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)

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

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INTRODUCTION

This petition seeks review of a decision of the Circuit Court of the Second Judicial Circuit holding that it has subject-matter jurisdiction over claims challenging the validity of Senate Joint Resolution 2-B, which establishes the apportionment plan for the Florida Senate (the "Senate Plan"). If the subject sounds familiar, it is because this Court resolved these precise claims less than a year ago in *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 877 (Fla. 2012). Plaintiffs have now brought the very same claims in circuit court. Petitioners, 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, in his official capacity as President of the Florida Senate (the "Legislative Parties") seek a writ of prohibition or, alternatively, a constitutional writ instructing the circuit court to dismiss these claims.

This Court should issue a writ for three independent reasons:

First, this Court has exclusive jurisdiction to determine the validity of state legislative redistricting plans under state constitutional standards. Therefore, the circuit court lacks subject-matter jurisdiction over Plaintiffs' Complaint.

Second, this Court has entered a declaratory judgment determining the validity of the Senate Plan. 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. Therefore, the circuit court's exercise of jurisdiction over claims this Court already determined interferes with this Court's complete exercise of its jurisdiction.

Third, Plaintiffs' so-called "as-applied" challenge to the Senate Plan is identical to the challenge this Court rejected.

I.

BASIS FOR JURISDICTION

This Court has jurisdiction to "issue writs of prohibition to courts" pursuant to Article V, Section 3(b)(7) of the Florida Constitution. *See* Fla. R. App. P. 9.030(a)(3). A writ of prohibition is appropriate "when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." *Roberts v. Brown*, 43 So. 3d 673, 677-78 (Fla. 2010); *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977) (same). Moreover, this Court "has concurrent jurisdiction with the district courts of appeal to entertain petitions for writs of prohibition directed to trial courts." *1-888 Traffic Schs. v. Chief Judge, Fourth Jud. Circuit*, 734 So. 2d 413, 417 (Fla. 1999). This Court may issue a writ of prohibition directly to a circuit court that has exercised jurisdiction over a matter exclusively within this Court's jurisdiction. *See Roberts*, 43 So. 3d at 678.

This Court may also issue "all writs necessary to the complete exercise of its jurisdiction"–also known as a constitutional writ. Art. V, § 3(b)(7), Fla. Const.

This Court may invoke its all-writs jurisdiction when a trial court encroaches on a matter within the Court's exclusive jurisdiction. *See Roberts*, 43 So. 3d at 677 (exercising all-writs jurisdiction to protect the Supreme Court's exclusive authority to consider pre-election challenges to the validity of citizen-initiative petitions); *United Servs. Auto. Ass'n v. Goodman,* 826 So. 2d 914, 915 (Fla. 2002) (exercising all-writs jurisdiction where circuit court orders "encroach[ed] upon this Court's ultimate jurisdiction to adopt rules for the courts"). A constitutional writ is used "to preserve the power of the court to fully and effectively decide cases that have been, or will be, presented on independent jurisdictional grounds." *Williams v. State*, 102 So. 3d 669, 669 (Fla. 1st DCA 2012). A constitutional writ may be issued to protect the Court's jurisdiction over prior cases that have concluded. *Roberts*, 43 So. 3d at 676, 678 (finding that all-writs jurisdiction existed where Court had previously issued an advisory opinion).

II.

STATEMENT OF RELEVANT FACTS

Article III, Section 16 of the Florida Constitution requires the Legislature to reapportion the state's legislative districts every ten years. Once the Legislature adopts an apportionment plan, the Attorney General must petition the Court "for a declaratory judgment determining the validity of the apportionment." Art. III, § 16(c), Fla. Const. If the Court determines that the plan is invalid, the Legislature

must adopt a new redistricting plan "conforming to the judgment of the supreme court." Art. III, § 16(d), Fla. Const. If the Court disapproves the revised plan, it must adopt a plan itself. Art. III, § 16(f), Fla. Const. Under the Constitution, "[a] judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all citizens of the state." Art. III, § 16(d), Fla. Const.

Before 2010, this Court's review was limited to determining a plan's compliance with (i) the one-person, one-vote standard of the United States Constitution, and (ii) Article III, Section 16(a), which requires districts to be consecutively numbered and to consist of contiguous, overlapping or identical territory. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 598 (Fla. 2012) ("*Apportionment I*"). In 2010, however, Florida voters approved Amendment 5, which imposed new, substantive standards on state legislative districts. The Florida Constitution now provides two "tiers" of redistricting standards. The first tier provides that:

> [n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and 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 to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

Art. III, § 21(a), Fla. Const.

