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IN THE SUPREME COURT OF FLORIDA

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' BRIEF IN SUPPORT OF JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

This action challenges the constitutionality of the Florida Legislature's 2012 congressional reapportionment plan (the "2012 Plan") under Article III, Section 20 of the Florida Constitution. The appeal concerns whether the Legislature may invoke a legislative privilege to avoid discovery into the very issue that Article III, Section 20 makes central to this action—whether the Legislature drew the 2012 Plan "with the intent to favor or disfavor a political party or incumbent." When the plaintiffs sought to depose legislators and legislative staffers directly involved in crafting the 2012 Plan, the Florida House of Representatives and Florida Senate (together, the "Legislative Respondents") sought a protective order from the Circuit Court. Invoking the "legislative privilege" recognized for the first time by a Florida Court in the First District Court of Appeal's decision last year in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012), the Legislative Respondents argued, *inter alia*, that the state constitution's separation of powers provision permitted legislators and staffers to avoid those depositions.

Expedia, however, had emphasized that the newly-recognized legislative privilege was not absolute. Instead, "[t]he court will always have to make a preliminary inquiry to determine whether the information is within the scope of the privilege and whether the need for privacy is outweighed by a more important governmental interest." *Id*. at 525. Dutifully applying that decision, which

involved neither a competing constitutional provision, nor a case in which legislative intent was at issue (much less *the central issue* to be decided), the Circuit Court found that the compelling government interest in enforcing Article III, Section 20 permitted discovery into objective information relied upon in reapportionment. The Legislative Respondents filed a petition for certiorari, which the First District granted in a 2-1 decision, reversing the Circuit Court.

Petitioners Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Agan (the "Romo Petitioners") timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court. This Court has jurisdiction because the order below expressly construes provisions of the Florida Constitution and expressly affects a class of constitutional or state officers.

A. The Fair District Amendments

In 2010, Floridians voted overwhelmingly to amend the state constitution by approving the Fair District Amendments, which prohibit the Legislature from engaging in partisan gerrymandering or favoring incumbent office-holders. As a result, Article III, Section 20 now provides: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." This Court has recognized that the Fair District Amendments impose "stringent new standards" on the Legislature. *In re Senate Joint Resolution of*

Legislative Apportionment 1176 ("*In re Leg. Apportmn't 1176*"), 83 So. 3d 597, 597 (Fla. 2012). The Amendments explicitly "prohibit[] practices that have been acceptable in the past, such as crafting a plan or district with the intent to favor a political party or an incumbent," *id*. at 607, and are unique: "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 (emphasis added). To ensure compliance with these unique standards, the Amendments "requir[e] a commensurately more expanded judicial analysis of legislative compliance." *Id*. at 607.

B. *Florida House of Representatives v. Expedia, Inc.*

This Court has never explicitly recognized a legislative privilege in any context. But last year, in *Expedia*, the First District found that the Florida Constitution's separation of powers provision and the common law give rise to a qualified legislative privilege. 85 So. 3d at 524. In that case, the First District found that the privilege protected a legislator and his aide from depositions to discover how confidential documents disclosed under a protective order in a Georgia tax case were publicly released. *Id*. at 519-20. The representative and his aide were not parties to the underlying action, and neither the substantive claims nor the discovery sought implicated any provisions in the Florida Constitution.

C. The Circuit Court's Decision

When the Legislative Respondents claimed that a legislative privilege permitted legislators and legislative staffers to avoid depositions in this case, the Circuit Court applied the balancing test articulated in *Expedia*. After careful consideration, the court permitted limited depositions, finding that:

> [I]t [is] 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. In this particular case, the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan.

Romo v. Detzner, Nos. 2012-CA-412, 2012-CA-490, at **5-6 (Fla. 2d Cir. Ct. Oct. 3, 2012).

D. The First District's Decision

The Legislative Defendants filed a petition for certiorari with the First District and, on May 22, 2013, the First District granted the petition in a 2-1 decision. The majority reiterated *Expedia*'s finding that there is a legislative privilege, which "has its roots in both the common law and the separation of powers provision of the Florida Constitution." A10-11. But while *Expedia* held that the privilege was qualified and would "always" be subject to "a preliminary inquiry to determine whether the information [sought] is within the scope of the

privilege and whether the need for [legislative] privacy is outweighed by a more important governmental interest," 85 So. 3d at 525, the majority held that the Legislature will always win under this balancing test, except in rare cases involving "interests outside of the legislative process and unrelated to the importance of the legislation at issue, such as criminal investigations and prosecutions." A13. The privilege, the majority found, was so expansive that it "broadly protects legislators and legislative staff members from being compelled to testify about any matter that is 'an essential part of the legislative process,'" including "*any* matter pertaining to their activities in the reapportionment process." A10-11 (emphasis added).

While the majority "agree[d] with the trial court that the Legislature's compliance with the standards in article III, section 20 is an important governmental interest," it expressly rejected the Circuit Court's construction of that provision, finding that interest not sufficient to qualify the privilege. A13. In particular, the majority found "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. Finally, although the majority recognized that, "in construing the identical language in article III, section 21(a) . . . the supreme court stated that 'the focus of the analysis must be on both direct and circumstantial evidence of intent,'" it did not view this Court's construction as permitting

deposition discovery into legislative intent in a challenge brought under the Amendments. "If that was indeed what the supreme court meant," the majority resolved, "it will need to say so more clearly." A16-17.

