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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-252

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

Petitioners,

L.T. CASE NO. 2012 CA 2842
(Second Judicial Circuit)

v.

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

Respondents.

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THE FAIRDISTRICTS COALITION'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION OR FOR CONSTITUTIONAL WRIT TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT

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INTRODUCTION

The Legislature's petition fundamentally misconstrues the claims asserted in this case. These are *as-applied* claims challenging the Senate plan based on facts existing outside the plan itself, not *facial* claims challenging the plan based on facts intrinsic to the maps themselves. The evidence already being uncovered through discovery – evidence which was not and could never have been considered by this Court during its facial review of the Senate plan – not only differentiates these claims from those that were before this Court previously, it shows why these important claims alleging violations of the Florida Constitution must be given their day in Circuit Court. Indeed, through third party discovery directed to outside political consultants, the Coalition[1] has already discovered documents that speak directly to the intent issue underpinning the claims in this case.[2]

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[1] The Coalition is the FairDistricts Coalition, comprised of Respondents The League of Women Voters of Florida, National Council of La Raza, Common Cause, Joan Erwin, Roland Sanchez-Medina, Jr., J. Steele Olmstead, Charles Peters, Oliver D. Finnigan, Serena Catherina Baldacchino, and Dudley Bates.

[2] For example, emails produced in discovery show that within a month after passage of the Fair Districts Amendments that required separation of partisan politics from redistricting, a private "redistricting meeting" was held at the headquarters of the Republican Party of Florida attended by Republican party officials, a number of paid political consultants for Republican candidates, the staff director for the House Redistricting Committee, an aide to the chair of the Senate Committee on Reapportionment (current Senate President Gaetz), and counsel for the Legislature. Other emails show extensive communications between paid

In this petition, the Legislature now seeks to squelch these claims. Last year, quite tellingly, the Legislature agreed that the Circuit Court has jurisdiction to hear these fact intensive claims and told this Court exactly that. Now, however, the Legislature makes the exact opposite argument, recasting the Coalition's claims to suit their argument here and criticizing the Circuit Court for refusing to buy into its fiction.

There are, to be sure, rare cases where an extraordinary writ is necessary to keep a court from acting when it has no jurisdiction to act. This is not such a case. No writ should issue.

SUMMARY OF ARGUMENT

The Legislature's primary argument is that this Court has exclusive jurisdiction over these claims, thereby depriving the Circuit Court of jurisdiction. According to the Legislature, the only form of permissible legal challenge to a state redistricting plan is in the nature of the facial review that has already been performed by this Court. This argument is contrary to this Court's own case law, and it contravenes and disregards the letter and spirit of the Florida Constitution.

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consultants, legislators, and legislative staff discussing the design and political implications of draft Senate maps, including exchanges in which legislative staff members used their personal email accounts to share draft maps and questions with paid partisan consultants, Senators asked their strategists about how proposed maps would affect their districts, and consultants re-drew district lines to include the homes of incumbents. Copies of these emails, which have already been filed with and submitted to the Circuit Court, can be submitted here at this Court's request.

This Court has made clear that its scope of review under Article III, Section 16 is a necessarily limited determination of the *facial* validity of a redistricting plan. This Court has also expressly recognized 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). While not expressly mentioning the Circuit Court's jurisdiction over as-applied challenges, this Court's most recent opinions on the 2012 Senate plans – *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) ("*Apportionment I*"), and *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) ("*Apportionment II*") – further confirm the inescapable dichotomy between a facial review of the plan itself and an as-applied challenge based on facts entirely outside the written plan. Indeed, both *Apportionment I* and *II* are replete with express references to the facial review of the Senate plans and statements about the absence of a meaningful evidentiary record.

It is impossible to reconcile the notion of exclusive jurisdiction in the Florida Supreme Court with the Florida Constitution itself. The Constitution now has an express prohibition in 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." This requires 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. Thus, while this Court certainly had jurisdiction to do what it did at that time – perform a thirty-day *facial* review of the Senate plan without any evidentiary record to speak of – that does not in any way deprive the Circuit Court of jurisdiction to hear the more fact-intensive, as-applied claims in this case. Although the 2012 redistricting opinions did not expressly address whether subsequent as-applied challenges may be brought in the trial court, this Court pointedly did *not* overrule its clear, earlier holdings that subsequent "as-applied" redistricting litigation in the trial court is both lawful and appropriate. At a minimum, therefore, given the absolute clarity of this Court's 2002 redistricting opinion on the issue of jurisdiction for as-applied challenges, there can be no legal basis for the Circuit Court to have found that this Court reversed itself *sub silentio* through its 2012 opinions. The Circuit Court correctly followed this law.