The second tier lists three more requirements: "districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall,

where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const. Compliance with these second-tier standards is "subordinate to those listed in the first tier of section 21 and to federal law in the event of a conflict." *Apportionment I*, 83 So. 3d at 599. The order in which the Constitution lists the standards in the two tiers is "not [to] be read to establish any priority of one standard over the other within that [tier]." Art. III, § 21(c), Fla. Const.

THE 2012 REDISTRICTING PROCESS

In February 2012, the Florida Legislature adopted Senate Joint Resolution 1176, containing a new redistricting plan for state legislative districts. The Attorney General petitioned this Court for review, and the Court permitted "adversary interests to present their views." Art. III, § 16(c), Fla. Const. The organizations that are Plaintiffs in the case below filed briefs in opposition and participated in oral argument, as did the Florida Democratic Party.

In March 2012, this Court approved the districts established for the House of Representatives but invalidated elements of the Senate's plan. *See Apportionment I*, 83 So. 3d at 686. In a lengthy opinion interpreting the new standards, the Court invalidated eight Senate districts. 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*.

In its decision, the Court clarified several features of its review process under the new constitutional framework:

- The Court's review is **plenary**. The Court must determine compliance with all standards set forth in the Florida Constitution. *See id.* at 600.
- The Court's review is **unique**. The Constitution imposes a unique role on the Court in its review of state legislative redistricting plans. *See id*. at 607.
- The Court's review is **independent**. The Court is not confined to the claims raised by interested parties. *See id.* at 606.

Thus, while the Legislature argued that the Court should not decide claims that present disputed facts, this Court disagreed and concluded that it has a unique and independent responsibility to determine validity under all state constitutional standards. *Id.* 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 . . . ."") (emphasis added and marks omitted).

The Court found that the "process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in our obligations." 83 So. 3d at 606. Usually a challenge to the

constitutionality of a legislative act "must be brought in a trial court and then reviewed by a district court of appeal. This Court has mandatory jurisdiction in those circumstances only if the legislative act is found to be unconstitutional." *Id.* By contrast, the Court has an obligation under the Florida Constitution "to independently examine the joint resolution [of apportionment] to determine its compliance with the requirements of the Florida Constitution." *Id.*

The Legislature convened in an extraordinary apportionment session and adopted Senate Joint Resolution 2-B, which embodied 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 this Court. The Court allowed interested parties to present their views, and the organizational Plaintiffs here again filed briefs and participated in oral argument. The Court rejected their arguments and approved the Senate Plan. *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 877 (Fla. 2012) ("*Apportionment II*").

THE CIRCUIT COURT COMPLAINT

On September 5, 2012—more than four months after this Court approved the Senate Plan—Plaintiffs filed a complaint in Leon County circuit court again challenging the Senate Plan (A. 7-24).[1] The Complaint raises forty-two claims, all of which were raised in *Apportionment II*. For example, Plaintiffs' previous

[1] "A. #" refers to the appendix filed with this petition.

challenge alleged that the Senate Plan "splits the city of Daytona Beach, as well as the African-American community in Daytona Beach, right down the middle. By splitting Daytona Beach, which votes heavily Democratic, the Legislature was able to maintain Republican performance in Districts 6 and 8" (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 at 16, *In re Senate Joint Resolution of Legislative Apportionment 2-B*, Case No. SC12-460 (Fla. Apr. 10, 2012) (the "LOWV Brief")). This Court rejected that claim. *Apportionment II*, 89 So. 3d at 888. The new complaint raises the identical issue (A. 15-16). Plaintiffs' prior challenge also alleged that "Districts 10 and 13 were tailor-made to favor incumbent Senators Simmons and Gardiner" (LOWV Brief at 22). This Court rejected that claim as well. 89 So. 3d at 889-90. Yet the new complaint raises the same issue (A. 17). It goes on and on.

The Legislative Parties moved to dismiss the complaint, asserting that this Court has exclusive jurisdiction to determine the validity of state legislative redistricting plans under the Florida Constitution and that its determination is binding on all citizens of the state (A. 32-49). In addition, Plaintiffs' so-called "as-applied" challenge relies on the same factual and legal theories this Court rejected in *Apportionment II*, and is therefore barred (A. 49-59).

On January 17, 2012, the circuit court denied the motion to dismiss (the "Order"). The Order found that this Court "has never held that it has exclusive jurisdiction over challenges to legislative redistricting plans" (A. 2). Rather, the circuit court found that this Court is limited to a "facial" review of redistricting plans. *Id*. The court also rejected the Legislative Parties' argument that this Court had already decided Plaintiffs' claims (A. 6). The court found that an as-applied challenge is distinguishable from a facial challenge because it is "based on facts that are not apparent on the face of the plan" and Plaintiffs are accordingly "entitled to develop and to present relevant evidence to support their claims." *Id*.

