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From: [Uthmeier, James](#)
To: [Mohammad O. Jazil](#)
Subject: Accepted: Florida Redistricting Kick-off Call

From: [Uthmeier, James](#) on behalf of [Mohammad O. Jazil](#)
To: [Spencer, Chris](#); [Kelly, Alex](#); [Uthmeier, James](#); [Jason Torchinsky](#); tom@bryangedemo.com
Subject: Florida Redistricting Kick-off Call

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From: Mohammad O. Jazil
Sent: Wednesday, January 5, 2022 8:15:26 AM
To: Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Uthmeier, James <James.Uthmeier@eog.myflorida.com>; Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; tom@bryangedemo.com <tom@bryangedemo.com>
Subject: Florida Redistricting Kick-off Call
When: Wednesday, January 5, 2022 10:00 AM-10:30 AM.
Where: Conference Line: +1 (571) 440-708[REDACTED]; access code: [REDACTED]

Conference Line: +1 (571) 440-[REDACTED]; access code: [REDACTED]

From: [Mohammad O. Jazil](#)
To: [Uthmeier, James](#); [Jason Torchinsky](#); tom@bryangeodemo.com
Subject: Florida Redistricting Kick-off Call

Conference Line: +1 (571) 440-████; access code █████

From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Date: Tuesday, January 11, 2022 3:05:00 PM
Attachments: [In re Senate Joint Resol. of Legislative Apportionment 1176 \(Apportionment I\), 83 So. 3d 597 \(Fla. 2012\).pdf](#)
[In re Senate Joint Resol. of Legislative Apportionment 2-B \(Apportionment II\), 89 So. 3d 872 \(Fla. 2012\).pdf](#)
[Fla. House of Representatives v. League of Women Voters of Fla. \(Apportionment III\), 118 So. 3d 198 \(Fla. 2013\).pdf](#)
[League of Women Voters of Fla. v. Fla. House of Representatives \(Apportionment IV\), 132 So. 3d 135 \(Fla. 2013\).pdf](#)
[League of Women Voters of Fla. v. Data Targeting, Inc. \(Apportionment V\), 140 So. 3d 510 \(Fla. 2014\).pdf](#)
[Bainter v. League of Women Voters of Fla. \(Apportionment VI\), 150 So. 3d 1115 \(Fla. 2014\).pdf](#)
[League of Women Voters of Fla. v. Detzner \(Apportionment VII\), 172 So. 3d 363 \(Fla. 2015\).pdf](#)
[League of Women Voters of Fla. v. Detzner \(Apportionment VIII\), 172 So. 3d 363 \(Fla. 2015\).pdf](#)

[League of Women Voters of Fla. v. Detzner \(Apportionment VIII\), 179 So. 3d 258 \(Fla. 2015\)](#)
[League of Women Voters of Fla. v. Detzner \(Apportionment VII\), 172 So. 3d 363 \(Fla. 2015\)](#)
[Bainter v. League of Women Voters of Fla. \(Apportionment VI\), 150 So. 3d 1115 \(Fla. 2014\)](#)
[League of Women Voters of Fla. v. Data Targeting, Inc. \(Apportionment V\), 140 So. 3d 510 \(Fla. 2014\)](#)
[League of Women Voters of Fla. v. Fla. House of Representatives \(Apportionment IV\), 132 So. 3d 135 \(Fla. 2013\)](#)
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[In re Senate Joint Resol. of Legislative Apportionment 2-B \(Apportionment II\), 89 So. 3d 872 \(Fla. 2012\)](#)
[In re Senate Joint Resol. of Legislative Apportionment 1176 \(Apportionment I\), 83 So. 3d 597 \(Fla. 2012\)](#)

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83 So.3d 597 (Mem)
Supreme Court of Florida.

In re SENATE JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT 1176.

No. SC12–1.

|
March 9, 2012.

Original Proceeding—Apportionment Law.

