MEMORANDUM

To:	Ranking Member Geller
From:	Matthew Henderson & David Melito
Date:	1/23/2022 4:35 PM
Re:	Florida Redistricting Case Briefs

1. In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597 (Fla., March 2012)
    a. **Background**: Voters approved the Fair Districts Amendments in 2010. The 2012 redistricting process was first to be constrained by the Amendments and this case was the first to apply those Amendments to an apportionment plan. "On February 9, 2012, the Legislature passed Senate Joint Resolution 1176. The next day, the Attorney General fulfilled her constitutional obligation by filing a petition in this Court for a declaratory judgment to determine the validity of the legislative apportionment plans contained within the Joint Resolution." This case constitutes a facial review of the proposed maps for the State Legislature and Congress.
    b. **Holding**: Fair districts imposed more stringent requirements than the U.S. Constitution and previous Florida reapportionment cycles. Pursuant to those higher standards, the Court's scope of review has increased. Those standards do not require proving a violation beyond a reasonable doubt. Impermissible intent can be inferred from objective indicators such as compactness and Tier-II requirements. Article III, sec. 16(c) does not preclude subsequent fact-based challenges. The State House map was held to be facially valid. The state senate map was held to be facially invalid. There was no review of the proposed congressional map.
    c. **Reasoning**: As to the House map, the Court explained that the challengers (a coalition of the Florid Democratic Party, League of Women Voters, Common Cause, and the City of Lakeland) did not meet their burden in proving there was impermissible intent in the drawing these maps. Specifically, the Court found that every challenged House district could be explained on proper grounds like tier 1 or tier 2 standards, or a combination of both.

        As for the Senate map generally, the Court first found a violation of Fair Districts in the renumbering process that decides which Senators will have to run in the next general election and which would be permitted to stay in their seats longer than the usual 8 years. The Court found evidence that the process was run in a way that not only ensured incumbents would not be pitted against each

other, but in a way that specifically took in incumbent information when renumbering the districts.

There were also specific Senate districts that violated Fair Districts. Two districts in Northwest Florida were struck down because they were drawn to avoid pitting incumbents against each other. Two Senate districts near Jacksonville were struck down because they were not compact and the Senate failed to perform a functional analysis to ensure minority voting power was protected. There was also evidence of improper intent to favor incumbents and a political party. The district covering Lake county was struck down because "we conclude that [the district] violates constitutional mandates because it is visually non-compact with an appendage that reaches out to clearly encompass an incumbent, and this bizarre shape cannot be justified based on concerns pertaining to ensuring minority voting strength." One more district covering Cape Coral and two that spanned from Palm Beach to Broward county were also struck down because they failed the visual compactness test and could not be explained on permissible grounds in the face of evidence that the Senate was using incumbent information in drafting the maps.

d. **Partial Dissent** by Canady & Polston: The Chief Justice would have held both plans as valid. This is primarily because, in his opinion, the Coalition had not overcome the presumption of constitutionality that is normally given to the Legislature. The Chief Justice would have applied a rational basis review to both plans and validate them. He quotes a ruling from the 1970s redistricting cycle (before the passage of Fair Districts) which held that "a legislative enactment should not be declared unconstitutional 'unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.'" In re Apportionment Law SJR 1305, 263 So. 2d 797 (Fla. 1972). The Chief Justice sees redistricting as "primarily a matter for legislative consideration and determination", so the courts must use restraint so as to not usurp a Legislative function.

In addressing the Fair Districts amendments, the Chief Justice would hold that they did nothing to alter the structure or nature of the constitutional review process for maps because the text of the amendments does not explicitly address judicial review. Next, the Chief Justice argues that failing to adhere to pre-Fair District precedent and engaging in an expanded review of the maps would allow for things like "suspicion and surmise" to enter the process. Finally, the Chief

Justice argues that because conservative justices have failed to sign on to any one legal standard in assessing gerrymanders, that that no court anywhere should be evaluating gerrymanders.

As for the specific issues the majority found in the Senate maps, the Chief Justice was not convinced by any. He was ok with the numbering plan because, in his opinion, that was not prohibited by Fair Districts which only mention the "drawing" of district boundaries, not the numbering of districts. For each specific district that was struck down, the Chief Justice disagrees and believes the majority is injecting "suspicion and surmise" in its review to rationalize a strict scrutiny. The Chief Justice would again apply rational basis to each district and validate the districts.