III.

NATURE OF THE RELIEF SOUGHT

The Legislative Parties request that this Court quash the Order and direct the circuit court to dismiss the complaint for lack of subject-matter jurisdiction.

IV.

ARGUMENT

A. THE CIRCUIT COURT DOES NOT HAVE JURISDICTION OVER CLAIMS CHALLENGING STATE LEGISLATIVE REDISTRICTING PLANS

This Court should issue a writ of prohibition because the circuit court lacks jurisdiction. The text and history of Article III, Section 16 of the Florida Constitution, as well principles of constitutional interpretation and this Court's precedent, make clear that this Court has exclusive jurisdiction over the validity of

legislative reapportionment plans under the state constitutional standards.

1. This Court Has Exclusive Jurisdiction to Determine the Validity of State Legislative Redistricting Plans Under the Florida Constitution

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

As this Court recently noted, *see Roberts*, 43 So. 3d 679, circuit courts have no jurisdiction over matters the Constitution expressly commits to another court. In *Roberts*, this Court considered its jurisdiction to determine the validity of ballot summaries for constitutional amendments proposed by citizen initiative. The Court had upheld two ballot summaries in its automatic review process, but the same summaries were later challenged in circuit court. *Id.* at 675-76. The plaintiffs argued that this Court cannot hear witnesses or review evidence, and offered to present evidence showing 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). This Court nevertheless found its

jurisdiction exclusive, noting that "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." 43 So. 3d at 679. The Constitution "provides that this Court *shall* consider the validity of citizen-initiative amendments, [which] indicates that no other Florida court has jurisdiction to consider these types of pre-election petitions." *Id.* (emphasis in original). The Court explained that the purpose of the amendments creating the ballot-summary review process 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." *Id*. at 678. To permit subsequent litigation would "nullify" the amendments and "eviscerate any protections to ballot initiatives that those amendments were intended to serve." *Id*. at 683.

For precisely the same reason, this Court's jurisdiction to determine compliance with state constitutional redistricting standards also is exclusive. The Constitution's express grant of jurisdiction to this Court removes such cases from the jurisdiction of circuit courts. In fact, the Court's ballot-summary review process and its redistricting review process are notably similar. In both cases, this Court must determine validity in an original, time-limited proceeding initiated by

the Attorney General and open to all interested parties. *Compare* Art. IV, § 10, Fla. Const. (ballot summaries), *with id*. Art. III, § 16 (state legislative redistricting).

The Order tries to distinguish *Roberts*, noting that Article III "specifically states that such advisory opinions are within the jurisdiction of the Florida Supreme Court" and the giving of advisory opinions "is not within the jurisdiction of the circuit courts" (A. 4). But just as in *Roberts*, the Constitution provides for original jurisdiction over state legislative apportionment in this Court and requires a thirty-day review by this Court. It does not provide for circuit-court jurisdiction.

2. The History of Article III, Section 16 Demonstrates that this Court's Jurisdiction Is Exclusive

The genesis of Article III, Section 16 shows that it was intended to grant this Court exclusive jurisdiction over state legislative redistricting. 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). In *Roberts*, this Court relied on the historical purpose of the ballot-summary review to support its conclusion that its jurisdiction is exclusive. 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 later 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*. at 683.

The history behind this Court's exclusive jurisdiction in legislative redistricting cases is even more compelling. Article III, Section 16 was designed and adopted in 1968 to remedy the never-ending waves of redistricting litigation that had overwhelmed the State with instability and uncertainty.

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

After *Sobel*, the Legislature reconvened. *See* Fla. H.R. Jour. 1 (Aug. 1, 1962).[2] It proposed a constitutional amendment containing a new redistricting formula and enacted new redistricting plans, contingent on the voters' adoption of the amendment. *See* Fla. H.R. Jour. 80 (Aug. 11, 1962); Fla. S. Jour. 53 (Aug. 11,

[2] The journals of the House of Representatives and Senate are accessible on their websites. *See* http://tinyurl.com/HouseJournals; http://tinyurl.com/SenateJournals.

1962); *Sobel*, 208 F. Supp. at 319-20 (supplemental opinion). The *Sobel* panel approved the contingent plans, but retained jurisdiction in case the voters rejected the proposed amendment. *Sobel*, 208 F. Supp. at 324-25 (supplemental opinion). The voters did reject it. *In re Adv. Opinion to the Governor*, 150 So. 2d 721, 722 (Fla. 1963). The Legislature therefore met again in special session, *see* Fla. H.R. Jour. 1 (Nov. 9, 1962), but could not adopt new 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).

