

>> ALL RISE.  
HEAR YE HEAR YE, HEAR YE.  
THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD,  
DRAW NEAR, GIVE ATTENTION AND  
YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.

LADIES AND GENTLEMEN, T  
HE SUPREME COURT OF FLORIDA.  
PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA  
SUPREME COURT.

THE FIRST CASE ON OUR DOCKET  
TODAY IS THE LEAGUE OF WOMEN  
VOTERS OF FLORIDA VERSUS THE  
FLORIDA HOUSE OF  
REPRESENTATIVES.  
YOU MAY PROCEED.

>> THANK YOU, YOUR HONOR.  
MAY IT PLEASE THE COURT.  
I AM TALBOT D'ALEMBERTE,  
REPRESENTING LEAGUE OF WOMEN VOTERS  
AND COALITION OF PETITIONER'S IN  
THIS CASE.

WE HAVE JOINED WITH THE ROMO  
PETITIONERS TO FILE A BRIEF AND  
WE'RE AUTHORIZED TO PRESENT ORAL  
ARGUMENT FOR BOTH PETITIONER'S  
IN CASE.

WITH ME IS JOHN DELANEY WITH THE  
ROMO PETITIONERS AND ADAM  
SCHACHTER, CO-COUNSEL FOR THE  
COALITION PETITIONER'S.

I RESPECTFULLY REQUEST THAT YOU  
RESERVE SEVEN MINUTES FOR  
REBUTTAL.

IN NOVEMBER OF 2010, AN  
OVERWHELMING MAJORITY OF FLORIDA  
VOTERS APPROVED AN AMENDMENT,  
AMENDMENTS TO THE FLORIDA  
CONSTITUTION ESTABLISHING FOR  
THE FIRST TIME STANDARDS FOR THE  
DEVELOPMENT OF APPORTIONMENT  
PLANS FOR BOTH THE LEGISLATURE  
AND FOR CONGRESSIONAL DISTRICTS.  
THIS COURT HAS HAD SEVERAL  
OPPORTUNITIES TO REVIEW THOSE

AMENDMENTS AND THE THINGS THAT YOU'VE SAID ABOUT THOSE AMENDMENTS WE THINK ARE EXTREMELY IMPORTANT FOR THE CASE IN FRONT OF YOU TODAY.

>> YOU'RE NOT SAYING, OR ARE YOU, THAT THE AMENDMENT DIRECTLY ANSWERS THIS QUESTION AS FAR AS LEGISLATIVE PRIVILEGE IN FLORIDA?

>> NO, YOUR HONOR.

>> OKAY.

AND ARE YOU TAKING THE PETITION, I KNOW THE BRIEFS DO, THERE IS NO AND SHOULD BE NO LEGISLATIVE PRIVILEGE IN FLORIDA SO JUDGE LEWIS'S ORDER WHICH ONLY ALLOWS OBJECTIVE EVIDENCE, TESTIMONY ABOUT OBJECTIVE FACTS SHOULD BE ALSO QUASHED BECAUSE IT DOESN'T ALLOW ALL OF THE SUBJECTIVE CONSIDERATIONS OF THE LEGISLATURE?

>> YOUR HONOR --

>> THAT IS LIKE --

>> I'VE GOT TWO QUESTIONS.

ONE, OUR SUBMISSION TODAY IS ONLY ON THE FACTS IN FRONT OF THE COURT.

IT IS NOT NECESSARY FOR THE COURT TO REACH BEYOND THE ISSUE OF WHETHER OR NOT LEGISLATORS, LEGISLATIVE DOCUMENTS AND OTHERS INDEED ARE MADE AVAILABLE TO ALL PARTIES IN ALL CASES.

>> WITH THE PART OF THE JUDGE LEWIS'S ORDER THAT TO ME SIGNIFICANTLY RESTRICTS WHAT YOU CAN QUESTION THE LEGISLATORS ABOUT?

>> AND THE ANSWER TO THAT, YOUR HONOR, IS THAT WE BELIEVE THAT THE RULES OF CIVIL PROCEDURE PROVIDE ALL THE GUIDANCE ANYONE NEEDS, SUBJECTIVE, SUBJECTIVE SEPARATION IS ONE THAT RESPONDENTS CRITICIZED AND WE THINK THE PROBLEM IN APPLICATION AND WE DON'T THINK IT IS NECESSARY TO GO BEYOND THE RULES

OF CIVIL PROCEDURE WHICH PROVIDE US ALL THE GUIDANCE THAT THE TRIAL COURT NEEDS.

SO OUR SUBMISSION IN TERMS OF LEGISLATIVE PRIVILEGE IS THAT UNDER THE FACTS OF THIS CASE WHERE WE HAVE CONSTITUTIONAL PROVISIONS, THE SPECIFICALLY STATE THAT INTENT IS TO BE CONSIDERED, THEN DISCOVERY SHOULD BE ALLOWED AS IT RELATES TO THE INTENT OF THE LEGISLATURE.

>> AND ALL ON WHAT INFORMATION CAN BE OBTAINED, THERE SHOULD BE --

>> YOUR HONOR --

>> THERE IS NO PRIVILEGE AS FAR AS YOU'RE CONCERNED.

ONLY THE PRIVILEGES THAT APPEAR IN THE RULES OF CIVIL PROCEDURE AND RULES OF EVIDENCE?

>> EXACTLY, YOUR HONOR.

>> THAT'S WHAT YOU'RE SAYING?

>> THAT'S OUR SUBMISSION, THAT THERE IS NO, THERE IS ACTUALLY NO LEGISLATIVE PRIVILEGE.

WE DON'T ASK THE COURT TODAY TO ISSUE A SWEEPING ORDER SAYING THERE CAN NEVER BE A RECOGNITION OF POLICIES THAT PROTECT THE LEGISLATURE FROM A ONE MATTER OR ANOTHER.

>> FROM A PRACTICAL STANDPOINT HOW WOULD THE LEGISLATURE FUNCTION IF EACH LEGISLATOR WAS UNDER THE BELIEF THAT ANYTHING HE OR SHE MAY SAY TO ANYONE ELSE MAY BE SOMETHING THAT THEY'RE GOING TO HAVE TO ANSWER UNDER OATH IN A DEPOSITION, OR PERHAPS IN COURT?

HOW CAN THEY POSSIBLY FUNCTION?

>> YOUR HONOR, I HOPE THEY WOULD FUNCTION IN ACCORDANCE WITH THE FLORIDA CONSTITUTION.

I HOPE THEY WOULD STAY AWAY FROM ANY IMPROPER INTENT DRAFTING APPORTIONMENT PLANS.

>> SO YOU DON'T, AGAIN, TRYING

TO UNDERSTAND THIS, JUSTICE LABARGA'S CONCERN AND I SHARE THAT CONCERN IS THAT IN THE MAJORITY OF THE CASES MR. CANTERO FILED MANY CIRCUIT COURT ORDERS, THAT IN THE ORDINARY COURSE OF DECIDING ISSUES OF LEGISLATIVE INTENT, IT IS, IT APPEARS THAT THOSE ORDERS WERE WELL-FOUNDED AS FAR AS INQUIRING INTO LEGISLATIVE PROCESS.

SO WHAT YOU WANT TO DO IS HAVE US NARROWLY ADDRESS THIS ISSUE, IS THAT CORRECT?

>> AN ISSUE RELATING TO THE CHALLENGE BASED ON PROVISIONS IN THE FLORIDA CONSTITUTION.

>> BUT AGAIN, I'M ASKING YOU THE QUESTION, IS IT YOUR POSITION THAT THE CONSTITUTIONAL PROVISION AT ISSUE SPECIFICALLY OVER INTENDED TO OVERTURN ANY PREEXISTING COMMON LAW LEGISLATIVE PRIVILEGE?