The Legislature's second argument is that, because this Court already made a finding of facial validity as to the Senate plan, the Circuit Court's exercise of jurisdiction over these as-applied claims interferes with this Court's exercise of its jurisdiction. This is not so. This Court could not have fully addressed or resolved

the issue of whether the facts surrounding the drawing of the Senate plan establish a violation of Article III, Section 21 given the absence of a record on the critical issue of legislative intent. This 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 under Article III, Section 21 could not have been fully addressed within the time constraints imposed by the Constitution. Thus, far from interfering with this Court's jurisdiction over the facial claims, these separate as-applied claims must be resolved by the Circuit Court in order to give full effect to the clear prohibition against political gerrymandering in the Florida Constitution.

The Legislature's final argument is that these claims are identical to the facial ones adjudicated previously by this Court. This argument also fails. The as-applied claims in this case are quite different from the claims that were before this Court previously. The claims would have to be different given that the proceedings themselves are so different. This Court's facial review pursuant to Article III, Section 16 is limited to a mere thirty-day window with no opportunity for any discovery. The trial court proceeding for an as-applied challenge, by contrast, affords ample time for discovery to create a full factual record from which there can be judicial findings on the critical issues.

As a matter of substance, as well, these as-applied claims are different in nature and scope from the claims that were previously before this Court. This is particularly so given the Article III, Section 21 legislative intent issues that still await resolution. Thus, the Circuit Court, in exercising its jurisdiction, will not be duplicating or undermining prior rulings from this Court.

Finally, this petition should not be transferred for consideration by the First District Court of Appeal. Doing so would invite further unnecessary delay in a case that demands a prompt resolution. It is also particularly appropriate for this Court to resolve issues about the scope of its own jurisdiction.

ARGUMENT

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

The Legislature's attack on the Circuit Court's jurisdiction is based on a faulty legal analysis. Relying on a meandering discussion of the text and legislative history of Article III, Section 16 of the Florida Constitution, the Legislature pays 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

[3] The Legislature's entire discussion of the impetus for 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 redistricting plans from litigation. The underlying, express 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*

full effect to the Florida Constitution – both Sections 16 and 21 – and applying the relevant case law leads inexorably to the conclusion that the Circuit Court has jurisdiction over this lawsuit.[4]

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

This 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 state redistricting maps due to the limited time this Court is given to conduct its review, as well as it being ill-equipped to make findings of fact. Art. III, § 16(c). Thus, by necessity, this Court could do no more than assess the facial validity of the redistricting plan,

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state." Art. III, § 16(a) (emphasis added). And, when read in conjunction with Article III, Section 21, the Legislature's strained interpretation of Section 16 becomes completely untenable.

[4] As a general proposition, the mere suggestion that the Circuit 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).

[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, 686 (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.*

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 this Court's review under Section 16 is limited to the facial validity of redistricting plans. This Court's jurisdiction, therefore, is not exclusive, and the Circuit Court should hear this case.

1. <u>This Court's Previous Redistricting Opinions Make Clear That Its Jurisdiction Is Not Exclusive</u>

This Court's prior reapportionment decisions make clear that subsequent as-applied challenges to redistricting plans should take place in the trial courts. Indeed, to the extent this Court 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 this Court invalidated the Senate map in *Apportionment I*, it necessarily retained jurisdiction to re-analyze the map that the Legislature adopted in response to its

[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).

invalidation ruling. Hence, in *Apportionment II*, this 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 the Circuit Court of jurisdiction to hear as-applied challenges. Nor could it, as this 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 Legislature's arguments. This Court expressly disavowed jurisdiction over fact-intensive 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 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 this Court's limited review in 2002, there was never any suggestion that the trial courts 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* – not in this Court or the federal courts – claiming that the 2002 Senate redistricting plan violated the equal protection clause of the *Florida* Constitution. *Id.* at 280. The case was resolved on the merits without any sort of jurisdictional challenge in the Circuit Court, with this 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).[7]

[7] In their petition, the Legislature makes a dispirited attempt to distance itself from *Forman*, declaring it a "starkly different case," and one that is "for all practical purposes, a federal claim." Petition at 24. These contentions do not withstand any level of scrutiny. The only meaningful jurisdictional difference between these two cases, other than the absence of a jurisdictional challenge in *Forman*, is that this case requires an even deeper factual inquiry due to the new Constitutional standards, making the case for jurisdiction in the Circuit Court even more compelling now than it was then. The "federal claim" argument collapses in the face of simple fact – the case was brought in state court and the claims are purely state law claims brought under the Florida Constitution.