In June 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 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 session in 1965, but failed to adopt a plan. *See Swann v. Adams*, 383 U.S. 210, 210-11 (1966). On June 5, the Legislature convened another session, *see* Fla. H.R. Jour. 1 (June 5, 1965), but again failed to adopt a plan, *see* Fla. H.R. Jour. 1 (June 25, 1965). It 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 panel held the new plan unconstitutional, but adopted it with minor modifications as an interim plan. *Swann v. Adams*, 258 F. Supp. 819, 822 (S.D. Fla. 1965). But the Supreme Court reversed, requiring that a valid plan be adopted for the 1966 elections. *Swann v. Adams*, 383 U.S. 210, 212 (1966).

The very next day, Governor Burns called the Legislature into its sixth special redistricting session 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, reversed. *Swann v. Adams*, 385 U.S. 440 (1967). In February 1967, the federal district court imposed a redistricting plan and ordered special elections in all districts before the regular legislative session that would begin two months later. *Swann v. Adams*, 263 F. Supp. 225 (S.D. Fla. 1967).

In light of this decade-long redistricting debacle, the 1968 Florida Constitution granted this Court the exclusive responsibility over an orderly, balanced, and *finite* redistricting process—one that ensures finality and stability, as well as a constitutionally valid redistricting plan. *See In re Constitutionality of*

House Joint Resolution 1987, 817 So. 2d 819, 835 (Fla. 2002) ("Clearly, 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.") (Lewis, J., concurring). Article III, Section 16 thus created a self-contained and carefully calibrated process that provides for all possible contingencies and guarantees a valid and timely apportionment. In responding to endless redistricting litigation, the 1968 Constitution achieved the long-sought values of stability, certainty, and confidence in government.

To interpret this Court's jurisdiction over redistricting as non-exclusive would emasculate these reforms. The Constitution would no longer prevent decade-long litigation, electoral districts that are in constant limbo, alternating court battles and special legislative sessions, with their attendant public expense, uncertainty, and instability. In fact, the trial court's interpretation would instead subject each redistricting plan to multiple rounds of litigation and exacerbate the precise evils Article III, Section 16 was intended to remedy.

3. Principles of Constitutional Interpretation Confirm that this Court's Jurisdiction Is Exclusive

Interpretative principles confirm that this Court's jurisdiction over state redistricting plans is exclusive. One such principle is that specific provisions control over general ones. In *Roberts*, this Court concluded that the specific grant

of jurisdiction to this Court to determine the validity of initiative amendments controls over the general grant of 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 this Court to determine the validity of redistricting plans controls over the same general grant of jurisdiction to circuit courts.

Another interpretive canon is *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), which provides 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. 253, 256 (Fla. 1927)). For example, this 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 creating a program of 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). Here, the Constitution prescribes how the validity of legislative redistricting plans is to be determined, and thus excludes other means.

Yet another canon of construction is that 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 reduce this Court's review to an expensive moot-court session and would nullify the Constitution's express statement 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." Art. III, § 16(d), Fla. Const.[3]

4. This Court's Precedent Demonstrates that Its Jurisdiction over Redistricting Challenges Is Exclusive

This Court's precedent demonstrates that even if Plaintiffs could bring further challenges to the Senate Plan, they would have to be brought in this Court. In 1972, 1982, and 1992, this Court directed parties seeking further review to petition *this* Court—not a trial court. *See Apportionment I*, 83 So. 3d at 609 ("A

[3] While not binding on this Court, two states with constitutional provisions similar to Florida's have interpreted them to confer not only original, but exclusive jurisdiction in their supreme courts. In Arkansas, the Constitution provided that "[o]riginal jurisdiction . . . is hereby vested in the Supreme Court of the State . . . to revise any arbitrary action 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 is 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 Maryland Constitution 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."

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 Appearing as Senate Joint Resolution 1E*, 414 So. 2d 1040, 1052 (Fla. 1982) ("[W]e retain ***exclusive state jurisdiction*** to consider any and all future proceedings relating to the validity of this apportionment plan."); *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)).

Moreover, in *Apportionment I*, this Court rejected the suggestion that 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. This approach would also create uncertainty for the voters of this state, the elected representatives, and the candidates who are required to qualify for their seats.

83 So. 3d at 609. The Court emphasized that "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. The Order creates precisely such a situation.

Although this Court recognized that in the past it had allowed a challenge to a redistricting plan to be brought in another forum at a later time, it found that "in light of two distinct developments, our past approach is not determinative of our review in this post-2010 case." 83 So. 3d at 609. The first development was the introduction of additional, explicit state constitutional standards by Amendment 5. As the Court noted, "[i]n 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." *Id*. at 626. The Court noted, however, that in 2002 "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." *Id*. (emphasis added). The second development was that "technology has continued to advance in the last decade, allowing this Court to objectively evaluate many of Florida's constitutionally mandated criteria without the necessity of traditional fact-finding." *Id*. at 610.