>> YOUR HONOR, WE DO NOT BELIEVE THERE WAS ANY COMMON LAW LEGISLATIVE PRIVILEGE. THAT WAS ABOLISHED IN THE ADOPTION OF THE FLORIDA EVIDENCE CODE.

>> IF THERE IS NO LEGISLATIVE PRIVILEGE THEN JUSTICE LABARGA'S QUESTION, HOW DO YOU DIFFERENTIATE BETWEEN THE ORDINARY DECISION-MAKING PROCESS THAT IS INVOLVED IN EVERY LEGISLATIVE SESSION AND EVERY LEGISLATIVE DECISION FROM THIS UNIQUE SITUATION?

DON'T WE NEED, I GUESS WHAT I WAS HOPING FOR, I'M LOOKING AT JUDGE LEWIS'S ORDER AND I THINK HE, APPEARS TO ME STRUCK A GOOD BALANCE.

NOW YOU'RE SAYING YOU THINK IT IS AN UNWORKABLE DICHOTOMY, SO YOU IN THAT WAY AGREE WITH MR. CANTERO.

>> YOUR HONOR, I DON'T THINK IT

IS UNWORKABLE.

I DON'T THINK IT IS PARTICULARLY DESIRABLE.

I DON'T THINK IT IS NEEDED.

LOOK, WE DEAL, AND COURTS DEAL WITH INTENT EVERY DAY OF THE WEEK.

WE DEAL WITH CONTRACTUAL INTENT.

WE DEAL WITH INTENT IN A CRIMINAL CONTEXT.

WE DEAL WITH INTENT, EVEN WITH BAR DISCIPLINE MATTERS.

SO INTENT IS NOT A STRANGER.

WE'RE NOT STRANGERS TO THE CONCEPT OF INTENT.

>> WELL, LISTEN, AS A PRACTICAL MATTER WERE YOU GOING TO DEPOSE SENATOR GARDINER, AND SAY, DID YOU INTEND TO FAVOR YOURSELF? ISN'T EVEN AS A QUESTION, ALMOST LIKE, BEGGING THE, QUESTION, ISN'T THE, THOSE COMMUNICATIONS THAT YOU GOT AHOLD OF AND WERE PRODUCED AND THAT REALLY THE CORE OF WHAT YOU WANT TO INQUIRE ABOUT?

>> YOUR HONOR, WE HAVE GRAVE DOUBTS THAT IF WE STARTED ASKING LEGISLATORS, DID YOU HAVE AN IMPROPER INTENT THAT WOULD NOT LEAD US VERY, VERY FAR.

LET'S PAUSE FOR A SECOND AND REMEMBER IN 2002 WHEN THE LEGISLATIVE APPORTIONMENT, BOTH LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT WERE BEFORE FEDERAL COURTS.

LEGISLATIVE PARTIES IN THE FEDERAL CASE STIPULATED THAT THEY ADOPTED THE PLANS OF APPORTIONMENT IN ORDER TO FAVOR A PARTICULAR POLITICAL PARTY. THERE WAS ACTUALLY A STIPULATION IN 2002 THAT WAS THE BASIS OF THE PLANS.

NOW, WE DON'T EXPECT THAT KIND OF STIPULATION IN THIS CASE BUT, WE'RE CERTAINLY ENTITLED TO INQUIRE INTO HOW THE PLANS WERE DEVELOPED, HOW THEY WERE DRAWN,

TO USE THE CONSTITUTIONAL WORD,  
AND WE SHOULD BE ALLOWED TO ASK  
WHO WAS CONTACTED, WHO WAS  
CONSULTED.

>> BUT ISN'T THAT OBJECTIVE, IN  
THIS CASE, AND IT'S HARD BECAUSE  
THERE HASN'T BEEN A DEPOSITION  
YET OR, SO WE'RE KIND OF LOOKING  
AT IT IN AN AMORPHOUS WAY, BUT  
ISN'T THAT WHAT JUSTICE, JUDGE  
LEWIS CONSIDERED TO BE  
OBJECTIVE, HOW THE PLAN WAS  
DEVELOPED, NOT WHAT THEY WERE  
THINKING AT THE TIME THAT THEY  
REJECTED THIS PLAN OR THAT PLAN?

>> YOUR HONOR, UNTIL WE GET TO  
THE DISCOVERY HONESTLY I CAN'T  
ANSWER YOUR QUESTION BUT I --

>> YOU CAN'T SAY THAT THAT, HOW  
THE PLAN WAS DEVELOPED IS AN  
OBJECTIVE FACT AS OPPOSED TO  
SUBJECTIVE THOUGHTS?

>> YOUR HONOR, IT'S POSSIBLE  
THAT THIS COURT COULD DRAW AN  
ORDER SAYING, YOU COULD GET TO  
OBJECTIVE FACTS AND DESCRIBED  
OBJECTIVE FACTS.

AT THIS POINT WE'RE NOT SURE  
EXACTLY HOW THE OBJECTIVE,  
SUBJECTIVE LINE GETS DRAWN.  
AND SO WE CAN'T ENTIRELY ANSWER  
YOU, AND THEREFORE, WE'RE A  
LITTLE BIT UNCOMFORTABLE WITH  
THAT AND THINK IT IS  
UNNECESSARY.

WHY DO YOU HAVE TO HAVE ANY RULE  
THAT IS DIFFERENT FROM ANY OTHER  
RULE ONCE --

>> LET ME ASK YOU A QUESTION  
ABOUT HOW THIS FITS IN THE  
OVERALL BODY OF THE LAW.

DO YOU HAVE ANY CASES WHERE A  
COURT IN THE UNITED STATES HAS  
ORDERED THAT A MEMBER OF A STATE  
LEGISLATURE SUBMIT TO A  
DEPOSITION IN A CIVIL CASE  
CONCERNING, TO ANSWER QUESTIONS  
CONCERNING MATTERS RELATED TO  
THE DELIBERATIONS OF THE  
LEGISLATURE AND THINGS INTERNAL

TO THE LEGISLATIVE PROCESS?

>> YOUR HONOR, I THINK STRONGEST CASE THAT WE'VE GOT, TWO IMPORTANT CASES BUT BALDUS FROM WISCONSIN --

>> DID THAT CASE DO THAT.

>> I'M SORRY?

>> DOES THAT CASE, IF YOU, IF YOU HAVE SIMILAR CASES OR CASES YOU THINK CAN BE PERSUASIVE YOU CAN TELL ME ABOUT THOSE BUT ARE THERE ANY CASES THAT FALL IN THE CATEGORY THAT I DESCRIBED?

>> NOT IN TERMS OF AN ASSERTION OF LEGISLATIVE PRIVILEGE, IN TERMS OF EXECUTIVE PRIVILEGE.

>> I'M NOT TALKING ABOUT EXECUTIVE.

I'M TALKING ABOUT LEGISLATORS BEING REQUIRED TO SUBMIT TO A DEPOSITION IN A CIVIL CASE RELATED TO MATTERS WITHIN THE LEGISLATIVE PROCESS?

>> NO, YOUR HONOR --

>> YOU DON'T HAVE ANY CASES LIKE THAT, DO YOU?

>> NO, YOUR HONOR.

SO BALDIS WAS AS SESSION OF LENDINGTIVE PRIVILEGE TO PROTECT THE LEGISLATIVE STAFF PERSON. ASSERTION SIMILAR TO BEING MADE --

>> YOU HAVE A CASE THAT INVOLVES REQUIRING THAT A STAFF PERSON?

>> THAT'S RIGHT.

>> YOUR HONOR, THE LEGISLATION IS DRAFTED, LEGISLATIVE, INTENTIONAL LEGISLATIVE FAVORING OF A PARTISAN PURPOSE.

SO IT IS NOT --

>> IN FAIRNESS, MR. D'ALEMBERTE.

