

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

THE FLORIDA HOUSE OF
REPRESENTATIVES; WILL
WEATHERFORD, in his official
capacity as Speaker of the Florida
House of Representatives; THE
FLORIDA SENATE; DON GAETZ, in
his official capacity as President of the
Florida Senate,

Petitioners,

vs.

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA; THE NATIONAL
COUNCIL OF LA RAZA; COMMON
CAUSE; JOAN ERWIN; ROLAND
SANCHEZ-MEDINA, JR.; J. STEELE
OLMSTEAD; CHARLES PETERS;
OLIVER D. FINNIGAN; SERENA
CATHERINA BALDACCHINO;
DUDLEY BATES; KENNETH W.
DETZNER, in his capacity as Florida
Secretary of State,

Respondents.

L.T. Case No.: 2012 CA 2842
(Second Judicial Circuit)

BY _____

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CLERK OF THE COURT

APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR FOR
CONSTITUTIONAL WRIT TO THE
CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT

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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA; THE NATIONAL
COUNCIL OF LA RAZA; COMMON
CAUSE FLORIDA; JOAN ERWIN;
ROLAND SANCHEZ-MEDINA, JR.;
J. STEELE OMSTEAD; CHARLES
PETERS; OLIVER D. FINNIGAN;
SERENA CATHERINA
BALDACCHINO; and DUDLEY BATES,

CASE NO: 2012 CA 2842

Plaintiffs,

vs.

KENNETH W. DETZNER, in his official
Capacity as Florida Secretary of State; THE
FLORIDA SENATE; DON GAETZ, in his
Official capacity as President of the Florida
State Senate; THE FLORIDA HOUSE OF
REPRESENTATIVES; and WILL
WEATHERFORD, in his official capacity
as Speaker of the Florida House of
Representatives,

Defendants.

ORDER DENYING MOTION TO DISMISS

THIS CASE is before me on a motion to dismiss with prejudice filed by the legislative defendants (The House and Senate) and adopted by the Secretary of State. The defendants argue that the Florida Supreme Court has exclusive jurisdiction to consider challenges to legislative redistricting plans and that the Circuit Court thus lacks subject matter jurisdiction to hear the plaintiff's claims. Alternatively, they argue that, even if this court has jurisdiction, the plaintiffs' claims have already been decided by the Florida Supreme Court, and they are therefore precluded from bringing the same claims here. I

have considered the motion, their response thereto, the oral arguments of counsel and the authorities relied upon by each. For the reasons set forth below, I deny the motion.

The defendants' jurisdictional argument may be summarized as follows: Because the Florida Constitution mandates a specific procedure for the Attorney General to file a petition for declaratory judgment with the Florida Supreme Court and for that court to determine the constitutional validity of legislative redistricting plans, and because the constitution provides that the court's judgment on such review is "binding on all the citizens of the state," such determination is intended to be final and jurisdiction to consider any challenges to such plans therefore rests exclusively with the Florida Supreme Court.

The problem with this argument is that it flies in the face of the case law. In the 40 plus years this method of review has been in the Florida Constitution, and despite the several opinions on redistricting, including the two most recent opinions in 2012, the Florida Supreme Court has never held that it has exclusive jurisdiction over challenges to legislative redistricting plans. To the contrary, it has repeatedly stated that it was limited to a "facial" review and that consideration of more fact intensive "as-applied" claims were "better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based upon the evidence presented." *See In Re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828 (Fla. 2002).

In *Brown v Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002), the court explained the difference between a facial review and an as-applied challenge to a legislative redistricting plan, and why the latter came within the jurisdiction of the Circuit Court.

“It is important to differentiate among redistricting cases. There are two general classes of challenges to a redistricting plan. First, there is the facial challenge, in which a party seeks to show that, as written, the plan explicitly violate some constitutional principle. Second, there is an as applied challenge, in which a party seeks to establish that, based on facts existing outside the plan, and as applied to one or more districts, the plan violates the federal or state constitutions, or the Voting Rights Act of 1965.”

Id. at 686.

This decision from the Fourth District Court of Appeal came only months after the Florida Supreme Court’s opinion in the case of *Florida Senate v. Foreman*, 826 So. 2d 279 (Fla. 2002). In that case, two Marion County residents brought a suit in Marion County Circuit Court claiming that the 2002 Senate redistricting plan violated the equal protection clause of the Florida Constitution. The case was resolved on the merits without any sort of jurisdictional challenge in the Circuit Court or in the Supreme Court. Indeed the Florida Supreme Court reiterated its previous holding that trial courts had jurisdiction in such cases:

“Earlier this year, this court issued its opinion in *In Re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002), wherein we found the Florida legislature’s 2002 reapportionment plan to be facially valid. We left open the opportunity for parties to raise as-applied challenges alleging “a race based equal protection claim, a section 2 of the Voting Rights Act claim or a political gerrymandering claim in a court of competent jurisdiction.”

Foreman, 826 So. 2d at 280 (quoting *In Re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 832.)

In its most recent reviews pursuant to Article III, *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597 (Fla. 2012) (“Apportionment I”) and *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) (“Apportionment II”), the Florida Supreme Court had many opportunities to declare that

its jurisdiction on the subject was exclusive. It did not, and I will not presume by its silence that the court meant to overturn its previous pronouncements that as-applied claims are properly brought in circuit court.

The defendants have cited no Florida redistricting case in support of their argument that exclusive jurisdiction rests in the Supreme Court relative to challenges to redistricting plans. The principal case relied upon by the defendants, *Roberts v. Brown*, 43 So. 3d 673, (Fla. 2010), is distinguishable. First, the case does not involve a challenge to a legislative redistricting plan, but rather the giving of advisory opinions as to the validity of ballot summaries of citizen-initiated amendments to the Constitution. Article III specifically states that such advisory opinions are within the jurisdiction of the Florida Supreme Court. There is no similar jurisdictional statement as to the court's review of redistricting plans.

Secondly, the giving of advisory opinions, on any subject, is not within the jurisdiction of the circuit courts. As the Supreme Court noted in *Brown*:

“Further, there is no jurisdiction in any circuit court to render in the form of a declaratory judgment a determination with regard to the impact of a citizen initiative, which pre-election would be an advisory opinion addressing merely the possibility of legal injury based on purely hypothetical facts which have not arisen and are only contingent, uncertain and rest entirely on future possible facts.”

43 So. 3d at 681.

The defendants argue alternatively that, because of the Florida Supreme Court considered factual matters in Apportionment I and Apportionment II, and considered the same issues that are presented in the plaintiffs' claims in this court, those claims are now precluded to the plaintiffs. They assert that the as-applied challenges of the plaintiffs are

nothing more than a rehash of the facial challenges they advanced before the Supreme Court, or that could have been advanced there but were not.

It is apparent from the questions and comments of the justices during oral argument that they had some concern or question about the preclusive effect of their review, and it would have been helpful had the Supreme Court specifically addressed this issue and given clear guidance as to what is and is not precluded from consideration.

We do know, however, from Apportionment II, that the doctrine of res judicata does not apply because of the unique nature of the proceedings before the Supreme Court. Although the justices declined to consider an argument advanced by the plaintiffs after the opinion in Apportionment I, that was based upon considerations of fundamental fairness. Specifically, the court noted that raising the objections after the initial review by the court would foreclose the legislative defendants from responding and correcting any deficiencies found by the court in Apportionment I.

We also know, from the previous opinions of the court that a clear distinction is made between a “facial” review of redistricting plans, which is conducted by the Supreme Court, and an “as-applied” challenge, which is better suited for the Circuit Court. The plaintiffs say their claims in this case are as-applied challenges. The defendants say they are the same facial claims considered by the Florida Supreme Court. It is impossible for me to make that determination from the pleadings themselves.

Although the issues may be the same, the allegations of constitutional infirmity the same, the difference between a facial challenge and an as-applied challenge speaks to the way the challenges are determined rather than the constitutional principles alleged to have been violated. As the Fourth DCA noted in *Brown v. Butterworth*, *supra*, in a facial

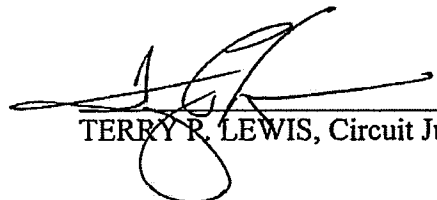
challenge the argument is that the plan, as written, explicitly violates some constitutional principle. In an as-applied challenge, the argument is that, based on facts that are not apparent on the face of the plan, and as applied to one or more specific districts, the plan violates one or more constitutional principles.

Certainly, I do not intend to enter any judgment in this case that is contradictory to, or inconsistent with, the opinions of the Florida Supreme Court in Apportionment I or Apportionment II. To the extent that the plaintiffs seek only a rehash of facial arguments made before the Florida Supreme Court, they will be disappointed. But to the extent their claims are as-applied challenges to the plans, they are entitled to develop and to present relevant evidence to support their claims. The defendants likewise are entitled to prepare and present contrary evidence in defense.

Accordingly, for the above reasons, I find dismissal of the complaint on any of the grounds urged by the defendants to be unwarranted, and therefore it is

ORDERED and adjudged that the motion to dismiss with prejudice is hereby **DENIED.**

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 17 day of January, 2013.


TERRY R. LEWIS, Circuit Judge

Copies to:

Counsel of Record

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

THE LEAGUE OF WOMEN VOTERS)
OF FLORIDA; THE NATIONAL)
COUNCIL OF LA RAZA; COMMON)
CAUSE FLORIDA; JOAN ERWIN;)
ROLAND SANCHEZ-MEDINA, JR.;)
J. STEELE OLMSTEAD;)
CHARLES PETERS; OLIVER D.)
FINNIGAN; SERENA CATHERINA)
BALDACCHINO; AND DUDLEY BATES)

Plaintiffs,

v.

KENNETH W. DETZNER, in his official)
capacity as Florida Secretary of State; THE)
FLORIDA SENATE; MICHAEL)
HARIDOPOLOS, in his official capacity)
as President of the Florida State Senate;)
THE FLORIDA HOUSE OF)
REPRESENTATIVES; and DEAN)
CANNON, in his official capacity as)
Speaker of the Florida House of)
Representatives,)

Defendants.

CASE NO.: _____

C-05
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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FILED

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, COMMON CAUSE FLORIDA, (hereinafter, "the Coalition"), J. STEELE OLMSTEAD, ROLAND SANCHEZ-MEDINA, CHARLES PETERS; OLIVER D. FINNIGAN; SERENA CATHERINA BALDACCHINO; DUDLEY BATES and JOAN ERWIN, hereby allege:

INTRODUCTION

1. On November 2, 2010, the voters of Florida approved Amendment 6 (one of the FairDistricts Amendments) for inclusion in the Florida Constitution, greatly expanding the standards that govern the Legislature during legislative apportionment, including apportionment of the Florida State Senate (“Senate”). The overall goal of the Amendment was to level the electoral playing field so that voters have a real opportunity to choose their elected officials fairly rather than having elections predetermined by those who draw the district lines. In order to accomplish this, the amendment requires the Legislature to redistrict without partisan or incumbent favoritism or discrimination, while respecting existing geographic and political boundaries and creating compact districts so that bizarrely shaped districts are avoided. After its passage, the Amendment was codified as Article III, Section 21, of the Florida Constitution.

2. With the adoption of Article III, Section 21, the Florida Constitution now imposes stringent requirements on the Legislature in conducting legislative reapportionment.

3. The new standards enumerated in Article III, Section 21, are set forth in two tiers, each of which contains three requirements.

a. The first tier, contained in Section 21(a), lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory.

b. The second tier, contained in section 21(b), lists three additional requirements, the compliance with which is subordinate to those listed in the first tier of Section 21 and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population

as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries.

c. The order in which the Constitution lists the standards within tiers one and two is “not [to] be read to establish any priority of one standard over the other within that [tier].” Art. III, § 21(c).

4. After the Florida Supreme Court struck down the first Senate map enacted by the Legislature in the 2012 redistricting cycle, the Legislature adopted a new Senate plan – CS-SJR 2-B (S9030) – that once again reflected blatant incumbent favoritism and partisan gamesmanship. The Legislature drew districts that will keep incumbent Senators in office, assist incumbent House members with election to the Senate, impact internal Senate leadership battles, and make gains for the controlling party. S9030 violates both the intent and the letter of the constitutional requirements of Article III, Section 21.

5. Upon *facial* review, considering only the facts that appeared on the record before it, and considering only specific areas of the state that were challenged in its review of the first Senate map, the Supreme Court found S9030 to be valid. Thus, plan S9030 is in place for the 2012 elections. Plaintiffs bring this *as-applied* challenge seeking declaratory and injunctive relief to prevent the implementation and enforcement of S9030 in future elections. S9030 infringes upon Plaintiffs’ rights to a fair and neutral redistricting plan, free of political gerrymandering or incumbent protection efforts. It likewise denies Plaintiffs’ rights to a redistricting plan that respects the constitutionally required redistricting principles of compactness and respect for political and geographical boundaries. The way the Legislature drew S9030 was neither necessary nor justified, and its potential implementation and enforcement causes injury to these voters and all citizens of Florida in violation of their rights under Article III, Section 21.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to Fla. Stat. § 26.012 (2012) and Article V, Section 5(b) of the Florida Constitution. Venue is proper pursuant to Fla. Stat. § 47.011 (2011). Plaintiffs' action for declaratory and injunctive relief is authorized by Fla. Stat. § 86.011(2011) as well as Fla. Stat. § 26.012(3) (2012).

PARTIES

Plaintiffs

7. Plaintiffs are citizens and registered voters residing throughout the State of Florida and organizations representing the interests of Floridians who supported the FairDistricts Amendments and will be harmed by the Legislature's Senate Plan S9030.

8. Plaintiff THE LEAGUE OF WOMEN VOTERS OF FLORIDA ("LWV" or "The League") is a nonpartisan organization founded in 1939 to promote active citizenship through informed and engaged participation in government. The League was one of the primary proponents of the FairDistricts Amendments and its members have been actively engaged in the redistricting process. A substantial number of its members will be harmed by the Legislature's Senate Plan.

9. Plaintiff THE NATIONAL COUNCIL OF LA RAZA (NCLR) is a nonpartisan, nonprofit Hispanic civil rights and advocacy organization in the United States, working to improve opportunities for Hispanic Americans. A substantial number of its members will be harmed by the Legislature's Senate Plan.

10. Plaintiff COMMON CAUSE FLORIDA (CCF) is a nonpartisan, nonprofit advocacy organization dedicated to helping citizens make their voices heard in the political process and hold their elected leaders accountable to the public interest. Common Cause Florida was also a primary proponent of the FairDistricts Amendments and its members have been

actively engaged in the redistricting process. A substantial number of its members will be harmed by the Legislature's Senate Plan.

11. Plaintiff J. STEELE OLMSTEAD is a citizen and registered voter in Tampa, Florida.

12. Plaintiff ROLAND SANCHEZ-MEDINA is a citizen and registered voter in Coral Gables, Florida.

13. Plaintiff JOAN ERWIN is a citizen and registered voter in Orlando, Florida.

14. Plaintiff CHARLES PETERS is a citizen and registered voter in Jensen Beach, Florida.

15. Plaintiff OLIVER D. FINNIGAN is a citizen and registered voter in Celebration, Florida.

16. Plaintiff SERENA CATHERINA BALDACCHINO is a citizen and registered voter in Daytona Beach, Florida.

17. Plaintiff DUDLEY BATES is a citizen and registered voter in Altamonte Springs, Florida.

Defendants

18. Defendant KEN DETZNER, Secretary of State for the State of Florida, is the State's chief elections officer. Defendant Detzner is responsible for administering and supervising the elections of the Florida Senate. He is sued in his official capacity.

19. Defendant the FLORIDA SENATE ("Senate") is one house of the Legislature of the State of Florida. Defendant FLORIDA SENATE is responsible for drawing reapportionment plans for the Senate that comply with the Florida Constitution.

20. Defendant MIKE HARIDOPOLOS is the President of the Florida State Senate. He is sued in his official capacity. Defendant FLORIDA SENATE is responsible for drawing

reapportionment plans for the Senate that comply with the Florida Constitution.

21. Defendant FLORIDA HOUSE OF REPRESENTATIVES (“House”) is the other house of the Legislature of the State of Florida. Defendant FLORIDA HOUSE OF REPRESENTATIVES is responsible for drawing reapportionment plans for the Senate that comply with the Florida Constitution.

22. Defendant DEAN CANNON is the Speaker of the Florida House of Representatives. He is sued in his official capacity. Defendant FLORIDA HOUSE OF REPRESENTATIVES is responsible for drawing reapportionment plans for the Senate that comply with the Florida Constitution.

The Passage of S9030

23. Following the Florida Supreme Court’s March 9, 2012 decision invalidating the Legislature’s first Senate Plan, the Governor called a special legislative apportionment session. On Saturday March 17, Senator Don Gaetz, Chairman of the Senate Reapportionment Committee, filed the first proposed reapportionment plan, S9016, on the Senate’s website. The Committee voted out S9016 without amendment on March 21 by a 21 to 6 vote. Chairman Gaetz then filed an amendment to randomly renumber the districts from the S9016 Plan. Using a lottery system, the districts were renumbered. The renumbered plan was passed by the Senate Reapportionment Committee as S9026.

24. S9026 then went to the full Senate. On March 22, amendments were offered on the Senate floor. Senator Chris Smith pointed out that in S9026, both Daytona Beach and its African-American community had been split right down the middle with just under half in District 6 and just over half in District 8. This was done with intent to enhance Republican performance in both districts and to disfavor Democrats. Senator Smith offered an amendment that would have kept Daytona Beach and its African-American community whole. The Senate

rejected Senator Smith's amendment.

25. Senator Jack Latvala then offered a substitute amendment, S9030, which had not been raised in committee or discussed prior to its introduction on the floor. Indeed, despite repeated assurances by Senate leadership that no amendments would be taken up without giving the public and other legislators ample opportunity to review them, the amendment was filed just two minutes before the deadline of 5:00 pm of March 21. This amendment altered the lines of four districts in Central Florida: Districts 15, 24, 21 and 26. Senator Latvala said he was offering the last minute change at the request of the Mayor of Plant City, who purportedly wanted his city to be kept in a Hillsborough County district. In reality, Senator Latvala and other Senators knew that the amendment was designed to ensure that two Republican Senate candidates (one a House incumbent, Denise Grimsley, and one a former House member, Bill Galvano) who had been pitted against one another in S9026 would not have to run against one another. S9030 put them in two separate districts, District 21 (Grimsley) and District 26 (Galvano). When asked about his intent on the Senate floor, Senator Latvala did not deny that this was the purpose and effect of his amendment.

26. More than one Senator openly questioned Senator Latvala's intent in offering the amendment, pointing out that passing the amendment would jeopardize the entire plan's chances before the Supreme Court. One Senator openly suggested that the intent of the amendment was to help some "friends" to come over to the Senate from the House. Even with knowledge that the intent of the amendment was to achieve a partisan gain for Republican incumbents, the amendment passed and Senators adopted S9030 on March 22, 2012 – the day after it was introduced.

27. The measure then went to the House. S9030 was voted out of the House Redistricting Committee by a 13 to 7 vote on March 26. On the House floor the next day,

several House members questioned why there were no real incumbent pairings in S9030. Representative Evan Jenne offered an amendment in which eight Senate incumbents would have been pitted against one another. Nonetheless, the House rejected Representative Jenne's amendment and passed S9030 by a vote of 61-47.