Attorneys and Law Firms

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Opinion

[PARIENTE, J.](#)

With the goal of reforming this state's legislative apportionment process, in 2010, the Florida voters approved an amendment to the Florida Constitution establishing stringent new standards for the once-in-a-decade apportionment of legislative districts. These express new standards imposed by the voters clearly act as a restraint on the Legislature in drawing apportionment plans. After the Legislature draws the apportionment plans, this Court is required by the Florida Constitution to review those plans to ensure their compliance with the constitution. In this review, we are obligated to interpret and apply these standards in a manner that gives full effect to the will of the voters. In order to do so, our review necessarily becomes more extensive than in decades past.

For the reasons set forth in this opinion, we declare the plan apportioning districts for the Florida House of Representatives to be constitutionally valid under the Florida Constitution. We declare the plan apportioning the districts for the Florida *598 Senate to be constitutionally invalid under the Florida Constitution. The Legislature is now tasked by the Florida Constitution with adopting a new joint resolution of apportionment “conforming to the judgment of the supreme court” as set forth in article III, section 16(d).

I. INTRODUCTION

The once-in-a-decade process of redistricting follows the United States Census Bureau's release of new census data. [Article III, section 16, of the Florida Constitution](#) expressly entrusts the Legislature with the obligation to redraw this

state's legislative districts and expressly entrusts this Court with the mandatory obligation to review the Legislature's decennial apportionment plans. The Florida House of Representatives and the Florida Senate must adopt a joint resolution apportioning the legislative districts in accordance with federal and state constitutional requirements. *Id.* After the Legislature adopts a joint resolution of apportionment, the Florida Constitution requires the Attorney General to petition this Court for a declaratory judgment to determine the validity of the Legislature's apportionment plans as enacted. *Art. III, § 16(c), Fla. Const.* Within thirty days of receiving the Attorney General's petition, and after permitting adversary interests to present their views, the Court has a mandatory obligation under the Florida Constitution to render a declaratory judgment determining the validity of the Legislature's apportionment plans. *Id.*

Before 2010, this Court held that Florida's constitutional requirements guiding the Legislature during the apportionment process were “not more stringent than the requirements under the United States Constitution.”   *In re Constitutionality of House Joint Resolution 1987 (In re Apportionment Law—2002)*, 817 So.2d 819, 824 (Fla.2002). Under this construction of the Florida Constitution, we reviewed legislative apportionment plans to determine whether those plans complied with (1) the general provisions of the United States Constitution, which set forth the one-person, one-vote standard under the Equal Protection Clause, and (2) the specific provisions of the [state constitution, article III, section 16\(a\)](#), requiring districts to be “consecutively numbered” and to consist of “contiguous, overlapping or identical territory.”

On November 2, 2010, the voters approved Amendment 5 (Fair Districts Amendment) for inclusion in the Florida Constitution, greatly expanding the standards that govern legislative apportionment.¹ When approving the Fair Districts Amendment for placement on the 2010 ballot, this Court explained that the “overall goal” of the Amendment was twofold: “[T]o require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations” and “to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts ... are avoided.” *Advisory Op. to Atty. Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So.3d 175, 181, 187–88 (Fla.2009) (plurality opinion). After its passage, the Fair Districts Amendment was codified as [article III, section 21, of the Florida Constitution](#).

With the advent of the Fair Districts Amendment, the Florida Constitution now imposes more stringent requirements as to apportionment than the United States Constitution and prior versions of the state *599 constitution. The new standards enumerated in [article III, section 21](#), are set forth in two tiers, each of which contains three requirements. The first tier, contained in [section 21\(a\)](#), lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. The second tier, located in [section 21\(b\)](#), lists three additional requirements, the compliance with which is subordinate to those listed in the first tier of [section 21](#) and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. *See art. III, § 21(b), Fla. Const.* The order in which the constitution lists the standards in tiers one and two is “not [to] be read to establish any priority of one standard over the other within that [tier].” *Art. III, § 21(c), Fla. Const.*

These express new standards imposed by the voters clearly act as a restraint on legislative discretion in drawing apportionment plans. In this original declaratory judgment proceeding, we must define these new standards for the first time since the passage of the Fair Districts Amendment. Although this Court's role is unquestionably circumscribed by the extremely short time frame set forth in [article III, section 16\(c\), of the Florida Constitution](#), such a limitation cannot deter the Court from its extremely weighty responsibility entrusted to us by the citizens of this state through the Florida Constitution to interpret the constitutional standards and to apply those standards to the legislative apportionment plans.