>> I'M SORRY?

>> IN RELATION TO JUSTICE CANADY'S QUESTION WHETHER THERE IS ANY CASE LAW DEALING WITH THE LEGISLATIVE PRIVILEGE, ARE YOU AWARE WHETHER OR NOT THERE ARE ANY OTHER STATES IN THE COUNTRY THAT HAVE AN AMENDMENT SUCH AS ONE THAT IS AT ISSUE HERE TODAY

LOOKING INTO THIS INTENT ISSUE?

>> NO, YOUR HONOR.

FLORIDA STANDS OUT AS THE SOLE STATE IN THE UNITED STATES.

>> THERE SHOULDN'T BE ANY CASE LAW DEVELOPING YET.

>> AND YOU WON'T FIND CASE LAW IN OTHER STATES RELATING TO A CONSTITUTIONAL PROVISION THAT PROHIBITS WRONGFUL INTENT. FLORIDA IS THE ONLY STATE THAT HAS SUCH A PROVISION.

>> ARE YOU SAYING THERE IS NO OTHER STATE CONSTITUTION THAT HAS A PROVISION SIMILAR TO THE PROVISION AT ISSUE HERE?

>> YOUR HONOR.

>> YOUR HONOR, YOU HAVE TO TELL ME WHAT SIMILAR MEANS BECAUSE --

>> YOU'RE SAYING THERE IS NO SUCH CONSTITUTIONAL PROVISION IN ANY OTHER STATE CONSTITUTION?

>> THERE IS NO STATE CONSTITUTIONAL PROVISION THAT USES THE WORD INTENT, YOUR HONOR.

THERE ARE OTHER CONSTITUTIONS THAT USE THE WORD PURPOSE.

AND I'M NOT --

>> THAT'S A VERY SIGNIFICANT DISTINCTION I'M SURE.

THE DISTINCT BETWEEN INTENT AND PURPOSE.

>> YOUR HONOR, THE CASE LAW BEING CITED IS A LEGISLATIVE IN --

>> WHAT IS THE DIFFERENCE BETWEEN INTENT AND PURPOSE?

>> YOUR HONOR, THERE MAY NOT BE ANY DIFFERENCE, BUT

IT'S CLEAR WHERE THE CONSTITUTION SAYS THERE MAY NOT BE IMPROPER INTENT WE'RE ALLOWED TO INQUIRE AS TO INTENT.

>> I'M STILL CONCERNED, SHOULDN'T, THERE SHOULD BE SOME LIMITATIONS ON THIS I COULD SEE REAL PROBLEMS DOWN THE ROAD IF WE ALLOW UNLIMITED DEPOSITIONS OF A LEGISLATOR, OR LEGISLATIVE



AIDE?

I'M WONDERING WHY YOU DO NOT AGREE WITH THE TRIAL COURT, AT LEAST SHOULD BE, IF THERE IS SOME PRIVILEGE, OR LIMITED PRIVILEGE, WHY THERE SHOULDN'T BE SOME KIND OF LIMITATIONS ON WHAT YOU CAN AND CAN NOT ASK A LEGISLATOR?

WHAT IS WRONG WITH THAT PROPOSITION?

>> YOUR HONOR, WHAT'S WRONG WITH THAT KIND OF LIMITATION IS THAT, IT DENIES US AN OPPORTUNITY TO ASK THE QUESTIONS, WHY?

WHY DID YOU SELECT ONE PLAN OVER ANOTHER?

WHY DID YOU YOU DRAW THE LINE HERE RATHER THAN THERE?

WE SHOULD BE ALLOWED TO ASK THOSE QUESTIONS.

>> THAT IS SUCH AN OPEN-ENDED QUESTION SEEMS TO ME.

IT IS MORE APPROPRIATE TO SAY, WHAT IS THE OBJECTIVE EVIDENCE THAT YOU HAD TO DRAW THE LINE THIS PLACE VERSUS SOME OTHER PLACE.

I'M JUST, I DON'T, I REALLY DON'T UNDERSTAND YOUR ARGUMENT OF WHY THIS HAS TO BE AN OPEN-ENDED, LET'S DO WHATEVER WE WANT TO, LET'S ASK ANYTHING WE WANT TO KIND OF QUESTION HERE?

>> YOUR HONOR, WE TAKE THE POSITION THAT WHEN INTENT IS IN THE CONSTITUTION WE SHOULD BE ABLE TO INQUIRE INTO YOU WILL AT FACTS RELATING TO INTENT.

AND BY THOSE FACTS INCLUDE WHY DID YOU CONSULT WITH OUTSIDE POLITICAL OPERATIVES, PARTISAN POLITICAL OPERATIVES IN DEVELOPING YOUR PLAN?

WHAT KIND OF COMMUNICATIONS TOOK PLACE BETWEEN YOU AND OUTSIDE POLITICAL OPERATIVES?

WAS THERE A PARALLEL SECRET PROCESS GOING ON AT THE SAME

TIME THAT THERE WAS AN OPEN  
APPORTIONMENT PROCESS?  
AND ALL THOSE QUESTIONS WE THINK  
SHOULD BE ALLOWED.

>> WELL, AREN'T THOSE -- THOSE  
ARE TWO DIFFERENT THINGS.  
ONE WOULD BE OBJECTIVE, WAS  
THERE ANOTHER PROCESS BUT THE  
PRIOR QUESTION, WHAT WAS YOUR  
INTENTION, WHY DID YOU DO THIS.

>> RIGHT.

>> I MEAN THAT IS EXACTLY WHAT  
IS BEING DESCRIBED AS THE  
OBJECTIVE VERSUS SUBJECTIVE,  
ISN'T IT?

>> BUT, YOUR HONOR -- PERHAPS,  
I'M NOT SURE AT THIS STAGE, JUSTICE  
LEWIS.

IT SEEMS TO ME THAT WE OUGHT TO  
BE ABLE TO ASK THE WHY QUESTION.  
WHY WAS THIS DONE?

>> DON'T YOU THINK IT IS A TIME  
FOR ABSOLUTE BRIGHT LINE?  
MAYBE YOU WILL HAVE TO HAVE  
DEPOSITIONS AND OBJECTIONS TO  
QUESTIONS SO THAT THIS CAN BE  
DEFINED?

IS THAT WHAT YOU'RE SAYING?

>> I HOPE THAT THIS COURT WILL  
ADOPT A RULE THAT ALLOWS INQUIRY  
INTO INTENT AND WAY WE'RE ALLOW  
INQUIRY INTENT IS PUT IN ISSUE  
AND IT IS PUT IN ISSUE HAD THIS  
CASE BY THE FLORIDA  
CONSTITUTION.

>> BUT YOU DO SEE AND RESPECT  
THIS OPEN-ENDED SORT OF REQUEST  
BEING MADE AN THE DANGERS THAT  
MAY POSE FOR A VALID LEGISLATIVE  
PROCESS?

>> YOUR HONOR, IT SEEMS TO ME  
THAT IF WE GO OVERBOARD AND  
START DOING A LARGE NUMBER OF  
DEPOSITIONS, THE TRIAL COURT IS  
EQUIPPED TO LIMIT THAT.  
AND ALSO IN OUR INQUIRY THERE IS  
NO REASON THAT THE PETITIONERS  
IN THIS CASE WILL WANT TO EXTEND  
THE PROCESS OF PROCEEDINGS IN  
THE TRIAL COURT BECAUSE WE'VE

GOT A 2014 ELECTION COMING ON US.

>> BUT YOU KNOW, I KNOW YOU'RE IN YOUR REBUTTAL, THIS STRIKES ME ANOTHER REASON WHY THE WHY QUESTION WOULD BE NOT REALLY, WOULD BE OVERLY INTRUSIVE. IT IS SUBJECTIVE, IS THAT, IF THE INTENT, ANDY GARDINER PERSONALLY SAYS, I WANT A DISTRICT THAT FAVORS ME, THAT'S WHY I PICKED THIS OVER THAT AND BUT I THOUGHT THEY WERE BOTH FINE.