28. S9030, as adopted by the Legislature, does not comply with Article III, Section 21. As more specifically alleged below, the Legislature's reapportionment plan demonstrates intent to favor Senate and House incumbents and to favor the party in control of the Legislature. Furthermore, a number of individual districts violate the constitutional imperatives of compactness and respect for political and geographical boundaries without justification.

29. Plaintiffs seek the opportunity to develop a full record, including discovery of all necessary evidence, that was unavailable in the facial review conducted by the Supreme Court, but that will demonstrate the unconstitutionality of the Senate Plan.

Whole-Plan Constitutional Violations

30. S9030 was drawn for the prohibited purpose of incumbent and partisan favoritism. The Legislature's entire process was tainted by the secrecy in which it was conducted. There was no genuine opportunity for input into (or even review of) the final map by the public or even by all legislators. The Senate Reapportionment Committee did not draw the redistricting plan in public. Staff or others drew it privately at the direction of the Senate leadership with the intent to favor incumbents and to advantage the political party of those Senate leaders.

31. S9030 does not pit any non-term-limited incumbents against one another in any meaningful way. The Senate drew districts and the entire plan with specific intent to favor non-term-limited incumbents.

32. Moreover, the Legislature intentionally designed Senate districts to favor a

number of House incumbents who were planning to run for open districts in the Senate. Some of those incumbents sat on the House Redistricting Committee.

33. The overall effects of S9030 demonstrate such a severe partisan skew that the intent to favor the party in power is clear. Even though Florida is basically a 50/50 state in terms of partisan division between Democratic and Republican voters – indeed, cumulatively in the last five presidential elections, Democratic Presidential candidates have received slightly more votes in total than Republican candidates in Florida – the Legislature’s Senate map is likely (and is intended) to result in the Republicans retaining a highly disproportionate share of the seats in the Senate. The Legislature purposefully achieved its goal of maximum partisan gain in part by intentionally packing as many Democrats as possible into as few districts as possible.

34. The Legislature intentionally drew S9030 to favor the Republican Party and Republican incumbents and to disfavor the Democratic Party.

District-Specific Constitutional Violations

35. The overall invalidity of S9030, based on its rampant partisan and incumbent favoritism, is borne out in the analysis of individual districts. In paragraphs 36 – 65, this Complaint details district-specific violations of which Plaintiffs are presently aware. Plaintiffs reserve the right to assert other violations should they discover evidence to support them.

A. Districts 6 And 8 Are Unconstitutional.

36. In Districts 6 and 8, the Legislature blatantly violated the requirement to draw compact districts that utilize existing political and geographical boundaries where feasible. The Legislature instead intentionally drew Districts 6 and 8 to favor the Republican Party and incumbents. It intentionally created two Republican performing districts by splitting Daytona Beach and its African-American community in half and diluting the voting power of its African-American and highly Democratic voters. Rather than keep Daytona Beach whole and create one

safely Republican district and increase the Democratic performance of the other district, Legislators intentionally chose to split Daytona Beach, thus intentionally favoring the party in control.

37. Daytona Beach is a city of more than 61,000 people, and African-Americans are nearly a third of the population. The city of Daytona Beach voted 61.6% for the Democratic candidate in the 2008 presidential race and 63.9% for the Democratic candidate in the 2010 gubernatorial election. In its systematic effort to ensure that those African-American and Democratic voters would not have an impact on elections, legislators created a border between Districts 6 and 8 that follows a minor roadway for part of the way and no discernable boundary for other parts of the way, thus violating the tier two requirements of compactness and utilization of existing political and geographical boundaries.

38. During floor proceedings, Senator Chris Smith warned the Senate about the problems with slicing Daytona and its African-American community in half, and proposed an amendment that would have kept Daytona Beach wholly within District 8. Adding Daytona Beach to District 8 would have elevated the Democratic performance of that district above the 48.9% that exists in S9030. Fully aware of these consequences, the Senate rejected the Smith amendment.

39. Moreover, District 8 was drawn with intent to favor House incumbent Dorothy Hukill, the Co-Chair of the Senate Redistricting Subcommittee in the House, who had announced her intent to run for the Senate. Legislators intentionally drew Senate District 8's contorted borders to follow enough of her house district borders to ensure that 98.39% of the constituents in her House District are in the Senate district for which she wanted to run.

40. The Legislature's disregard for the constitutional imperatives of Section 21 was intentional and motivated by a desire to favor particular incumbents and the party in control.

B. Districts 10 And 13 Are Unconstitutional.

41. Senators Andy Gardiner and David Simmons are both extremely influential in the Senate. During the redistricting process, they lived very close to each other in Orange County. Their homes were flanked on the west by Senate District 12 and on the South and East by Senate District 14. When they drew the first Senate map, legislators had carefully avoided pitting Senators Gardiner and Simmons against each other. But the Supreme Court required that portion of the map to be redrawn, creating a situation where pairing the two powerful senators was unavoidable. So in drawing S9030, the Legislature strained to create two districts (Districts 10 and 13) that would accommodate the electoral wishes of both Simmons (District 10) and Gardiner (District 13).

42. District 10 was drawn with specific intent to favor Senator Simmons. The bulk of the district's population is in Seminole County, the county of Senator Simmons's political base and where he had lived for most of his political career. He had only recently moved to Orange County and still owned more than one home in Seminole County, and 64.55% of his old Senate district is contained in the new District 10. The Legislature intentionally tailor-made District 10 for him.

43. The Legislature also had to contort the map to make a district from which Senator Gardiner could run. It intentionally created District 13 that encompassed his home in order to ensure that he had a place to run. To do that, the Legislature had to connect a bizarrely shaped appendage that encompasses his home to a district that goes all the way from Orange County to the Atlantic Ocean.

44. Districts 10 and 13 were drawn with the knowledge and intent that Senator Simmons would run from District 10 and Senator Gardiner would have his own district in which to run, District 13.

45. The Legislature drew Districts 10 and 13 with intent to favor two incumbents. Its disregard for the constitutional imperatives of Section 21 was intentional and motivated by an intent to favor particular incumbents and the party in control.

C. Districts 17, 19, and 22 Are Unconstitutional.

46. The Legislature's configuration of districts in the Tampa Bay region was designed by Senate leadership with the intent to maintain its party's dominance of the area's Senate seats and protect incumbents.

47. In order to accomplish this goal, legislators gerrymandered Senate District 22 to cross Tampa Bay so it encompasses population in both Pinellas and Hillsborough Counties when it could easily have been kept entirely in Pinellas. If the district were drawn entirely in Pinellas, it would be a naturally-occurring toss-up district. Instead, the gerrymandered District 22 as drawn by the Legislature intentionally favors Republicans and will reliably perform Republican.

48. The Legislature unnecessarily violated the tier two requirements of compactness and utilizing political and geographical boundaries in creating District 22. This in itself provides evidence of intent to favor Republicans. In combination with the obvious partisan impact of the District 22 gerrymander, the evidence of a tier one violation is even stronger.

49. Districts 17 and 19 were drawn with intent to favor the party in power and its incumbents. District 19 is a minority district that has traditionally elected an African-American candidate. Using the oldest trick in the redistricting playbook, Legislators packed as many Democrats as possible into District 19 in order to ensure that District 17 would remain safely Republican. In this case, the Legislature unnecessarily packed Democrats into District 19, including a large group of Hispanic voters who naturally would have been in District 17 had the Legislature adhered to tier two standards. This has the triple effect of (1) lowering the African-American vote share in District 19; while (2) lowering the Hispanic and Democratic vote total in

District 17 to make it safe for Republicans; and (3) eliminating the ability of Hispanic voters to have a meaningful electoral opportunity or influence in District 17.

50. One example of favoring an incumbent can be found in District 17. Although he subsequently pulled out of the race, the Legislature initially drew the district with intent to favor incumbent Senator Jim Norman by including 68% of the constituents from his former district in the visually non-compact District 17 that sprawls from Hillsborough into Pasco County. This was purposefully accomplished by retaining constituents from precincts in which Norman had not previously done well and adding territory adjacent to where he had received a greater percentage of the vote.

51. The Legislature's disregard for the constitutional imperatives of Section 21 was intentional and motivated by intent to favor particular incumbents and the party in power.

D. Districts 21 and 26 Are Unconstitutional.

52. Legislators knowingly accepted the last minute change to Districts 21 and 26 offered by Senator Latvala with the intent to favor the Republican party and to ensure that two party insiders could each win seats in the Senate. Incumbent Representative Denise Grimsley (Sebring) had made it clear that she intended to run for the Senate, as had former Representative Bill Galvano (Bradenton). Both had begun to campaign for the Senate. S9026 drew both into District 26. It was widely known to members of the Legislature that in offering his amendment (S9030), Senator Latvala intended to separate Sebring from District 26 so that Representatives Galvano and Grimsley did not have to run against one another and so that each of them could win seats in the Senate. In fact, S9030 moved district lines so that Representative Grimsley's home is now in District 21, Representative Galvano's home is in District 26, and they do not have to run against each other.

53. In addition to intentionally drawing lines to favor Representatives Grimsley and

Galvano, this last minute change by the Florida Legislature was also intended to help and thus intentionally favor Senator Latvala in his quest to become Senate President by helping candidates who were pledged to vote for him.

54. The Legislature's disregard for the constitutional imperatives of Section 21 was intentional and motivated by intent to favor particular incumbents and the party in power.

E. District 32 Is Unconstitutional.

55. Much like Senate Districts 2 and 4 that the Supreme Court invalidated on March 9, 2012, the Legislature's District 32 sprawls along the coast, dividing four counties in a clear tier two violation. There is no tier one justification for this disregard of political and geographical boundaries. The Legislature's real purpose for adopting this configuration was to favor incumbent Senator Joe Negron. Drawing District 32 in this way favors Senator Negron by enabling him to run in a district that contains 72.2% of his former constituents.

56. The Legislature's coastal District 32 looks as if someone pushed it northward from where it otherwise should have abutted District 27, creating a gap into which District 25 strangely protrudes. And indeed, by pushing it northward into Indian River County, the district avoids including Democratic voters to the south and is maintained as safely Republican. The Legislature designed the lines of this district and adjacent districts to favor a political party and to protect one or more incumbents.

57. Had the Legislature instead respected the boundary of Martin County, or had it included more voters from St. Lucie County, the district would have become less safe for incumbent Senator Negron.

58. The Legislature intentionally disregarded political and geographic boundaries to favor particular incumbents and the party in power.

F. District 39 as well as surrounding Districts 35, 37 and 40 are Unconstitutional.

59. In District 39, under the guise of protecting minority (African-American) voters, the Senate intentionally sacrificed compactness and created an illogical and bizarrely shaped district, packing Democrats into the district in excessive numbers in order to favor certain incumbents in the area and ensure that nearby districts remain safe for the party in power.

60. At the two eastern corners of District 39, separate long, spindly appendages protrude and make the district extremely non-compact. The northern appendage stretches almost 19 miles from the rest of the district, narrowing to the width of the airport before it turns south and widens again. The southern appendage stretches over 11 miles from Homestead into Richmond Heights.

61. These appendages amble through communities to grab pockets of Democratic, African-American voters for the purpose of packing as many Democratic, African-American voters as possible into District 39 in order to remove their electoral power or influence from surrounding districts.

62. By drawing District 39 as it did, the Senate intentionally preserved safe seats for several Senate incumbents, including those in adjacent Districts 35, 37 and 40, and at least one House incumbent who planned to run for District 39. With respect to Districts 37 and 40, the Legislature drew districts that are so favorable for the Republican incumbents that each of these incumbents is running for reelection in 2012 unopposed. In District 35, the Democratic incumbent has an almost ten-point performance advantage.

63. The Legislature intentionally drew the map in this way to favor particular incumbents and the party in power in violation of the compactness requirement of Section 21.

COUNT I

64. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

65. S9030 was drawn with the intent to favor the controlling political party and to disfavor the minority political party in violation of the Florida Constitution, Article III, Section 21(a).

COUNT II

66. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

67. S9030 was drawn with the intent to favor certain incumbents and disfavor other incumbents in violation of the Florida Constitution, Article III, Section 21(a).

COUNT III

68. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

69. The Legislature drew the following individual districts in S9030 intentionally to favor the controlling political party and to disfavor the minority political party in violation of the Florida Constitution, Article III, Section 21(a): Districts 6, 8, 10, 13, 17, 19, 21, 22, 26, 32, 35, 37, 39, and 40.

COUNT IV

70. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

71. The Legislature drew the following districts in S9030 intentionally to favor certain incumbents and disfavor others in violation of the Florida Constitution, Article III, Section 21(a): Districts 6, 8, 10, 13, 17, 19, 21, 22, 26, 32, 35, 37, 39, and 40.

COUNT V

72. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

73. The following individual districts in S9030 are not compact in violation of the Florida Constitution, Article III, Section 21(b): Districts 6, 8, 13, 17, 22, 32, and 39.

COUNT VI

74. Plaintiffs reallege the facts set forth in paragraphs 1 through 63, above.

75. The following individual districts in S9030 fail to utilize existing political and geographic boundaries where feasible in violation of the Florida Constitution, Article III, Section 21(b): Districts 6, 8, 17, 22 and 32.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

- a. Assume jurisdiction of this action.
- b. Issue a declaratory judgment, pursuant to Fla. Stat. § 86.011 (2012) as well as Fla. Stat. § 26.012(3) (2012) declaring that the Legislature's Senate Plan (S9030) and/or individual districts in the Legislature's Senate Plan violate Article III, Section 21 of the Florida Constitution.
- c. Issue preliminary and permanent injunctions enjoining the Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the proposed Senate district boundaries as drawn in the Legislature's Senate Plan (S9030), including enjoining Defendants from conducting any post-2012 elections for the Senate based on the Legislature's Senate Plan (S9030).
- d. Enter an order adopting a lawful Senate redistricting plan for the State of Florida or directing the Florida Senate and the Florida House to adopt a lawful Senate districting plan for the State of Florida.
- e. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case.
- f. Issue an order requiring Defendants to pay Plaintiffs' costs and expenses

incurred in the prosecution of this action, as authorized by Fla. Stat. § 86.081 (2012).

g. Grant such other and further relief as it deems is proper and just.

Respectfully submitted this 5th day of September, 2012.



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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA, *et al.*,

Plaintiffs,

v.

Case No. 2012-CA-002842

KENNETH W. DETZNER, *et al.*,

Defendants.

THE LEGISLATIVE PARTIES' MOTION TO DISMISS

Defendants, the Florida House of Representatives; Dean Cannon, in his official capacity as Speaker of the Florida House of Representatives; the Florida Senate; and Michael Haridopolos, in his official capacity as President of the Florida Senate, respectfully move the Court to dismiss Plaintiffs' Complaint with prejudice.

This Court should dismiss the Complaint for three independent reasons:

First, the Florida Supreme Court has exclusive jurisdiction to determine the validity of state legislative redistricting plans under the standards set forth in the Florida Constitution. As a consequence, this Court is without subject-matter jurisdiction to entertain Plaintiffs' Complaint.

Second, the Florida Supreme Court has entered a declaratory judgment determining that the Senate Plan is valid under the Florida Constitution. Because the Florida Constitution expressly states that the Supreme Court's declaratory judgment is "binding upon all the citizens of the state," *see* Art. III, § 16(d), Fla. Const., the Court's judgment has preclusive effect and would bar Plaintiffs' claims even if this Court had subject-matter jurisdiction to consider them.

Third, Plaintiffs’ so-called “as-applied” challenge to the Senate Plan is identical to the challenge to the Senate Plan previously rejected by the Florida Supreme Court. When an “as-applied” claim is subsumed within a prior facial challenge, the claim is precluded.

INTRODUCTION

Plaintiffs allege that Senate Joint Resolution 2-B, which the Florida Legislature enacted on March 27, 2012, to establish new electoral districts for the Florida Senate, violates standards contained in Article III, Section 21 of the Florida Constitution. Yet the Florida Supreme Court reviewed and validated the Senate Plan on April 27, 2012, in accordance with the exclusive and comprehensive procedures established by Article III, Section 16 of the Florida Constitution for judicial review of state legislative redistricting plans. In fact, the Supreme Court considered and rejected each and every one of the forty-two claims raised by Plaintiffs in this case.

This Court should reject Plaintiffs’ invitation to overrule the Supreme Court. The Florida Constitution creates one process for judicial review of state legislative redistricting plans, and that process does not include the circuit court. The Constitution grants exclusive jurisdiction of these claims to the Florida Supreme Court in an original action.

Even if this Court had jurisdiction, the claims have already been decided, and, under the express terms of the Constitution, that decision is binding on all citizens. Moreover, because the Legislature enacted the Senate Plan in direct response to the Supreme Court’s earlier review of the Legislature’s initial plan for Senate districts, and because the Senate Plan was subsequently approved by the Supreme Court, a circuit-court do-over would violate basic notions of orderly government, fundamental fairness, justifiable reliance, and separation of powers. As a matter of constitutional law, history, and policy, the Supreme Court’s determination is entitled to finality.

In addition, where an “as-applied” challenge is subsumed by a prior facial challenge, it is precluded. Despite Plaintiffs’ claim that they bring an “as-applied” challenge to the Senate Plan, their claims are identical to the challenges to the Senate Plan previously rejected by the Supreme Court. Plaintiffs cannot relitigate those claims, regardless of how they choose to label them.

ARTICLE III, SECTION 16 OF THE FLORIDA CONSTITUTION

Article III, Section 16 was adopted by the voters of Florida in 1968, together with the broader revisions that comprised the 1968 Constitution. It requires the Florida Supreme Court to determine the validity of state legislative redistricting plans in an original action brought by the Attorney General, and provides that the Court’s determination of validity is “binding upon all the citizens of the state.” When framed in 1968, Article III, Section 16 was a studied and deliberate response to an epidemic of redistricting litigation afflicting Florida’s government throughout the 1960s, and was designed to ensure finality and stability, as well as a constitutionally valid plan.

From 1962 to 1967, Florida experienced tremendous instability in government. At considerable expense to the public and detriment to orderly government, the State’s legislative districts remained in constant limbo between alternating court battles and special apportionment sessions of the Legislature. During this period, as discussed below, the Legislature enacted, and the courts invalidated, no fewer than four legislative redistricting plans. The Legislature met in special session six times to address legislative redistricting, and even the United States Supreme Court intervened three times. Ultimately, a federal court imposed its own redistricting plan and ordered new elections in all state legislative districts. The election was held one week before the 1967 regular session. Article III, Section 16 was drafted with this turbulence fresh in all minds.

Article III, Section 16 responded to the chaos of endless redistricting litigation with a new, comprehensive, fail-safe mechanism for the adoption and prompt judicial review of state

legislative redistricting plans. Article III, Section 16 created a self-contained process that imposes a series of mandates on the Legislature, the Attorney General, the Governor, and the Florida Supreme Court, and provides for all possible contingencies in order to guarantee the final accomplishment of a valid and timely apportionment. While ensuring the validity of the plan, it achieved the long-sought values of finality, stability, certainty, and confidence in government.

Article III, Section 16 directs the Legislature, in the second year after each census, to adopt a state legislative redistricting plan. Art. III, § 16(a), Fla. Const. If the Legislature fails to adopt a redistricting plan, the Governor must reconvene the Legislature in special apportionment session, and, if the Legislature again fails to perform its “mandatory duty” to apportion the state, *id.*, the Attorney General must petition the Florida Supreme Court, and the Court must make the apportionment, *id.* Art. III, § 16(b). If the Legislature does adopt a redistricting plan, either at its regular session or a special apportionment session, the Attorney General must petition the Court “for a declaratory judgment determining the validity of the apportionment.” *Id.* Art. III, § 16(c).