When interpreting constitutional provisions, this Court endeavors to ascertain the will of the people in passing the amendment. We follow the approach that has been consistently undertaken when interpreting constitutional provisions:

The fundamental object to be sought in construing a constitutional provision is

to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

Pleus v. Crist, 14 So.3d 941, 944–45 (Fla.2009); *Zingale v. Powell*, 885 So.2d 277, 282 (Fla.2004) (quoting *Gray v. Bryant*, 125 So.2d 846, 852 (Fla.1960)); *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So.2d 492, 501 (Fla.2003).

This Court's duty to measure the Legislature's apportionment plans with the yardstick of express constitutional provisions arises from the “well settled” principle that “the state Constitution is not a grant of power but a limitation upon power.”  *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session (In Re Apportionment Law–1972)*, 263 So.2d 797, 805 (Fla.1972). With the recent addition of section 21 to article III of the Florida Constitution, the Legislature is governed by a different and more comprehensive constitutional measurement than before—the limitations on legislative authority in apportionment decisions have increased and the constitutional yardstick has more measurements.

In addition to measuring the Legislature's compliance with these standards, we *600 recognize the crucial role legislative apportionment plays with respect to the right of citizens to elect representatives. Indeed, the right to elect representatives—and the process by which we do so—is the very bedrock of our democracy. To ensure the protection of this right, the citizens of the state of Florida, through the Florida Constitution, employed the essential concept of checks and balances, granting to the Legislature the ability to apportion the state in a manner prescribed by the citizens and entrusting this Court with the responsibility to review the apportionment plans to ensure they are constitutionally valid. The obligations set forth in the Florida Constitution are directed not to the Legislature's right to draw districts, but to the people's right to elect representatives in a fair manner so that each person's vote counts equally and so that all citizens receive “fair and effective representation.” Once validated by the Court, the apportionment plans, which redraw each of the 40 Senate districts and each of the 120 House districts, will

have a significant impact on the election of this state's elected representatives for the next decade.

On February 9, 2012, the Legislature passed Senate Joint Resolution 1176 (Joint Resolution), apportioning this state into 120 House districts and 40 Senate districts. 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. Following the Attorney General's filing, this Court “permit[ted] adversary interests to present their views” as required by article III, section 16(c). Under this Court's plenary authority to review legislative apportionment plans, we now have “jurisdiction to resolve all issues by declaratory judgment arising under article III, section 16(c), Florida Constitution.” *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session (In re Apportionment Law–1982)*, 414 So.2d 1040, 1045 (Fla.1982).

We have carefully considered the submissions of both those supporting and opposing the plans.² 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. We agree with the position of the House that the House plan can be severed from the Senate plan. In accordance with article III, section 16(c), of the Florida Constitution, the Court enters a declaratory judgment determining that the apportionment plan for the House of Representatives as contained in Senate Joint Resolution 1176 is constitutionally valid and determining that the apportionment plan for the Senate *601 as contained in Senate Joint Resolution 1176 is constitutionally invalid.

II. HISTORICAL EVOLUTION OF ARTICLE III OF THE FLORIDA CONSTITUTION

In order to provide context for our present task of determining the validity of the House and Senate apportionment plans, we first review the historical evolution of the constitutional provisions pertinent to the Legislature's decennial apportionment.