In deciding whether the House and Senate plans were valid in *Apportionment I* and *Apportionment II*, this Court conducted a factual investigation unprecedented in the apportionment context. "To ensure that the Court would have the means to objectively evaluate the plans," the Court issued a scheduling order that required the Attorney General to provide "maps of the House and Senate apportionment plans depicting the new districts, which shall include maps depicting the entire state as well as regional maps." 83 So. 3d at 610. The Court also required the submission of the redistricting plans and any alternative plans in .doj format, which would allow the Court and the challengers to perform an objective statistical analysis of the plans submitted by using standard redistricting software. *Id*. 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. The Court also considered other information about how the plan was created, including the transcripts of twenty-six public hearings held throughout the state. *Id*. at 664. And the Court did not limit itself to challenges raised by opponents, noting its "separate obligation to 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.

As in the past, this Court described its review as "facial." *Apportionment I*, 83 So. 3d at 614. But it does not follow that the Constitution authorizes subsequent, trial-level review of such claims. While in 2002 the Court deferred so-called "as-applied" claims under *federal* statutory and constitutional provisions (indeed, state law could not bar such claims), *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 832, it has never authorized trial-court adjudication of express state constitutional standards, *see Apportionment I*, 83 So. 3d at 626.

5. <u>The Cases on Which the Circuit Court Relied Do Not Apply</u>

The Order cites this Court's decision in *In re Constitutionality of House Joint Resolution 1987* for the holding that the Court does not have exclusive jurisdiction over redistricting claims (A. 2). In 2002, the Court decided claims under state apportionment standards, which were limited to adherence to the one-person, one-vote constitutional requirement and the requirement that districts contain contiguous, overlapping or identical territory. The Court declined to rule on three categories of claims: those 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 where there is an opportunity to present evidence and witness testimony. . . [t]herefore, we decline to rule on these claims in this proceeding." *Id*. at 829; *see also Johnson v. De Grandy*, 512 U.S. 997, 1004-05 (1994) (concluding that this Court's review of federal Voting Rights Act claims ten years earlier did not have preclusive effect, and that such claims might be revisited "in any court with jurisdiction"). Moreover, the Court recognized that such claims were based on federal law, and "article III, section 16(c) did not envision the development of the highly complex federal claims." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 829 n.13.

This Court has never authorized the re-litigation of issues it has actually decided. Indeed, circuit courts are bound by this Court's determinations. *See Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 724 (Fla. 2012). Moreover, 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. 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, it can and does obligate this Court to resolve all state constitutional claims with finality.

The Order also cites *Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002), a starkly different case. *Forman* concerned claims that this Court had expressly declined to resolve during its automatic thirty-day review, *see In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 830-31, while the case below presents the same claims this Court has considered and adjudicated. *Forman* did not implicate any "explicit state constitutional requirement"—requirements constitutionally entrusted to this Court, *see Apportionment I*, 83 So. 3d at 609, 626—but an equal-protection claim developed chiefly by federal courts under the federal Constitution and therefore implied in Florida's analogous guarantee of equal protection. Thus, while framed as a state equal-protection claim, the claim in *Forman* was, for all practical purposes, a federal claim, and not one brought pursuant to the "'instructions' of the citizens as expressed in specific requirements of the Florida Constitution governing this process." *Id*. at 608. *Forman*, moreover, preceded the adoption of Amendment 5, and was decided under a review process that this Court has already held is "not determinative" of its review in a "post-2010 case." *Id*. at 609.

Moreover, the parties in *Forman* apparently did not argue—and the Court did not address—the jurisdictional issue. In any event, the Court rejected a claim by Marion County residents that they constituted "an identifiable political group" for the purpose of an equal protection challenge, holding that such a conclusion "would be opening up the floodgates to allow voters and residents of every city, county, or any other political subdivision to raise equal protection claims in the future—a precedent that is neither practical nor logical." 826 So. 2d at 282.

The Order also relies on *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002) (A. 2-3). But *Brown* does not apply at all; it concerned *congressional* redistricting, which is not governed by Article III, Section 16.[4]

B. THE CIRCUIT COURT'S EXERCISE OF JURISDICTION INTERFERES WITH THE BINDING JUDGMENT OF THIS COURT

Even if the circuit court had concurrent jurisdiction to decide the claims, the plain words of the Florida Constitution would still give preclusive effect to this 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 this Court found that the

[4] We recognize that this Court does not have original jurisdiction to review claims based on federal congressional redistricting. Parties related to these Plaintiffs have filed actions, now consolidated, challenging those districts in the Leon County circuit court. *See Romo, et al. v. Detzner,* Case no. 2012-CA-000412; *League of Women Voters of Fla., et al. v. Detzner,* Case no. 2012-CA-000490. That litigation is proceeding. Trial is currently scheduled for June, 2013.

