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

THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; COMMON CAUSE FLORIDA; JOAN ERWIN; ROLAND SANCHEZ-MEDINA, JR.; J. STEELE OLMSTEAD; CHARLES PETERS; OLIVER D. FINNIGAN; SERENA CATHERINA BALDACCHINO; AND DUDLEY BATES	)	
Plaintiffs,	)	
v.	)	CASE NO.: 2012-CA-2842
KENNETH W. DETZNER, in his official capacity as Florida Secretary of State; THE FLORIDA SENATE; MICHAEL HARIDOPOLOS, in his official capacity as President of the Florida State Senate; THE FLORIDA HOUSE OF REPRESENTATIVES; and DEAN CANNON, in his official capacity as Speaker of the Florida House of Representatives,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

TABLE OF CONTENTS

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

INTRODUCTION

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

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

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

> I think the way the Court should approach it, and has in the past tried to approach it, is if there are material facts at issue with some of these standards, then if there are disputed issues of material fact about those standards, then that has to await a full evidentiary proceeding with the ability to have discovery and all of that.
>
> The Court made a common sense evaluation that you do a facial review and that a court of competent jurisdiction, thereafter, can decide those fact intensive bases. I don't know how else this Court does that without it doing exactly the same way.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

Id. at 280 (emphasis added).

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

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

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

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

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

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

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

> [I]t is important to differentiate among redistricting cases. There are two general classes of challenges to a redistricting plan. First, there is the facial challenge, in which a party seeks to show that, as written, the plan explicitly violates some constitutional principle. Second, there is an as-applied challenge, in which a party seeks to establish that, based on facts existing outside the plan, and as applied to one or more districts, the plan violates the federal or state constitutions, or the Voting Rights Act of 1965.
>
> A comparison of these two classes of claims as to redistricting plans shows that the "one-person, one-vote" claim challenging the entire plan as written alleges facial unconstitutionality, while an as-applied constitutional claim and a VRA section 2(b) claim turn on particular facts applicable to specific districts . . . In this

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 653 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

preclude people from enforcing their rights to bring as-applied challenges based on Article III, Section 21.[9]

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

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

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

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

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

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

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

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

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

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

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

> Res judicata, as well as the related concept of law of the case, are premised on the assumption that the parties have had the ability to raise all necessary claims and discover all necessary evidence to develop their cases. *The Court's review of legislative apportionment is significantly different from the traditional types of cases to which res judicata has been applied, which are traditional, adversarial proceedings.*
>
> In contrast to traditional, adversarial proceedings, the Court's review of legislative apportionment under the Florida Constitution is unique. *Based on the restrictive time frames under the Florida Constitution, together with other inherent limitations in the constitutional structure and the limited record before us, this*

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

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

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

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

Id. at 893 (citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> I find it difficult to imagine a more compelling, competing government interest than that represented by the plaintiffs' claim. It is based upon a specific constitutional direction to the Legislature as to what it can and cannot do with respect to drafting legislative reapportionment plans. It seeks to protect the essential right of our citizens to have a fair opportunity to select those who will represent them. In this particular case, the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan. The information sought is certainly probative and relevant of intent.

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

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

CONCLUSION

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

Dated: December 14, 2012

Respectfully submitted,

/s/Adam M. Schachter
Gerald E. Greenberg
Florida Bar No. 0440094
ggreenberg@gsgpa.com
Adam M. Schachter
Florida Bar No. 647101
aschachter@gsgpa.com
GELBER SCHACHTER & GREENBERG, P.A.
1441 Brickell Avenue, Suite 1420
Miami, Florida 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951

Michael B. DeSanctis
mdesanctis@jenner.com
Admitted Pro Hac Vice
JENNER & BLOCK, LLP
1099 New York Ave NW, Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Richard Burton Bush
Florida Bar No. 294152
rbb@bushlawgroup.com
BUSH & AUGSPURGER, P.A.
3375-C Capital Circle N.E., Suite 200
Tallahassee, FL 32308
Telephone: (850) 386-7666
Facsimile: (850) 386-1376

J. Gerald Hebert
hebert@voterlaw.com
Admitted Pro Hac Vice
191 Somervelle Street, #415
Alexandria, VA 22304
Telephone: (703) 628-4673
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this, the 14th day of December, 2012, a true and correct copy of the foregoing was sent by electronic mail to all counsel of record listed below:

Charles T. Wells
George N. Meros, Jr.
Jason L. Unger
Allen Winsor
GrayRobinson, P.A.
P.O. Box 11189 (32302)
301 South Bronough Street
Suite 600
Tallahassee, Florida 32301
Tel. (850) 577-9090
Fax. (850) 577-3311
Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Jason.Unger@gray-robinson.com
Allen.Winsor@gray-robinson.com
croberts@gray-robinson.com
tbarreiro@gray-robinson.com
mwilkinson@gray-robinson.com

Miguel De Grandy (FBN 332331)
800 Douglas Road, Suite 850
Coral Gables, Florida 33134
Telephone: 305-444-7737
Facsimile: 305-443-2616
mad@degrandylaw.com

Daniel E. Nordby
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, Florida 32399-1300
Telephone: 850-410-0451
Daniel.Nordby@myfloridahouse.gov

Counsel for The Florida House of Representatives and Dean Cannon, in his official Capacity as Speaker of the Florida House of Representatives

George T. Levesque (FBN 555541)
General Counsel
409 The Capitol
404 South Monroe Street
Tallahassee, Florida 32399-1110
Tel. (850) 487-5229
Levesque.George@flsenate.gov
Glevesque4@comcast.net
Carter.velma@flsenate.gov

Raoul G. Cantero
Jason N. Zakia
Jesse L. Green
WHITE & CASE LLP
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
rcantero@whitecase.com
jzakia@whitecase.com
jgreen@whitecase.com
ldominguez@whitecase.com
mgaulding@whitecase.com

Counsel for The Florida State Senate and Michael Haridopolos in his official capacity as President of The Florida State Senate

Ashley E. Davis
Florida Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250
Tel. (850) 245-6536
Fax. (850) 245-6127
Ashley.Davis@DOS.MyFlorida.com
Betty.Money@DOS.MyFlorida.com
Stacey.Small@DOS.MyFlorida.com

Counsel for Kenneth W. Detzner
Secretary of State

/s/Adam M. Schachter
ADAM M. SCHACHTER