Three months later, the Fourth District reached a similar jurisdictional conclusion in *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002).[8] 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 Legislature here.

[8] The Legislature offers little more than silence on *Brown*, casually stating that it "does not apply at all" because "it concerned Congressional redistricting." Petition at 25. As the Circuit Court correctly recognized, however, nothing could be further from the truth. In fact, as we recount herein, the majority of the Fourth District's opinion analyzes the precise jurisdictional issue before this Court, addressing both the legal and policy arguments on circuit court jurisdiction for as-applied challenges, and doing so in a way that is applicable to a both state and Congressional redistricting plans.

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 (emphasis added). Finally, the Fourth District reached the exact conclusion that the Legislature seeks 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 state law, state court as-applied challenges demonstrate that fact-intensive claims concerning apportionment plans may be properly heard in the Circuit Court, proving that this Court does not have automatic exclusive jurisdiction over such claims.

The 1972, 1982, and 1992 reapportionment decisions from this Court are not to the contrary. These opinions also confirm that this 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, this 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) (emphasis added). Noting that "the other grounds of protesters' attacks on the validity of the apportionment plan are based upon factual situations," this 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.

In 1982, this 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, this 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 – this 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 Legislature now argues, there would have been no need for this Court to ever "retain" such jurisdiction. Regardless, where this Court wishes to retain exclusive jurisdiction, it does so explicitly. In neither of its 2012 opinions did this Court retain exclusive jurisdiction (or reject its own precedent of allowing subsequent challenges in courts of competent jurisdiction). This case is now properly in trial court.

2. <u>This Court's 2012 Redistricting Opinions Confirm That Its Jurisdiction Is Not Exclusive</u>

Consistent with its past practice, this Court's 2012 review of the Senate plans under Article III, Section 16 was again limited to a determination of facial validity. Finding that time constraints precluded any review other than a review of the plans on their face, this Court did not reach the many factual issues that are now before the Circuit Court on this as-applied challenge. The examples are plentiful.

In the introductory paragraphs of *Apportionment I*, this 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 this Court was plainly 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 this Court did delve into the record, it was unable

to go beyond the objective (and undisputed) indicia of whether the Senate map complied with the Constitution. With respect to partisan imbalance, for example, this Court confronted 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 Circuit Court 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. And, in fact, as indicated above (*see supra* n. 2), the evidence is already beginning to fill that void.

Justice Lewis's concurring opinion further crystallized the issue, while also making clear that this 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 followed suit in this regard. This Court's conclusion was similarly 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).

Justice Pariente's concurring opinion specifically examined how this 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. The concurrence 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, this 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.

Perhaps more important than what this Court did say in *Apportionment I* and *Apportionment II*, is what this Court *did not* say in those opinions. It did *not* reverse its longstanding precedent by holding that subsequent as-applied redistricting challenges in the trial court are prohibited. Thus, given the absolute clarity emanating from this Court's prior jurisprudence on the issue of circuit court jurisdiction over as-applied challenges, there is no legal basis to find that this Court reversed itself *sub silentio* through its 2012 opinions. Indeed, this 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 Legislature's reliance on *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010), is 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 this Court has exclusive jurisdiction to consider the validity of citizen initiative petitions, that particular area of the law does not provide for anything other than a facial, advisory opinion on the constitutional validity of such petitions, which can arise only in the pre-election context. Indeed, this Court went out of its way to make clear that its jurisdictional ruling applied only to the review of the initiative proposals themselves, and not on the larger constitutional issues raised in the litigation:

> Further, certain claims raised by the respondents involve challenges to the constitutionality of the amendments, which are not now justiciable under this Court's exclusive jurisdiction to review initiative proposals.

Id. at 684, n.2 (citations omitted).

Consequently, *Roberts* has no bearing on the very issues that permeate the Legislature's petition – the supposed exclusive jurisdiction of this Court arising out of Article III, Section 16 to hear an as-applied challenge. Moreover, *Roberts* is a perfect example of how this 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* or *II* or any other case.

The Legislature's reliance on other states' constitutional provisions, specifically Arkansas and Maryland, is similarly unavailing. 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 say anything about jurisdiction – exclusive, original or otherwise.

Even more fundamentally, though, neither of these states' 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.