LET'S SAY HE SAID THAT HOW MANY MEMBERS OF SENATE, WOULDN'T YOU IN ORDER TO SHOW IN ADOPTING THE PLAN, THERE WAS AN INTENT TO FAVOR NEED TO TAKE EVERY SENATOR'S DEPOSITION TO FIND THAT OUT?

AND THAT SEEMS TO BE WHY YOU WOULD STICK TO, IF THEY WERE COMMUNICATIONS ALREADY DEVELOPED, NOT WHY DID YOU TALK TO THIS POLITICAL OPERATIVE BUT YOU TALKED TO THE POLITICAL OPERATIVE THE MORNING OF THIS SUPPOSEDLY TRANSPARENT PUBLIC HEARING YOU WERE HAVING AND ISN'T, I MEAN, AND THAT WOULD BE OBJECTIVE, YE YOU TALKED TO HIM. NOT WHY YOU TALKED TO HIM.

IT WAS PRETTY APPARENT IF THEY WERE TALKING TO POLITICAL OPERATIVES AT THE SAME TIME THEY WERE HOLDING PUBLIC HEARINGS THAT A TRIAL COURT OR FINDER OF FACT COULD INFER THAT THEY WERE TRYING TO UNDERMINE THE PROCESS BUT ISN'T THE PROBLEM THE IDEA THAT THE INTENT OF THE INDIVIDUAL PERSON, WHY, THE WHY QUESTION, IS, WITHIN THEIR OWN THOUGHT PROCESS AND REALLY ISN'T THE ANSWER JUST BECAUSE ONE LEGISLATOR WOULD HAVE WANTED TO DO IT THIS WAY OR THAT WAY?

>> YOUR HONOR, LET'S LOOK AT THE LEGISLATIVE PROCESS AS IT

OPERATES TODAY IN FLORIDA.  
ON MOST ISSUES LEGISLATORS ARE  
FOLLOWING LEADERSHIP AND THE  
PEOPLE WHO MAKE THE  
DETERMINATION ARE PRESIDING  
OFFICERS OF THE HOUSE AND SENATE  
AND THE COMMITTEE CHAIR AND IN  
DRAWING A PLAN A LIMITED NUMBER  
OF LEGISLATORS WERE INVOLVED IN  
DRAWING THE PLAN.

THAT THE CONSTITUTIONAL WORD.  
YOU MAY NOT HAVE WRONGFUL INTENT  
IN DRAWING A PLAN.

SO WE DO NOT THINK A LARGE  
NUMBERS OF LEGISLATORS ARE  
INVOLVED.

YOUR HONOR, I'M DEEPLY INTO MY  
REBUTTAL BUT I JUST, JUSTICE  
PARIENTE --

>> MY QUESTION HAS BEEN ASKED  
AND ANSWERED.

>> THANK YOU.

>> MAY IT PLEASE THE COURT.  
RAOUL CANTERO, ON BEHALF OF THE  
FLORIDA SENATE.

ALSO WITH ME IS GEORGE MEROS ON  
BEHALF OF HOUSE.

I WILL DO THE ARGUMENT ON BEHALF  
OF ALL THE RESPONDENTS.

WE KNOW NOW FROM THE PREVIOUS  
ARGUMENT THERE ARE NO CASES EVER  
IN THE UNITED STATES THAT HAVE  
ORDERED THE INVOLUNTARY  
DEPOSITION OF LEGISLATORS TO  
DETERMINE ANYTHING ABOUT THE  
LEGISLATIVE PROCESS.

AND THE --

>> PART OF THAT, ARE THERE ANY  
CONSTITUTIONAL PROVISIONS IN  
OTHER STATES CONCERN BE INTENT  
OF DRAWING DISTRICTS FOR  
LEGISLATORS?

>> YES, THERE ARE, ON PAGE 30 AND  
31 OF OUR BRIEF I HAVE EIGHT STATES  
ADOPTED SIMILAR PROVISIONS.  
ALL THE ADOPTIONS ARE RELATIVELY  
IN RECENT PAST.

WE DON'T HAVE ANY CASES GOING  
EITHER WAY ON THIS ISSUE.

WE DO HAVE CASES GOING OUR WAY,

ISSUES REGARDING INTENT,  
REGARDING THE VOTING RIGHTS ACT  
WHICH INTENT IS AN ISSUE.  
MANY CASES IT CITED IT INVOLVED  
THE VOTING RIGHTS ACT WHICH  
INTENT WAS AN ISSUE.  
DESPITE THAT NONE OF THOSE CASES  
ORDERED DEPOSITIONS OF STATE  
LEGISLATORS.  
IN FACT THE CASE WHICH JUDGE  
LEWIS BELOW RELIED HEAVILY WAS  
COMMITTEE FOR A FAIR AND  
BALANCED MAP.  
WELL THAT CASE IMPOSED  
RESTRICTIONS ON DOCUMENTS THAT  
WERE GOING TO BE PRODUCED AND  
SAID THERE ARE CERTAIN DOCUMENTS  
YOU SHOULD PRODUCE.  
OTHERS ARE PROTECTED.  
IT DIDN'T EVEN CONSIDER  
DEPOSITIONS.  
SO JUDGE LEWIS EXTRAPOLATED FROM  
THAT AND ORDERED DEPOSITIONS.  
>> LET'S GO THOUGH TO, YOU WERE,  
YOU'RE CANDID AND WE APPRECIATE  
THE CANDOR THAT THE STATES THAT  
HAVE SIMILAR PROVISIONS HAVE NOT  
HAD LITIGATION OVER THIS.  
I AGREE THAT JUDGE LEWIS'S  
ORDER, I CAN'T ACCEPT THE  
PLAINTIFF'S POSITION THAT IT  
SHOULD BE OPEN-ENDED AND I THINK  
THAT IN MOST CASES OF  
LEGISLATIVE INTENT, STATUTORY  
CONSTRUCTION, IT WOULD BE  
IMPROPER TO START TO ASK  
LEGISLATORS, WHY DID YOU PASS  
THIS BILL?  
BUT WE ARE DEALING WITH A UNIQUE  
PROVISION THAT WAS ADOPTED THAT  
DIDN'T PUNISH OR PROHIBIT EFFECT  
BUT INTENT.  
NOW, THE LEGISLATURE IN  
APPORTIONMENT ONE WENT OUT OF  
ITS WAY TO TALK ABOUT THE  
MULTIPLE PUBLIC HEARINGS THEY  
HAD IN OBTAINING PUBLIC INPUT.  
SO WE HAVE THAT IN THE RECORD.  
NOW IF AT THE SAME TIME AS THEY  
WERE DOING THESE HEARINGS IT WAS

A PARALLEL SECRET PROCESS GOING ON WHERE THEY WERE REALLY, BECAUSE NO MAPS WERE SHOWN AT THOSE PUBLIC HEARINGS, WHERE THEY WERE REALLY DEVELOPING THE MAP THEY WANTED, WHY WOULDN'T, AND TO ME THAT'S OBJECTIVE, WHY WOULDN'T THAT BE DIRECTLY RELEVANT TO REFUTE WHAT THE LEGISLATURE HAS ALREADY SAID, WHICH IS, NO, WE CERTAINLY DIDN'T ACT IMPERMISSIBLY BECAUSE LOOK AT ALL THESE PUBLIC HEARINGS?

>> YOUR HONOR, EVERY SINGLE PRIVILEGE THAT EXISTS IN THE UNITED STATES ASSUMES THAT THAT PRIVILEGE WILL PROTECT AGAINST DISCLOSURE OF RELEVANT EVIDENCE. THE ATTORNEY/CLIENT PRIVILEGE WOULD PROTECT AGAINST DISCLOSURE OF RELEVANT EVIDENCE.