Before 1968, there was no process by which challengers to the Legislature's apportionment plans could seek direct and immediate review of the apportionment plans by the Supreme Court of Florida. Under the Florida Constitution

of 1885, which was in effect until the adoption of the 1968 Constitution, litigation surrounding the validity of the Legislature's adopted apportionment plans proliferated. Indeed, “[f]rom the years 1955 through 1966, no fewer than seven apportionment plans were formulated by the state legislature, all of which were determined eventually to be invalid by the federal judiciary.” *In re Apportionment Law—1982*, 414 So.2d at 1048 & n. 4 (citing *Swann v. Adams*, 208 F.Supp. 316 (S.D.Fla.1962); *Swann v. Adams*, 214 F.Supp. 811 (S.D.Fla.1963), *rev'd*, 378 U.S. 553, 84 S.Ct. 1904, 12 L.Ed.2d 1033 (1964); *Swann v. Adams*, 258 F.Supp. 819 (S.D.Fla.1965), *rev'd*, 383 U.S. 210, 86 S.Ct. 767, 15 L.Ed.2d 707 (1966); *Swann v. Adams*, 258 F.Supp. 819 (S.D.Fla.1965), *rev'd*, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967); *Swann v. Adams*, 263 F.Supp. 225 (S.D.Fla.1967)).

In some cases, litigation over a particular plan literally spanned a period of several years, infusing the apportionment and the electoral process with uncertainty. The end product of the Legislature's attempt to avoid further apportionment litigation was the drafting of [article III, section 16](#). In 1968, the citizens of Florida approved [article III, section 16](#), for inclusion in the Florida Constitution, which provided a mechanism whereby the Supreme Court of Florida was given mandatory and express jurisdiction to determine the validity of the Legislature's enacted apportionment plan under a strict thirty-day time limit. *See id.* at 1048; *see also art. III, § 16(c), Fla. Const.³*

The affirmative decision of the voters to place the apportionment responsibility squarely in the state judiciary rather than leave it to the federal judiciary was in line with the United States Supreme Court's recognition of that preference:

The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged. *State of Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676 [84 S.Ct. 1429, 12 L.Ed.2d 595]

(1964); *City of Scranton v. Drew*, 379 U.S. 40 [85 S.Ct. 207, 13 L.Ed.2d 107] (1964), citing *Butcher v. Bloom* [415 Pa. 438], 203 A.2d 556 (1964); *Jackman v. Bodine* [43 N.J. 453], 205 A.2d 713, 724 (1964). *See also Kidd v. McCannless* [200 Tenn. 273], 292 S.W.2d 40 (1956), and discussion thereof in *Baker v. Carr*, 369 U.S. 186, 235–236 [82 S.Ct. 691, 7 L.Ed.2d 663] (1962).

Scott v. Germano, 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965) (parallel citations omitted).

*602 In addition, [article III, section 16](#), required the Legislature to comply with federal and state constitutional standards:

The legislature ... shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

[Art. III, § 16\(a\), Fla. Const.](#) In every apportionment decision since the adoption of [article III, section 16](#), this Court has reviewed the validity of the Legislature's joint resolution of apportionment consistent with the language of that provision, examining criteria such as population disparities between legislative districts (federal equal protection standard of one-person, one-vote), territorial boundaries (contiguity), and numbering issues (consecutiveness).⁴

In 2002, this Court discussed the scope of the Legislature's duty in relation to the constitutional standards, explaining that “the requirements under the Florida Constitution [were]

not more stringent than the requirements under the United States Constitution.”   *In re Apportionment Law–2002*, 817 So.2d at 824 (citing  *In re Apportionment Law–1972*, 263 So.2d at 807–08). Limited by a construction of Florida’s constitution that was not more extensive than the United States Constitution, the Court declined to require the Legislature to adopt an apportionment plan using the following four objective standards proposed by Common Cause Florida and the Florida League of Women Voters:

[A]ll districts should (1) have equal population as closely as possible; (2) be drawn to be compact and contiguous and respect local political boundaries; (3) not dilute the voting strength of any racial, ethnic, or minority group; and (4) be drawn neutrally without regard to the incumbent or political party.