2. In re Senate Joint Resolution of Legislative Apportionment 2-B, 89 So. 3d 872 (Fla., April 2012)
    a. **Background:** After the first apportionment plan was struck down, the legislature adopted a revised plan. Pursuant to the same constitutional process as before, the Attorney General petitioned the Supreme Court to determine the validity of the new apportionment plan.
    b. **Holding:** The redrawn apportionment plan was valid and constitutional. Res judicata prohibited the Coalition from bringing new challenges to districts that they did not challenge the last time around, nor could they raise new and different challenges to districts that they unsuccessfully challenged last time.
    c. **Reasoning:** The court engaged in a facial review of the challenged districts much like the last time they were petitioned to review an apportionment plan. In the court's view, the coalition was unable to establish violations of Fair Districts.
    d. **Partial Dissent** by Perry: Would have rejected the redrawn Senate district 8 because it was "noncompact, does not follow consistent geographical or political boundaries, and splits a historically black Democratic community in Daytona Beach when it was feasible for it to be kept whole." Id. At 898. The district split three different counties, was bounded by minor roads and ignored political boundaries of the area. Further, "the Legislature split Daytona Beach to dilute an African–American community and the area surrounding Bethune–Cookman University specifically, which votes heavily Democratic, with the attendant goal of maintaining Republican performance in Redrawn Districts 6 and 8." Id. at 899.
    e. **Concurrence** by Pariente: Justice Pariente asked for "further exploration of the limitations of time, process, and the language of the 'intent' standard." Id. at 898.
3. Florida House of Representatives v. League of Women Voters of Florida, 118 So. 3d 198 (Fla. 2013)

a. **Background:** In September 2012, 5 months after the Supreme Court of Florida upheld redrawn apportionment plans, the League of Women Voters of Florida, Common Cause, and seven individually named plaintiffs (collectively "the Coalition") filed a complaint in circuit court, alleging that the revised Senate map continues to favor incumbents and reflects "partisan gamesmanship," thereby violating the express standards contained in Fair Districts. The Legislature moved to dismiss with prejudice, arguing the circuit court lacked subject matter jurisdiction and also that the claims were identical to those previously rejected, so were blocked by res judicata.

The circuit court rejected the motion, explaining that precedent cases never eliminated the possibility of subsequent review, but actually stated that factual, as-applied challenges would be more proper in a court of competent jurisdiction that allows for the presentation of evidence and witness testimony, as well as factual findings based on the record. The circuit court stated that the Supreme Court of Florida had ample opportunity to claim exclusive jurisdiction for itself but refused to do so.

To the claims of res judicata, the circuit court explained that it could see by the pleadings that these claims were indeed fact-specific, as-applied challenges that were properly before the circuit court.

The Legislature then filed for relief from that ruling, either by writ of prohibition or by the constitutional "all writs" authority in the Florida Supreme Court, asking the circuit court to dismiss the complaint.

b. **Holding:** The circuit court does have subject matter jurisdiction over as-applied challenges to apportionment plan. Their fact-based challenges were not barred by earlier facial challenges. The Legislature's claim that challenges were identical was insufficient to provide relief through extraordinary writ.

c. **Reasoning:** The Supreme Court of Florida looked to its own precedent to understand the Legislature's claim that circuit courts do not have subject matter jurisdiction. In rejecting that, the Court stated that the constitutional review process for facial challenges to apportionment plans was instituted to keep federal courts out of the process, not lower state courts. More importantly, if the Legislature's claims were correct, subsequent factual challenges in 1972, '82, '92, and 2002 would not have occurred, which they did. Finally, the Court worries that the Legislature's argument would severely undermine the purpose and intent of the Fair Districts amendments. The Court rightly points out that everyone

understood those amendments to create more stringent new standards without upsetting precedent that gave courts' jurisdiction over as-applied challenges.

To the Legislature's request for extraordinary relief, the Court dug into the text of Article III, sec. 16 which lays out the process for facial review of apportionment plans. The Court cited a 1972 case which reasoned that the text of that provision which gives the supreme court a timeline for rendering a "declaratory judgment" limits that review to a declaration of facial validity. Another case in 2002 expressly stated that subsequent fact-intensive challenges could be brought in a court of competent jurisdiction and similarly limited the declaratory judgment to one of facial validity or invalidity. Id. at 209.

The majority maintains that the arguments from the 1972 case were integral to its holding, and not just dicta, as the dissent suggested.

To the Legislature's final claim, that these are identical to the claims made during the first facial review, the court roundly rejected that. The Court reviewed the complaint and found that some were fact-based, as-applied challenges and so were not barred.

d. **Dissent** by C.J. Canady, Polston concurring: The Chief Justice had a fundamentally different understanding of the text of Article III, section 16. The Chief Justice dismissed the discussion of facial versus as-applied challenges from the precedent cases cited by the majority as dicta. The Chief Justice would hold that the declaratory judgment from that section necessarily precludes all future challenges because of the language stating that the declaratory judgment is "binding upon all citizens of the state."