IT WOULD BE RELEVANT IF A DEFENDANT TOLD HIS LAWYER, YEAH, I DID IT.

IT WOULD BE RELEVANT IF A HUSBAND HAD TOLD A SPOUSE, YES, I DID IT.

THIS WAS DESIGNED TO PROTECT AGAINST RELEVANT EVIDENCE AND I THINK --

>> BUT THERE ISN'T, AND AGAIN, THERE IS NO EVIDENTIARY PRIVILEGE SO NOW WHAT WE'RE REALLY TALKING ABOUT, AND I ACCEPT THAT IT SHOULD EXIST, IS A SEPARATION OF POWERS ISSUE.

AND RESPECT FOR A BRANCH GOVERNMENT SO A LEGISLATOR DOESN'T GET HAULED INTO COURT EVERY TIME A BILL GETS PASSED BUT WE'RE DEALING WITH A ONCE IN EVERY 10-YEAR PROCESS AND A UNIQUE CONSTITUTIONAL PROVISION. IN THAT SITUATION SEEMS TO ME THE NEED TO EFFECTUATE THE INTENT OF THE VOTERS IS SERVED BY THE LIMITED ORDER THAT JUDGE LEWIS ENTERED THAT DOES PROTECT

AGAINST THIS WHOLESALE, THE WHY QUESTIONS BUT ALLOWS THINGS THAT IN THE ORDINARY COURSE OF HOW THIS PLAN WAS DEVELOPED FOR THERE TO BE SOME DISCOVERY ON IT.

>> WELL THE ORDER, ALTHOUGH IT SEEMS TO TRY TO BE FAIR IT HAS THE SAME CHILLING EFFECT AS AN ORDER SAYING YOU CAN DEPOSE REGARDING ANYTHING BECAUSE LEGISLATORS ARE STILL GOING TO BE RELUCTANT TO DO ANYTHING TO GET INVOLVED IN THIS REDISTRICTING PROCESS IF IT MEANS NOW I'M GOING TO GET DEPOSED AND --

>> MAYBE NEXT 10 YEARS THEY WON'T, IF THERE ARE, IS EVIDENCE THAT IT REALLY WASN'T QUITE AS TRANSPARENT AS THE LEGISLATURE SAID IT WAS, MAYBE 10 YEARS FROM NOW IT WILL ALL BE TRANSPARENT?

>> WELL THAT IS NOT THE POINT. THEY HAVE TO TAKE YOUR WORD FOR IT.

>> THE POINT IS, WE ADOPTED AND WE APPROVED THE ENTIRE HOUSE PLAN AND MOST OF THE SENATE PLAN AND REAPPROVED THE SENATE PLAN, UNDERSTANDING THAT WHAT HAD BEEN PRESENTED SHOWED INDICATIONS THAT THERE WAS NEVER AN IMPROPER MOTIVE IN HOW THE LINES WERE DRAWN.

AND --

>> WE'RE NOT SAYING THAT THEY'RE NOT ENTITLED TO DISCOVERY. WE NEVER SAID THEY'RE NOT ENTITLED TO DISCOVERY EVEN THOUGH THEY SAY AT THAT IS WHAT WE'VE DONE.

WE HAVE PRODUCED OVER 33,000 DOCUMENTS.

THE PUBLIC RECORDS ACT OF THE STATE OF FLORIDA CIRCUMSCRIBES THE LEGISLATIVE PRIVILEGE SO ANYTHING THAT IS A PUBLIC RECORD THEY HAVE GOTTEN.

THE ONLY THING THEY DON'T HAVE IS DEPOSITIONS OF LEGISLATORS WHICH DESPITE THE REQUIREMENT OF INTENT IN OTHER STATUTES AND THE VOTING RIGHTS ACT AND EQUAL PROTECTION HAVE NEVER BEEN ORDERED IN THIS COUNTRY.

>> LET ME ASK YOU THAT ABOUT THE DOCUMENTS BECAUSE I WAS TRYING TO TRACE THROUGH WHERE THE PROTECTIVE ORDER CAME. IS THERE A REQUEST TO PRODUCE THAT IS IN THE RECORD THAT WOULD SHOW WHAT IT IS THAT IS, WAS THE SUBJECT OF THE PROTECTIVE ORDER? BECAUSE THE ONLY THING IN THE APPENDIX OF THE PETITIONER'S BRIEF ARE THE NOTICE OF TAKING DEPOSITIONS AND THE MOTION FOR PROTECTIVE ORDER.

I HAD TO GO BACK --

>> THERE IS NO, WE PRODUCED THE VAST MAJORITY OF DOCUMENTS.

>> WELL, ARE WE TALKING ABOUT, ABOUT THAT PART OF THE JUDGE'S ORDER?

IS IT PREMATURE TO EVEN ADDRESS THAT, OR ARE WE TALKING ABOUT THE DRAFT LEGISLATIVE PLANS THAT LED UP TO THE FINAL PLAN?

IS THAT WHAT, BECAUSE YOU TALK ABOUT 30,000 DOCUMENTS BUT --

>> IT IS TRUE THAT THEY HAVEN'T REQUESTED IT, BUT THEY HAVE REQUESTED, ALL MAPS THAT WERE DEVELOPED.

THE DRAFT MAPS, IS THE ONLY THING THAT IS EXEMPTED UNDER PUBLIC RECORDS ACT AND THOSE ARE ONLY THINGS THAT WE HAVE ASSERT AD PRIVILEGE OF.

>> YOU UNDERSTAND, NO, THAT THE CASE LAW IS PRETTY CLEAR THAT, SOMETHING THAT IS EXEMPT UNDER THE PUBLIC RECORDS ACT, WHICH, EXEMPTS SOMETHING FROM THE GENERAL PUBLIC VIEW IS THOSE EXEMPTIONS, ARE GOVERNED THEN BY THE RULES OF DISCOVERY.

>> YES.



>> SO I DON'T UNDERSTAND --  
>> NEITHER PARTY IN THIS CASE  
HAS CONTESTED THAT PART OF THE  
FIRST DCA'S OPINION WHICH SAYS  
THAT IT NOT ONLY HAS TO BE  
EXEMPT, IT ALSO HAS TO BE  
COVERED BY THE LEGISLATIVE  
PRIVILEGE.  
SO, EVEN THOUGH --  
>> BUT WHEN, EXPLAIN TO ME, ARE  
WE TALKING ABOUT, BECAUSE I'M,  
YOU KNOW IT IS EASIER WHEN, IF  
WE COULD HAVE SEEN WHAT THE  
DOCUMENTS WERE THAT ARE AT ISSUE  
AND JUDGE LEWIS HAD ORDERED THE  
IN CAMERA INSPECTION.  
ARE WE TALKING ABOUT DRAFT PLANS  
BEFORE THE FINAL PLANS?  
IS THAT WHAT --  
>> DRAFT PLANS THAT WERE NEVER  
FILED TO BE CONSIDERED.  
>> WELL, BUT WHAT IS, AND --  
>> IN OTHER WORDS THERE IS  
PLANS --  
>> YOU'RE SAYING WE CAN'T REACH  
THAT BECAUSE THEY HAVE NOT CROSS  
APPEALED THAT ISSUE?  
>> WE HAVEN'T CROSS APPEALED.  
I'M NOT SAYING YOU CAN'T REACH.  
I'M SAYING NEITHER PARTY HAS  
CONTESTED THAT PART OF THE FIRST  
DCA'S OPINION WHICH SAYS JUST  
BECAUSE IT'S EXEMPT DOESN'T MEAN  
YOU SHOULDN'T PRODUCE IT AND  
JUDGE LEWIS NOW HAS TO CONDUCT  
ANALYSIS A, IS IT EXEMPT AND B,  
EVEN IF EXEMPT IS IT COVERED BY  
THE PRIVILEGE OR NOT?  
>> BUT IF WE DISAGREE WITH THE  
FIRST DISTRICT'S ORDER ABOUT THE  
SUBJECTIVE, THAT SAYS, IT IS A  
TOTAL PRIVILEGE, WOULDN'T THAT,  
THOSE DRAFT PLANS WOULD NOT BE  
ABLE TO BE PRODUCED?  
SO IF WE DISAGREE WITH THAT  
PART, WE NECESSARILY HAVE TO  
DISAGREE WITH THE PART THAT  
APPLIES --  
>> IF YOU FIND THERE IS NO  
PRIVILEGE --