If the Court determines that the apportionment is invalid, the Governor must reconvene the Legislature in extraordinary apportionment session, and the Legislature must adopt a new redistricting plan “conforming to the judgment of the supreme court.” *Id.* Art. III, § 16(d). If the Legislature does not adopt a plan, the Attorney General must petition the Court, and the Court must make the apportionment. *Id.* Art. III, § 16(f). If the Legislature enacts a plan, the Attorney General must petition the Court for a determination of validity. *Id.* Art. III, § 16(e). If the Court determines that the plan is invalid, the Court must make the apportionment. *Id.* Art. III, § 16(f).

The design and structure of Article III, Section 16, no less than its historical origins, make clear that its purpose is to secure a redistricting plan that is *valid* and *final*. The Supreme Court’s declaratory judgment determining a redistricting plan to be valid is expressly “binding”

on all citizens. *Id.* Art. III, § 16(d). Each mandate imposed on the Attorney General, Governor, and Supreme Court is strictly time-limited, as are special apportionment and extraordinary apportionment sessions, and each possible sequence of events leads promptly and unfailingly to a redistricting plan drawn or approved by the Supreme Court. Article III, Section 16 promised a remedy for the unending litigation that characterized the period before its enactment.

THE 2012 REDISTRICTING PROCESS

On November 2, 2010, Florida voters approved Amendment 5, which imposed new, substantive standards on state legislative districts. Codified as Article III, Section 21 of the Florida Constitution, Amendment 5 prohibits the drawing of districts with an intent to favor or disfavor incumbents or political parties, protects the voting rights of minorities, and requires that districts be compact and, where feasible, utilize existing political and geographical boundaries.

On February 9, 2012, after conducting twenty-seven public hearings at locations across the state, as well as twenty-three meetings of redistricting committees and subcommittees, the Florida Legislature adopted Senate Joint Resolution 1176, containing a new redistricting plan for state legislative districts. As required by Article III, Section 16, the Attorney General petitioned the Florida Supreme Court for review, and the Supreme Court permitted “adversary interests to present their views.” *Id.* Art. III, § 16(c). The organizations that are Plaintiffs in this case filed briefs in opposition and participated in oral argument, as did the Florida Democratic Party.

On March 9, 2012, the Supreme Court issued its opinion. The Court validated the districts established for the House of Representatives, and invalidated elements of the plan for the Senate. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (“*Apportionment I*”). In a lengthy opinion that assessed the Legislature’s compliance with all standards contained in the Florida Constitution, the Court held that eight Senate districts

violated Amendment 5. It directed the Legislature to redraw these and affected districts, conduct a functional analysis of minority districts, determine whether the City of Lakeland can be preserved within one district, and correct the district-numbering of Senate districts. *Id.* at 686.

Pursuant to Article III, Section 16(d), the Legislature convened in extraordinary apportionment session. On March 27, 2012, the Legislature adopted Senate Joint Resolution 2-B, which set forth a new apportionment plan “conforming to the judgment of the supreme court.” Art. III, § 16(d), Fla. Const. The Attorney General submitted the Senate Plan to the Supreme Court. The Court permitted adversary interests to present their views, and the organizational Plaintiffs here again filed briefs in opposition and participated in oral argument. The Court rejected all of their arguments. In another lengthy opinion, the Court concluded that the Senate Plan is “constitutionally valid under the Florida Constitution.” *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 877 (Fla. 2012) (“*Apportionment II*”).

In its decisions, the Supreme Court clarified several features of its review process:

- The Court’s review is **plenary**. The Court must determine compliance with all standards set forth in the Florida Constitution.
- The Court’s review is **unique**. The Constitution contemplates a unique role for the Supreme Court in the validation of state legislative redistricting plans.
- The Court’s review is **independent**. In determining compliance with state constitutional standards, the Court is not confined to the claims raised by interested parties.

Thus, while the Legislature argued that the Court should not decide claims that present disputed facts,¹ the Court disagreed. The Court has a unique and independent responsibility to determine

¹ The organizational Plaintiffs here argued that the Supreme Court is bound to resolve *all* claims. *See* Reply Brief of the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida in Opposition to the Legislature’s Joint Resolution of

validity under all state constitutional standards. *See, e.g., Apportionment I*, 83 So. 3d at 600 (“[T]he citizens of the state of Florida, through the Florida Constitution, employed the essential concept of checks and balances, . . . entrusting this Court with the responsibility to review the apportionment plans to ensure they are constitutionally valid.”); *id.* (“Under this Court’s plenary authority to review legislative apportionment plans, we now have jurisdiction to resolve all issues by declaratory judgment”) (marks omitted); *id.* at 606 (“[T]he Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution.”); *id.* at 684 (“[T]he citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in article III, sections 16 and 21.”).²

Legislative Apportionment at 3-4, *In re Senate Joint Resolution of Legislative Apportionment 1176*, Case No. SC12-1 (Fla. Feb. 22, 2012) (“Contrary to the Florida Senate’s view that the Court should decline to resolve [fact-intensive] claims in this proceeding, it is the Court’s constitutional duty to resolve these claims so that it can determine the validity of the Legislature’s plans under the Florida Constitution.”) (marks and citation omitted). Nevertheless, they also requested at oral argument that the *validation* of a redistricting plan should be without prejudice their ability to challenge it subsequently in circuit court. (Exh. A at 14:21-15:1.) The attached excerpts of oral argument show that Plaintiffs’ suggestion met with decided skepticism. (*Id.* at 15:2-18:6.) Regardless, their position finds no support in the Court’s lengthy opinions, or in the Constitution, which expressly makes the Court’s declaratory judgment binding on all citizens.

² *See also Apportionment I*, 83 So. 3d at 597 (“After the Legislature draws the apportionment plans, *this Court is required* by the Florida Constitution to review those plans to ensure their compliance with the constitution.”) (emphasis added); *id.* at 598 (“[The Florida Constitution] expressly *entrusts this Court with the mandatory obligation* to review the Legislature’s decennial apportionment plans.”) (emphasis added); *id.* at 607 (“It is *this Court’s duty*, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements”) (emphasis added); *id.* at 608 (“Rather, *this Court is required* by the state constitution to evaluate whether the Legislature’s apportionment plans conflict with Florida’s express constitutional standards.”) (emphasis added in part); *id.* at 623 (“Unlike the posture of a Section 2 VRA claim before a federal court, *the Florida Supreme Court is charged* with

On September 5, 2012, more than four months after the Florida Supreme Court validated the Senate Plan, Plaintiffs filed this attack on the validated plan. Plaintiffs' Complaint raises forty-two claims under Amendment 5, each of which was presented to the Supreme Court and rejected in *Apportionment II*. Because the Florida Supreme Court has exclusive jurisdiction to determine the validity of state legislative redistricting plans under the standards set forth in the Florida Constitution, and, alternatively, because the Supreme Court's determination of validity is binding on all citizens of the state, *see* Art. III, § 16(d), Fla. Const., Plaintiffs' claims are barred. In addition, Plaintiffs' so-called "as-applied" challenge relies on the same factual and legal theories rejected by the Supreme Court in *Apportionment II*, and is therefore precluded.

ARGUMENT

I. THE FLORIDA SUPREME COURT HAS EXCLUSIVE JURISDICTION TO DETERMINE THE VALIDITY OF STATE LEGISLATIVE REDISTRICTING PLANS UNDER THE FLORIDA CONSTITUTION.

Article III, Section 16(c) requires the Supreme Court to enter "a declaratory judgment determining the validity" of state legislative redistricting plans. The Florida Constitution thus imposes an "extremely weighty responsibility" on the Florida Supreme Court. *Apportionment I*, 83 So. 3d at 599. Because the Constitution commits jurisdiction over legislative redistricting to the Florida Supreme Court, it removes such cases from the jurisdiction of all other state courts.

Circuit courts are without jurisdiction over specific matters expressly committed by the Constitution to another court. The Supreme Court's recent decision in *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010), is on point. In *Roberts*, the Court considered its jurisdiction to determine the

analyzing the apportionment plan to determine compliance with all constitutional provisions.") (emphasis added); *id.* at 626 (explaining, in contrast to federal statutory claims, that the Florida Supreme Court must review all claims "under the Florida Constitution"); *id.* at 684 ("The citizens, through our state constitution, have now imposed upon *this Court* a *weighty obligation* to measure the Legislature's Joint Resolution with a very specific constitutional yardstick.") (emphasis added).

validity of ballot summaries for constitutional amendments proposed by citizen initiative. Art. IV, § 10, Fla. Const.; Art. V, § 3(b)(10), Fla. Const. The Court had upheld two ballot summaries in its automatic review process, but the ballot summaries were later challenged in circuit court.³ 43 So. 3d at 675-76. The plaintiffs argued that the Supreme Court is unable to hear witnesses or review evidence, and offered to introduce evidence to show that the summaries were misleading. See Respondent Corrine Brown and Mario Diaz-Balart's Response to Petition for Constitutional Writ or, Alternatively, for Writ of Prohibition, *Roberts v. Brown*, Case No. SC10-1362 (Fla. July 19, 2010). The Supreme Court nevertheless held that its jurisdiction was exclusive:

[A]lthough the circuit courts may be courts of general jurisdiction under the Florida Constitution and have the general authority to consider declaratory actions and issue injunctions, under rules of constitutional construction a specific statement that jurisdiction over one type of legal matter exists in another court removes jurisdiction from the circuit court to consider such matters. Thus, article V, section 3(b)(10), which provides that this Court *shall* consider the validity of citizen-initiative amendments, indicates that no other Florida court has jurisdiction to consider these types of pre-election petitions.

43 So. 3d at 679 (citations omitted; emphasis in original). Because the Constitution entrusts the Supreme Court with responsibility to determine the validity of citizen-initiative amendments, no other court has jurisdiction to make the same determination.

For precisely the same reason, the Supreme Court has exclusive jurisdiction over state legislative redistricting plans. The Constitution confides responsibility directly to the Supreme Court to determine the validity of legislative redistricting plans. In fact, the Supreme Court's ballot-summary review process and its redistricting review process are notably similar. In both cases, the Constitution requires the Court to determine validity in an original, time-limited proceeding initiated by the Attorney General and open to participation by all interested parties.

³ Coincidentally, the amendments at issue in *Roberts* were Amendment 5 and 6. Amendment 6 imposes on congressional districts the same standards that Amendment 5 imposes on state legislative districts, and is codified at Article III, Section 20 of the Florida Constitution.

Compare Art. IV, § 10, Fla. Const. (ballot summaries), *with id.* Art. III, § 16 (state legislative redistricting). As in *Roberts*, the specific provision conferring jurisdiction on the Supreme Court controls the broader provision that confers general subject-matter jurisdiction on circuit courts.

In *Roberts*, the Court also relied on the historical purpose of the ballot-summary review. The Court explained that the purpose of the ballot-summary review process created in 1986 was “to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort of obtaining the required number of signatures for placement on the ballot.” 43 So. 2d at 678 (quoting *Armstrong v. Harris*, 773 So. 2d 7, 13 n.18 (Fla. 2000)). To permit subsequent litigation of ballot summaries would “nullify” the 1986 amendments and “eviscerate any protections to ballot initiatives that [the 1986] amendments were intended to secure.” *Id.*

The historical support for the Supreme Court’s exclusive jurisdiction in legislative redistricting cases is even more compelling. As discussed below, Article III, Section 16 was designed to remedy the never-ending waves of redistricting litigation that had overwhelmed the State with instability and uncertainty. This historical context brings into sharp focus the intent of the voters who adopted Article III, Section 16 and the invaluable purposes it continues to serve.

In the watershed decision of *Baker v. Carr*, 369 U.S. 186 (1962), the United States Supreme Court held that inequalities in district populations present justiciable questions under the Equal Protection Clause of the United States Constitution. Less than four months later, a three-judge panel of the federal District Court for the Southern District of Florida declared Florida’s redistricting plans for state legislative districts unconstitutional. *See Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962). The Court’s decision opened a new era of instability that featured alternating court battles and special legislative sessions, four new redistricting plans in a five-year period, and finally court-imposed redistricting plans and court-ordered elections.

After the decision in *Sobel*, the Legislature convened in special session to consider state legislative redistricting. *See* Fla. H.R. Jour. 1 (Aug. 1, 1962).⁴ The Legislature proposed a constitutional amendment containing a new redistricting formula and enacted new redistricting plans for the House and Senate, contingent on the voters' adoption of the proposed amendment at the next general election. *See* Fla. H.R. Jour. 80 (Aug. 11, 1962); Fla. S. Jour. 53 (Aug. 11, 1962); *Sobel*, 208 F. Supp. at 319-20 (supplemental opinion). The *Sobel* Court then held that the contingent plans adopted by the Legislature were valid, but it retained jurisdiction in case the voters rejected the proposed amendment. *Sobel*, 208 F. Supp. at 324-25 (supplemental opinion).

The voters defeated the constitutional amendment, and, as a result, the new redistricting plans did not take effect. *In re Adv. Opinion to the Governor*, 150 So. 2d 721, 722 (Fla. 1963). The Legislature met again in special session, *see* Fla. H.R. Jour. 1 (Nov. 9, 1962), but the session terminated without new redistricting plans, *see In re Adv. Opinion to the Governor*, 150 So. 2d at 722. Governor Bryant again convened the Legislature in special session. *See* Fla. H.R. Jour. 1 (Jan. 29, 1963). The Legislature adopted a new redistricting plan, *see* Fla. S. Jour. 25 (Feb. 1, 1963), and the federal court upheld it, *Sobel v. Adams*, 214 F. Supp. 811, 812 (S.D. Fla. 1963).

On June 15, 1964, the United States Supreme Court decided *Reynolds v. Sims*, 377 U.S. 533 (1964), which clarified the constitutional one-person, one-vote standard as applied to state legislative districts. A week later, the United States Supreme Court reversed and remanded the district court's decision upholding Florida's legislative districts. *See Swann v. Adams*, 378 U.S. 553 (1964) (per curiam). Once again without valid districts, the Legislature convened in regular

⁴ The historic Journals of the House of Representatives and Senate are accessible on their respective websites. *See* <http://tinyurl.com/HouseJournals>; <http://tinyurl.com/SenateJournals>.

session in 1965, but failed to adopt a new redistricting plan.⁵ *See Swann v. Adams*, 383 U.S. 210, 210-11 (1966). On June 5, the Legislature convened in another special session, *see* Fla. H.R. Jour. 1 (June 5, 1965), but again failed to adopt a redistricting plan, *see* Fla. H.R. Jour 1 (June 25, 1965). The Legislature convened yet again on June 25 and passed House Bill 19-XX, which apportioned the state into House and Senate districts. *See* Fla. H.R. Jour. 18-21 (June 29, 1965).

The federal three-judge panel held that the new plan was unconstitutional, but adopted it with minor modifications as an interim plan. *Swann v. Adams*, 258 F. Supp. 819, 822 (S.D. Fla. 1965). The Supreme Court reversed the trial court's adoption of the unconstitutional plan. The Court did not share the trial court's willingness to prolong doubt and litigation: "This litigation was commenced in 1962. The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969." *Swann v. Adams*, 383 U.S. 210, 211(1966). The Court remanded for a valid redistricting for the 1966 elections. *Id.* at 212.

The very next day, Governor Burns called the Legislature into its sixth special session on state legislative redistricting in less than four years, *see* Fla. S. Jour. 1 (Mar. 2, 1966), and the Legislature enacted its fourth redistricting plan in four years, *see* Fla. S. Jour. 29 (Mar. 9, 1966). The federal court reviewed the plan—its fifth review in four years—and upheld it, *see Swann v. Adams*, 258 F. Supp. 819, 827 (S.D. Fla. 1965) (supplemental opinion), but the Supreme Court, in its third review of Florida's districts, reversed, *Swann v. Adams*, 385 U.S. 440 (1967). On February 13, 1967, the federal trial court imposed a redistricting plan and ordered elections in all districts prior to the commencement of the regular legislative session on April 4, 1967. *Swann v.*

⁵ Under the 1885 Constitution, the Legislature was required to draw new districts in the fifth year after each decennial census. Art. VII, § 3, Fla. Const. (1885) (amended 1924). Since 1968, the Constitution has required the Legislature to act in the second year after each census. *See* Art. III, § 16(a), Fla. Const.

Adams, 263 F. Supp. 225 (S.D. Fla. 1967). The State held court-ordered primary elections in all districts on February 28 and March 14, and a court-ordered general election on March 28, 1967.

As Justice Lewis concluded after reviewing this history, “[c]learly, the structure for redistricting plan review contained in article III, section 16 of the Florida Constitution is a direct consequence of the drafters’ prior litigation experience and expectations regarding the nature of probable challenges to redistricting plans in the future.” *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 835 (Fla. 2002) (Lewis, J., concurring). That structure contemplated a pivotal role for the Florida Supreme Court, and, after repeated efforts to enact a valid redistricting plan, an orderly and balanced redistricting process in Florida.

If the Supreme Court’s jurisdiction were not exclusive, the evils that the 1968 Constitution sought to remedy would return in force. The Constitution would no longer afford protection against decade-long litigation, alternating court battles and special sessions, and public expense, uncertainty, and instability. In fact, the Constitution would have exacerbated the evils sought to be remedied. It would subject each redistricting plan to double litigation: once in the Supreme Court, and again in this Court. The purpose of Article III, Section 16 was not to promote more litigation, but to secure a prompt, conclusive determination in an orderly process. *Cf. Apportionment II*, 89 So. 3d at 886 (“[T]he Court understands that the Florida Constitution imposes a critical obligation in the redistricting process to ensure that the constitutional mandates are followed. However, the process must also work in an orderly and balanced manner.”).⁶

⁶ Article III, Section 16 does not apply to congressional redistricting plans, which, accordingly, are litigated in circuit courts. *See* Order Denying Mot. for Summ. J., *Romo v. Detzner*, No. 2012-CA-000412 (Fla. 2d Cir. Ct. Apr. 30, 2012). It would make little sense to subject state legislative redistricting plans to the same process of circuit-court litigation, where the Constitution prescribes a vastly different regimen. As this Court recognized in *Romo*, because “there is no mandated automatic judicial review of this [congressional redistricting] legislation[, t]he authority and the process for challenging the constitutionality of the

The principles of constitutional interpretation support the conclusion that the Supreme Court's jurisdiction to determine the validity of state legislative redistricting plans is exclusive:

First, the “fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers,” *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008), and, in “ascertaining the intent of the voters, the Court may examine the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document,” *Apportionment I*, 83 So. 2d at 614 (marks omitted); *accord Coastal Fla. Police Ben. Ass’n, Inc. v. Williams*, 838 So. 2d 543, 549 (Fla. 2003) (“[C]onstitutional provisions should not be construed so as to defeat their underlying objectives.”) To construe the Court’s jurisdiction as concurrent would defeat the basic purpose of securing a prompt and final determination.

Second, specific provisions control provisions covering the same and other subjects in general terms. In *Roberts*, the Supreme Court relied on this canon to conclude that the specific grant of jurisdiction to determine the validity of constitutional amendments controls the general grant of subject-matter jurisdiction to circuit courts in Article V, Section 5(b) of the Constitution. 43 So. 3d at 679. Likewise, the specific grant of jurisdiction to the Supreme Court to determine the validity of redistricting plans controls the general grant of jurisdiction to the circuit courts.