He concedes that the Court has never interpreted Art. II, sec. 16(d) in the way the Legislature proposes here, but that is only because they have never had the question before them.

"I do not contest the proposition that since 1972 the Court has repeatedly said things that support the majority's position. Nor do I contest the proposition that the constitutional validation proceeding established by article III, section 16, is not suited to the adjudication of facts in the consideration of fact-intensive claims. But those propositions are not sufficient to establish that the unconditional and unequivocal rule of preclusion in the text of section 16(d) does not bar the lawsuit brought by the respondents." Id. at 218.

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1. *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013).
    a. **Background**: In February 2012, the Florida Legislature approved the decennial plan apportioning Florida's twenty-seven congressional districts. Soon after its adoption, two separate plaintiffs filed civil complaints in circuit court, which were later consolidated, challenging the constitutionality of the plan under the Fair District Amendments. As part of pretrial civil discovery—and specifically in an effort to uncover and demonstrate alleged unconstitutional partisan or discriminatory intent in the congressional apportionment plan—the challengers sought information from the Legislature and from third parties regarding the 2012 reapportionment process. In response, Florida state legislators and legislative staff members sought a protective order asserting that they have an absolute privilege against testifying about these issues. The circuit court granted in part and denied in part the motion for a protective order, determining that although a legislative privilege exists in Florida, the privilege is not absolute and "must be balanced against other compelling government interests." The First District Court of Appeal reversed, holding that legislators and legislative staff members enjoyed absolute immunity and could not be compelled to testify. This decision followed an appeal of the First District Court's ruling.
    b. **Holding**: Reversed. The Florida Supreme Court approved the circuit court's order permitting the discovery of information and communications, including the testimony of legislators and the discovery of draft apportionment plans and supporting documents, pertaining to the constitutional validity of the challenged apportionment plan. The Court recognized the existence of legislative privilege but concluded that the privilege is not absolute and does not act as a bar on obtaining information needed to enforce the provisions of the Fair Districts Amendments.
    c. **Reasoning**: In its approval of the circuit court order, the Court first recognized and delineated the limits of legislative privilege in Florida. After this recognition, the Court held that, when the legislative privilege is asserted, courts must engage in an inquiry to determine both if the privilege applies to protect the particular information being sought and the reason the information is being sought. In the

instant case, the testimony and documentation being sought, by virtue of the fact that it relates to functions undertaken by legislators and legislative staff during the course of their legitimate legislative duties, falls within the scope of the privilege, but the purpose underlying the privilege is outweighed by a compelling, competing interest.

In establishing the existence of legislative privilege in Florida, the court first noted that many factors weighed against recognition, including (1) the lack of a speech and debate clause in the Florida Constitution, (2) the broad policy of the state to foster transparency and public access to the legislative process, and (3) the lack of any statute granting such privilege. But, the Court concluded that these factors were not conclusive because another factor, the doctrine of separation of powers flowing out of article II, section 3 of the Florida Constitution, weighs heavily in favor of recognition. The court agreed with the trial court's statement that "[l]egislators could not properly do their job if they had to sit for depositions every time someone thought they had information that was relevant to a particular court case or administrative proceeding." Recognizing such privilege ensures that the separation of powers is maintained so that the Legislature can accomplish its role of enacting legislation in the public interest without undue interference.

The privilege, however, is not an "unbending right for legislators and legislative staff members to hide behind" where another compelling, competing interest is at stake. The Court noted that "this case involves the vindication of an explicit constitutional prohibition against partisan political gerrymandering and a constitutional restraint on the Legislature's actions—a public interest that is also compelling." The trial court noted that "if the compelling government interest in this case does not justify some relaxing of the legislative privilege, then there's probably no other civil case which would."

This case is unlike a traditional case where the challengers seek to vindicate private rights. This case seeks to determine whether the Florida Legislature violated an explicit constitutional provision outlawing improper partisan and discriminatory intent in the redistricting process; The "intent" standard contained in article III, section 20(a), poses an entirely different question than a traditional lawsuit that seeks to determine legislative intent through statutory construction. The Court, approving of the standard set forth by the circuit court, concluded that the compelling, competing constitutional interest in prohibiting the Legislature from engaging in unconstitutional partisan political

gerrymandering outweighs the purposes underlying the legislative privilege as to all discovery, except for the subjective thoughts or impressions of individual legislators or legislative staff.

d. **Dissent** by Canady, J: The dissent avers that the majority opinion "effectively abrogates the well-established common law legislative privilege and grievously violated the constitutional separation of powers." Justice Canady argues that under § 2.01, Fla. Stat., the importation of common law at Florida's founding enshrined legislative privilege in Florida law and that, accordingly, legislators and legislative staff may not be compelled to testify in challenges to apportionment plans under the Fair Districts Amendments—or in any other scenario. While the majority reasoned that, by the express terms of the Amendments, voters wished for "more judicial scrutiny" of apportionment plans, the dissent claims that this is based purely on supposition and that "[s]uch a radical alteration in the operation of the separation of powers should not be accomplished absent the clear assent of the people of Florida."