The law favoring jurisdiction in the Circuit Court should not come as any great surprise to the Legislature. In fact, standing before this very Court almost one year ago to the day, the House's counsel expressly contemplated a lawsuit such as this one:

> 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 Transcript of Oral Argument at 6:25-7:7, 8:12-17, *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (No. SC12-1) (emphasis added). The Senate's counsel wholeheartedly agreed:

> 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 this Court, made the point that allowing these claims to proceed in Circuit Court serves all interests:

> *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; emphasis added). *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.").[9]

These concessions are fatal to the extraordinary relief the Legislature now seeks. Indeed, not only should the Legislature be equitably estopped from now advancing the contrary argument before this Court, *see Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001), its prior statements are absolutely correct under the law.

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

In addition to this Court's own redistricting opinions supporting jurisdiction in the Circuit Court, the Florida Constitution itself also compels the Circuit Court to exercise its jurisdiction over this case. While the Legislature devotes a substantial portion of its brief to discussing Article III, Section 16 of the Constitution, it spends precious little time addressing Article III, Section 21, which is the provision under which the claims in this case arise. Because this Court expressly recognized that it was unable to give full effect to Article III, Section 21 in its facial review, a ruling that this Court's jurisdiction is in fact exclusive in that

[9] Although the Coalition did urge this Court to resolve all claims as to the numerous Constitutional deficiencies in the Senate plan, the Coalition was unable to take discovery or support its 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 the Circuit Court in this case.

regard would be tantamount to reading Article III, Section 21 out of the Constitution, thereby denying both justice and due process to the citizens of this State that overwhelmingly voted it into law.

Indeed, if this Court is neither equipped nor authorized to address fact-intensive inquiries into legislative intent, such as the inquiry required by Article III, Section 21, then the people of Florida will be left with no recourse to see that their Constitution is followed.[10] 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

[10] There is no dispute that the record before this Court in *Apportionment I* and *II* contained no testimony or documentary evidence other than evidence about the components of the redistricting maps themselves. This Court did not have the benefit of seeing documents and communications from the map drawers and paid political consultants – such as the ones that have already been produced – that would tend to show that the maps were in fact drawn with impermissible intent.

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 preclude people from enforcing their rights to bring as-applied challenges based on Article III, Section 21. Indeed, if citizens are only able to challenge a redistricting plan in the context of a facial review conducted pursuant to Article III, Section 16, where the Legislature has total control of the record before this Court, then the words of Article III, Section 21 prohibiting improper intent will be rendered a nullity and unenforceable.[11]

[11] The Legislature's passing mention of interpretive canons such as *expressio unius est exclusio alteriu*, which roughly means that the expression of one thing is the exclusion of another, are of no moment here. As the First District has made clear, this particular 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

Nor do the Legislature's complaints about finality and stability provide a sound basis for an extraordinary writ. 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 Legislature concedes in its motion, citizen challengers can still pursue such claims in federal court. Most importantly, finality and closure are hardly reasons to deprive citizens of Constitutional rights. If the Legislature was truly interested in avoiding litigation over the redistricting process, it should have followed the Constitution in the first place.

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 (N.C. 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 Legislature's argument that this Court has exclusive jurisdiction over these claims, particularly in the face of a Constitutional provision and Supreme Court jurisprudence to the contrary.

II. The Circuit Court's Exercise of Jurisdiction Does Not Interfere With The Judgment of This Court

The Legislature next makes a preclusion argument, and then attempts to dress it up in jurisdictional terms. The argument itself fails, as does the attempt to conjure up a basis upon which a writ may issue from this Court.

In making the argument, the Legislature relies specifically upon Article III, Section 16(d), which provides that a "judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all citizens of the state." Based on this language, the Legislature argues that this Court's ruling in *Apportionment II* bars the claims asserted in this case. This argument fails in numerous respects.

At the outset, this Court has already recognized that 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). This Court went on to state 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 already found that claim preclusion does *not* apply as between *Apportionment I* and *Apportionment II*, this Court should not find that claim preclusion operates to bar the claims in this lawsuit. Nor, of course, could it foreclose the Circuit Court's jurisdiction to hear the claims in the first instance. Indeed, as discussed above, with respect to the fact-based claims asserted in this lawsuit, this Court made clear that such claims did not receive a full and fair adjudication:

> 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).

Even more fundamentally speaking, the Legislature does not even bother to address the governing law on preclusion. Nor does it 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 this 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 this Court. Quite simply,

the claims in this case, while obviously addressing the same redistricting map and seeking the same type of relief, are of an entirely different nature and scope than what was before this Court; they are uniquely fact-intensive claims that have never before been litigated and thus could not be precluded.