Third, the principle of *expressio unius est exclusio alterius* holds that, where the Constitution “prescribes the manner of doing an act, the manner prescribed is exclusive,” even if the Constitution “does not in terms prohibit the doing of a thing in a different manner.” *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (quoting *Weinberger v. Bd. of Pub. Instruction*, 112 So.

congressional redistricting plan is thus the same as for any other legislation, *i.e.*, the filing of an action in Circuit Court.” *Id.*; *see also Apportionment I*, 83 So. 3d at 606-07 (holding that, because the Supreme Court reviews state legislative redistricting plans, unlike other legislation, in a mandatory, original proceeding, the beyond-a-reasonable-doubt standard of judicial review is inapplicable).

253, 256 (Fla. 1927)). Thus, the Supreme Court has held that because the Constitution directs the Legislature to provide a free education through a system of free public schools, it implicitly bars the Legislature from providing a free education through private-school scholarships. *Id.*; see also *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977) (noting that, because the Constitution vests the power of pardon in the executive, the power cannot be exercised by other means). The Constitution prescribes the manner in which the validity of legislative redistricting plans will be determined. It would be inconsistent with this provision to do the same act in a different manner.

Fourth, a “constitutional provision is to be construed in such a manner as to make it meaningful. A construction that nullifies a specific clause will not be given unless absolutely required by the context.” *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979). An open door to further litigation would nullify the Supreme Court’s review and destroy its efficacy. It would reduce the Court’s review to an expensive moot-court session that merely primes the parties for the litigation to follow. It would make meaningless the Constitution’s express statement: “A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state.” Art. III, § 16(d), Fla. Const. If a disappointed party is entitled to a do-over, then this provision and the Supreme Court’s review are meaningless.

In *Apportionment I*, the Supreme Court repelled the suggestion that the resolution of claims under the Florida Constitution should await trial-court adjudication: “To accept the Legislature’s and Attorney General’s position that this Court should not undertake a meaningful review of compliance with the new constitutional standards in this proceeding, but instead await challenges brought in trial courts over a period of time, would be an abdication of this Court’s responsibility under the Florida Constitution.” 83 So. 3d at 609. The “Senate’s approach to permit each trial court to define the standards in a discrete proceeding, to make findings of fact

based on the trial court's interpretation of the standards, and to eventually have the cases work their way up to this Court would itself be an endless task." *Id.* at 617. To postpone a resolution, the Supreme Court explained, would "create uncertainty for the voters of this state, the elected representatives, and the candidates who are required to qualify for their seats." *Id.* at 609.

In 2002, the Supreme Court expressly declined to rule on three categories of claims: claims under the *federal* Voting Rights Act, and racial and political gerrymandering claims, which ordinarily arise under the *federal* Equal Protection Clause. *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 828-29. The Court concluded that such claims should be raised in a "court of competent jurisdiction." *Id.* at 832. Importantly, in *Apportionment I*, the Court distinguished its earlier decision: "as we have mentioned previously, at that time, there was no explicit state constitutional requirement." 83 So. 3d at 626. Thus, the Court rejected the view that "challenges based on the new constitutional provisions, including the minority voting protection provision, should await challenges brought in the trial court after validation of the plans." *Id.* While the Florida Constitution cannot preclude litigation of federal claims,⁷ it can and does obligate the Supreme Court to resolve all state constitutional claims with finality.⁸

⁷ Any effort to do so would be invalid under the Federal Constitution's Supremacy Clause. Accordingly, the Florida Constitution would not preclude Plaintiffs from pursuing federal claims against these districts in federal court. But to date, Plaintiffs have elected to pursue only claims under state law.

⁸ In *Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002), the Court reviewed a circuit-court challenge to a state legislative redistricting plan. The parties do not appear to have argued—and the Court did not address—the jurisdictional question. While the Fourth DCA in *Brown v. Butterworth*, 831 So. 2d 683, 685-86 (Fla. 4th DCA 2002), stated that Forman "implies . . . the circuit courts do have the power to consider gerrymandering challenges to the 2002 redistricting plan," that statement was pure *dictum*. The issue in *Brown* was the jurisdiction of circuit courts over *congressional* districts, not state legislative districts. Further, while the challenge in *Forman* involved a claim under Florida's Equal Protection Clause, this claim mirrors the gerrymandering claims which, under the federal Equal Protection Clause, the Florida

In addition, in 1972, 1982, and 1992, the Court directed parties seeking further review to petition the Florida Supreme Court—not a trial court. *See Apportionment I*, 83 So. 3d at 609 (“A review of prior reapportionment decisions from 1972, 1982, and 1992 reveals that in the past, the Court has retained *exclusive state jurisdiction* to allow challenges to be later brought” (emphasis added)); *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 286 (Fla. 1992) (“Thus, we retain *exclusive state jurisdiction* to consider any and all future proceedings relating to the validity of this apportionment plan.” (emphasis added)); *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 822 (Fla. 1972) (“By classifying the proceeding as one for ‘declaratory judgment,’ the Florida Constitution contemplates that we retain *exclusive state jurisdiction* and consider any and all future proceeding relating to the validity of the apportionment plan.” (emphasis added)).

Two states with constitutional provisions similar to Florida’s have interpreted them to confer exclusive jurisdiction on their supreme courts.⁹ In Arkansas, the Constitution provided that “[o]riginal jurisdiction . . . is hereby vested in the Supreme Court of the State . . . to revise

Supreme Court had expressly declined to decide. *See* 826 So. 2d at 280-81 (applying *Davis v. Bandemer*, 478 U.S. 109 (1986)). Even in *Apportionment I*, the Court did not resolve gerrymandering claims under the Equal Protection Clause, but it did resolve all claims under the “explicit” state constitutional requirements. *See* 83 So. 3d at 626. In any event, no court has found that parties may bring challenges based on the state constitutional provisions specifically governing legislative apportionment in any court other than the Florida Supreme Court, even though the state constitutional requirement of “contiguous, overlapping, or identical territory” has existed since the 1968 Constitution was adopted. *See* Art. III, § 16(a), Fla. Const.

⁹ Many states vest their courts of last resort with original jurisdiction over redistricting. *See Apportionment I*, 83 So. 3d at 614 n.16. In several, that jurisdiction is *expressly* “exclusive.” *See* Art. XXI, § 3(b)(1), Cal. Const.; Art. IV, § 3(b), Ill. Const.; Art. II, § 2, N.J. Const.; Art. XI, § 13, Ohio Const.; Mich. Comp. Laws § 3.71; Vt. Stat. Ann. tit. 17, § 1909. These courts have faithfully applied redistricting standards without trial-court litigation. *See, e.g., Schrage v. State Bd. of Elections*, 430 N.E.2d 483 (Ill. 1981) (invalidating non-compact districts); *In the Matter of Legislative Districting of the State*, 805 A.2d 292 (Md. 2002) (invalidating districts that deviated from boundaries); *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323 (Vt. 1993) (invalidating districts that were not compact and deviated from boundaries).

any arbitrary action of or abuse of discretion by the board in making [an] apportionment.” In *Rockefeller v. Smith*, 440 S.W.2d 580, 584 (Ark. 1969), the Court held that its jurisdiction was exclusive: “We find nothing in the language of the constitutional amendment to indicate that any Arkansas court other than this one has any jurisdiction. It would be strange indeed, if this court should be vested with both original and appellate jurisdiction in these cases. We hold that the jurisdiction of this court in these matters is exclusive.” Similarly, the Constitution of Maryland provided that “the Court of Appeals shall have original jurisdiction to review the legislative districting of the State.” In *State Administrative Board of Election Laws v. Calvert*, 327 A.2d 290, 303 (Md. 1974), the Court held that, “under this constitutional provision this Court and only this Court may consider a challenge to the constitutionality of a legislative districting plan.”¹⁰

Apportionment I and *Apportionment II* demonstrate that the Supreme Court can and did apply all state constitutional standards. “To ensure that the Court would have the means to objectively evaluate the plans,” the Court issued a scheduling order that required submission of the redistricting plans and any alternative plans in .doj format. *Apportionment I*, 83 So. 3d at 610. The Court reviewed statistical reports and utilized the web-based redistricting software created by the House and Senate and the software programs of third-party vendors. *Id.* at 610-12. The Court had access to incumbent addresses, compactness scores, voter-registration data, election results, and other objective measures to facilitate its plenary review. *Id.* at 612-13. And the Court did not limit itself to challenges raised by opponents, noting its “separate obligation to

¹⁰ In *Apportionment I*, the Florida Supreme Court twice quoted the Maryland Court of Appeals in describing its own jurisdiction over state legislative redistricting plans. See *Apportionment I*, 83 So. 3d at 609 (“In other words, it is this Court’s duty to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards unconstitutional.” (quoting *In the Matter of Legislative Districting of State*, 805 A.2d at 316)); *id.* at 613 (“As in those states, the Florida Constitution ‘expressly entrusts to this Court the responsibility, upon proper petition, to review the constitutionality of districting plans . . .’” (quoting *In the Matter of Legislative Districting of State*, 805 A.2d at 316)).

independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution.” *Apportionment II*, 89 So. 3d at 881 (quoting *Apportionment I*, 83 So. 3d at 606). The Court’s opinion proves the depth and comprehensiveness of the Court’s review (the majority opinion alone occupies eighty-nine pages in the Southern Reporter), and reveals that the Court was fully equipped to determine the validity of the Senate Plan under all standards in the Florida Constitution.¹¹

As in the past, the Supreme Court described its review as “facial”—*i.e.*, based upon the redistricting plan and objective information such as statistics, incumbent addresses, and the legislative record. But it does not follow that the Constitution authorizes any other or further review of state constitutional claims. While in 2002 the Court deferred so-called “as-applied” claims under *federal* statutory and constitutional provisions, *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 832, it has never authorized trial-court adjudication of state constitutional standards, *see Apportionment I*, 83 So. 3d at 626.¹² Nor does it follow that the Supreme Court’s review was deficient. The Court’s duty was to “apply these standards in a manner that gives full effect to the will of the voters,” *Apportionment I*, 83 So. 3d at 597, and it did, even resolving issues of disputed fact that, on summary judgment, a court would not have decided.¹³ As Plaintiffs stated in their attack on congressional districts, the “Supreme Court has

¹¹ Of course, even if the Supreme Court had not performed a thorough review, it would not belong to this Court to do so. The Supreme Court’s jurisdiction is exclusive.

¹² In *Apportionment II*, the NAACP argued that there was “insufficient evidence” to conclude that two challenged districts comply with the voting-rights provisions of Amendment 5. 89 So. 3d at 883. Rather than authorize future litigation in a trial court, where the evidence might be produced or discovered, the Supreme Court “reject[ed] all aspects of this claim.” *Id.*

¹³ *See Apportionment I*, 83 So. 3d at 666-67, 671-79 (finding, as to certain districts in the initial plan for the Senate, an intent to favor incumbents, and determining that alternative districts would have afforded minorities an undiminished ability to elect their candidates of choice). As this Court explained, the Supreme Court “initiated its own limited fact finding so that it could, irrespective of the position taken by the Attorney General or any other interested party, fulfill its

shown [that the new standards] have real enforceability, even in the context of a facial review.”

Mot. for Summ. J., *Romo v. Detzner*, No. 2012-CA-000412 (Fla. 2d Cir. Ct. Mar. 26, 2012).

Amendment 5 imposed new standards, but it did not change the review process in Article III, Section 16. When it reviewed the ballot summaries of Amendments 5 and 6, the Florida Supreme Court noted that the “amendments do not alter the functions of the judiciary,” but “merely change the standard of review.” *Adv. Opinion to Att’y Gen. re Standards for Establishing Legislative Dists.*, 2 So. 3d 175, 183 (Fla. 2009) (plurality opinion). More recently, in *Apportionment I*, the Court noted that Article III, Section 16 “is still in effect and has not been changed.” 83 So. 3d at 601 n.3. The citizens of Florida have established both the substantive standards and the process by which compliance with those standards will be reviewed. The recent adoption of standards did not nullify the review process created by the citizens of Florida. *See Adv. Opinion to Att’y Gen. re Standards for Establishing Legislative Dists.*, 2 So. 3d at 183 (“[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions.”) (quoting *Jackson v. City of Jacksonville*, 225 So.2d 497, 500-501 (Fla.1969)); *Chiles v. Phelps*, 714 So. 2d 453, 459 (Fla. 1998) (“We are precluded from construing one constitutional provision in a manner which would render another provision superfluous, meaningless, or inoperative.”); *cf. Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (finding implied repeal where provisions are in “irreconcilable conflict” or the later provision is “clearly intended as a substitute”).¹⁴

obligation to the people of Florida to perform a meaningful review of the plans and determine if they met the new constitutional standards.” Order Denying Mot. for Summ. J. at 4, *Romo v. Detzner*, No. 2012-CA-000412 (Fla. 2d Cir. Ct. Apr. 30, 2012).

¹⁴ The rules governing ballot summaries also confirm that Amendment 5 did not affect Article III, Section 16. To be clear and unambiguous under Section 101.161, Florida Statutes, a ballot summary must disclose the proposed amendment’s effect on existing provisions of the Florida Constitution. *See, e.g., Fla. Dep’t of State v. Fla. State Conference of NAACP Branches*,

Justices Lewis and Pariente wrote in separate opinions that a time-limited proceeding in the Supreme Court may be a “less than optimum forum” for the resolution of all fact-based claims. *See Apportionment I*, 83 So. 3d at 690 (Lewis, J., concurring); *accord Apportionment II*, 89 So. 3d at 892-94 (Pariente, J., concurring). It is, however, the process established by the citizens, and the Court’s opinions nowhere suggest that the constitutional process can be ignored. In fact, rather than commend redistricting challenges to trial courts, Justice Pariente urged the Legislature or the Constitution Revision Commission to propose an amendment to the process. *Apportionment II*, 89 So. 3d at 898. In doing so, she noted that procedural limitations precluded the Court from remanding for fact-finding. *Id.* at 893; *accord Apportionment I*, 83 So. 3d at 609. Far from suggesting that these “barriers” could be surmounted by litigation, *see Apportionment II*, 89 So. 3d at 892, Justice Pariente urged a constitutional amendment: “Unless the process is changed, the Legislature, and this Court, will again in ten years be placed under these unrealistic time constraints,” *id.* at 894. If the process is to be changed, the Constitution must be amended.

The “citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in article III, sections 16 and 21.” *Apportionment I*, 83 So. 3d at 684 (emphasis added). This express commitment of jurisdiction to the Supreme Court divests this Court of jurisdiction and provides the exclusive

43 So. 3d 662, 664 (Fla. 2010) (invalidating a redistricting amendment offered by the Legislature because its ballot summary did not disclose the amendment’s effect on Article III, Section 16); *Adv. Opinion to Att’y Gen. ex rel. Amendment to Bar Gov’t from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 894 (Fla. 2000) (invalidating amendments that “fail to identify the constitutional provisions that they substantially affect”); *Adv. Opinion to the Att’y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994) (“[T]he electorate must be advised of the effect a proposal has on existing sections of the constitution.”). Because Amendment 5 did not disclose an effect on Article III, Section 16, it must be presumed that there is no effect. *See Graham v. Haridopolos*, 75 So. 3d 315, 320 (Fla. 1st DCA 2011) (construing an amendment to avoid an effect on other provisions because its ballot summary did not disclose that effect).

means of determining the validity of legislative redistricting plans. To avoid the all-too-familiar mischiefs of cyclical redistricting litigation, instability, and uncertainty, the citizens created this process to ensure validity and finality. This Court is without jurisdiction over Plaintiffs' claims.

II. THE FLORIDA SUPREME COURT'S DETERMINATION THAT THE SENATE PLAN IS VALID HAS PRECLUSIVE EFFECT AND BARS PLAINTIFFS' CLAIMS.

Even if this Court had concurrent jurisdiction (which it does not), the plain words of the Florida Constitution give preclusive effect to the Supreme Court's determination of validity. Article III, Section 16(d) states that a "judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state." Because the Supreme Court reviewed the Senate Plan and found that the Senate Plan satisfies all standards under the Florida Constitution, further challenges under those standards are expressly barred.

The Constitution speaks with pointed clarity. First, it directs the Attorney General to petition the Florida Supreme Court for a "declaratory judgment" determining the validity of the redistricting plan. Art. III, § 16(c), Fla. Const. In 1968, it was well understood that declaratory judgments are binding determinations, *see Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953) ("The difference[] between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties . . .") (quoting *Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring)), and the Court must presume that the words of the Constitution were chosen deliberately and understandingly. Next, Article III, Section 16(d) provides that the "judgment" of the Supreme Court "shall be binding upon all the citizens of the state." These emphatic terms express finality as clearly as words can. All matters decided by the Supreme Court—matters not clearly reserved for future litigation—are decided, once and for all. If parties that are unsuccessful in the Supreme Court may pursue their claims elsewhere, the Constitution's express prescription of binding force is meaningless.

In its design and structure too, Article III, Section 16 reveals its purpose to secure a preclusive, final judgment. It allows all “adversary interests to present their views,” *id.* Art. III, § 16(c), and, to ensure an inclusive hearing, the Supreme Court permitted all interested persons to file briefs, informal comments, and alternative plans, *see Apportionment II*, No. SC12-460 (Fla. Mar. 13, 2012) (scheduling order). The process created by Article III, Section 16 imposes strict time limitations, guards against all contingencies, and ensures that, in all cases, the process concludes with a redistricting plan either drawn or approved by the Florida Supreme Court. The Constitution does not provide for further judicial review, and, until the next census, it provides no point of reentry into the detailed, comprehensive process described in Article III, Section 16.

The Court should reject the self-refuting position that the framers of Florida’s Constitution painstakingly created a complete and integrated redistricting process, but at the same time intended to permit circuit-court litigation without prescribing any procedures for the adoption of a final, valid redistricting plan after litigation. The self-evident conclusion is that the Constitution intended the Supreme Court’s determination to preclude additional litigation.

Thus, even if this Court has jurisdiction, it must not disturb matters decided by the Supreme Court. In this case, the Supreme Court has examined the *entire* redistricting plan for compliance with *all* state constitutional standards, and its judgment resolved all claims under the Florida Constitution. As the Court emphasized, its review was not initiated or defined by private parties; rather, the Constitution requires the Court to conduct a plenary and independent review of compliance with all standards under the Florida Constitution. *See Apportionment II*, 89 So. 3d at 881 (“In this type of original proceeding, the Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance

with the requirements of the Florida Constitution.” (quoting *Apportionment I*, 83 So. 3d at 606)). Because the Court conducted a plenary and independent review of the Senate Plan and found it compliant, Plaintiffs’ claims are barred. Otherwise, the Court’s review would be meaningless.

Review in this case would violate not only the express words of the Constitution, but fundamental notions of orderly government, fundamental fairness, and separation of powers. In *Apportionment I*, the Supreme Court invalidated elements of the initial redistricting plan for the Senate. The Legislature, in reliance on that opinion and at considerable expense, reconvened and corrected all of the deficiencies identified by the Supreme Court. On review, the Supreme Court concluded that the Senate Plan “conform[ed] to the judgment of the supreme court,” as required by Article III, Section 16(d). To relitigate a plan drawn in compliance with the Supreme Court’s instructions, and approved by the Supreme Court, would offend notions of fundamental fairness.