>> I UNDERSTAND, HOW SUBJECTIVE,  
OBJECTIVE EVEN WOULD APPLY TO  
DRAFT PLANS.  
IT MIGHT BE THAT ANDY GARDINER --  
>> MIGHT RELY ON THE PLAN.  
>> I DON'T LIKE THIS PLAN  
BECAUSE --  
>> RIGHT.  
>> I DON'T LIKE THIS PLAN  
BECAUSE MY HOUSE IS HERE AND I  
WANT IT TO BE THERE.  
IS THAT A, WOULD THAT BE  
SUBJECTIVE?  
>> THAT IS OBJECTIVE.  
>> WELL, IT IS WRITTEN IN A, IT  
IS NOT IN THE BRAIN.  
IT WENT DOWN, WENT BACK TO THE  
STAFFER.  
A LOT OF THINGS THAT ARE WRITTEN  
IN THE BRAIN ARE THEN  
COMMUNICATED AND THAT IS STILL  
SUBJECTIVE.  
I THINK THAT, THAT'S SUBJECTIVE.  
YOU'RE THINKING, THAT IS YOUR  
OPINION.  
STILL SUBJECTIVE.  
>> I WOULD LIKE TO KILL  
SOMEBODY, THAT IS OBJECTIVE?  
>> YOU THINK THAT YOU KILLED?  
>> IF I EXPRESS IT TO ANOTHER  
PERSON?  
>> IT MAY BE.  
YOU'RE POINTING OUT THE  
UNWORKABILITY OF A DICHOTOMY  
BETWEEN OBJECTIVE AND SUBJECTIVE  
TESTIMONY WHICH IS ONE OF THE  
REASONS WHY THE FIRST DCA SAID,  
WE'RE NOT GOING TO ACCEPT THAT  
BECAUSE IT IS JUST UNWORKABLE.  
YOU'RE STILL GOING TO DEPOSE  
LEGISLATORS, SO THERE IS STILL  
GOING TO BE CHILLING EFFECT.  
THERE WILL STILL BE A VIOLATION  
OF SEPARATION OF POWERS.  
>> I KNOW YOU THOUGHT ABOUT THIS  
A LOT.  
IF YOU DON'T LIKE JUDGE LEWIS'S  
ORDER, BUT IF THE COURT DECIDES  
THERE OUGHT TO BE SOME  
DISCOVERY, HOW WOULD YOU FRAME

THE, THE APPROPRIATE, IF YOU WERE --

>> I HATE WHEN I GET QUESTIONS LIKE THAT.

HOW WOULD I FRAME IT?

I JUST DON'T THINK THAT THE DEPOSING LEGISLATORS AT ALL COMPLIES WITH THE SEPARATION OF POWERS.

>> SO YOU FEEL -- IF WE DECIDE THAT IT IS NOT, IT'S A UNIQUE SITUATION AND IT IS A UNIQUE CONSTITUTIONAL PROVISION AND, AND THE OTHER PART I THINK JUDGE LEWIS WAS WORRIED ABOUT, IN DEFENDING THIS, A LEGISLATOR GETS ON THE STAND AND SAYS, LISTEN, I DID THIS ON THE UP AND UP.

I HAD NO IMPROPER INTENT, AT THAT POINT IT IS TOO LATE. DISCOVERY HASN'T, HAS NOT BEEN PRECLUDED.

SO HOW DO YOU THEN, HOW DO YOU REBUT THAT ARGUMENT IF, YOU KNOW, THEY HAVE QUOTE, WAIVED THE PRIVILEGE BUT THEY DON'T DO IT UNTIL THE TIME OF TRIAL?

>> WELL, I THINK, JUDGE LEWIS IN HIS ORDER AND IF NOT, WE WOULD CONCEDE, IF THAT, YOU CAN'T WAIVE THE PRIVILEGE WITHOUT GIVING THE OTHER SIDE THE OPPORTUNITY THEN TO DEPOSE THE PERSON.

AND YOU CAN WAIVE THE PRIVILEGE UNDER CANOVER AND DAVIS VERSUS CENTRAL DISTRICT OF CALIFORNIA ONLY FOR YOURSELF.

THERE IS NOTHING TO PREVENT THE LEGISLATOR WAIVING PRIVILEGE BUT YOU CAN ONLY DO IT TO YOUR OWN STATEMENTS I SAY WE CAN'T CLAIM LEGISLATIVE PRIVILEGE DURING DISCOVERY AND PRESENT A SLEW OF LEGISLATORS WHAT WAS INTEND. WE DON'T INTEND TO DO AND WE SHOULDN'T BE ABLE TO DO THAT. IF WE INTEND TO WAIVE THE PRIVILEGE THEY SHOULD PRIOR

NOTICE AND THEY SHOULD BE ABLE TO DEPOSE THOSE THAT ARE GOING TO WAIVE THE PRIVILEGE YOU.

>> CAN'T COME UP WITH A BETTER CONSTRUCT?

>> IF I HAD, IF YOU'RE PRESSING ME ON WHAT NATURE OF THE DEPOSITIONS WOULD BE, IT WOULD BE ANY COMMUNICATIONS HAD WITH SOMEBODY OUTSIDE OF THE LEGISLATURE AND NOT WITH OTHER LEGISLATORS WHICH IS COVERED BY THE PRIVILEGE LIKE AN ATTORNEY/CLIENT PRIVILEGE COMMUNICATIONS WITH OTHER LEGISLATORS.

IT WOULD BE COMMUNICATIONS OUTSIDE.

>> COULD YOU, THE 30,000 DOCUMENTS, AS A LAWYER, PRODUCTS LIABILITY CASES, YOU KNOW, SOMEBODY MIGHT PRODUCE 30,000 DOCUMENTS AND NOT ONE OF THEM WAS, I MEAN THERE WAS A LOT OF DOCUMENTS BUT IT WAS --

>> THEY INCLUDED MAPS. THEY INCLUDED 16,000 EMAILS, BETWEEN LEGISLATORS AND STAFF.

>> OKAY.

SO NOW HOW DID THAT COMMUNICATION --

>> IT WAS PUBLIC RECORD. AND SO WE PRODUCED PUBLIC RECORDS.

>> SO IF THE COMMUNICATION BETWEEN THE LEGISLATURE AND, LEGISLATOR AND THE STAFF IS THERE BUT IS SOMETHING IN THE EMAIL THAT IS UNCLEAR?

ARE YOU SAYING AGAIN THAT YOU COULDN'T ASK THE PERSON --

>> I'M SAYING YOU CAN'T ASK IN DEPOSITIONS BECAUSE THE LEGISLATORS GOING IN UNDERSTAND THAT THEY ARE SUBJECT TO THE PUBLIC RECORDS ACT AND THAT THAT PUBLIC RECORDS ACT CIRCUMSCRIBES THE LEGISLATIVE PRIVILEGE.