Chief Judge Benton dissented, emphasizing that "Legislators should not, and until today did not, enjoy any blanket immunity from discovery, by virtue of their status as Legislators." A33. He argued that the Amendments "make[] plain that how and why the Legislature redistricts is a matter of paramount public concern." A31. Because Article III, Section 20 explicitly prohibits specific intent on behalf of legislative mapdrawers, this action is distinguished from "'the usual 'deliberative process' case in which a private party challenges governmental action . . . . and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public domain.'" A32 n.11. Judge Benton recognized that the Legislature sought nothing less than to prevent disclosure of "[p]artisan political shenanigans" made impermissible by the Amendments in redistricting, "the process our supreme court recognized as playing a 'crucial role . . . with respect to the right of citizens to elect representatives . . . . in a fair manner so that each person's vote counts . . . and so that all citizens receive 'fair and effective representation.'" A31 (quoting *In re Leg. Apportmn't 1176*, 83 So. 3d at 600).

II. SUMMARY OF THE ARGUMENT

The opinion below expressly construes two different provisions of the Florida Constitution and expressly affects a class of constitutional or state officers—i.e., legislators. This Court has jurisdiction to review this case on either ground and it is critical that it exercise that jurisdiction here, so as to protect the intent of the voters who overwhelmingly voted to enact the Fair District Amendments to end political gerrymandering in this state, and protect Floridians' right to cast their votes under a fair and balanced map.

III. ARGUMENT

A. The Opinion Expressly Construes Two Constitutional Provisions

The Court has jurisdiction to review the First District's opinion because it expressly construes Article II, Section 3's general separation of powers provision and Article III, Section 20's prohibition on political gerrymandering in congressional reapportionment. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). The opinion substantially expands the legislative privilege that the First District first recognized in *Expedia*, which "has its roots in both the common law and the separation of powers provision," A10-11, and expressly construes Article III, Section 20 as not displacing that privilege. A13-17.

The First District's conclusion that the separation of powers provision establishes an implicit privilege that protects legislators and their staffers from

discovery in an action to enforce a separate constitutional provision that expressly limits the Legislature's reapportionment powers is contrary to this Court's precedent. First, the majority improperly dismissed this Court's construction of identical language in Article III, Section 21(a), which recognized that under the Fair District Amendments "the focus of the analysis must be on both *direct* and circumstantial evidence of intent." *In re Leg. Apportmn't 1176*, 83 So. 3d at 617 (emphasis added). Second, the majority's decision runs counter to this Court's long-standing precedent, which has interpreted the separation of powers provision only "to require the judiciary to 'refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution.'" *Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) (quoting *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981)). Even if the separation of powers provision could give rise to a legislative privilege in other contexts (a question that this Court has never answered in the affirmative), it cannot create a privilege in this case, where the "demonstrable text of the constitution" prohibits the Legislature from drawing districts intended to favor a political party or incumbent. Finally, the majority's decision, which invites the Legislature to flout the mandates of the Fair Districts Amendments simply by being savvy enough not to leave explicit evidence of partisan gerrymandering in the public record, is contrary to the canons of constitutional construction applied by Florida Courts.

See In re Leg. Apportmn't 1176, 83 So. 3d at 631 ("Constitutional provisions 'must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied."); *Roberts v. Brown*, 43 So. 3d 673, 679 (Fla. 2010) (noting that specific constitutional provisions control over general provisions); *In re Apportmn't Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 807 (Fla. 1972) ("Every word of the Florida Constitution should be given its intended meaning and effect.").

The majority offered no reasoned explanation for its broad construction of the separation of powers provision in this context. Instead, the majority purported to construe Article III, Section 20, largely relying on "[t]he fact that the [Fair District] amendment's ballot title and summary were silent on the issue [of legislative privilege]." A15. The majority opined that this is "good indication" the Amendments did not "abrogate or limit[] the legislative privilege," which would have been, in the majority's view, "a dramatic change in the law." *Id*. This reasoning ignores that the Amendments were enacted in 2010—*two years before* the First District's decision in *Expedia*, a decision that even today remains the *only* decision of a Florida Court expressly recognizing a legislative privilege. *See Expedia*, 85 So. 3d at 524 (noting that "there is no judicial precedent in Florida for legislative immunity"). In sum, this Court should exercise its jurisdiction to

review the First District's patently unreasonable construction of the separation of powers provision and the Fair District Amendments.

B. The Opinion Expressly Affects a Class of Constitutional Officers

The Court separately has jurisdiction to review the decision below because it expressly affects a class of constitutional or state officers. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iii). Plaintiffs seek to depose individual legislators, who are by definition constitutional officers. *See* Art. III, §§ 1, 2, 15, Fla. Const.; *Chiles*, 714 So. 2d at 457. Moreover, this Court has jurisdiction because the majority's decision *exclusively* affects "the duties, powers, validity, formation, termination or regulation" of the particular class of constitutional officers to which legislators belong. *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974). This is reflected in the very nature of the privilege which the lower court endorsed—it is a *legislative* privilege, available not to the public at large, but only to "legislators and legislative staff members . . . 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.

IV. CONCLUSION

Petitioners request that the Court accept jurisdiction of this appeal and, for the reasons set forth in the concurrently filed motion for expedited review, issue a briefing and argument schedule that will allow for its swift resolution.

Dated: June 7, 2013

By: /s/ *Mark Herron*

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