Moreover, to second-guess the determination of the Supreme Court would conflict with the hierarchical structure of Florida’s court system, in which trial courts are bound by the decisions of all appellate courts, and intermediate appellate courts are bound by the decisions of the Florida Supreme Court. See *Nader v. Fla. Dep’t of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 724 (Fla. 2012); *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992); *Jones v. State*, 619 So. 2d 418, 419 (Fla. 5th DCA 1993) (“Our oath and the law require that we apply the law as determined by the Florida Supreme Court. This obligation is not based on the premise that we agree with the supreme court’s opinion. Rather, it is based on the concept of precedent and the relative standing of the courts in the judicial hierarchy.”). The hierarchical structure of the court system, as well as the words of the Constitution, gives preclusive effect to *Apportionment II*.

In *Apportionment II*, the Supreme Court applied claim-preclusion principles to its own review. In *Apportionment I*, the Court had invalidated eight Senate districts, and the Legislature

redrew these districts (and affected, neighboring districts). In *Apportionment II*, these Plaintiffs for the first time challenged districts that were not challenged or invalidated in *Apportionment I* and not redrawn by the Legislature. The Court, however, rejected the notion that claims that might have been brought, but were not brought, could be raised in *Apportionment II*. See 89 So. 3d at 883-86. The Court explained that it “will not ignore the effect of what occurred in our prior review, in which [Plaintiffs] filed comprehensive briefs raising multiple facial challenges,” or the fact that the “Legislature had only this one opportunity to correct any deficiencies.” *Id.* at 885. To consider such challenges would be “fundamentally unfair” and “defeat the very purpose” of the redistricting process created by Article III, Section 16. *Id.* at 885. While the Constitution imposes on the Supreme Court a “critical obligation” to “ensure that the constitutional mandates are followed,” the “process must also work in an orderly and balanced manner.” *Id.* at 886.

The same is true here. Plaintiffs ask this Court to ignore the plain words of the Constitution, as well as its textually and historically discernible objectives, and to overrule the Supreme Court’s determination of validity. To do so would defeat the 1968 Constitution’s intent and revive the chaos, uncertainty, and instability of the 1960s. Under the Florida Constitution, the Supreme Court’s determination is binding upon all citizens of the state, including Plaintiffs.

III. PLAINTIFFS’ “AS-APPLIED” CHALLENGE IS IDENTICAL TO THE CHALLENGE REJECTED BY THE FLORIDA SUPREME COURT.

Plaintiffs attempt to avoid the preclusive effect of *Apportionment II* by characterizing their action as an “as applied challenge” (Compl. ¶ 5). Plaintiffs’ claims, however, are identical to the claims rejected by the Supreme Court in *Apportionment II*. Because Plaintiffs’ so-called “as-applied” claims would require this Court to overturn determinations of the Supreme Court in the prior challenge, the claims are precluded and must be dismissed.

A. An “As-Applied” Challenge Subsumed by a Prior Facial Challenge is Precluded.

“Where a judgment on the merits was reached in a prior action, the principle of *res judicata* will bar ‘a subsequent action between the same parties on the same cause of action.’” *Apportionment II*, 89 So. 3d at 883-884 (quoting *Youngblood v. Taylor*, 89 So. 2d 503, 505 (Fla. 1956)). As explained above, Article III, Section 16(d) clearly establishes that *Apportionment II* has preclusive effect on all citizens in the State, even though the individual Plaintiffs did not file objections in *Apportionment II*.¹⁵ The application of *res judicata* therefore turns on whether Plaintiffs have brought the same claims considered in *Apportionment II*.

Plaintiffs have attempted to avoid application of *res judicata* by calling their action an as-applied challenge (Compl. ¶ 5). The manner in which Plaintiffs label their claims, however, does not spare them from the preclusive effect of *Apportionment II*. While courts may sometimes permit an as-applied challenge after a statute was previously held to be facially valid, where an as-applied claim is subsumed by a prior facial challenge and relies on the same factual and legal theories already contested, the claim is barred. *See Laurel Sand & Gravel, Inc.*, 519 F.3d 156, 163 (4th Cir. 2008) (rejecting claim where the “‘as-applied’ claim itself was subsumed by” a prior facial challenge); *Monahan v. N.Y. City Dep’t of Corr.*, 214 F.3d 275, 290 (2d Cir. 2000) (“The ‘as applied’ label cannot obscure the fact that [the new litigation is] part of the same series of transactions. If the new as-applied challenges are to aspects of the policy which survive the earlier litigation, then the claim itself was subsumed by the earlier litigation.”); *Am. Fed’n of Gov’t Emps. v. Loy*, 332 F. Supp. 2d 218, 226 (D.D.C. 2004) (rejecting as-applied challenges that

¹⁵ Even absent Article III, Section 16(d), *res judicata* would apply to any individual Plaintiffs in privity with the organizational Plaintiffs, who participated in *Apportionment I* and *Apportionment II*. *See Gomez-Ortega v. Dorten, Inc.*, 670 So. 2d 1107, 1109 (Fla. 3d DCA 1996). Moreover, the Florida Constitution expressly invites all “adversary interests to present their views” in the Supreme Court’s automatic review process. *See* Art. III, § 16(c), Fla. Const.

bore “striking similarities with respect to both their factual allegations and legal theories” as a prior facial challenge); *Robert Penza, Inc. v. City of Columbus, Ga.*, 196 F. Supp. 2d 1273, 1279 n.6 (M.D. Ga. 2002) (“Plaintiffs shall not be permitted to escape the preclusive effects of their previous litigation by creatively converting a classic facial challenge to an ‘as applied’ one by simply asserting that the *application* of a facially unconstitutional ordinance gives rise to an ‘as applied’ claim which is not subject to *res judicata*.”)

For example, in *Walgreen Co. v. Louisiana Department of Health & Hospitals*, 220 Fed. App’x 309, 312 (5th Cir. 2007), the Fifth Circuit rejected an as-applied challenge to pharmaceutical regulations because “[t]here is no way for [plaintiff] to prevail on its challenge to the regulations without challenging the determinations of the prior suit,” which found that the regulations are facially valid. As the court stated, “[t]he only way to establish the unlawful application of these regulations in these circumstances is to directly challenge the outcome of the [prior] litigation, the precise situation that *res judicata* is designed to avoid.”

B. Plaintiffs’ As-Applied Challenge is Identical to the Challenge in *Apportionment II*.

Given the overwhelming similarity between the claims asserted here and those the Supreme Court previously rejected, Plaintiffs’ new claims would require this Court to overturn the Supreme Court’s factual and legal determinations in *Apportionment II*. Indeed, Plaintiffs’ as-applied challenge is not only subsumed by the challenge in *Apportionment II*; it is virtually *identical* to it. Plaintiffs’ allegations of whole-plan and district-specific constitutional violations were each considered, and rejected, by the Supreme Court. Because the Court would have to overturn the Supreme Court’s prior determinations to rule in favor of Plaintiffs, their claims are barred. See *Walgreen*, 220 Fed. App’x at 312.

1. The Supreme Court has already rejected Plaintiffs' whole-plan claims.

The Complaint contains two counts alleging that the Senate Plan as a whole violates Article III, Section 21 of the Florida Constitution. The first count of the Complaint is that the Senate Plan “was drawn with the intent to favor the controlling political party and to disfavor the minority political party in violation of the Florida Constitution, Article III, Section 21(a)” (Compl. ¶ 65). Plaintiffs’ claim is based on the allegation that “[t]he Legislature purposefully achieved its goal of maximum partisan gain in part by intentionally packing as many Democrats as possible into as few districts as possible” (Compl. ¶ 33).

The organizational Plaintiffs made identical allegations in *Apportionment II*. See Brief of the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida in Opposition to the Legislature’s Joint Resolution of Legislative Apportionment, *In re Senate Joint Resolution of Legislative Apportionment 2-B*, Case No. SC12-460 (Fla. Apr. 10, 2012), available at http://www.floridasupremecourt.org/pub_info/redistricting2012/04-10-2012/LWV_Initial_Brief.pdf (the “LOWV Brief”). There, the organizational Plaintiffs alleged that “the Legislature achieved its goal of maximum partisan gain by packing as many Democrats as possible into as few seats as possible.” *Id.* at 13. Nonetheless, the Supreme Court determined that the Senate Plan was not drawn with intent to favor a political party in violation the Florida Constitution, concluding the Plaintiffs “failed to present new facts demonstrating the Legislature redrew the plain with improper intent.” *Apportionment II*, 89 So. 3d at 882.

The second count of the Complaint is that the Senate Plan “was drawn with the intent to favor certain incumbents and disfavor other incumbents in violation of the Florida Constitution, Article III, Section 21(a)” (Compl. ¶ 67). This count is based on allegations that the Senate Plan “does not pit any non-term-limited incumbents against one another in any meaningful way”

(Compl. ¶ 31). Plaintiffs also allege that the Senate Plan “favor[s] a number of House incumbents who were planning to run for open districts in the Senate” (Compl. ¶ 32).

The organizational Plaintiffs made identical allegations in *Apportionment II*. In that case, they alleged that “the Senate plan does not pit any incumbents against one another in any meaningful way.” LOWV Brief at 10. The organizational Plaintiffs also alleged that “a number of open Senate districts appear to have been drawn specifically [for] such House incumbents.” *Id.* at 12. Nonetheless, the Supreme Court found no evidence that the Senate Plan was drawn with intent to favor political incumbents. 89 So. 3d at 882.

Thus, Plaintiffs’ “as-applied” whole-plan claims are virtually identical to the whole-plan challenges advanced by the organizational Plaintiffs in *Apportionment II*. Because Plaintiffs’ whole-plan claims rely on factual and legal theories already rejected the Supreme Court, they are precluded and must be dismissed.

2. The Supreme Court has already rejected Plaintiffs’ district-specific claims.

The remaining counts of the complaint allege that certain individual districts violate Article III, Section 21 of the Florida Constitution (Compl. ¶¶ 69, 71, 73, 75). But the Supreme Court considered and rejected each one of these claims in *Apportionment II*. Because Plaintiffs’ claims would essentially require this Court to overturn the Supreme Court’s declaratory judgment, the claims are precluded and must be dismissed.

Plaintiffs allege that Districts 6 and 8 were intentionally drawn to favor a political party and certain incumbents, while also violating constitutional requirements of compactness and adherence to political and geographical boundaries (Compl. ¶¶ 69, 71, 73, 75). Plaintiffs’ allegations that Districts 6 and 8 were drawn to split Daytona Beach, thereby weakening Democratic performance and favoring a House incumbent running for Senate (Compl. ¶¶ 36-40),

are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 15-20). The Supreme Court rejected these claims, concluding that District 8 is a competitive district under the Senate Plan and that alternative plans would render “District 6 less compact and mak[e] other trade-offs in northeast Florida.” *Apportionment II*, 89 So. 3d at 888. Accordingly, the Court upheld these districts. *Id.*

Plaintiffs allege that Districts 10 and 13 were intentionally drawn to favor a political party and certain incumbents, while also claiming that District 13 is not compact (Compl. ¶¶ 69, 71, 73). Plaintiffs’ allegations that Districts 10 and 13 were drawn to favor two incumbent Republican senators (Compl. ¶¶ 41-45) are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 20-22). The Supreme Court rejected these claims, finding that the “evidence does not support the Coalition’s argument that Redrawn District 10 and 13 were ‘tailor-made’ for two incumbents.” *Apportionment II*, 89 So. 3d at 888. Accordingly, the Court upheld these districts. *Id.* at 889-90.

Plaintiffs allege that Districts 17, 19 and 22 were intentionally drawn to favor a political party and certain incumbents, while also claiming that Districts 17 and 22 are not compact and fail to adhere to political and geographical boundaries (Compl. ¶¶ 69, 71, 73, 75). Plaintiffs’ allegations that the Senate leadership gerrymandered districts in the Tampa Bay area to favor Republicans (Compl. ¶¶ 46-51), are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 23-27). The Supreme Court rejected these claims, finding that “it would be fundamentally unfair to entertain such challenges” because they were not raised in *Apportionment I*. *Apportionment II*, 89 So. 3d at 886. Accordingly, the Court upheld these districts. *Id.*

Plaintiffs allege that Districts 21 and 26 were intentionally drawn to favor a political party and certain incumbents (Compl. ¶¶ 69, 71). Plaintiffs' allegations that the Senate leadership gerrymandered districts to protect two incumbent representatives who intended to run for Senate (Compl. ¶¶ 52-54), are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 28-31). The Supreme Court rejected these claims, finding that the Senate Plan "made improvements—both with respect to following county boundaries and compactness—and was based on a logical justification." *Apportionment II*, 89 So. 3d at 890. Accordingly, the Court upheld these districts. *Id.*

Plaintiffs allege that District 32 was intentionally drawn to favor a political party and certain incumbents, while also violating constitutional requirements of compactness and adherence to political and geographical boundaries (Compl. ¶¶ 69, 71, 73, 75). Plaintiffs' allegations that Legislature divided four counties to create District 32 for the purpose of protecting an incumbent Senator (Compl. ¶¶ 55-58), are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 32-36). The Supreme Court rejected these claims in both *Apportionment I* and *Apportionment II*, finding that there was no evidence that District 32 (which was District 25 in the original Senate plan) "could have been drawn to split fewer counties and cities while adhering to the remaining constitutional requirements." 83 So. 3d at 679; *see also Apportionment II*, 89 So. 3d at 890. Accordingly, the Court upheld District 32. 83 So. 3d at 679.

Finally, Plaintiffs allege that District 39 "as well as surrounding Districts 35, 37, and 40" were intentionally drawn to favor a political party and certain incumbents, while also claiming that District 39 is not compact (Compl. ¶¶ 59, 69, 71, 73). Plaintiffs' allegations that the Senate intentionally sacrificed compactness to "pack[] Democrats into [District 39] in excessive

numbers” and protect incumbents in adjacent districts (Compl. ¶¶ 59-63), are virtually identical to the allegations made in *Apportionment II* (LOWV Br. at 36-42). The Supreme Court rejected these claims, noting that they were not raised in *Apportionment I*, and “the parties do not get a second bite at the apple.” *Apportionment II*, 89 So. 3d at 886. Accordingly, the Court upheld the Senate Plan. *Id.*

As shown above, the Supreme Court has already considered, and rejected, the allegations forming the basis of Plaintiffs’ district-specific claims. Although they characterize their action as an as-applied challenge, Plaintiffs rely on the exact same factual and legal theories rejected in *Apportionment II*. Each claim would require this Court to second-guess the specific findings made by the Supreme Court in rejecting the prior challenge. Because Plaintiffs cannot prevail on their claims without overturning the Supreme Court’s determinations in *Apportionment II*, their claims are barred and must be dismissed. *See Walgreen*, 220 Fed. App’x at 312.

C. No Additional Discovery is Necessary to Dispose of Plaintiffs’ Claims.

Plaintiffs also attempt to avoid the preclusive effect of *Apportionment II* by asserting that they “seek the opportunity to develop a full record, including discovery of all necessary evidence, that was unavailable in the facial review conducted by the Supreme Court” (Compl. ¶ 29). But the Supreme Court relied on objective evidence when it determined that the Senate Plan is constitutionally valid, and no additional discovery could create a basis for overturning the Supreme Court’s conclusion.

To determine whether the Senate districts are compact in accordance with Article III, Section 21(b) of the Florida Constitution, the Supreme Court had access to numerical measures of compactness generated by commonly used redistricting software. *Apportionment I*, 83 So. 3d at 613, 635; *Apportionment II*, 89 So. 3d at 877 n.1. The Supreme Court also visually examined

the districts and considered factors such as the geography of a district and the need to abide by other constitutional requirements. 83 So. 3d at 635. No additional discovery could create a basis for disturbing the Supreme Court's conclusion that the districts in the Senate Plan are constitutionally compact. The districts in the Senate Plan are the same districts the Supreme Court reviewed, and therefore the numerical measures of their compactness are the same. As a result, the Supreme Court's determination that the districts meet the compactness requirement precludes Plaintiffs' compactness claims.

To determine whether districts utilize existing political and geographical boundaries in accordance with Article III, Section 21(b) of the Florida Constitution, the Supreme Court determined the extent to which a district "adhere[s] to county and city boundaries as political boundaries, and rivers, railways, interstates and state roads as geographical boundaries." *Apportionment I*, 83 So. 3d at 638. The districts in the Senate Plan are unchanged from *Apportionment II*, and therefore the objective measures used by the Supreme Court to assess a district's adherence to political and geographical boundaries are the same. No additional discovery could undermine these objective measures of adherence to the constitutional requirements. Accordingly, the Supreme Court's determination that the districts utilize existing political and geographical boundaries in accordance with Article III, Section 21(b) precludes Plaintiffs' claims.

To determine whether the Legislature drew the Senate Plan intentionally to favor a political party in violation of Article III, Section 21(a) of the Florida Constitution, the Supreme Court considered objective evidence of such intent, including "the effects of the plan, the shape of district lines, and the demographics of an area" as well as adherence to the tier-two requirements of Article III, Section 21(b). *Apportionment I*, 83 So. 3d at 617, 638. To determine

whether the Legislature drew the Senate Plan intentionally to favor certain incumbents and disfavor others in violation Article III, Section 21(b) of the Florida Constitution, the Supreme Court considered objective evidence of such intent including “the shape of the district in relation to the incumbent’s legal residence, . . . 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.” *Apportionment I*, 83 So. 3d at 618-19. The Supreme Court also had access to legislative materials, including transcripts of the committee and floor debates, as well as the Senate’s statistical analysis and data reports, *id.* at 610, 657 n.40, and it recognized (as Plaintiffs conceded at oral argument) that the partisan composition of districts is influenced by residential patterns, *id.* at 642-43. On the basis of all the objective evidence, the Supreme Court concluded that the Senate Plan did not intentionally favor a political party or incumbents in violation Article III, Section 21(b) of the Florida Constitution. *Apportionment II*, 89 So. 3d at 890-91.

Plaintiffs now seek to engage in a fishing expedition by deposing members of the Legislature and their staff in an effort to unearth evidence of improper intent. But Plaintiffs are precluded from engaging in such discovery under the doctrine of legislative privilege, which protects legislators from being “required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill.” *See Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 523-24 (Fla. 1st DCA 2012) (recognizing the common law doctrine of legislative privilege); *Florida v. United States*, ___ F. Supp. 2d ___, 2012 WL 3594322, at *3 (N.D. Fla. Aug. 10, 2012) (Hinkle, J.) (same). Moreover, such discovery would violate Florida’s strict separation-of-powers provision. *Expedia*, So. 3d at 524. Absent such discovery, Plaintiffs are left with the same objective indications of intent that the Supreme

Court considered in *Apportionment II*. Accordingly, the Supreme Court's determination that the districts do not exhibit improper intent precludes Plaintiffs' claims.

Indeed, even if this Court were to determine that the doctrine of *res judicata* does not apply to Plaintiffs' claims, it should still dismiss the claims for failure to state a cause of action. The Supreme Court's decision in *Apportionment II* is binding precedent on all circuit courts. Because the Supreme Court based its determination on objective evidence, and the districts at issue in this case are the same as the districts upheld in *Apportionment II*, no additional discovery is necessary to determine the validity of Plaintiffs' claims. The Supreme Court has already resolved the factual and legal issues set forth in the Complaint, and this Court is obligated to reach the same result as the Supreme Court and uphold the Senate Plan. Accordingly, Plaintiffs' Complaint should be dismissed.

