at 270.

inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy").

Second, Respondents attack Petitioners for arguing that article III, section 20 "assumes an active and indispensable role for private plaintiffs and the judiciary." Merits Brief at 19. In particular, Respondents chide Petitioners for suggesting that article III, section 20 "alter[ed] the functions of the judiciary." Answer Brief at 22.

Respondents are playing word games. Petitioners do not claim that article III, section 20 rewrote the basic rules of Florida's Constitution. Instead, Petitioners' position is that article III, section 20 "dramatically alter[ed] the landscape with respect to redistricting," *In re Apportionment Law—2012*, 83 So. 3d at 607, requiring "a commensurately more expanded judicial analysis of legislative compliance," *id*., and hence an expanded opportunity to obtain evidence of legislative intent, *see League of Women Voters*, 2013 WL 3466819, at *14.[3]

Third, Respondents argue that the discovery Petitioners seek is unnecessary because it would have limited probative value and because Petitioners have received more than enough evidence. Neither argument has merit.[4]

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3. Respondents try to escape that conclusion by arguing that it was not spelled out in the ballot summary. *See* Answer Brief at 26-28. But a ballot summary need not identify every effect of an amendment. *See Adv. Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1192 (Fla. 2006).

4. Respondents also argue that article III, section 20 does not require deposition testimony because "[s]everal other states have enacted similar

There is no real dispute that "a legislator's or staff member's testimony about the progress of a bill through the legislature, or about similar matters, may be relevant" to "overall legislative purpose." *Florida*, 886 F. Supp. 2d at 1302; *see also 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."). It is equally clear that the information Petitioners seek would be crucial to Petitioners' claims. As shown by filings in the trial court, third-party discovery has revealed that Florida legislators and staff communicated secretly and extensively with partisan organizations and consultants while formulating the 2012 Plan, even going so far as to seek approval of draft maps. The facts surrounding those communications must be brought to light if Petitioners' claims are to be adjudicated fairly. And Respondents cannot argue that those communications, which are improper under article III, section 20, fall within the scope of any applicable privilege. *See Doe v. Pittsylvania Cnty., Va.*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) ("[I]t cannot be credibly argued that any common law evidentiary privilege applies" to acts outside "the sphere of legitimate legislative activities[.]"); *Dublin v. State*, 742 N.E.2d 232,

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prohibitions," and "no court in these states has compelled depositions of state legislators to discern legislative intent." Answer Brief at 30, 31. But Respondents omit the fact that no court in those states has *declined* to compel legislative depositions in cases brought under provisions similar to ours.

237 (Ohio App. Ct. 2000) ("We therefore hold that requiring legislators to divulge the identity of corporate representatives with whom they have had private, off-the-public-record meetings . . . is not . . . violative of legislative privilege.").

Equally misguided is Respondents' claim that further discovery should be barred in light of "the unprecedented legislative record and abundance of information obtained through discovery[.]" Answer Brief at 3. It is rather bold for Respondents to congratulate themselves on the volume of documents disclosed. Nearly all of those documents come from the self-serving public record manufactured by the Legislature. Few (if any) documents produced contain unguarded internal communications or draft maps that would reveal how partisan interests influenced the 2012 Plan. To give but one example: Respondents have refused to produce communications with outside political consultants—communications that would surely shed light on the Legislature's partisan machinations. Thus, discovery to date has borne out Chief Judge Benton's prediction: allowing the Legislature to choose which evidence 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).

Fourth, Respondents argue that "the legislative privilege does not depend on the importance of the legislation at issue." Answer Brief at 32. But *Expedia* states,

in no uncertain terms, that the privilege is limited when "the need for privacy is outweighed by a more important governmental interest." 85 So. 3d at 525. And contrary to Respondents' arguments and the First District's decision below, *Expedia* neither holds nor suggests that only matters outside the civil context and unrelated to the legislation at issue suffice to limit the privilege. *Expedia* said nothing at all to that effect, and *Expedia* was a civil case.

In short, *Expedia* recognizes that competing interests may limit the scope of the legislative privilege. On that point, *Expedia* is consistent with the majority of cases interpreting the privilege, particularly in the redistricting context. *See Favors v. Cuomo*, 285 F.R.D. 187, 213 (E.D.N.Y. 2012) (explaining that "[m]ost decisions in redistricting cases involving claims of legislative privilege . . . have recognized a qualified legislative privilege, and have balanced the parties' competing interests when determining if and to what extent the privilege applies"). Here, the competing interests are the Legislature's desire to obscure its partisan misconduct versus the public's right to vote in districts free from partisan intent. The latter interest plainly outweighs the former.

VI. The Public Records Laws Are Not Relevant To This Appeal

Discussions of document discovery in this case have referred to section 11.0431(2)(e), Florida Statutes, which exempts from the public domain certain draft redistricting maps and supporting documents. These discussions are a

diversion from the real issue in this case, and any interpretation of that statute is premature. Petitioners have not yet served a single request for such documents under the Public Records Act. All requests for draft maps and supporting documents have been submitted pursuant to the applicable litigation discovery rules. Therefore the validity of those requests depends on whether the documents are privileged. If Florida does not recognize a legislative privilege, then Respondents must produce all requested documents relevant to the 2012 redistricting, limited only by the applicable rules of discovery. *See* A022-23.

CONCLUSION

Respondents claim that an absolute legislative privilege draws an impenetrable cloak over the very misconduct that article III, section 20 seeks to expose and eliminate. That position, which is consistent with Respondents' long-running campaign to derail redistricting reform, has no basis in Florida law. And adopting it would thoroughly undermine the voters' intent. Thus, this Court should reverse the First District's decision below and permit Petitioners to discover, through depositions and document requests, all relevant facts about the legislative process that led to the 2012 Plan—facts the trial court needs to determine whether the 2012 Plan was motivated by unconstitutional partisan intent or incumbency protection. Public confidence in our Constitution and government requires nothing less.

Dated: August 12, 2013

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CERTIFICATE OF SERVICE

I certify that on August 12, 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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