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1. *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015).
   a. **Background**: Following the challenge of the 2012 congressional apportionment plan, the trial court found that the plan violated the Fair Districts Act. Despite a finding of unconstitutional partisan intent, the trial court only invalidated Districts 5 and 10, rejecting the challenges to seven other districts. As a remedy, the challengers urged the trial court to adopt one of their remedial plans, to draw its own remedial plan, or hire an independent expert to draw a remedial plan. The court declined and determined that the Legislature should redraw the plan. The Legislature held a special session in August 2014 to enact a remedial redistricting plan, in which they made modest changes to correct the tier-two deficiencies identified in Districts 5 and 10. After the plan was signed into law, the trial court held another hearing to consider the validity of the revised plan and whether it could be implemented in time for the 2014 elections. The trial court approved the Legislature's remedial redistricting plan and ordered the then-impending 2014 elections to proceed under the unconstitutional 2012 plan due to time constraints, with the remedial plan to take effect for the 2016 elections.

      The challengers appealed the trial court's initial order containing its factual findings and legal conclusions, as well as its subsequent order approving the remedial redistricting plan, and the Legislature cross-appealed, attacking certain aspects of the trial court's judgment but ultimately seeking affirmance of the order approving the remedial plan. The First District Court of Appeal then certified the trial court's judgment for direct review by this Court. The First District Court of Appeal then certified the trial court's judgment for direct review by the Florida Supreme Court, who granted certification.

   b. **Holding**: Affirmed in part reversed in part. The Court affirmed the trial courts finding that the 2012 apportionment plan violated the Fair Districts Amendments, but found that the trial court failed to give proper legal effect to the determination that the Fair District Amendment was violated.

      c. **Reasoning**: The Court agrees with the trial court that the Legislature's 2012 congressional redistricting plan was drawn in violation of the Florida Constitution's prohibition on partisan intent, but holds the trial court (1)

erred in failing to properly recognize and apply a distinction between a challenge to the plan as a whole and a challenge to individual districts and (2) erred by applying a standard of review that was improperly deferential to the Legislature's decision following the finding of a violation.

In reviewing the 2012 apportionment plan, the trial court "first examine[d] the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries [and], then consider[ed] any additional evidence that supports the inference that such districts are also in violation of tier-one requirements." Accordingly, the trial court required Districts 5, 10, and "any other districts affected thereby" to be redrawn. But, as the Court holds here, if one or more districts violate tier-one requirements, then the entire act is unconstitutional. "The districts are part of an integrated indivisible whole. So in that sense, if there is a problem with a part of the map, there is a problem with the entire plan." Since the trial court found that the Legislature's intent was to draw a plan that benefitted the Republican Party, the burden should have been placed on the Legislature to demonstrate that its decision to choose one compact district over another compact district, or one tier-two compliant map over another tier-two compliant map, was not motivated by this improper intent.

The failure to apply this burden shifting framework after finding a violation of tier-one requirements led to the trial court's failure to give any independent legal significance to its finding of unconstitutional intent when examining the challenges to individual districts. This ultimately contributed to its decision to approve a remedy that was effectively no different than the remedy if there had been no finding of unconstitutional intent. The trial court rejected the challenges to Districts 13, 14, 21, 22, 25, 26, and 27, concluding that the challengers had not met their burden to demonstrate unconstitutionality and had not shown more than "de minimis" tier-two violations.

The Court reversed the trial court's order approving the remedial apportionment plan and, applying the burden shifting framework discussed above, determined that Districts 5, 13, 14, 21, 22, 25, 26, and 27 had to be redrawn as the Legislature could not justify why they chose the configurations they did over configurations that better complied with tier-two factors such as compactness and keeping municipalities and counties wholly within one district.

d. **Dissent** by Canady, J. Polston, J., Concurring: The dissent approved of the ruling of the trial court that challengers failed to establish any basis for requiring the

Legislature to further revise the congressional apportionment plan. The majority's decision to reverse the circuit court and to invalidate numerous districts in the remedial congressional district plan adopted by the Legislature is, to Justice Canady a violation of the separation of powers doctrine. The dissent argues that the majority misreads the trial court's opinion and reads in a tier-one violation that was never declared by the trial court, stating that "[t]he trial court cannot be faulted for failing to give independent significance to a factual finding it did not make." Accordingly, the dissent argues that it is improper here for an appellate court to make this finding of fact where none was made below. Substituion of the Court's opinion for those of the Legislatures in determining when districts need to be more compact where no finding of unconstitutional intent existed "tramples on the institutional independence and integrity of the Legislature."