CONCLUSION

In *Apportionment I*, Plaintiffs urged the Court to permit circuit-court challenges to *validated* redistricting plans. (Exh. A at 14:21-15:1.) When asked whether such circuit-court litigation would compel another redistricting at some future time, Plaintiffs' counsel argued that in other states post-litigation, mid-decade redistricting is a "fairly common thing." (*Id.* at 17:19.)

In Florida, the citizens adopted Article III, Section 16 with the precise purpose of ensuring that decade-long redistricting chaos is not a "fairly common thing." Florida's own experience convinced the voters that it was necessary to achieve *validity* with *finality*. Article III, Section 16 bestows exclusive jurisdiction on the Supreme Court, and accords preclusive effect to the Court's determinations. Moreover, Plaintiffs cannot avoid the preclusive effect of *Apportionment II* by relabeling their claims as as-applied challenges. Plaintiffs' Complaint must be dismissed with prejudice.

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I certify that on October 22, 2012, a copy of the foregoing was served by mail and email to all counsel on the attached service list.

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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

THE LEAGUE OF WOMEN VOTERS)
OF FLORIDA; THE NATIONAL)
COUNCIL OF LA RAZA; COMMON)
CAUSE FLORIDA; JOAN ERWIN;)
ROLAND SANCHEZ-MEDINA, JR.;)
J. STEELE OLMSTEAD;)
CHARLES PETERS; OLIVER D.)
FINNIGAN; SERENA CATHERINA)
BALDACCHINO; AND DUDLEY BATES)

Plaintiffs,

v.

CASE NO.: 2012-CA-2842

KENNETH W. DETZNER, in his official)
capacity as Florida Secretary of State; THE)
FLORIDA SENATE; MICHAEL)
HARIDOPOLOS, in his official capacity)
as President of the Florida State Senate;)
THE FLORIDA HOUSE OF)
REPRESENTATIVES; and DEAN)
CANNON, in his official capacity as)
Speaker of the Florida House of)
Representatives,)

Defendants.

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

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Plaintiffs respectfully oppose the Legislative Parties' motion to dismiss, which has been adopted in full by the Secretary of State. The motion should be denied for the reasons set forth herein.

INTRODUCTION

The Legislative Parties' motion to dismiss teeters atop a single premise – that the Florida Supreme Court has already decided this case. Based on this flawed premise, the Legislative Parties make three (really two) principal dismissal arguments: (i) the Florida Supreme Court has exclusive jurisdiction over the claims in this lawsuit, and thus this Court lacks subject matter jurisdiction; (ii) the claims in this case are precluded by the claims that were before the Florida Supreme Court; and, relatedly (iii) the claims in this case are identical to, and thus subsumed by, the claims that were before the Florida Supreme Court. As explained below, each of these arguments collapses in the face of undisputed law and fact. Not only did the Florida Supreme Court plainly *not* decide the as-applied claims asserted in this case, it *could not* have decided those claims without the factual record that the FairDistricts Amendments to the Florida Constitution now require.¹ Because that factual record was not and could not have been before the Supreme Court, and because the discovery necessary to make such a record is poised to take place in this case, resolution of these claims appropriately rests with this Court.

Until recently, the Legislative Parties shared this view. In fact, during oral argument before the Florida Supreme Court, the House's counsel expressly contemplated a lawsuit such as this one:

¹ After decades of blatant partisan gerrymandering and incumbent protection by the Florida Legislature, the "FairDistricts Amendments" to the Florida Constitution were overwhelmingly approved by Florida voters in November 2010. The Amendments are codified at Article III, Sections 20 and 21 of the Florida Constitution.

I think the way the Court should approach it, and has in the past tried to approach it, is if there are material facts at issue with some of these standards, then if there are disputed issues of material fact about those standards, then that has to await a full evidentiary proceeding with the ability to have discovery and all of that.

The Court made a common sense evaluation that you do a facial review and that a court of competent jurisdiction, thereafter, can decide those fact intensive bases. I don't know how else this Court does that without it doing exactly the same way.

See Exhibit A at 6:25-7:7, 8:12-17, Transcript of Oral Argument, *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (No. SC12-1). The Senate's counsel not only wholeheartedly agreed, he stated unambiguously that the Senate would not advance the very dismissal arguments that are now before this Court:

We're not asking for res judicata or collateral estoppel effect on disputed facts as I think my co-counsel made clear.

Id. at 16:11-13. Even the Attorney General, in its briefing to the Supreme Court, made the point that allowing these claims to proceed in this Court serves the interests of all parties:

Claims like these are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based on the evidence. Directing claims like the Coalition's to other courts of competent jurisdiction will also satisfy this Court's concern that the Legislature and other proponents of the redistricting plan must be afforded an opportunity to respond.

Response of Attorney General Pamela Bondi to the Coalition's Reply Brief at 4, *In re Senate Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. Feb. 23, 2012) (internal quotations and citations omitted).²

Even absent these concessions, this Court without question has jurisdiction to hear as-applied challenges to a state legislative redistricting plan. The Florida Supreme Court has for

² Aside from revealing a plain desire to avoid litigating these issues in any court, the Legislative Parties' flip-flopping also poses a legal obstacle to their dismissal arguments in this Court pursuant to the doctrine of equitable estoppel. See *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) (citations omitted).

forty years made clear that its scope of review under Article III, Section 16 is a limited determination of the *facial* validity of a redistricting plan, thereby expressly recognizing that *as-applied* claims – such as those asserted here – “are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based on the evidence presented.” *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 829 (Fla. 2002). Thus, while the Supreme Court may have exclusive jurisdiction to do what it did – perform a thirty-day facial review of the Senate redistricting plan without any evidentiary record to speak of – that does not in any way deprive this Court of jurisdiction to hear the more fact-intensive, as-applied claims in this case.

In addition to the precedent derived from its prior redistricting opinions, simply reading the Supreme Court’s two opinions on the 2012 Senate redistricting plans drives home this point. See *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (“*Apportionment P*”); *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) (“*Apportionment IP*”). Both opinions are replete with express references to its *facial* review of the Senate redistricting plans and statements about the absence of a meaningful evidentiary record, and it could not be clearer that the Court did not adjudicate the factual legislative intent issues that the Constitution requires and are now before this Court. The Florida Supreme Court’s language makes it inconceivable that it was overturning, *sub silentio*, forty years of practice and precedent that allowed for a separate, as-applied challenge on those factual issues. It is similarly impossible to reconcile the notion of exclusive jurisdiction in the Florida Supreme Court with the Florida Constitution itself, which now has an express mandate at Article III, Section 21 that “[n]o apportionment plan or district shall be drawn with the intent to favor or

disfavor a political party or an incumbent,” thus *requiring* an even deeper factual inquiry and a more robust evidentiary record on the fact-intensive issue of whether the Legislature drew the 2012 Senate map with improper intent. This Court has jurisdiction to hear the claims before it.

Because the Florida Supreme Court did no more than pass on the facial validity of the Senate redistricting plan, that decision necessarily does not preclude the as-applied claims in this case. As a matter of law, claim preclusion could never bar the as-applied claims in this case where such claims were not (and could never have been) brought previously; indeed, it is black-letter law that a prior proceeding does not have preclusive effect when there was not a full and fair adjudication of the claims. Here, by its own admission, the Supreme Court never fully addressed or resolved the issue of whether the Senate map complies with Article III, Section 21, and could not have addressed or resolved that issue given the absence of an evidentiary record on the critical issue of legislative intent. The Supreme Court’s limited review of a very limited record was consistent with forty years of precedent allowing for as-applied legal challenges to follow a Supreme Court finding of facial validity, while also acknowledging that the factual issues made relevant by Article III, Section 21 could not have been fully addressed within the time constraints imposed by the Constitution. Thus, far from being precluded by the Supreme Court’s finding of facial validity, the as-applied claims in this case are required to be resolved by this Court pursuant to the clear language of the Florida Constitution.

Relatedly, the as-applied claims in this case are quite different from the claims that were before the Florida Supreme Court. The claims would have to be different given that the proceedings themselves are so different – a necessarily limited thirty-day Supreme Court review without discovery, as compared to a trial court proceeding with ample time and discovery to create a full factual record and judicial findings. As a matter of substance as well, these as-

applied claims are different in nature and scope from the claims before the Supreme Court, particularly given the Article III, Section 21 legislative intent issues that still await resolution.

Simply put, the claims in this case are properly before this Court.

ARGUMENT

I. This Court Has Subject Matter Jurisdiction To Hear As-Applied Challenges To Legislative Redistricting Plans.

The Legislative Parties' attack on this Court's jurisdiction is based on a faulty Constitutional legal analysis. Relying on a meandering discussion of the text and legislative history of Article III, Section 16 of the Florida Constitution, the Legislative Parties pay little more than lip-service to Article III, Section 21, which is the Constitutional provision that actually governs the claims in this lawsuit.³ Giving effect to the Florida Constitution – both Sections 16 and 21 – and applying the relevant case law leads inexorably to the conclusion that this Court has jurisdiction over this lawsuit.⁴

³ The Legislative Parties entire discussion of Article III, Section 16 turns the whole purpose of the provision on its head. Its purpose is not to secure finality for the sake of finality so as to forever shield the Legislature from litigation. The underlying purpose is to ensure that the Legislature follows the law in the first place; indeed, as the very first sentence of Section 16 makes clear, the Legislature “shall apportion the state *in accordance with the constitution of the state.*” Art. III, § 16(a) (emphasis added). And, when read in conjunction with Article III, Section 21, the Legislative Parties' strained interpretation of Section 16 becomes completely untenable.

⁴ As a general proposition, the mere suggestion that this Court does not have jurisdiction over purely state law claims is somewhat extreme. It has been ironclad law in this state for decades that “circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.” *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977) (citation omitted). “The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail . . . They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly outside of

A. The Supreme Court Does Not Have Exclusive Jurisdiction Over State Legislative Redistricting Plans.

For forty years, the Florida Supreme Court has consistently stated that its job under Article III, Section 16 is to review the *facial* validity of legislative redistricting plans.⁵ Section 16 itself compels such a limited brand of analysis with respect to the Supreme Court's review of state redistricting maps, as under subsection (c), the Attorney General has just fifteen days from the enactment of a redistricting plan to petition the Supreme Court for a determination of validity, and the Supreme Court then has a mere thirty days to issue its opinion on the plan's validity. Art. III, § 16(c). Thus, by necessity, the Supreme Court could do no more than assess the facial validity of the redistricting plan, leaving the more in-depth analysis and fact-finding to the trial court presiding over as-applied challenges, such as those asserted here. And, with the new Constitutional mandate of Article III, Section 21 requiring an even greater degree of factual inquiry on the issue of intent,⁶ it is even clearer that the Supreme Court's review under Section 16 is a limited inquiry on the facial validity of redistricting plans. Its jurisdiction, therefore, is not exclusive, and this Court may hear this case.

and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto." *Id.* (citations omitted).

⁵ In the redistricting context, a facial claim challenges a plan as written and seeks to show that it explicitly violates some constitutional principle. *See Brown v. Butterworth*, 831 So. 2d 683, 685 (Fla. 4th DCA 2002). In an as-applied challenge, a party seeks to establish that, based on facts existing outside the plan, and as applied to one or more districts, the plan violates the federal or state constitutions, or the Voting Rights Act of 1965. *Id.*

⁶ The issue of intent is particularly fact intensive in the redistricting context. In *Hunt v. Cromartie*, 526 U.S. 541 (1999), the United States Supreme Court overturned a summary judgment ruling in a redistricting lawsuit because there were triable issues as to intent. The Court expressly noted the need for a more in-depth inquiry into the facts: "The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 546 (citations omitted).

1. The Florida Supreme Court's Previous Redistricting Opinions Make Clear That Its Jurisdiction Is Not Inherently Exclusive.

The Florida Supreme Court's prior reapportionment decisions leave no doubt that subsequent litigation over as-applied challenges to redistricting plans should take place in the trial courts, not in the Supreme Court or federal court as the Legislative Parties now suggest. Indeed, to the extent the Supreme Court itself retains jurisdiction with respect to legislative redistricting plans, it continues to do so in the context of its Article III, Section 16 powers – that is, to conduct a facial review of those plans. For example, after the Supreme Court invalidated the Senate map in *Apportionment I*, it necessarily retained jurisdiction to re-analyze the map that the Legislature adopted in response to the Court's invalidation ruling. Hence, in *Apportionment II*, the Supreme Court analyzed the redrawn Senate map in accordance with Article III, Section 16. But that analysis, like its prior analysis in *Apportionment I*, does not deprive this Court of jurisdiction to hear as-applied challenges. Nor could it, as the Supreme Court in *Apportionment II* was still limited in both time and evidence as to the nature of its review.

The 2002 round of redistricting litigation fatally undermines the Legislative Parties' arguments. The Florida Supreme Court expressly disavowed jurisdiction over claims such as these:

[W]ith the advancement of redistricting technology, the continued development of case law in this area, and the unique fact-intensive circumstances presented in the instant case, we determine that we are not in a position to properly address such issues in the present proceeding, especially in light of the constitutional time limitations placed on the Court. *Such claims are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based on the evidence presented.*

In re Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 829 (Fla. 2002) (emphasis added). This unambiguous pronouncement from the Court left no uncertainty that as-applied challenges should be brought in the trial courts – and that is precisely what happened.

Indeed, not only were there state-law-based challenges to state legislative redistricting plans filed in the Circuit Courts following the Supreme Court’s limited review in 2002, there was never any suggestion that the trial court did not have subject matter jurisdiction to hear those challenges. In *Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002), for example, two Marion County residents brought suit in *Marion County Circuit Court* claiming that the 2002 Senate redistricting plan violated the equal protection clause of the *Florida Constitution*. *Id.* at 280. The case was resolved on the merits without any sort of jurisdictional challenge in the Circuit Court, with the Supreme Court again confirming that trial courts had jurisdiction to reach those merits in the first instance:

Earlier this year, this Court issued its opinion in *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002), wherein we found the Florida Legislature’s 2002 reapportionment plan to be facially valid. *We left open the opportunity for parties to raise as-applied challenges alleging “a race-based equal protection claim, a Section 2 [of the Voting Rights Act] claim, or a political gerrymandering claim in a court of competent jurisdiction.”* *Id.* at 832.

Id. at 280 (emphasis added).

Three months later, the Fourth District reached a similar jurisdictional conclusion in *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002). Therein, the Court again confirmed that trial courts do in fact have jurisdiction to address redistricting claims after the Supreme Court completes its own review under Article III, Section 16:

It is clear that the supreme court decided *Forman* on the merits, not on jurisdictional grounds. Obviously if the circuit court were not a court of competent jurisdiction to decide the political gerrymandering claim in *Forman*, there would have been no basis to review the lower court’s judgment on the merits. *Forman* thus implies that, contrary to the court’s decision in the present

case, the circuit courts do have the power to consider gerrymandering challenges to the 2002 redistricting plan. *Forman*, however, did not involve a Congressional reapportionment claim. It is therefore necessary to explain how we reach the conclusion that the circuit court is a court of competent jurisdiction for Congressional redistricting claims.

Id. at 685-86. The Fourth District went on to recount many of the fundamental legal points that allow for jurisdiction over as-applied challenges in the trial courts, all of which also undercut the points advanced by the Legislative Parties here.

For example, the Fourth District observed that nothing in the Florida Constitution expressly and clearly vests all apportionment claims in some court other than the circuit court:

[T]he circuit courts in Florida are the primary trial courts of general jurisdiction. As our Supreme Court has explained, “In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.... ‘The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King’s Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly outside of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto.’”

Id. at 686 (citations omitted). The Fourth District further explained the historical legal basis supporting trial court jurisdiction over as-applied challenges to redistricting plans:

[I]t is important to differentiate among redistricting cases. There are two general classes of challenges to a redistricting plan. First, there is the facial challenge, in which a party seeks to show that, as written, the plan explicitly violates some constitutional principle. Second, there is an as-applied challenge, in which a party seeks to establish that, based on facts existing outside the plan, and as applied to one or more districts, the plan violates the federal or state constitutions, or the Voting Rights Act of 1965.

A comparison of these two classes of claims as to redistricting plans shows that the “one-person, one-vote” claim challenging the entire plan as written alleges facial unconstitutionality, while an as-applied constitutional claim and a VRA section 2(b) claim turn on particular facts applicable to specific districts . . . In this

case plaintiffs challenge the plan as applied to their districts and allege that it violates the Florida Constitution In short, our supreme court held that the fact intensive nature of political gerrymandering claims requires that they be brought not in the supreme court under article III, section 16, but rather in a trial court “of competent jurisdiction.”

Id. at 685-87. Finally, the Fourth District reached the exact conclusion that the Legislative Parties seek to avoid in this case:

The Florida Supreme Court’s review under article III, section 16, is limited to claims of facial invalidity involving the one-person, one-vote principle as well as the specific districting requirements of the state constitution. All as-applied constitutional and VRA challenges – the kind alleged in this case – must be brought in a court of competent jurisdiction. Under Florida law, the circuit courts are competent to hear these latter claims.

Id. These as-applied challenges demonstrate that fact-intensive claims concerning apportionment plans may be properly heard in Circuit Court, and that the Florida Supreme Court does not have automatic exclusive jurisdiction over such claims.

The 1972, 1982, and 1992 Florida Supreme Court reapportionment decisions are not to the contrary. These opinions confirm that the Court’s constitutionally required Article III, Section 16 review is limited to a determination of facial validity. In its first apportionment decision following the passage of the 1968 Florida Constitution, the Court stressed that due to the limitations of its new Article III, Section 16 review, “we are only determining the validity of the apportionment plan on its face” and analyzed the plan for compliance with only the federal “one person one vote” requirement, and the requirement that districts be contiguous. *See In re Apportionment Law*, 263 So. 2d 797, 802, 807-808 (Fla. 1972). Noting that “the other grounds of protesters’ attacks on the validity of the apportionment plan are based upon factual situations,” the Court stated that it would be “impractical under Fla. Const. Art. III, Sec. 16(c), F.S.A., mandating us to enter a judgment within thirty days” to adjudicate such fact-intensive challenges. *Id.* at 808. The Court was well aware that if it undertook to preside over further challenges, it

would require the assistance of a commissioner to conduct trial and make the requisite findings of fact. *See In re Apportionment Law*, 263 So. 2d 797, 822 (Fla. 1972).

As it turned out, when faced with an as-applied challenge in 1980, the Court appointed a Circuit Judge to make the factual findings and recommendations. *See Milton v. Smathers*, 389 So. 2d 978, 979 (Fla. 1980). Similarly, in 1982, the Florida Supreme Court recognized the limited scope and substance of its Article III, Section 16 review: “In this apportionment process, the sole question to be considered by this Court in this proceeding is the facial constitutional validity of Senate Joint Resolution 1 E.” *In re Apportionment Law*, 414 So. 2d 1040, 1052 (Fla. 1982).

And in 1992, the Court again emphasized the “the limitations of our review, including both time constraints and the unavailability of specific factual findings,” and declined to undertake fact-intensive as-applied challenges. *In re Constitutionality of Senate Joint Resolution*, 597 So. 2d 276, 285 (Fla. 1992). Accordingly, in all of these opinions – 1972, 1982, and 1992 – the Florida Supreme Court contemplated that there would be subsequent as-applied challenges to the apportionment plans, and expressly did not reserve for itself exclusive jurisdiction over those challenges. *See In re Constitutionality of House Joint Resolution*, 263 So. 2d 797, 822 (Fla. 1972) (“[W]e retain exclusive state jurisdiction and consider any and all future proceeding relating to the validity of the apportionment plan.”); *In re Apportionment Law*, 414 So. 2d 1040, 1052 (Fla. 1982) (same); *In re Constitutionality of Senate Joint Resolution*, 597 So.2d 276, 285 (Fla. 1992) (same).

