Electronically Filed 06/07/2013 06:39:21 PM ET

RECEIVED, 6/7/2013 18:43:43, Thomas D. Hall, Clerk, Supreme Court

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

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

COALTITION PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Coalition Petitioners The League of Women Voters of Florida, Common Cause, Robert Allen Schaeffer, Brenda Ann Holt, Roland Sanchez-Medina Jr., and John Steele Olmstead (collectively, the "Coalition") challenged the Legislature's 2012 Congressional redistricting plan. The Coalition sought deposition and document discovery to determine whether the plan was drawn with impermissible intent under article III, section 20 of the Florida Constitution. The Legislature asserted that legislative privilege shielded legislators and staff from having to reveal what went on outside of public view. The circuit court rejected in-part the Legislature's assertion of legislative privilege. The Legislature then sought certiorari in the First District, which, in a 2-1 decision, held that legislative privilege shields all legislators and their staff from discovery. The Coalition now seeks review in this Court.

This Court has jurisdiction because the decision expressly construes two constitutional provisions and expressly affects a class of constitutional officers. The petitioners in Case No. SC13-951 seek review of the same decision for the same jurisdictional reasons.

The Florida Constitution expressly prohibits the drawing of apportionment plans or districts with the intent to favor or disfavor a political party or an incumbent. Art. III, § 20, Fla. Const. Having alleged that the 2012 Congressional redistricting plan violated these constitutional standards that were overwhelmingly

passed into law by Florida's voters, the Coalition sought discovery on the precise issue for which the Constitution now requires an answer: Was there improper intent in the drawing of the 2012 Congressional redistricting plan? A6.[1] And, the Coalition sought the discovery from precisely those persons who were responsible for drawing the map and could best provide that answer: Legislators and staff. A6.

Seeking to avoid that factual inquiry, the Legislature moved the circuit court for a protective order based on the doctrine of legislative privilege, relying principally on the First District's decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012). A6. The circuit court, following *Expedia* closely, and attempting to strike a balance between the policy justifications for a legislative privilege and the constitutional language militating against recognizing an absolute privilege in this instance, issued a narrow protective order that only allowed for limited deposition and document discovery. A6-7. As the First District found, the circuit court "acknowledged the holding in *Expedia*, but reasoned that the legislative privilege 'must bend somewhat' in this case because of the 'compelling, competing government interest' embodied in article III, section 20 requiring 'the motive or intent of legislators in drafting the reapportionment plan' to be considered in determining the validity of the plan." A6.

[1] Petitioners' appendix will be referred to as A_ (page).

The First District, on a petition for writ of certiorari, quashed the order, ruling that a legislative privilege precludes discovery from legislators and their staff in an action challenging the legislative apportionment process under article III, section 20. While acknowledging its earlier statement in *Expedia* that there may be situations where "the need for privacy is outweighed by a more important governmental interest," the First District construed the language of article III, section 20 and its history to find that the constitutional protections against improper intent in the redistricting process are outweighed by a legislative privilege rooted in the common law. A13-15. The First District similarly concluded that applying the legislative privilege in this manner will not thwart the express language of the constitution because evidence of legislative intent can be "gleaned" from other sources, *i.e.*, the records prepared by the Legislature and those submitted to the Florida Supreme Court for its facial review. A17. Accordingly, the First District held that Petitioners cannot "depose legislators and legislative staff members concerning the reapportionment process," or obtain relevant documents and draft maps from them. A24.

In dissent, Chief Judge Benton stated that he would deny certiorari. A26. Noting that "[p]artisan political shenanigans are not 'state secrets,'" he found that the Florida Constitution now makes the Legislature's "quintessentially public business" of redistricting an issue of "paramount public concern," such that

"Legislators should not, and until today did not, enjoy any blanket immunity from discovery by virtue of their status as Legislators." A31, 33.

This petition for review follows.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction because the decision below expressly affects legislators, a class of constitutional officers. The jurisdictional analysis in this regard is straightforward and cannot be disputed. Not only are legislators indisputably a class of constitutional officers, the First District's decision expressly affects this class by insulating all of its members from deposition and document discovery in redistricting challenges based on the legislative privilege doctrine. Because the application of this doctrine to this class of officers precludes the factual inquiry necessary to ensure compliance with article III, section 20, this Court should exercise its discretion to accept review.

This Court also has jurisdiction because the First District's decision, which insulates legislators and their staff from discovery about the apportionment process based on a virtually absolute legislative privilege, expressly construed two constitutional provisions, article III, section 20 and article II, section 3 of the Florida Constitution. First, the court expressly construed both the language and history of article III, section 20 to hold that the legislative privilege does not yield even to the important prohibitions mandated by this provision. Second, the First District expressly construed article II, section 3, codifying the separation of powers

doctrine, aggressively expanding that doctrine to make the legislative privilege absolute in the face of a constitutional prohibition against improper intent in redistricting. Because of the breadth and importance of these constitutional issues, and given that apportionment only arises every ten years, this Court should exercise its discretion to accept review in this case.

ARGUMENT

I. The First District's Decision Expressly Affects A Class of Constitutional or State Officers

This Court has jurisdiction because the First District's decision, which provides for a broad legislative privilege from factual discovery concerning the apportionment process, expressly affects a class of constitutional officers. Art. V, § 3(b)(3), Fla. Const. This Court has made clear that jurisdiction vests on this basis when a decision directly and exclusively affects the duties and powers of a class of constitutional officers. *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

Legislators are the quintessential class of constitutional officers. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); *see also Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998) (finding speaker of house, senate president, and clerk of house are state officers subject to writ of quo warranto). Indeed, the constitution itself creates this class:

> The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district.

Art. III, § 1, Fla. Const.