Senate Plan satisfies the Florida Constitution, further challenges under those standards are expressly barred. Thus, the proceedings below interfere with this Court's complete exercise of its jurisdiction, warranting a constitutional writ from this Court. *See Roberts*, 43 So. 3d at 677.

The Constitution 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. When that provision was adopted 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. The Constitution also states that the "judgment" of the Supreme Court "shall be binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. Therefore, all matters this Court decides—those not clearly reserved for future litigation—are decided once and for all. If parties unsuccessful in this Court may pursue their claims elsewhere, the Constitution's express prescription is meaningless. This Court should reject such an interpretation. *See Apportionment I*, 83 So. 3d at 614 (quoting *In re Apportionment Law Senate Joint*

Resolution No. 1305, 263 So. 2d at 807) ("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.").

The design and structure of Article III, Section 16 also reveals its purpose to secure a final judgment. It allows all "adversary interests to present their views," *id*.; and, to ensure an inclusive hearing, this 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 Constitution imposes strict time limitations, guards against all contingencies, and ensures that, in all cases, the process concludes with a valid redistricting plan either drawn or approved by this Court. The Constitution does not provide for further judicial review until after the next decennial census and reapportionment.

Thus, even if the circuit court had jurisdiction, it must not disturb matters this Court has decided. In this case, the Court examined the *entire* redistricting plan for compliance with *all* state constitutional standards, and its judgment resolved all claims 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)). The Constitution's emphatic instruction that this Court's judgment is "binding upon all the citizens of the state" must be given effect and meaning. *See Apportionment I*, 83 So. 3d at 614 ("Every word of the Florida Constitution should be given its intended meaning and effect. In construing constitutions, that construction is favored which gives effect to every clause and every part of it." (quoting *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d at 807)).

Allowing the circuit court to proceed 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*, this Court invalidated eight Senate districts and remanded with specific instructions. In reliance on that opinion and at considerable expense, the Legislature reconvened and corrected the deficiencies the Court had identified. In *Apportionment II*, these organizational Plaintiffs for the first time challenged districts they had not challenged in *Apportionment I* and which the Legislature had not redrawn. This Court refused to review these newly raised claims. *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 this Court's mandatory review process created by Article III, Section 16. *Id*. at 885.

C. PLAINTIFFS CANNOT AVOID THIS COURT'S FINAL DETERMINATION OF THE SENATE PLAN'S VALIDITY BY FILING IDENTICAL CLAIMS IN CIRCUIT COURT SEEKING TO PRESENT MORE EVIDENCE

Attempting to avoid this Court's decision in *Apportionment II*, Plaintiffs have filed identical claims in circuit court. They argue they can file such claims because *Apportionment II* was a "facial" challenge to the Senate districts, while the current Complaint raises an "as-applied" challenge. But as explained below, Plaintiffs confuse these terms. *Apportionment II* was not a practice round. It was intended to—and did—finally adjudicate any claims that the Senate districts violated Article III, Section 21 of the Florida Constitution.

1. An "As-Applied" Challenge Subsumed by a Prior Facial Challenge Is Precluded

In *Apportionment II*, this Court noted that "[w]here 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.'" 89 So. 3d at 883-884 (quoting *Youngblood v. Taylor*, 89 So. 2d 503, 505 (Fla. 1956)).[5] Moreover, "[i]t would be fundamentally unfair to entertain challenges in this second-phase

[5] The Order claims that *res judicata* does not apply "because of the unique nature of the proceedings before the Supreme Court" (A. 5). *Apportionment II* did not address whether the doctrine applies in a subsequent circuit court proceeding.

proceeding that could have been made and were not, or *to entertain challenges that were made and rejected*, after the Legislature is no longer able to correct any alleged deficiencies." *Id*. at 886 (emphasis added).

Plaintiffs attempt to avoid the preclusive effect of *Apportionment II* by calling their new action an as-applied challenge (A. 9). The circuit court accepted their description (A. 6) and concluded that it is "impossible . . . to determin[e] from the pleadings themselves" whether Plaintiffs have brought as-applied claims or facial claims, and therefore ruled that the claims were not barred (A. 5).

