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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-951

RENE ROMO, *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

Raoul G. Cantero
Florida Bar No. 552356
Jason N. Zakia
Florida Bar No. 698121
Jesse L. Green
Florida Bar No. 95591
White & Case LLP
200 S. Biscayne Blvd., Suite 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: jzakia@whitecase.com
E-mail: jgreen@whitecase.com

Charles T. Wells
Florida Bar No. 086265
George N. Meros, Jr.
Florida Bar No. 263321
Jason L. Unger
Florida Bar No. 0991562
Andy Bardos
Florida Bar No. 822671
Gray Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone: (850) 577-9090
E-mail: Charles.Wells@gray-robinson.com
E-mail: George.Meros@gray-robinson.com
E-mail: Jason.Unger@gray-robinson.com
E-mail: Andy.Bardos@gray-robinson.com

George T. Levesque
Florida Bar No. 555541
General Counsel, The Florida Senate
305 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399-1100
Telephone: (850) 487-5237
E-mail: levesque.george@flsenate.gov

Attorneys for the Florida Senate and President Don Gaetz

Miguel A. De Grandy
Florida Bar No. 332331
Holland & Knight LLP
701 Brickell Avenue, Suite 3000
Miami FL 33131
Telephone: (305) 789- 7535
E-mail: miguel.degrandy@hklaw.com

Daniel E. Nordby
Florida Bar No. 14588
General Counsel, The Florida House of Representatives
422 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
Telephone: 850-717-5500
E-mail: daniel.nordby@myfloridahouse.gov

Attorneys for the Florida House of Representatives and Speaker Will Weatherford

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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."). The First DCA affirmed these time-honored principles.

In an effort to avoid this result, Petitioners argue that the decision construes article II, section 3 and article III, section 20 of the Florida Constitution. But the First DCA did not expressly attribute the privilege to either the common law or the Florida Constitution, and therefore did not expressly construe the Constitution. Petitioners also argue that the Opinion affects a class of constitutional officers.

But any impact on individual legislators derives from the Legislature's freedom from encroachment on its powers. Finally, even if the Court had jurisdiction, it should decline review because the Opinion merely applies 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 granted certiorari, holding that the trial court departed from the essential requirements of law by permitting Petitioners to depose legislators and legislative staff members (Op. at 12). The First DCA concluded that "the true purpose of the depositions set by Petitioners 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 portion of the order permitting Petitioners to depose legislators and legislative staff members (Op. at

19). The First DCA 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 ARGUMENT

Petitioners seek review on the basis that the Opinion expressly construes article II, section 3 and article III, section 20 of the Florida Constitution. The Opinion does not expressly construe these provisions. Petitioners also seek review on the basis that the Opinion affects a class of constitutional officers. But any impact on individual legislators derives from the Legislature's freedom from encroachment on its powers by the other branches. This Court therefore lacks jurisdiction. Even if the Court had discretionary jurisdiction, however, 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.

ARGUMENT

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

Petitioners assert that jurisdiction exists because the Opinion construes article II, section 3's general separation-of-powers provision and article III, section 20's standards for congressional redistricting (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, 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 simply 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; it 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.").

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

Petitioners also assert that the Opinion affects a class of constitutional officers (br. 13). 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*.

III. THE 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 the country have rejected the contention that judicial evaluation of legislative motive 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*. And in evaluating the Legislature's intent regarding 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. 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,

/s/ Raoul G. Cantero
Raoul G. Cantero
Florida Bar No. 552356
Jason N. Zakia
Florida Bar No. 698121
Jesse L. Green
Florida Bar No. 95591
White & Case LLP
200 S. Biscayne Blvd., Suite 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: jzakia@whitecase.com
E-mail: jgreen@whitecase.com

George T. Levesque
Florida Bar No. 555541
General Counsel, The Florida Senate
305 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399-1100
Telephone: (850) 487-5237
E-mail:
levesque.george@flsenate.gov

Attorneys for the Florida Senate and President Don Gaetz

/s/ George N. Meros, Jr.
Charles T. Wells
Florida Bar No. 086265
George N. Meros, Jr.
Florida Bar No. 263321
Jason L. Unger
Florida Bar No. 0991562
Andy Bardos
Florida Bar No. 822671
Gray Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone: (850) 577-9090
E-mail: Charles.Wells@gray-robinson.com
E-mail: George.Meros@gray-robinson.com
E-mail: Jason.Unger@gray-robinson.com
E-mail: Andy.Bardos@gray-robinson.com

Miguel A. De Grandy
Florida Bar No. 332331
Holland & Knight LLP
701 Brickell Avenue, Suite 3000
Miami FL 33131
Telephone: (305) 789- 7535
E-mail: miguel.degrandy@hklaw.com

Daniel E. Nordby
Florida Bar No. 14588
General Counsel, The Florida House of Representatives
422 The Capitol, 402 South Monroe Street
Tallahassee, Florida 32399-1300
Telephone: 850-717-5500
Email: daniel.nordby@myfloridahouse.gov

Attorneys for the Florida House of Representatives and Speaker Will Weatherford

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.

By: /s/ Raoul G. Cantero
Raoul G. Cantero

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.