>> I GUESS I THOUGHT WHEN THEY WERE GOING INTO, AND I REMEMBER

WHAT WILL WEATHERFORD SAID AT THE TIME, NOT TO, YOU KNOW, BUT IN THE PUBLIC RECORD, THAT THIS WAS A UNIQUE TIME AND THEY WERE GOING TO TAKE CARE, TAKE EXTRAORDINARY CARE TO DO, TO HAVE THE REDISTRICTING PROCESS FULFILL THE INTENT OF THE VOTERS.

AND SO IT WAS GOING TO BE UNIQUE AND DIFFERENT.

SO THE IDEA THAT THE LEGISLATORS WENT IN THERE SAYING, WE'RE GOING TO SAY THAT BUT AT THE SAME TIME WE'RE GOING TO DO SOMETHING ELSE I WOULD BE SURPRISED THAT'S HAPPENING.

>> I THINK YOU'RE ASSUMING FACTS NOT IN EVIDENCE BECAUSE THEY SAY THIS WILL BE THE MOST OPEN PROCESS IN HISTORY DOESN'T MEAN WE CAN'T ASSERT A PRIVILEGE AND AGAINST TESTIFYING IN COURT. AND BEING DEPOSED.

THOSE ARE TWO DIFFERENT THINGS.

>> LET ME SEE IF I CAN GET A FEW QUESTIONS IN.

LOOK, LOOKING AT IT FROM A TRIAL JUDGE'S STANDPOINT, LOOK AT IT AS TO HOW WORKABLE THIS WOULD BE, IT SEEMS TO ME LIKE, WHEN YOU HAVE A DEPOSITION OF A LEGISLATOR, THEY'RE GOING TO BE AN OBJECTION, THERE IS GOING TO BE OBJECTION TO JUST ABOUT EVERY QUESTION BASED ON THE FACT THAT IT IS SUBJECTIVE.

AND THEN, BECAUSE IT IS A PRIVILEGE, THE PERSON DOESN'T HAVE TO ANSWER IT AND THAT QUESTION WILL HAVE TO GO BACK TO THE TRIAL JUDGE AND YOU HAVE TO HAVE A HEARING ON EACH SINGLE OBJECTION.

I JUST SEE IT AS AN UNWORKABLE SITUATION FOR A TRIAL JUDGE. IT WOULD TAKE DAYS TO HANDLE EACH AND EVERYONE OF THE OBJECTIONS THAT ARE GOING TO BE RAISED AND THAT'S MY CONCERN

ABOUT, ABOUT THIS ISSUE HERE.  
I JUST DON'T, YOU MENTIONED,  
PERHAPS THIS IS A BETTER  
QUESTION FOR MR. D'ALEMBERTE AND  
I HOPE HE ANSWERS WHEN HE GETS  
BACK, HOW IS THIS WORKABLE?

>> THAT WAS OUR POSITION IN THE  
FIRST DISTRICT AND THAT IS WHAT  
THE FIRST DISTRICT CONCLUDED.  
JUST THE FACT OF HAVING TO BE  
DEPOSED.

IT WILL BE HOURS LONG  
DEPOSITION.

WE DON'T KNOW HOW MANY THEY'RE  
GOING TO DEPOSE.

WE DON'T KNOW WHICH QUESTIONS  
WILL BE DETERMINED TO BE  
SUBJECTIVE.

WHICH ARE GOING TO BE DETERMINED  
TO BE OBJECTIVE.

JUST THE FACT THAT IS GOING TO  
HAPPEN IS NOW GOING TO HAVE A  
CHILLING EFFECT IN THE  
LEGISLATURE.

THE WAY I SEE IT, I'M SORRY,  
JUSTICE LEWIS, DID YOU HAVE A  
QUESTION?

>> I WILL LISTEN TO THE REST OF  
YOUR STATEMENT.

THEN I'M GOING TO ASK YOU.

>> ALL RIGHT.

I'LL GET READY.

THE WAY I SEE IT THE PRIVILEGE  
IS BASED ON THREE PILLARS AND  
CASES DON'T ANALYZE IT THIS WAY.  
I THINK THIS IS WAY YOU SEE THE  
CASES.

THE FIRST PILLAR IS THE  
PRIVILEGE ASPECT OF  
COMMUNICATIONS AMONG LEGISLATORS  
JUST LIKE ATTORNEY/CLIENT  
PRIVILEGE OR SPOUSAL PRIVILEGE.  
THE SECOND IS THE RESPECT FOR  
COORDINATE BRAND OF GOVERNMENT,  
REGARDLESS OF COMMUNICATIONS  
WE'RE NOT GOING TO HAUL YOU INTO  
A DEPOSITION OR INTO A COURT TO  
ASK YOU QUESTIONS ABOUT HOW YOU  
DID YOUR JOB JUST LIKE WE DON'T  
ASK JUDGES ABOUT HOW THEY DID

THEIR JOB.

THAT'S A SEPARATION OF POWERS  
ISSUE.

AND THE THIRD PILLAR, IF YOU  
WILL, IS THE MARGINAL RELEVANCE  
OF TAKING DEPOSITIONS OF  
INDIVIDUAL LEGISLATORS IS NOT  
GOING TO GET YOU ANYWHERE IN  
DETERMINING THE LEGISLATURE'S  
INTENT IN DRAFTING A STATUTE OR  
DRAFTING MAPS.

>> BUT YOU WOULD AGREE THAT THE  
PRIVILEGE IS TO THE PARTICULAR  
QUESTIONS BEING PROPOSED?

>> NOT IN THIS INSTANCE, YOUR  
HONOR.

>> YOU MEAN A BLANKET, YOU'RE  
ASSERTING AN ABSOLUTE BLANKET  
YOU CAN NOT TAKE A DEPOSITION OF  
A LEGISLATIVE MEMBER?

>> REGARDING THE LEGISLATIVE  
PROCESS, YE.

>> WELL AGAIN, I DIDN'T SAY  
LEGISLATIVE PROCESS.

YOU CAN NOT TAKE A DEPOSITION OF  
A LEGISLATOR?

BECAUSE YOU DID SAY, IF YOU ARE  
PRODUCING THE STATEMENT, A  
MESSAGE, OF SOMEONE OUTSIDE THE  
LEGISLATURE.

IS THAT PART OF THE PROCESS OR  
IS IT NOT?

>> I THINK IT IS PART OF THE  
PROCESS, YOUR HONOR.

>> WELL THEN, OKAY.

YOU'RE SAYING --

>> ONLY BECAUSE JUSTICE PARIENTE  
MADE ME ANSWER IT WHICH IS IF WE  
DETERMINE THERE HAS TO BE SOME  
KIND OF DEPOSITION, WHAT ARE THE  
PARAMETERS OF THAT DEPOSITION.

>> I MEAN ANYTHING AT ALL, THAT  
DEALS WITH THEIR POSITION IS  
PROHIBITED?

>> YES, SIR.

>> PROHIBITED GROUND, THAT'S  
YOUR POSITION ON THIS.

>> YE.

>> SEEMS TO ME THAT OTHER  
PRIVILEGES DON'T FALL INTO THAT

CATEGORY.

THERE ARE CERTAIN PRIVILEGES,  
LAWYER-CLIENT PRIVILEGES,  
HUSBAND/WIFE PRIVILEGES, THEY  
ARE NOT ABSOLUTE.

THEY ARE CIRCUMSPECT BY THE  
TERMS OF WHAT IS GOING ON.

>> RIGHT.

>> I'M NOT SURE WE HAVE ANY  
ABSOLUTE BLANKET, EVEN JUDGES.

>> WELL, YOUR HONOR, THAT'S WHY  
I TALKED ABOUT THE THREE PILLARS  
BECAUSE IT IS NOT ONLY BASED ON  
THE COMMUNICATION TYPE OF  
PRIVILEGE, IT IS BASED ON  
SEPARATION OF POWERS.