If exclusive jurisdiction was somehow automatic or constitutionally proscribed, as the Legislative Parties now argue, there would have been no need for the Court to ever “retain” such jurisdiction. Regardless, where the Florida Supreme Court wishes to retain exclusive

jurisdiction, it does so explicitly. In neither of its 2012 opinions did the Florida Supreme Court retain exclusive jurisdiction (or reject its own precedent of allowing subsequent challenges in courts of competent jurisdiction), and thus this case is now properly in trial court.

2. The Florida Supreme Court's Redistricting Opinions in 2012 Also Confirm That Its Jurisdiction Is Not Exclusive.

Consistent with its past practice, the Florida Supreme Court's 2012 review of the legislative redistricting plans under Article III, Section 16 was again limited to a determination of facial validity. The Court limited itself to a review of the plans on their face, refusing to reach the many factual issues that are now before this Court on this as-applied challenge. The examples are plentiful.

In the introductory paragraphs of *Apportionment I*, the Supreme Court expressly characterizes the nature of its conclusions:

We have carefully considered the submissions of both those supporting and opposing the plans. We have held oral argument. For the reasons more fully explained below, we conclude that the Senate plan is *facially* invalid under article III, section 21, and further conclude that the House plan is *facially* valid.

Id. at 600 (emphasis added). The Court went on to observe that not only was it limiting itself to a facial review, it had no choice but to do so given the paucity of evidence in the record before it:

We conclude that *on this record*, any *facial* claim regarding vote dilution under Florida's constitution fails. While the Court does not rule out the potential that a violation of the Florida minority voting protection provision could be established by a pattern of overpacking minorities into districts where other coalition or influence districts could be created, *this Court is unable to make such a determination on this record*.

Id. at 645 (emphasis added). Thus, even though the Court was aware of the mandate set forth in Article III, Section 21, it couched its conclusions in that regard with language making clear that it was performing a review for facial validity only:

Based on the nature of the review that this Court is able to perform in a facial

challenge, we find that there has been no demonstrated violation of the constitutional standards in article III, section 21, and we conclude that the House plan is *facially* valid.

Id. at 653 (emphasis added).

Furthermore, to the extent the Supreme Court did delve into the record, it was unable to go beyond the objective indicia of whether the Senate map complied with the Constitution. With respect to partisan imbalance, for example, the Court was confronted with compelling statistical data showing improper intent in the drawing of Senate districts, but was unable to look at the evidence behind the data to make an evidentiary based conclusion as to improper intent:

One of the primary challenges brought by the Coalition and the FDP is that a statistical analysis of the plans reveals a severe partisan imbalance that violates the constitutional prohibition against favoring an incumbent or a political party. The FDP asserts that statistics show an overwhelming partisan bias based on voter registration and election results. Under the circumstances presented to this Court, we are unable to reach the conclusion that improper intent has been shown based on voter registration and election results.

Id. at 641-42. The Court reasoned that “although effect can be an objective indicator of intent, mere effect will not necessarily invalidate a plan.” *Id.* This case, by contrast, with the opportunity for discovery from parties and third parties, provides the much needed opportunity to fill in that evidentiary void, particularly where the objective data itself is so compelling.

In his concurring opinion, Justice Lewis further crystallized the issue, while also making clear that the Court was not breaking new ground by limiting itself to a facial review of the redistricting plans:

This Court is not structurally equipped to conduct complex and multi-faceted analyses with regard to many factual challenges to the 2012 legislative reapportionment plan. *As was the case in 2002, we can only conduct a facial review of legislative plans and consider facts properly developed and presented in our record.*

Id. at 689-90 (emphasis added, citations omitted). *See also id.* at 604 (“we examine whether the

Legislature’s apportionment plans are *facially* consistent with these requirements.”) (emphasis added); 607 (“We reject the assertions of the Attorney General and the House that a challenger must prove *facial* invalidity beyond a reasonable doubt.”) (emphasis added); 613 (“we undertake our constitutionally mandated review of the facial validity of the Senate and House plans contained within Senate Joint Resolution 1176.”); 614 (“Guided by both this Court’s precedent and a proper construction of the pertinent provisions contained within article III, we must determine whether the Legislature’s joint resolution is facially consistent with the specific constitutionally mandated criteria under the federal and state constitutions.”); 617 (“This Court has before it objective evidence that can be reviewed in order to perform a facial review of whether the apportionment plans as drawn had the impermissible intent of favoring an incumbent or a political party.”); 621 (“the Court reviews Florida’s constitutional provisions in a facial review of the apportionment plans.”); 647 (“A facial review of the House plan reveals no dilution or retrogression under the Florida Constitution.”); 654-655 (“we conclude on this record that the Senate plan does not facially dilute a minority group’s voting strength or cause retrogression under Florida law.”); 656 (“it is clear from a facial review of the Senate plan that the “pick and choose” method for existing boundaries was not balanced with the remaining tier-two requirements, and certainly not in a consistent manner.”); 662 (“Our facial review of both of these districts confirms that at least two constitutional standards were violated”); 687 (“I write to again reiterate and emphasize that this Court is limited to resolving only *facial* challenges to such plans.”) (Lewis, J., concurring) (emphasis in original).

Apportionment II is more of the same in this regard. The Supreme Court’s conclusion was clear, expressly stating that “the opponents have failed to satisfy their burden of demonstrating any constitutional violation in this *facial* review.” *Id.* at 881 (emphasis added).

See also id. at 884 (“In contrast to traditional, adversarial proceedings, the Court’s review of legislative apportionment under the Florida Constitution is unique. Based on the restrictive time frames under the Florida Constitution, together with other inherent limitations in the constitutional structure and the limited record before us, *this Court announced that the review would be restricted to a facial review of the plan* and that no rehearing would be permitted.”) (emphasis added).

In her concurring opinion, Justice Pariente specifically examined how the Supreme Court’s limited analysis under Article III, Section 16 could never do justice to the new mandate of Article III, Section 21:

Notwithstanding the goal of this new amendment, the structural and temporal constraints placed upon this Court by article III, section 16, of the Florida Constitution remained the same. In other words, the Fair Districts Amendment engrafted new and expansive standards onto an old constitutional framework unsuited for such inquiry.

Id. at 891. Justice Pariente further commented that the Supreme Court itself could not undertake the fact-finding required to perform a meaningful analysis of the redistricting plans in light of the mandate in Article III, Section 21:

Because the Court’s inquiry has greatly expanded with the passage of the FairDistricts Amendments, including an examination of legislative intent in drawing the district lines, the time limitations in our current constitutional framework are no longer suitable. Working within a strict time period, this Court is realistically not able to remand for fact-finding, which creates concerns that are compounded by the fact that the Court is constrained to the legislative record that is provided to it.

Id. at 893. Accordingly, the Supreme Court’s 2012 opinions, like its earlier opinions, plainly contemplate that as-applied challenges may be brought in a court of competent jurisdiction, particularly with respect to the intent issues implicated by Article III, Section 21.

Even if *Apportionment I* and *Apportionment II* did not expressly rule that subsequent as-

applied challenges may be brought in the trial court, the Supreme Court pointedly did *not* hold that subsequent redistricting litigation in the trial court is prohibited. Thus, given the absolute clarity emanating from prior Florida Supreme Court jurisprudence on the issue of circuit court jurisdiction over as-applied challenges, there is no legal basis to find that the Supreme Court would have reversed itself *sub silentio* through its 2012 opinions. The Florida Supreme Court has expressly stated that it would not do that: “We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio*. Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding.” *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002); *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003). *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”).

The Legislative Parties’ reliance on *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010), is also misplaced. At the outset, *Roberts* is not a redistricting case; it involves a legal challenge to citizen-proposed amendments to the Constitution. Although *Roberts* does stand for the proposition that the Supreme Court has exclusive jurisdiction to consider the validity of citizen initiative petitions, the law does not provide for anything other than a facial, advisory opinion on the validity on such petitions, which can arise only in the pre-election context. Consequently, *Roberts* has no bearing on the very issues that permeate the Legislative Parties’ entire brief – the supposed exclusive Supreme Court jurisdiction arising out of Article III, Section 16 and the jurisdiction of this Court to hear an as-applied challenge. Moreover, *Roberts* is a perfect example of how the Supreme Court can, when it wants to, make abundantly clear that its

jurisdiction is in fact exclusive. There is no such affirmative language of exclusive jurisdiction in *Apportionment I* and *II*.

The Legislative Parties' reliance on other states' constitutional provisions, specifically Arkansas and Maryland, is similarly unavailing. At the outset, it goes without saying that the Constitutions of other states are not controlling here. There are also vast material differences between those states' constitutional provisions and Article III, Section 16. Both the Arkansas and Maryland Constitutions explicitly provide for "original jurisdiction" over claims concerning the legality of reapportionment plans. *See* Ark. Const. Amd. 4, Sec. 5; Md. Const. Art. III, Sec. 5. As discussed above, however, Article III, Section 16 does not do so.

Even more fundamentally, though, neither of these constitutional provisions restricts the state supreme courts' ability to fully and fairly adjudicate as-applied, fact-intensive challenges. Indeed, both provisions expressly contemplate that claims will be brought by petitioners following the passage of a plan, and neither restricts the courts' ability to resolve those claims at that time. *See id.* The same is obviously not true here.

Nor, as indicated above, should the law favoring jurisdiction in this Court come as any great surprise to the Legislative Parties. The Legislative Parties themselves, as well as the Attorney General, repeatedly told the Florida Supreme Court that it did *not* have exclusive jurisdiction and that fact-intensive claims should be addressed by a court of competent jurisdiction. *See supra* at pp. 3-4. *See also* Initial Brief of the Florida House of Representatives in Support of SJR 1176 at 8, *In re Senate Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. Feb. 17, 2012) ("the Court must not consider any disputed, fact-based claims."); Brief of the Florida Senate at 4, *In re Senate Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. Feb. 17, 2012) ("This Court's extremely limited

review in this proceeding only passes upon the facial validity of the Legislature's reapportionment plan and not upon any as-applied challenges.") (internal quotations and citations omitted); Brief of Attorney General Pamela Jo Bondi at 6, *In re Senate Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. Feb. 17, 2012) ("Due to time and structural limitations inherent in the 30-day review process, this Court's ruling should not affect the ability of challengers to assert fact-based claims in other appropriate courts of competent jurisdiction.").⁷

3. Article III, Section 21 Compels This Court to Exercise Its Jurisdiction.

In addition to the Florida Supreme Court's own redistricting opinions supporting jurisdiction in this Court, the Florida Constitution itself also compels this Court to exercise its jurisdiction over this case. While the Legislative Parties devote a substantial portion of their brief to discussing Article III, Section 16 of the Constitution, they spend precious little time addressing Article III, Section 21, which is the provision under which the claims in this case arise. Because the Supreme Court expressly recognized that it was unable to give full effect to Article III, Section 21 in its facial review, it cannot be that the Supreme Court's jurisdiction is exclusive in that regard, as it would be a clear case of denial of justice and due process.

Indeed, if the Florida Supreme Court is neither equipped nor authorized to address fact-intensive inquiries into legislative intent, such as the inquiry required by Article III, Section 21,

⁷ Although Plaintiffs did urge the Supreme Court to resolve all claims as to the numerous Constitutional deficiencies in the Senate plan, Plaintiffs were unable to take discovery or support their arguments with anything more than the objective evidence that was already in the record. Thus, the nature of the challenge remained decidedly facial and limited in nature, far different from the as-applied claims supported by discovery that will be put before this Court in this case.

then the people of Florida will be left with no recourse to see that the Constitution is followed.⁸ Providing for a state Constitutional right and then denying the people a forum in which to enforce that right implicates serious due process issues. “Although the constitutional provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied, the limited thirty-day review makes it nearly impossible for the will of the people as expressed in the Fair Districts Amendment to be fully realized.” *Apportionment II* at 892 (internal quotations and citations omitted). *See also Gray v. Bryant*, 125 So. 2d 846, 851-52 (Fla. 1960) (“The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.”) (citations omitted).

Moreover, in construing multiple constitutional provisions addressing a similar subject, the provisions “must be read *in pari materia* to ensure a consistent and logical meaning that gives effect to each provision.” Advisory Opinion to the Governor-1996 Amendment 5 (Everglades), 706 So. 2d 278, 281 (Fla. 1997). *See also Amos v. Matthews*, 126 So. 308, 316 (Fla. 1930) (“The object of constitutional construction is to ascertain and effectuate the intention and purpose of the people in adopting it. That intention and purpose is the ‘spirit’ of the Constitution-as obligatory as its written word.”). Article III, Section 16 should not be read to

⁸ There is no dispute that the record before the Supreme Court contained no testimony or documentary evidence other than evidence about the components of the redistricting maps themselves. The Court did not have the benefit of seeing documents and communications of the map drawers that would tend to show that they drew the maps with impermissible intent.

preclude people from enforcing their rights to bring as-applied challenges based on Article III, Section 21.⁹

Nor do the Legislative Parties' complaints about finality and stability provide a sound basis for dismissal of this lawsuit on jurisdictional grounds. At the outset, the notion that depriving state trial courts of subject matter jurisdiction to hear as-applied challenges would bring an end to all such litigation is simply untrue. As the Legislative Parties concede in their motion, citizen challengers can still pursue such claims in federal court. More importantly, finality and closure are hardly reasons to deprive citizens of Constitutional rights. If the Legislative Parties were truly interested in avoiding litigation over the redistricting process, they would have followed the Constitution in the first place.

II. The Supreme Court's Determination of Facial Validity Does Not Preclude Plaintiffs' As-Applied Claims.

The Legislative Parties' preclusion argument again looks to the language of Article III, Section 16 for support. In making this argument, they specifically rely upon subsection (d), which provides that a "judgment of the supreme court of the state determining the apportionment

⁹ The Legislative Parties' passing mention of the interpretive canon *expressio unius est exclusio alterius*, which roughly means that the expression of one thing is the exclusion of another, is of no moment here. As the First District has made clear, this maxim "is strictly an aid to statutory construction and not a rule of law." *Smalley Transp. Co. v. Moed's Transfer Co.*, 373 So. 2d 55 (Fla. 1st DCA 1979) (citation omitted). It is also particularly ill-suited for use in construing the Constitution. See *Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) ("*Expressio unius est exclusio alterius* . . . should be sparingly used in construing the constitution, or . . . should be applied with great caution to the provisions of an organic law relating to the legislative department.") (citations omitted); see also *Baker v. Martin*, 410 S.E.2d 887, 891 (1991) (recognizing that the *expressio unius maxim* has never been applied to interpret the state constitution because the maxim "flies directly in the face" of the principle that "[a]ll power which is not expressly limited . . . in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution"). In any event, it provides no support to the Legislative Parties' argument that the Supreme Court has exclusive jurisdiction over these claims, particularly in the face of a Constitutional provision and Supreme Court jurisprudence to the contrary.

to be valid shall be binding upon all citizens of the state.” The argument fails in numerous respects.

At the threshold, the Legislative Parties do not even bother to address the governing law on preclusion. Nor do they make a meaningful attempt to apply that law to this case. We do so here.

Claim preclusion “bars a subsequent action between the same parties on the same cause of action.” *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003); *see also Pumo v. Pumo*, 405 So. 2d 224, 226 (Fla. 3d DCA 1981) (“Under the doctrine of res judicata, a final judgment or decree on the merits by a court of competent jurisdiction constitutes an absolute bar to a subsequent suit on the same cause of action and is conclusive of all issues which were raised or could have been raised in the action.”); *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 862 (Fla. 4th DCA 1972) (same). The doctrine applies under Florida law “when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made.” *Fla. Bar v. Rodriguez*, 959 So. 2d 150, 158 (Fla. 2007) (quotation marks omitted).

Issue preclusion, by contrast, operates more narrowly to prevent re-litigation of issues that have already been decided between the parties in an earlier lawsuit. *See Mortgage Elec. Registration Sys., Inc. v. Badra*, 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008) (stating that issue preclusion “precludes re-litigating an issue where the same issue has been fully litigated by the same parties or their privies, and a final decision has been rendered by a court”); *State Dep’t of Revenue v. Ferguson*, 673 So. 2d 920, 922 (Fla. 2d DCA 1996) (“The doctrine of collateral estoppel prevents identical parties from relitigating issues that have previously been decided

between them.”). The “essential elements” of issue preclusion under Florida law are “that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.” *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) (quotation marks omitted); *Dep’t of Health & Rehabilitative Servs. v. B.J.M.*, 656 So. 2d 906, 910 (Fla. 1995) (same).

These preclusion doctrines are plainly inapplicable here. At a most basic level, this case and the claims asserted herein are fundamentally different than what the Florida Supreme Court considered and ruled upon in *Apportionment I* and *Apportionment II*. As alleged in the Complaint, this as-applied challenge is a far different type of lawsuit from the limited brand of inquiry conducted by the Florida Supreme Court. Quite simply, the claims in this case, while obviously addressing the same redistricting map, are of an entirely different nature and scope than what was before the Supreme Court; they are uniquely fact-intensive claims that have never before been litigated and thus could not be precluded.

More importantly, as the Supreme Court recognized, the entire framework of redistricting litigation under Article III, Section 16 does not lend itself to claim preclusion. The issue was addressed specifically in *Apportionment II*:

Res judicata, as well as the related concept of law of the case, are premised on the assumption that the parties have had the ability to raise all necessary claims and discover all necessary evidence to develop their cases. *The Court’s review of legislative apportionment is significantly different from the traditional types of cases to which res judicata has been applied, which are traditional, adversarial proceedings.*

In contrast to traditional, adversarial proceedings, the Court’s review of legislative apportionment under the Florida Constitution is unique. *Based on the restrictive time frames under the Florida Constitution, together with other inherent limitations in the constitutional structure and the limited record before us, this*

Court announced that the review would be restricted to a facial review of the plan and that no rehearing would be permitted.

Id. at 884 (emphasis added). The Court went on to state, contrary to the Legislative Parties' assertion in their motion to dismiss, that "res judicata does not apply" in the redistricting litigation context. *See id.* at 886. Thus, while the Court did refuse to re-analyze certain districts in *Apportionment II* that could have been challenged in the earlier proceeding, it did not reach that ruling based on preclusion principles because, like here, there was not a full and fair adjudication of those claims in the prior proceeding given the "inherent limitations in the constitutional structure and the limited record before [the Supreme Court]." *Id.* at 884.

Consequently, having found that claim preclusion does *not* apply as between *Apportionment I* and *Apportionment II*, the Supreme Court would most certainly not find that claim preclusion operates to bar the claims in this lawsuit. Indeed, as discussed above, with respect to the fact-based claims asserted in this lawsuit, the Supreme Court went out of its way to make clear that such claims did not receive a full and fair adjudication. Justice Pariente captured the issue appropriately:

Because the Court's inquiry has greatly expanded with the passage of the Fair Districts Amendment, including an examination of legislative intent in drawing the district lines, the time limitations in our current constitutional framework are no longer suitable. Working within a strict time period, this Court is realistically not able to remand for fact-finding, which creates concerns that are compounded by the fact that the Court is constrained to the legislative record that is provided to it. As Justice Lewis has now twice observed, "[t]he parameters of our review simply do not allow us to competently test the depth and complexity of the factual assertions presented by the opponents."