By: /s/ Raoul G. Cantero
Raoul G. Cantero

SERVICE LIST

Karen C. Dyer
Boies, Schiller & Flexner LLP
121 South Orange Avenue, Ste. 840
Orlando, FL 32801
Telephone: (407) 425-7118
Facsimile: (407) 425-7047
E-mail: kdyer@bsfllp.com

Jon L. Mills
Elan Nehleber
Boies, Schiller & Flexner LLP
100 SE 2nd Street, Ste. 2800
Miami, FL 33131-2144
Telephone: (305) 539-8400
Facsimile: (305) 539-1307
E-mail: jmills@bsfllp.com
E-mail: enehleber@bsfllp.com

Abha Khanna
Kevin J. Hamilton
Noah G. Purcell
Perkins Coie, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
E-mail : AKhanna@perkinscoie.com
E-mail : KHamilton@perkinscoie.com
E-mail: npurcell@perkinscoie.com

John M. Devaney
Mark Erik Elias
Abha Khanna
Elisabeth C. Frost
Perkins Coie, LLP
700 Thirteenth Street, NW, Ste. 700
Washington, DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
E-mail: JDevaney@perkinscoie.com
E-mail: MElias@perkinscoie.com
E-mail: efrost@perkinscoie.com

Mark Herron
Robert Telfer
Angelina Perez
Messer Caparello & Self, P.A.
Post Office Box 1876
Tallahassee, Florida 32302-1876
Telephone: 850-222-0720
E-mail: mherron@lawfla.com
E-mail: rtelfer@lawfla.com
E-mail: aperez@lawfla.com

Attorneys for Respondents Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan and Bonita Agan

Gerald E. Greenberg
Adam M. Schachter
Gelber Schachter & Greenberg, P.A.
1441 Brickell Avenue, Suite 1420
Miami, FL 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951
E-mail: ggreenberg@gsgpa.com
E-mail: aschachter@gsgpa.com

Bruce V. Spiva
The Spiva Law Firm, PLLC
1776 Massachusetts Ave., N.W.
Suite. 601
Washington, DC 20036
Telephone: (202) 785-0601
Facsimile: (202) 785-0697
E-mail: bspiva@spivafirm.com

Jessica Ring Amunson
Paul Smith
Michael B. DeSanctis
Kristen M. Rogers
Christopher Deal
Jenner & Block LLP
1099 New York Ave, N.W., Ste. 900
Washington, DC 20001-4412
Telephone: (202) 639-6023
Facsimile: (202) 661-4993
E-mail: JAmunson@jenner.com
E-mail: psmith@jenner.com
E-mail: mdesanctis@jenner.com
E-mail: krogers@jenner.com
E-mail: Cdeal@jenner.com

Ronald Meyer
Lynn Hearn
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
Post Office Box 1547 (32302)
Tallahassee, FL 32301
Telephone: (850) 878-5212
Facsimile: (850) 656-6750
E-mail: rmeyer@meyerbrookslaw.com
E-mail: Lhearn@meyerbrookslaw.com

J. Gerald Hebert
191 Somervelle Street, #405
Alexandria, VA 22304
Telephone: (703) 628-4673
E-mail : Hebert@voterlaw.com

Attorneys for Petitioners The League of Women Voters of Florida, The National Council of La Raza, Common Cause Florida; Robert Allen Schaeffer, Brenda Ann Holt, Roland Sanchez-Medina, Jr., and John Steele Olmstead

J. Andrew Atkinson
Ashley Davis
Assistant General Counsel
Florida Department Of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399
Telephone: (850) 245-6536
E-mail:
JAndrew.Atkinson@dos.myflorida.com
E-mail:
Ashley.Davis@dos.myflorida.com

Attorneys for Respondent Ken Detzner, in his Official Capacity as Florida Secretary of State

Harry O. Thomas
Christopher B. Lunny
Radey, Thomas, Yon & Clark, PA
301 South Bronough Street
Suite 200
Tallahassee, Florida 32301-1722
Telephone: (850) 425-6654
Facsimile: (850) 425-6694
E-mail: hthomas@radeylaw.com
E-mail: clunny@radeylaw.com

Attorneys for Bill Negron, Anthony Suarez, Luis Rodriguez, Father Nelson Pinder; N.Y. Nathiri; Mayor Bruce B. Mount, Pastor Willie Barnes, Mable Butler, and Judith A. Wise

Blaine H. Winship
Office Of Attorney General
Capitol, Pl-01
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 401-1630
E-Mail:
Blaine.winship@myfloridalegal.com

Attorneys for Pam Bondi, in her capacity as Florida Attorney General

Michael A. Carvin
Louis K. Fisher
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-7643
Facsimile: (202) 626-1700
E-mail: macarvin@jonesday.com
E-mail: lkfisher@jonesday.com

Attorneys for the Florida Senate and President Don Gaetz

Charles G. Burr
Burr & Smith, LLP
Grand Central Place
442 West Kennedy Blvd., Ste. 300
Tampa, FL 33606
Telephone: (813) 253-2010
Facsimile: (813) 254-8391
E-mail: cburr@burrandsmithlaw.com

Stephen Hogge
Stephen Hogge, LLC
117 South Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 459-3029
E-mail:
Stephen@StephenHoggeEsq.com

Victor L. Goode
Dorcas R. Gilmore
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: (410) 580-5790
Facsimile: (410) 358-9350
E-mail: vgoode@naacpnet.org
E-mail: dgilmore@naacpnet.org

Allison J. Riggs
Anita S. Earls
Southern Coalition For Social Justice
1415 West Highway 54, Ste. 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
E-mail: allison@southerncoalition.org
E-mail: anita@southerncoalition.org

Attorneys for the Florida State Conference of NAACP Branches