**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 . . . ."); *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]

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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

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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.

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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

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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]

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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

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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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**CERTIFICATE OF SERVICE**

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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