The First District expressly recognized that its legislative privilege rulings are uniquely applicable to the entire class of officers:

> the legislative privilege broadly protects legislators and legislative staff members from being compelled to testify about any matter that is an essential part of the legislative process or pertains to the performance of a legitimate legislative function.

A11 (internal quotations and citations omitted). This Court, in turn, has recognized such rulings as providing a clear basis for jurisdiction. *See Fla. State Bd. of Health v. Lewis*, 149 So. 2d 41 (Fla. 1963) (purpose of accepting review in this context is to review a decision that affects a state officer while simultaneously affecting every other state officer in that category). Because the impact of the First District's decision on these officers is both substantial and significant, as they have now been immunized absolutely from producing documents or sworn testimony that would show whether they complied with a constitutional provision intended to limit their power in apportionment process, this Court should accept review.

II. The First District's Decision Expressly Construes Article III, Section 20 and Article II, Section 3 of the Florida Constitution

This Court also has jurisdiction because the First District's decision expressly construed two constitutional provisions in holding that legislators and their staff enjoy a broad legislative privilege – a privilege that has never been recognized by this Court. Art. V, § 3(b)(3), Fla. Const.; *see also Ogle v. Pepin*,

273 So. 2d 391 (Fla. 1973) (jurisdiction exists when district court decisions "explain, define, or otherwise eliminate existing doubts arising from language or terms of a constitutional provision.").

First, the First District's decision expressly construed article III, section 20. The court devotes several pages to analyzing the provision's language and history, not only reiterating the text but also reviewing the title and ballot summary itself, to support its holding that the legislative privilege doctrine outweighs the constitutional interests and restrictions in article III, section 20. The court found an absence of language addressing the legislative privilege doctrine specifically in either the text or history, and concluded that such silence necessarily means that the doctrine can be applied without any judicial or constitutional limitation: "We see nothing in the language of article III, section 20 or its history to suggest that it was intended to abrogate or limit the legislative privilege in any way." A14.

The First District, reading words into the Constitution that are not there, also expressed a distinction between the term "Legislature" as a body, and the term "legislators" as individuals:

> Thus, the fact that article III, section 20(a) precludes the *Legislature*, as a body, from drawing districts with certain "intent" does not, as the trial court concluded, justify an inquiry into "the motive or intent of *legislators*" in drafting the Plan.

A14 (emphasis in original, citations omitted). Through this constitutional analysis, the First District justified an expansive application of the legislative privilege

doctrine, resulting in an absolute bar to any and all discovery directed toward the Legislature, its staffers or any individual legislator.

The First District's decision also expressly construed article III, section 20 by finding that the governmental interests embodied in that provision are not sufficiently compelling to overcome a common law privilege. A16. The decision is express in this regard:

> while we agree with the trial court that the Legislature's compliance with the standards in article III, section 20 is an important governmental interest, we reject the court's determination that this interest is sufficient to outweigh the legislative privilege or to afford less protection to "objective" information that falls within the scope of the privilege.

A13. Thus, the First District expressly construed the mandate to avoid intent to favor or disfavor in article III, section 20, as insufficiently compelling. A16.

The First District's decision also expressly construed article III, section 20 by concluding that a circuit court challenge to the redistricting process does not require any fact discovery beyond that which the Legislature itself deigns to make part of the public record. A17-18. Finding that all evidence of legislative intent can be "gleaned" from public record materials – and foreclosing any opportunity for inquiry into what transpired in *private* that led to the creation of those public materials – the First District's construction leaves the provision as a mere shell of its former self. A17-18.

Because the First District expressly construed article III, section 20, and because the issues in play – legislative privilege and apportionment – are of exceptional importance, this Court should exercise its discretion to accept jurisdiction to decide these important issues.

The First District also expressly construed article II, section 3, which codifies the concept of separation of powers, as a foundation for applying the legislative privilege doctrine in this case:

> the legislative privilege has its roots in both the common law and the separation of powers provision of the Florida Constitution . . . the power vested in the legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill.

A10-11 (internal quotations and citations omitted). The First District's analysis and application of this constitutional provision rightly falls within the discretionary jurisdiction of this Court.

The First District construed the separation of powers provision broadly, allowing for blanket immunity from discovery for legislators and staff. In doing so, the court expands the doctrine beyond its own natural limitations. Indeed, traditionally, the doctrine does no more than inform the judiciary to "refrain from deciding a matter that is committed to a coordinate branch of government." *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981) (citations omitted). Here, however, the First District construed the constitutional provision in a way that does

significantly more, foreclosing judicial enforcement and protection of a separate, equally compelling constitutional provision, namely article III, section 20. Because of the paramount importance of this construction and the broad application it will have statewide, this Court should also accept review.

CONCLUSION

This Court should be at the crossroads of the important constitutional issues implicated here. In fact, the First District explicitly recognized that if this Court meant to allow for legislative discovery to demonstrate direct evidence of intent underlying an apportionment plan, "it will need to say so more clearly." A17. As it stands now, the First District has declared that the application and scope of the legislative privilege in redistricting cases, where the Legislature's compliance with article III, section 20 has been challenged in court, forever shields and immunizes legislators and their staff from the discovery process. Because apportionment is a decennial process, if this Court does not grant review now, trial courts will be bound by the First District's decision in any future challenge and will have no choice but to stop the challengers from propounding discovery upon legislators and their staff. This Court should have the last word. Review should be granted.

Dated: June 7, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 7, 2013, a true and correct copy of this Brief in Support of Jurisdiction was served by electronic mail to all counsel of record on the attached service list.

/s/Adam M. Schachter
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CERTIFICATE OF COMPLIANCE

I certify that this Brief is submitted in Times New Roman 14-point font, complying with the font requirements of Rule 9.210(a)(2).

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