Id. at 893 (citations omitted).

Moreover, a determination of facial validity of a legislative redistricting plan has never precluded an as-applied challenge. As discussed above, following the 2002 redistricting cycle, there were state-law-based challenges to state legislative redistricting plans filed in the Circuit

Courts following the Supreme Court's determination of facial validity. *See Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002); *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002). Thus, in addition to dooming the Legislative Parties' jurisdictional arguments, these cases also defeat preclusion as a basis for dismissal. In *Forman*, which, like here, was filed in the wake of a Supreme Court finding of facial validity, the Marion County Circuit Court held a trial on the merits and made factual findings based on that trial. 826 So. 2d at 280. If the Legislative Parties' preclusion argument in this case had any merit, the Supreme Court in *Forman* would have summarily disposed of the case on res judicata grounds without engaging any sort of merits or jurisdictional analysis. It did not do so.

Similarly, in *Brown*, the Fourth District criticized and reversed the trial court for refusing to reach the merits of a redistricting claim filed after the Supreme Court had already passed on the plan. Once again, if there was a legal basis to do so, the Fourth District also could have disposed of the case based on the preclusion argument advanced here. It also did not do so.

The Legislative Parties' assertion that allowing this case to proceed would somehow offend "the hierarchical structure of Florida's court system" is a red-herring. Misapplying the law on precedent, the Legislative Parties cite several cases for the unremarkable proposition that this Court is bound to follow decisions of the Florida Supreme Court. That, of course, is true, but that does not mean this Court is without jurisdiction to hear this case.

III. This As-Applied Challenge Is Different From The Facial Challenge In The Florida Supreme Court.

The Legislative Parties' final dismissal argument is substantively indistinguishable from their prior argument asserting claim preclusion. Declaring the claims in this case to be "identical" to the claims in the Supreme Court, the Legislative Parties assert that preclusion principles bar these claims. They are wrong.

This as-applied challenge differs in scope and in kind from the proceedings before the Supreme Court. As the Supreme Court has made clear, this trial court is exactly the sort of court of competent jurisdiction “where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based on the evidence presented.” Thus, because the Article III, Section 16 proceeding before the Supreme Court did not provide such an opportunity, it is necessarily of a dramatically different nature from this case and thus could never have a preclusive effect here.

The Legislative Parties’ cited cases on this point are inapposite. None are remotely relevant to the issue of claim preclusion in the redistricting context. More importantly, the res judicata issue in each case arose out of a prior *trial court* proceeding, which is precisely the type of proceeding that Plaintiffs are pursuing here for the very first time. In *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156 (4th Cir. 2008), which dealt with the constitutionality of the Maryland Surface Mine Dewatering Act, the Fourth Circuit upheld a district court dismissal of federal court challenge to the Act following a adjudication of a similar challenge filed in the state trial court. *Monahan v. New York City Dep’t of Corr.*, 214 F.3d 275 (2d Cir. 2000), arose out of successive trial court challenges to the Department of Corrections’ sick leave policy. *Am. Fed. of Govt. Emps. v. Loy*, 332 F. Supp. 2d 218 (D.D.C. 2004), involved successive trial court challenges to certain labor policies of the Transportation Security Administration. *Robert Penza, Inc. v. City of Columbus*, 196 F. Supp. 2d 1273 (M.D. Ga. 2002), involved city ordinances regulating “adult entertainment” and plaintiffs’ lawsuits challenging those ordinances. Because plaintiffs and their privies had filed *at least five* other trial court challenges against the same ordinances, the court had little trouble in reaching a finding of res judicata. *Id.* at 1278, n.1. And, *Walgreen Co. v. Louisiana Dep’t of Health and Hospitals*, 220 F. App’x 309

(5th Cir. 2007), involved competing trial court challenges to a Louisiana prescription drug reimbursement program. As these cases demonstrate, the law does not support the Legislative Parties' argument on this point.

A. These Claims Have Not Been Rejected By The Florida Supreme Court

In both *Apportionment I* and *Apportionment II*, the Supreme Court repeatedly emphasized that it was ruling only on the facial validity of the plans and was not able to take evidence or hear witness testimony. Thus, the Legislative Parties' attempt to link the Supreme Court's rulings in *Apportionment I* and *Apportionment II* to the claims in this case is unavailing. The Supreme Court ruled as it did based on the record before it. There was no record against which to evaluate the as-applied claims in this case, and thus the Supreme Court could not have already rejected these claims.

Through discovery, this Court will be afforded the opportunity to examine evidence going well beyond the objective indicia made available to the Supreme Court. If, after reviewing that evidentiary record obtained through discovery, it is apparent that legislators or their staff drew certain districts (or the entire Senate map) for partisan gain or to protect incumbents, then clearly this Court would not be contravening anything the Supreme Court did in making a determination of facial validity without the benefit of seeing such evidence. Indeed, the Supreme Court itself acknowledged that it was unaware of any such information and did not have the ability to obtain such information.

The Legislative Parties' discussion of district-specific claims before the Supreme Court further establishes that the claims in this case are not precluded. For each district, the Legislative Parties dutifully recount the Supreme Court's conclusions, yet fail to abide by the Court's express finding that its conclusions were based on "evidence in the record." The absence of such

evidence in the record demonstrates precisely why this lawsuit is necessary. Plaintiffs must be given the opportunity to present a court of competent jurisdiction with the evidentiary indicators of intent that are plainly present.

Moreover, this Court has already recognized the importance of the information that can be discovered through an as-applied challenge. In the companion Congressional redistricting as-applied challenge pending before this Court, this Court addressed the importance of both the claim and the discovery required to evaluate that claim in its legislative privilege ruling:

I find it 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. The information sought is certainly probative and relevant of intent.

Romo v. Detzner, et al., Case Nos. 2012-CA-412, 2012-CA-490, Order Granting in Part and Denying in Part Motion for Protective Order, at 4-5 (Oct. 3, 2012). The import of that ruling – that the necessary discovery will play a role in resolving the claims before the Court – applies with equal force in this case.

This Court's legislative privilege ruling also nullifies the Legislative Parties' final argument that no discovery is necessary to resolve these claims. Although the Supreme Court did all it could with the objective information at its disposal, there is significantly more valuable information that can be obtained through discovery that will bear upon the claims in this case. Plaintiffs should be able, at a minimum, to discover evidence that speaks to the Legislature's intent behind the drawing the Senate map. That inquiry has not yet happened. The Constitution requires that it happen in this case.

CONCLUSION

For the foregoing reasons and on the foregoing authorities, the Legislative Parties' motion to dismiss, as adopted by the Secretary of State, should be denied.

Dated: December 14, 2012

Respectfully submitted,

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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA, *et al.*,

Plaintiffs,

v.

Case No. 2012-CA-002842

KENNETH W. DETZNER, *et al.*,

Defendants.

**THE LEGISLATIVE PARTIES' REPLY
IN SUPPORT OF MOTION TO DISMISS**

Defendants, the Florida House of Representatives; Will Weatherford, in his official capacity as Speaker of the Florida House of Representatives; the Florida Senate; and Don Gaetz,¹ in his official capacity as President of the Florida Senate (collectively, the "Legislative Parties"), submit this reply in support of their Motion to Dismiss.

INTRODUCTION

Plaintiffs ask this court to do what no Florida court has done: to hear challenges to state legislative districts already considered and adjudicated by the Supreme Court. Because the Supreme Court has exclusive jurisdiction over challenges to state legislative districts, and because its judgment is constitutionally binding on all citizens, the Court should decline.

Despite their request for an unprecedented do-over, Plaintiffs take almost no notice

¹ On November 20, 2012, Representative Will Weatherford succeeded Representative Dean Cannon as Speaker of the Florida House of Representatives, and Senator Don Gaetz succeeded Senator Mike Haridopolos as President of the Florida Senate. Pursuant to Florida Rule of Civil Procedure 1.260(c)(1), Speaker Weatherford and President Gaetz, in their official capacities, are substituted as parties to this action.

of the leading arguments in the Motion to Dismiss. Plaintiffs are unable to distinguish *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010), which is on point and fatal to their claims. They ignore the historical origins and purposes of Article III, Section 16, Florida Constitution. They minimize the Supreme Court’s recent, powerful statement of institutional competence and responsibility to determine compliance with the new, explicit standards in the Constitution. And they offer no alternative explanation for the Constitution’s declaration that the Supreme Court’s judgment is “binding” on all the citizens of the state—plain words that are meaningless if Plaintiffs are right.

Plaintiffs would transform the Supreme Court’s review of legislative districts into ceremony without substance—a mere prelude to endless court battles and legislative sessions. The voters have struck a different balance. The voters enacted standards, but demanded *finality*. The Supreme Court has exclusive jurisdiction, and its rejection of Plaintiffs’ claims is binding.

ARGUMENT

I. The Florida Supreme Court Has Exclusive Jurisdiction to Determine the Validity of State Legislative Redistricting Plans Under the Florida Constitution.

Plaintiffs never squarely address the principles advanced in the Motion to Dismiss. Instead, Plaintiffs demand an opportunity to conduct discovery and misapply the distinction between facial and as-applied claims, contending that opponents of a redistricting plan, if frustrated in the Supreme Court, may seek a different result on the same claims in circuit court.

The Supreme Court, however, has *never* held that circuit courts have jurisdiction to reconsider claims already adjudicated by the Supreme Court. On the single occasion that the Supreme Court permitted claims to be brought in other courts, the Court had *not* adjudicated those claims—and the claims were *federal* claims that the Florida Constitution cannot bar. The Court has *never* postponed consideration of claims under specific state constitutional standards.

In 1972, 1982, and 1992, the Florida Supreme Court stated that it has “exclusive state

jurisdiction” over challenges to state legislative districts. See *In re Senate Joint Resolution 2G*, 597 So. 2d 276, 286 (Fla. 1992); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1052 (Fla. 1982); *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d 797, 822 (Fla. 1972). In 2002, when the Court was asked to adjudicate *federal* claims—claims under the Voting Rights Act and Equal Protection Clause—the Court declined, reserving adjudication of such “as-applied” claims “for a court of competent jurisdiction.” *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828-29 (Fla. 2002).

In 2012, the Legislative Parties argued that the Court should decline to adjudicate fact-based claims not only under federal law, but also under the new *state* constitutional standards in Article III, Section 21. The Court rejected this argument and adjudicated *all* claims under the new standards. The Court noted that in 2002 it had refused to decide claims under the Voting Rights Act, but is obligated to adjudicate claims under “explicit” state constitutional standards:

In light of two distinct developments, our past approach is not determinative of our review in this post-2010 case. The first development, as mentioned above, is that in 2010, the voters imposed upon the Legislature *explicit, additional state constitutional standards*. . . .

. . .

We acknowledge that in 2002, this Court declined ruling on Federal VRA claims and race-based discrimination claims, instead leaving those claims to be brought on an “as-applied” basis. Of course, as we have mentioned previously, at that time, there was no *explicit state constitutional requirement*, and it was entirely logical to defer such claims until after this Court determined the facial validity of the plans under the Florida Constitution.

Apportionment I, 83 So. 2d at 609, 626. Thus, the Court distinguished federal claims from the “explicit” standards in the Florida Constitution, which the Supreme Court is obligated to review.

Florida Senate v. Forman, 826 So. 2d 279 (Fla. 2002), is not to the contrary. *Forman* involved political-gerrymandering claims, which the Supreme Court had expressly declined to

adjudicate, *see In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 831 (Fla. 2002), and which arise under the Equal Protection Clause—not under an “explicit” redistricting standard in the Florida Constitution. These claims, which *federal* courts developed under the Federal Constitution, *see Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986), remained for subsequent adjudication—and still do. The Supreme Court has *never* adjudicated these claims in its thirty-day review (not even in 2012), even though the same claim may be implicit in the Florida’s general guarantee of equal protection. *See* Art. I, § 2, Fla. Const.

Brown v. Butterworth, 831 So. 2d 683 (Fla. 4th DCA 2002), is even farther afield.

Brown concerned congressional redistricting, which is not governed by Article III, Section 16.²

In *Apportionment I* and *Apportionment II*, the Court asserted a unique, institutional responsibility to determine compliance with the new standards. In both cases, the Court issued lengthy opinions that decided *all* claims under *all* standards. Contrary to Plaintiffs’ suggestion that the Court “did not adjudicate the factual legislative intent issues,” “never fully addressed or resolved the issue of whether the Senate map complies with” the new standards, and “expressly recognized that it was unable to give full effect to Article III, Section 21” (Resp. at 3, 4, 18), the Court announced: “In this review, we are obligated to interpret and apply these standards in a manner that gives full effect to the will of the voters.” *Apportionment I*, 83 So. 3d at 597.

The Court did not fail. It carefully determined compliance with *all* standards. The Court reviewed a vast record consisting of maps, statistics, transcripts, and other information submitted by proponents and opponents, and issued opinions that decided all matters argued by

² Plaintiffs argue that the Court has not overruled its 2002 decision *sub silentio*, but, clearly, the Court expressly distinguished that decision, limiting its application to *federal* claims the Court has refused to address—not “explicit” state constitutional requirements. Further, if the Supreme Court does not overrule itself *sub silentio*, then its decision in 2002 did not overrule its determination in 1972, 1982, and 1992 that it has “exclusive state jurisdiction.”

the parties, declaring multiple districts invalid under the intent standard. *Id.* at 669, 672, 673, 678. The Court gave “full effect to the will of the voters” without once suggesting that further work in circuit courts was necessary, *id.* at 597, and Plaintiffs participated in that process and raised the same claims there as here. To afford Plaintiffs a second chance would disparage the comprehensive work of the Supreme Court and open a door to never-ending litigation.

Plaintiffs cannot distinguish *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010), which sets forth the principles that control this case. Plaintiffs argue that *Roberts* is different because, as to initiative amendments, “the law does not provide for anything other than a facial” review of validity. (Resp. at 16.) But the same is true here. Here, as in *Roberts*, the Constitution requires a thirty-day review by the Supreme Court. Here, as in *Roberts*, the Constitution does not provide circuit-court jurisdiction. Here, as in *Roberts*, the Constitution prescribes standards, and parties have sought to discover facts to prove violations. The two cases are exactly parallel.³

After an inundation of redistricting litigation, alternating court battles and legislative sessions, and court-drawn districts and court-ordered elections, the voters of Florida expressed their preference for a redistricting process that achieves *finality*. Plaintiffs might disagree with the policy, but the voters are entitled to strike this balance.⁴ The Court should refuse to open a door to decade-long litigation, and should affirm the exclusive jurisdiction of the Supreme Court.

³ In *Roberts*, the Court was undeterred by complaints that challengers would have “no recourse” to facts that prove the invalidity of ballot language—and the Court had previously permitted trial-court challenges, *see Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992).

⁴ Plaintiffs assert that the purpose of Article III, Section 16 was not to ensure finality, but to foster *more* litigation (Resp. at 5 n.3)—an assertion at odds with reason and history. And Plaintiffs state that the Legislative Parties have “conceded” that opponents may pursue claims in federal court (*id.* at 20), but the Legislative Parties’ only “concession” is that opponents may pursue *federal* claims in *federal* court. Even if the Florida Constitution purported to bind all citizens with respect to federal claims, the Supremacy Clause would preclude such a result.

II. The Florida Supreme Court's Determination That the Senate Plan Is Valid Has Preclusive Effect and Bars Plaintiffs' Claims.

The plain words of the Florida Constitution give preclusive effect to the Supreme Court's determination of validity: "A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. If these words have *any* meaning, they bar claims adjudicated by the Supreme Court.

It is axiomatic that every word of the Florida Constitution must be given effect. "In construing constitutions, that construction is favored which gives effect to every clause and every part of it. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which gives it effect." *Apportionment I*, 83 So. 3d at 614 (quoting *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d at 807).

Plaintiffs offer no possible meaning for this provision of the Constitution. No theory of these words is consistent with their Complaint in this case. Thus, Plaintiffs divert the discussion to the judicially developed doctrines of "claim preclusion" and "issue preclusion," and argue that the Legislative Defendants have not satisfied the elements of those doctrines. But the Legislative Defendants have not asserted those doctrines. They rely on the plain words of the Constitution.

If disappointed parties may relitigate any claim that was before the Supreme Court, then the Court's judgment is not "binding." See, e.g., Black's Law Dictionary (6th ed. 1990) (defining the verb "bind" to mean "[t]o affect one in a constraining or compulsory manner with a contract or a judgment. So long as a contract, an adjudication, or a legal relation remains in force and virtue, and continues to impose duties or obligations, it is said to be '*binding*.'"). The plain and ordinary meaning of the word "binding" is inconsistent with a relitigation of claims.⁵

⁵ Again, *Forman* does not support Plaintiffs' argument. *Forman* concerned claims that the Supreme Court had expressly declined to adjudicate. Clearly, to the extent the Supreme Court expressly declines to adjudicate a claim, there is no binding judgment. Here, Plaintiffs

III. Plaintiffs’ “As-Applied” Challenge Is Identical to the Challenge Rejected by the Florida Supreme Court.

Plaintiffs contend that their claims are “dramatically different” from the claims raised in the Supreme Court. According to Plaintiffs, their claims are dramatically different because *this* forum permits them to conduct discovery and create a different factual record. Nonetheless, the claims are identical. The possibility of creating a different record does not distinguish their claims; indeed, the possibility of creating a different record inheres in every judicial proceeding.

The claims raised in Plaintiffs’ Complaint are identical to the claims raised in their Initial and Reply Briefs in *Apportionment II*. The same attacks on the same districts can be found at the following places in their Supreme Court briefs:

District 6	Initial Brief at 15-20 Reply Brief at 5-7
District 8	Initial Brief at 15-20 Reply Brief at 5-7
District 10	Initial Brief at 20-22 Reply Brief at 8-9
District 13	Initial Brief at 20-22 Reply Brief at 8-9
District 17	Initial Brief at 23-27 Reply Brief at 9-10
District 19	Initial Brief at 23-27 Reply Brief at 9-10
District 21	Initial Brief at 28-32 Reply Brief at 10-11

District 22	Initial Brief at 28-32 Reply Brief at 10-11
District 26	Initial Brief at 23-27 Reply Brief at 9-10
District 32	Initial Brief at 28-32 Reply Brief at 10-11
District 35	Initial Brief at 32-36 Reply Brief at 12
District 37	Initial Brief at 39
District 39	Initial Brief at 38-41 Reply Brief at 14
District 40	Initial Brief at 36-42 Reply Brief at 12-14

raised all of their claims in the Supreme Court, which emphasized its obligation to review the map for compliance with all explicit standards, independent of the claims raised by the parties.

Plaintiffs also cite *Apportionment II* for the proposition that the Court refused to apply claim-preclusion principles. In *Apportionment II*, however, the Court declined Plaintiffs’ invitation to consider new challenges to unchanged districts, and thus hardly supports Plaintiffs’ position. And in *Apportionment II* the Court reviewed a *new* redistricting plan, while this case concerns the same map reviewed and approved by the Supreme Court in *Apportionment II*.

Plaintiffs' position that their claims are different is refuted by obvious facts. The only difference is that Plaintiffs would prefer to raise their claims in this forum—not in the forum prescribed by the Florida Constitution. Because Plaintiffs' claims are identical to the claims presented to the Supreme Court, this Court should dismiss their Complaint.

WHEREFORE, the Legislative Parties respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

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