THAT'S WHY YOU DON'T HAVE ANY  
COURT IN THE COUNTRY, IF IT WERE  
AS YOU SUGGEST THERE WOULD BE  
SOME CASES, RIGHT, SOMEWHERE  
THAT SAY, YEAH, YOU CAN DEPOSE A  
LEGISLATOR FOR THIS AND NOT FOR  
THAT.

FOR OBJECTIVE, NOT SUBJECTIVE.  
NO COURT HAS EVER DRAWN THAT  
DISTINCTION.

THIS PRIVILEGE IS MORE THAN THE  
ATTORNEY/CLIENT COMMUNICATION  
PRIVILEGE.

>> IS THIS THE ONLY ABSOLUTE  
PRIVILEGE KNOWN TO OUR  
JURISPRUDENCE?

>> NO.

THE JUDICIAL PRIVILEGE AS WELL.

>> YOU CAN'T ASK A JUDGE CERTAIN  
QUESTIONS ABOUT EXTRA JUDICIAL  
FUNCTIONS?

>> EXTRA, THAT'S WHY I SAID  
WITHIN THE LEGISLATIVE FUNCTION.

>> BEHAVIOR OUTSIDE OF THE  
COURTROOM?

>> YES AND LEGISLATORS TOO.  
I'M NOT SAYING IN THAT SENSE,  
NO.

I'M NOT GOING THAT FAR.

>> OKAY.

>> AND JUST LIKE, IF THE COURT  
IN GIRARDEAU, IF THERE IS  
CRIMINAL INVESTIGATION THAT  
CIRCUMSCRIBES THE PRIVILEGE AS



WELL AND WE EXPAND ASK QUESTIONS TO LEGISLATORS ABOUT THAT.

SO I'M NOT GOING TO THE OTHER EXTREME AS WELL BUT, AS FAR AS THE LEGISLATIVE FUNCTION, ESPECIALLY IN THIS CASE IN DRAFTING MAPS, DRAFTING A STATUTE, THAT IS ALL PART OF THEIR LEGISLATIVE FUNCTION THERE, YOU CAN'T ASK ANY QUESTIONS ABOUT THAT.

THE MERE FACT HAVING TO DEPOSE THEM I SUGGEST IS THEN A VIOLATION OF THE SEPARATION OF POWERS, IS THEN, NOT RESPECT FOR COORDINATE BRANCH OF GOVERNMENT.

WHY ARE WE GOING THROUGH THE EXERCISE ANYWAY IF THE INTENT WE'RE TALKING ABOUT IS THE INTENT OF THE LEGISLATURE AS A WHOLE AND NOT INDIVIDUAL --

>> YES, I JUST WANT TO, THE JUDGE'S ORDER, I GO BACK TO THAT AND I READ IT AND REREAD IT.

HE SAYS THAT THERE ARE SOME CATEGORIES OF INFORMATION, COMMUNICATIONS THAT ARE MOST IN NEED OF THE PROTECTION OFFERED BY THE PRIVILEGE AND SOME LESS IN NEED.

THE THOUGHT PROCESSES OF A LEGISLATURE OR THE COMMUNICATION BETWEEN LEGISLATORS OR BETWEEN LEGISLATORS AND THEIR STAFF FALL WITHIN THE FIRST CATEGORY.

HE SAYS THAT.

>> RIGHT.

>> OKAY.

AND THEN THE SECOND CATEGORY WOULD INCLUDE ROUTINE TRANSMITTAL COMMUNICATIONS BETWEEN LEGISLATORS AND STAFF AND COMMUNICATIONS WITH OUTSIDE CONSULTANTS AND OR CONSTITUENTS ALTHOUGH HE TALKS -- I DON'T FIND THAT ALL DIFFICULT TO UNDERSTAND.

>> YOUR HONOR, THAT ASSUMES WE'RE GOING TO HAVE DEPOSITIONS AND HOW MANY LEGISLATORS ARE WE

GOING TO DEPOSE?

>> YOU WERE SAYING IT IS  
UNWORKABLE.

AND I DIDN'T SEE --

>> LIKE WE'RE NOT GOING TO CALL  
A JUDGE IN TO DETERMINE HOW HE  
DECIDED A CASE BUT WE'LL ASK HIM  
HOW MANY TIMES HE TALKED TO HIS  
LAW CLERK AND WHAT HIS LAW CLERK  
DID AND --

>> AGAIN, NOW WE'RE REALLY GOING  
OUTSIDE OF WHAT THE  
CONSTITUTIONAL AMENDMENT CALLED  
FOR AND WHY THE I AM QUERY IS  
RELEVANT BUT I APPRECIATE YOUR  
ADVOCACY AND YOUR ARGUMENT.

>> OKAY.

YOUR HONOR, UNLESS COURT HAS ANY  
FURTHER QUESTIONS?

>> THANK YOU FOR YOUR ARGUMENT.

>> THANK YOU.

>> REBUTTAL?

>> THANK YOU, YOUR HONOR.

IF THERE'S TIME, I WOULD LIKE TO  
MAKE ABOUT THREE POINTS.

FIRST OF ALL, ON PRIVILEGE, EVEN  
RESPONDENTS DO NOT ASSERT THAT  
THE PRIVILEGE IS ABSOLUTE.

THEY CONCEDE THAT IN SOME  
CIRCUMSTANCES THAT IS CRIMINAL  
LAW INQUIRY, THE LEGISLATIVE  
PRIVILEGE DOES NOT EXIST.

THEY CITE GIRARDEAU, AND IT IS  
CLEAR THAT THERE ARE SOME THINGS  
THAT WOULD TRUMP THE LEGISLATIVE  
PRIVILEGE.

IT IS OUR SUBMISSION THAT WHERE  
YOU HAVE A CONSTITUTIONAL  
PROVISION THAT PROHIBITS CERTAIN  
TYPES OF CRIMINAL INTENT, I MEAN  
OF LEGISLATIVE INTENT, THAT IS,  
PARTISAN AND INTENT, INTENT, TO  
INTRUDE ON MINORITIES YOU MAY  
ALSO INQUIRE OF LEGISLATORS.

THE SECOND POINT I WOULD LIKE TO  
MAKE IS, A POINT THAT WAS MADE  
BY JUSTICE PARIENTE ABOUT  
SEPARATION OF POWERS.

LET'S THINK ABOUT SEPARATION OF  
POWERS.

WE HAVE A CONSTITUTIONAL AMENDMENT, THE DUTY OF THE LEGISLATURE IS TO ABIDE BY THE PROVISIONS OF THE CONSTITUTION. AND THE JUDICIAL ROLE IS TO INTERPRET THAT CONSTITUTIONAL PROVISION AND TO APPLY IT IN A WAY THAT IT HAS MEANING. AND THAT INCLUDES ALLOWING INFORMATION ABOUT THE PROCESS AS IT TOOK PLACE. THE THIRD POINT I WANTED TO MAKE IS A POINT ABOUT CHILLING EFFECT. COUNSEL ARGUES THERE WOULD BE A CHILLING EFFECT. THE CONSTITUTIONAL AMENDMENTS ADOPTED IN 2010 WERE INTENDED TO CHILL THE LEGISLATURE. IT CHANGED WHAT THE LEGISLATURE COULD DO. THE LEGISLATURE COULD NO LONGER DO WHAT IT DID IN 2002 AND ADOPT A PLAN WITH THE INTENTION OF FAVORING A PARTISAN PARTY. THOSE TYPES OF INTENTION WERE DECLARED TO BE UNCONSTITUTIONAL IN 2002. IN 2010. AND WE RESPECTFULLY SUBMIT THAT TO IMPLEMENT THESE CONSTITUTIONAL PROVISIONS YOU HAVE TO ALLOW INQUIRY INCLUDING INQUIRY OF LEGISLATORS. THANK YOU VERY MUCH, YOUR HONOR.