But in the context of constitutional litigation, as-applied challenges assert claims that are *different from* facial challenges. While facial challenges review a statute in a vacuum—without applying it to any particular facts—as-applied challenges argue that a statute is unconstitutional when applied to a discrete situation. In a facial constitutional challenge, "we determine only whether there is any set of circumstances under which the challenged enactment might be upheld." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (quoting *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 265 (Fla. 2005)); *see also State v. Hosty*, 944 So. 2d 255, 263 (Fla. 2006) ("a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid."). Facial challenges are exemplified by cases like *State v. Catalano*, __ So. 3d __, 37 Fla. L. Weekly S763 (Fla. Dec. 13, 2012), where this

Court concluded that a noise statute restricting the volume at which car stereos could be played on public streets was unconstitutionally overbroad. In analyzing this facial challenge, this Court did not consider any facts particular to the case but reviewed only the statute's text to determine whether it was constitutional.

By contrast, an as-applied challenge considers whether there has been a "constitutional application of a statute to a particular set of facts." *Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982); *see Falzone v. State*, 500 So. 2d 1337, 1340 (Fla. 1987) (distinguishing a facial challenge from a challenge "as applied to a specific set of facts"); *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986) (same); *see also Westwood Lake, Inc. v. Dade Cnty.*, 264 So. 2d 7, 9 n.4 (Fla. 1972) ("It is a well-recognized principle of law that a statute or ordinance may be valid as applied to one set of facts, though invalid in its application to another set of facts.").

This Court's decision in *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004), is an example of an "as-applied" challenge. There, this Court held that the Florida Sexual Predators Act, which provides for automatically designating an offender as a sexual predator based on a conviction for certain crimes, was unconstitutional as applied to a defendant whose crime of kidnapping indisputably did not contain a sexual element. *Id.* at 1207. While the Act was presumably *facially* valid because "the Act's designation of child kidnappers as sexual predators is rationally related to the legislative purpose of protecting children from sexual predators," it was

unconstitutional as applied to the defendant because "the *application* of this statute to a defendant whom the State concedes did not commit a sexual offense is not [reasonable]." *Id.* at 1215 (emphasis added). Thus, the Court decided that the statute was unconstitutional as applied to a particular set of facts.

When the purported as-applied challenge presents the same assertions as a prior challenge, but seeks to present more evidence to prove them, the claim is barred. *See Laurel Sand & Gravel, Inc.*, 519 F.3d 156, 163 (4th Cir. 2008) (rejecting a 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."); *Republican Nat'l Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent."); *Am. Fed'n of Gov't Emps. v. Loy*, 332 F. Supp. 2d 218, 226 (D.D.C. 2004) (rejecting as-applied challenges that bore "striking similarities with respect to both their factual

allegations and legal theories" as a prior facial challenge); *Robert Pennza, 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." *Id*.

2. Plaintiffs' Current Challenge Is Identical to their Challenge in *Apportionment II*

The identity between the claims asserted here and those this Court rejected make it impossible for Plaintiffs to prevail without the circuit court overturning the factual and legal determinations in *Apportionment II*. This Court considered and rejected each of Plaintiffs' allegations of whole-plan and district-specific constitutional violations.

i. This 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 alleges that the Senate Plan "was drawn with the intent to favor the controlling political party and to disfavor the minority political party" (A. 22). 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" (A. 15).

The organizational Plaintiffs made identical allegations in *Apportionment II*. 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." LOWV Brief at 13. This Court determined that the Senate Plan was not drawn with intent to favor a political party in violation of the Florida Constitution, concluding the Plaintiffs "failed to present new facts demonstrating the Legislature redrew the plain with improper intent." 89 So. 3d at 882.

The second count alleges 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)" (A. 22). 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" (A. 14). 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" (A. 14-15).

The organizational Plaintiffs made identical allegations in *Apportionment II*. They alleged that "the Senate plan does not pit any incumbents against one another in any meaningful way" (LOWV Br. at 10). The same Plaintiffs also alleged that "a number of open Senate districts appear to have been drawn specifically [for] such House incumbents." *Id*. at 12. This Court found no evidence that the Senate Plan was drawn with intent to favor incumbents. 89 So. 3d at 882.

ii. This Court has already rejected Plaintiffs' district-specific claims.

The remaining counts of the complaint allege that several individual districts violate Article III, Section 21 (A. 22-23). Again, this Court considered and rejected each of them in *Apportionment II*, as a review of the organizational Plaintiffs' Supreme Court briefs in that case demonstrates:

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 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 19	Initial Brief at 23-27 Reply Brief at 9-10
District 21	Initial Brief at 28-32 Reply Brief at 10-11

District 39	Initial Brief at 38-41 Reply Brief at 14
District 40	Initial Brief at 36-42 Reply Brief at 12-14

Each claim would require second-guessing this Court's findings.