Even with only the limited amount of discovery that has taken place in the Circuit Court, it is readily apparent that these claims could never be barred by this Court's prior adjudication of the facial claims. As indicated above, there are now documents and testimony from third party political consultants that will, at the very least, factor into the factual findings that the Circuit Court must make in evaluating the claims. Even putting aside the compelling nature of the evidence for these claims, the fundamental point here is that this evidence was not – and could never have been – part of the record before this Court on its facial review. Thus, since there was never even an opportunity to litigate these fact issues previously, these as-applied claims are not precluded.

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 this 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). These cases not only

rightly doomed the jurisdictional arguments before the Circuit Court, they also defeat preclusion as a basis for a writ from this Court. In *Forman*, which, like this lawsuit, 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 this preclusion argument had any merit, this Court in *Forman* could have summarily disposed of the case on res judicata grounds without engaging in 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 this 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.

Finally, the Legislature's assertion that allowing this case to proceed would somehow violate "fundamental notions of orderly government, fundamental fairness and separation of powers" is a red-herring. Clearly, the Circuit Court must follow the decisions of this Court. But that does not mean the Circuit Court is without jurisdiction to hear this case.

III. The Coalition Does Not Seek to Revisit This Court's Rulings

The Legislature asks this Court to ignore the distinction between facial and as-applied claims. But the distinction is a very real one. It is particularly real and significant here, as this Court has never before addressed the claims in this case nor seen the evidence that will be introduced to support those claims. Thus, absent resolution of these claims by the Circuit Court, these important claims and the substantial evidence that goes with them will never be heard, leaving the Constitution's prohibitory language as little more than an aspirational goal rather than an actual legal requirement.

To be very clear, though, the Coalition is not suggesting that this Court's rulings in *Apportionment I* or *Apportionment II* (or, for that matter, any other case) are anything less than binding precedent for the Circuit Court. If, at the time of trial, the Coalition does no more than simply recycle the same claims with the same objective evidence put before this Court previously, the Circuit Court should have little trouble in following this Court's prior adjudication of those claims. But that is not this case, and that is not what will happen. The Circuit Court will look at claims and evidence that could never have been (and were not) put before this Court, and thus its findings will not offend or contradict this Court's rulings in any way.

A. These Claims Are Not Subsumed By the Prior Claims

This as-applied challenge differs in scope and in kind from the earlier proceedings before this Court. As this Court has made clear, the Circuit 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." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 829 (Fla. 2002). Thus, because the Article III, Section 16 proceeding before this 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 Legislature's cited cases on this point are inapposite. *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004), which the Legislature holds up as a good example of a proper as-applied challenge, proves the case for jurisdiction in the Circuit Court in this case. In *Robinson*, this Court was able to find that the Florida Sexual Predators Act was unconstitutional as applied to Leon Robinson based on evidence gathered at the trial court level. Applying the Legislature's argument in this case to *Robinson* would have made it impossible for this Court to reach the conclusion that it did. Here, likewise, the Coalition is entitled to set forth its own particular set of facts in the trial court to support these as-applied claims, particularly since those claims and facts have never, and could never, be heard by this Court.

The Legislature's other cited cases are irrelevant to the issue of claim preclusion in the redistricting context. They even cite a case on the issue of preclusion where the opinion itself makes clear the court did not consider that issue. *See Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 162 n.7 (D.D.C. 2010) ("Because we find that all of plaintiffs' claims are foreclosed on their merits, we need not consider the FEC's argument that some of the claims are also barred by res judicata.") (citations omitted). And, even if the issue was considered, it would have no application here, as the prior decision in *FEC* was one that, unlike here, addressed the "same factual and legal arguments." *Id.* at 157.

More importantly, the res judicata issue in all of the other cited cases arose out of a prior *trial court* proceeding, which is precisely the type of proceeding that the Coalition is 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 all of these cases demonstrate, the law does not support the Legislature's argument on this point.

B. The Claims In This Case Have Not Been Already Been Rejected By This Court

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

Through discovery, the Circuit Court will be afforded the opportunity to examine evidence going well beyond the objective indicia made available to the this 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 plan) for partisan gain or to protect incumbents, then clearly the Circuit Court would not be contravening anything this Court did in making a determination of facial validity without the benefit of seeing such evidence. Indeed, this Court acknowledged that it was unaware of any such information and did not have the ability to obtain such information. And, in fact, this has already been proven true, as new evidence has already been uncovered that will make the Circuit Court's inquiry dramatically different from this Court's facial analysis.