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1. *League of Women Voters of Florida v. Florida House of Representatives*, 179 So. 3d 258 (Fla. 2015).
    a. **Background**: Following the remand in *League of Women Voters of Florida v. Florida House of Representatives*, 172 So. 3d 363 (Fla. 2015), for redrawing of specified districts, the circuit court entered order recommending adoption of the remedial map. The Legislature held a special session in August of 2015 to redraw the districts specified in this Court's order remanding to the trial court. However, the House and Senate were unable to come to an agreement and adjourned sine die without having enacted a remedial congressional apportionment plan as required by the order. The House and Senate plans differed in only six central and southwest Florida Districts. After the Legislature failed to enact a remedial congressional plan, the House filed a "Motion For Further Relinquishment of Jurisdiction," specifically requesting that the Court "initiate proceedings toward the judicial adoption" of a remedial redistricting plan and allow all parties to submit proposed remedial congressional plans to the trial court for its review. The Court granted the motion, in part, and directed the trial court to make a recommendation to the Court as to "which map proposed by the parties—or which portions of each map—best fulfills the specific directions in" the prior order. Seven plans were submitted to the trial court for consideration; a single map submitted by the House; two maps submitted by the Senate; three maps submitted by the Coalition Plaintiffs; and the one map submitted by the Romo Plaintiffs.
    b. **Holding**: The Court approves in full of the trial court's Order Recommending Adoption of Remedial Map, and approves the plan for use in the 2016 congressional elections and thereafter until the following redistricting cycle.
    c. **Reasoning**: The trial court decided that if, in its review, it determined that the parties were "in agreement as to any particular district," then "it is no longer an issue for [the trial court] to resolve." In its review of the Legislature's proposed plans for Districts 1 through 19, the trial court concluded that these districts were not disputed by the coalition plaintiffs. As to the remaining disputed districts, the trial court recommended that the Court adopt the configurations of Districts 20 through 27 contained in one of the coalition plaintiffs' maps as they performed

better with respect to tier-two criteria than the House's or Senate's proposed alternatives.

The trial court stated that because the Legislature had "the burden of defending its choices in all respects," the Legislature should have taken another look at its proposed districts, "not for political performance but for better tier two compliance, either in response to the Plaintiffs' complaint, or better yet, on its own initiative." As it did not, and as a result of the prior finding of tier-one violations, each chamber was required to justify why its proposed configurations should be used over others that more robustly fulfil tier-two requirements. Having provided no convincing justification as to any of the disputed district, the trial court recommended the configurations offered by the coalition plaintiffs.

d. **Concurring in Part, Dissenting in Part**, Canady, J: Justice Canady agrees with the selection of the agreed upon district configurations for the undisputed districts but argues for the use of one of the Senate plans for the remaining disputed districts. The justice argues that the majority have gone far beyond imposing reasonable requirements on the Legislature, and that in rejecting the configuration of Districts 20 through 27 contained in the House and Senate plans, the trial court and the majority have imposed a requirement to make additional changes that were not required the Court prior to the remand for redrawing the specified districts.
e. **Dissent** Polston, J. Justice Polston argues that in accepting the recommended configurations put forth by the coalition plaintiffs, the majority is approving a redistricting plan that has never been judicially examined to determine whether it violates the constitutional prohibition of redistricting plans "drawn with the intent to favor or disfavor a political party or incumbent," and that "[a]lthough the majority invalidated a prior plan lawfully enacted by Florida's elected legislators on the basis of Republican operatives' attempts to influence the legislative mapmaking process, it judicially adopts a remedial plan drawn entirely by Democratic operatives." The justice notes that although the trial court found "no evidence to suggest that CP–1 was drawn with improper partisan intent," this lack of evidence in the record was due to the Court expressly prohibited any discovery regarding the maps proposed by the coalition plaintiffs. Further, the justice disagrees with the result of the burden shifting framework and the resulting choice of the majority to choose the coalition plaintiff's configurations because they more fully meet tier-two goals and asserts that "the majority unlawfully imposes a burden on the Legislature to prove matters of judicial preference regarding compactness, unrelated to constitutional deficiencies."