The circuit court also found that Plaintiffs are entitled "to develop and present relevant evidence to support their claims" (A. 6). But this Court relied on objective evidence when it determined that the Senate Plan is constitutionally valid. No additional discovery could justify overturning its conclusion.

To determine whether the Senate districts are sufficiently compact, this Court had access to 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 Court also visually examined the districts and considered factors such as a district's geography and the need to abide by other constitutional requirements. 83 So. 3d at 635. No additional discovery could disturb this Court's conclusion that the Senate districts are compact.

To determine whether districts utilize existing political and geographical boundaries, the 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 this Court used to assess a district's adherence to political and geographical boundaries remain the same. No additional discovery could undermine these objective measures.

To determine whether the Legislature drew the Senate Plan intentionally to favor a political party, this Court considered not only the extensive record of public hearings and legislative debate but also the submissions of the parties along with objective evidence of 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 600 n.2, 617, and 639. To determine whether the Legislature drew the Senate Plan intentionally to favor certain incumbents and disfavor others, this Court also considered objective evidence of 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." *Id.* at 618-19. The 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. Based on all the objective

evidence, the Court concluded that the Senate Plan did not intentionally favor a political party or incumbents. *Apportionment II*, 89 So. 3d at 890-91. And the Court never intimated that the Legislature's intent may be gleaned from anything other than objective evidence.

3. This Court Did Not Conduct a Mere Facial Review in *Apportionment II*

The entire premise behind the complaint is that in *Apportionment II,* this Court conducted a mere "facial" review. We have demonstrated why, even if they are correct, Plaintiffs cannot merely file a complaint, under the guise of an as-applied challenge, asserting identical claims but seeking to present more evidence. But just as fundamentally, Plaintiffs' premise is incorrect. As this Court noted in *Apportionment I,* the "process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in our obligations." 83 So. 3d at 606. Although this Court may have described its review as "facial," *see, e.g., id.* at 614, it could not have meant that term in the sense used to describe facial constitutional challenges to a statute. This Court did not simply review the district maps and determine whether districts were "facially" compact or whether they "facially" adhered to political and geographic boundaries. To the contrary, this Court's opinion in *Apportionment I* detailed the unprecedented amount of extrinsic evidence the Court had reviewed:

- The Court directed the Attorney General to file maps of the House and Senate apportionment plans and maps depicting the entire state;
- The Court required all plans to be submitted electronically in .doj format, which allowed this Court and the challengers to statistically analyze the plans submitted using standard redistricting software;
- The Court had access to MyDistrict-Builder and District Builder, the software programs the House and Senate developed;
- The Court utilized both software applications to evaluate voting-age population and to conduct a visual inspection of the districts;
- The Court used registration and elections data to analyze minority voting behavior in evaluating challenges to individual districts;
- The Court used this data to examine the overall political composition of the House and Senate plans, as well as that of each challenged district;
- The Court received the incumbent addresses upon which the challengers based their claims that districts were drawn to favor incumbents;
- The Court allowed objecting parties to file alternative plans;
- The Court acquired Maptitude for Redistricting, another software program;
- The Court inputted into Maptitude the incumbent addresses and voter registration, political, and elections data used by MyDistrictBuilder;
- The Court used Maptitude to locate incumbents' addresses and calculate the percentage of prior population retained by a district;
- The Court examined graphical data overlays of voting age population using Maptitude in evaluating certain challenged districts;
- The Court acquired ESRI Redistricting software to generate compactness scores for each district;

Id. at 610-13. Finally, the Court reviewed the transcripts of 26 public hearings held throughout the state. *Id.* at 664. Obviously, this Court conducted a much

more thorough factual review than is done when a statute is challenged as facially unconstitutional. Therefore, however described, this Court's review did not leave room for challenges raising identical issues but simply seeking to present even more evidence, which is precisely what the Plaintiffs attempt to do. This Court's constitutional charge was to "apply these standards in a manner that gives full effect to the will of the voters," *id.* at 597, and it did so, fulfilling its "weighty obligation" to determine the constitutional validity of the Senate Plan, *id*. at 684; *see also* Art. III, § 16(c), Fla. Const.

CONCLUSION

The "citizens of this state have entrusted to [this Court] 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. This Court fulfilled its responsibility and upheld the Senate Plan. Its determination is final. This Court should quash the Order and issue a writ of prohibition or constitutional writ directing the circuit court to dismiss the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2013, a copy of this petition was served by mail and email to all counsel on the attached service list. I further certify that on February 14, 2013, in accordance with Florida Rule of Appellate Procedure 9.100(e)(2), a copy of this petition was served by mail to:

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/s/ Raoul G. Cantero
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CERTIFICATE OF COMPLIANCE

I certify that this petition is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(l).

/s/ Raoul G. Meros
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