Unable, therefore, to mount a serious argument that the claims are substantively the same, the Legislature resorts to pointing out the wholly unremarkable similarities between this as-applied challenge and the earlier claims before this Court, such as in the request for relief and phrasing of certain allegations. This exercise is of little value. There is no question that these cases are related, involving many of the same words, phrases and subject-matter. But that does not mean the claims are the same. In fact they are not.

The Legislature's discussion of the Coalition's district-specific claims in *Apportionment II* further establishes that the claims in this case are not precluded.

For each district, the Legislature dutifully recounts this Court's conclusions, yet fails to abide by this Court's express finding that its conclusions were based on "evidence in the record." The absence of extrinsic evidence in the record demonstrates precisely why this lawsuit is necessary. The Coalition must be given the opportunity to present the Circuit Court with the evidentiary indicators of intent that are plainly present.[12]

That inquiry has not yet happened. The Constitution, through a full implementation of Section 21, requires that it happen in this case.

C. This Court Did Not Conduct More Than a Facial Review in *Apportionment II*

The Legislature's final argument is that this Court did more than conduct a facial review. To support this argument, the Legislature laundry lists thirteen items of purported "extrinsic evidence" considered by this Court. It is in fact nothing of

[12] In fact, the Circuit Court has already recognized the importance of the information that can be discovered through an as-applied challenge. In the companion Congressional redistricting as-applied challenge, the Circuit Court addressed the importance of both the claim and the discovery required to evaluate that claim in its ruling on the applicability of the legislative privilege: "I find it difficult to imagine a more compelling, competing government interest than that represented by the plaintiffs' claim . . . 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 Circuit Court – applies with equal force in this case.

the sort, as all thirteen items refer to objective data concerning the maps themselves, all of which was made part of the record before this Court by the Legislature.

The Legislature also claims that the twenty-six public hearing transcripts were "extrinsic evidence" in the record. But this is also false. Indeed, this Court, in *Apportionment I*, expressly stated that, in conducting its facial review of the Senate plans, it would not consider what was said during the public hearings. 83 So. 3d at 644. Thus, even if the public hearings do have some evidentiary value on the underlying constitutional issues, it is yet another example of evidence that was not considered by this Court but that could be considered by the Circuit Court in this as-applied challenge.

The appropriate measure is the underlying nature of the evidence. That is, whether it derives from the plan itself or from information outside the plan. None of the evidence mentioned by the Legislature makes this Court's inquiry any less facial. Not only was this Court presented with purely objective data, it did not have access to any evidence that would answer the critical fact questions as to the intent behind the maps, such as email communications between and among those who actually drew the maps, let alone sworn testimony from those people. That is precisely the sort of evidence that has been uncovered and will be presented in this case.

The Legislature's argument is also belied by this Court's own words. Both the nature of the evidence and the scope of review were made clear:

> 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.

Apportionment I at 617 (emphasis added). This Court meant what it said. This as-applied challenge is an entirely different proceeding, one that does not intrude upon this Court's jurisdiction or the force of its prior rulings.

IV. This Petition Should Not Be Transferred to the First District Court of Appeal

This Court should resolve this petition. Transferring this petition to the First District Court of Appeal would waste judicial resources, as this Court is uniquely well suited to resolve issues as to the scope of its own jurisdiction. Indeed, the relevant issues concern this Court's own opinions on redistricting litigation – issue with which this Court is undoubtedly familiar. This Court, not the First District Court of Appeal, should resolve these issues.

CONCLUSION

Florida voters overwhelmingly supported a constitutional provision prohibiting improper intent in redistricting. The Legislature should not be permitted to hide its disregard for this mandate any longer, requiring discovery and a trial before the Circuit Court. Accordingly, for the foregoing reasons and on the

foregoing authorities, the Legislature's petition should be denied and no writ should issue.

Dated: February 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this, the 28th day of February, 2013, a true and correct copy of the foregoing Response to Petition was served by electronic mail to all counsel of record on the attached service list. I further certify that in accordance with Florida Rule of Appellate Procedure 9.100(e)(2), a copy of the foregoing was served by U.S. Mail to:

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Circuit Judge
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/s/Adam M. Schachter
ADAM M. SCHACHTER

CERTIFICATE OF COMPLIANCE

I certify that this Response to Petition is submitted in Times New Roman 14-point font, complying with the font requirements of Rule 9.210(a)(2).

/s/Adam M. Schachter
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