  *Id.* at 832. Other challengers, including the Attorney General, “questioned the Legislature’s decision not to articulate objective standards that guided its redistricting process.”   *Id.* at 831. The Court rejected all of these arguments, making the following observation:

The only standards that the Legislature is constitutionally required to follow in redistricting are the equal protection standard of “one-person, one-vote,” the Florida Constitutional requirement that legislative districts be “either contiguous, overlapping, or identical territory,” and the requirement not to discriminate against any racial or language minority or political group. *See*  [*Davis v. Bandemer*, 478 U.S. [109,] 118–27, 106 S.Ct. 2797 [92 L.Ed.2d 85 (1986)]];  *In re Senate Joint Resolution 2G*, 597 So.2d at 278–80. While the other “standards” advocated by the opponents have been traditional considerations in the redistricting process, they are not constitutionally required. *See*  *Shaw v. Reno*, 509 U.S. [630,] 647, 113 S.Ct. 2816 [125 L.Ed.2d 511 (1993)]];  *Gaffney v. Cummings*, *603 412 U.S. [735] 752 n. 18, 93 S.Ct. 2321 [37 L.Ed.2d 298 (1973)]. Hence, we decline the Attorney General’s and other parties’ requests to return the plan to the Legislature to create standards.

As explained above, for those standards that can be fully addressed in this opinion, we conclude that the Legislature has complied with the requirements set forth by the federal and state constitutions.

  *Id.* at 832.

Under the state constitutional framework, while the Florida Constitution grants the Legislature the authority to apportion the legislative districts every ten years, the authority is circumscribed by the right of the people to instruct their representatives on the manner in which apportionment should be conducted. As this Court stated in 1972:

When the people of Florida adopted the Constitution of 1968 they reserved to themselves the right to instruct their representatives and, at the same time, authorized the election of these representatives in senatorial and representative districts which may be “either contiguous, overlapping or identical territory.”

 *In re Apportionment Law–1972*, 263 So.2d at 807.

In 2010, with the passage of the Fair Districts Amendment, the people of Florida increased the instructions to their representatives to provide additional constitutional imperatives for their elected representatives to follow when drawing the senatorial and representative districts. Our conclusion in 2002 that the above criteria were not constitutionally required has been expressly overridden by a constitutional amendment approved by the voters of Florida on November 2, 2010.

The ballot summary for the Fair Districts Amendment on which Florida citizens voted stated:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must

make use of existing city, county and geographical boundaries.

Standards for Establishing Legislative Dist. Boundaries, 2 So.3d at 179. Proposed by initiative petitions that the organization FairDistrictsFlorida.org sponsored, this constitutional amendment is now codified in [article III, section 21, of the Florida Constitution](#) and imposes additional substantive standards with which the Legislature must comply in carrying out its constitutional duties in establishing legislative district boundaries. *See art. III, § 21, Fla. Const.*

As approved by Florida voters, [article III, section 21](#), provides in full:

In establishing legislative district boundaries:

(a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with ***604** federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

[Art. III, § 21, Fla. Const.](#) (footnotes omitted).

In contrast to the standards that guided the Legislature during prior apportionment cycles, the standards governing the instant apportionment process are now more stringent than the requirements under the United States Constitution and prior versions of the Florida Constitution. It is our task to interpret these new constitutional standards, together with the previous constitutional standards, against the apportionment plans contained within the Joint Resolution. Through our interpretation of these provisions, we necessarily determine

the validity of both the House and Senate legislative apportionment plans.

In making these determinations, we first set forth the applicable standard of review. We next discuss each of the separate constitutional requirements imposed by the Florida and United States Constitutions and how the requirements are to be analyzed both individually and collectively. Then, in light of challenges raised by the opponents of the plans, we examine whether the Legislature's apportionment plans are facially consistent with these requirements.

III. ANALYSIS

A. STANDARD AND SCOPE OF REVIEW

The overarching question to be considered by the Court in this declaratory judgment proceeding is the constitutional validity of the plans contained within the Legislature's joint resolution of apportionment. *See*   *In re Apportionment Law—2002*, 817 So.2d at 824; *In re Apportionment Law—1982*, 414 So.2d at 1052. The validity of the joint resolution is determined by examining whether the Legislature has operated within the constitutional limitations placed upon it when apportioning the state's legislative districts. The newly added constitutional standards are directly related to ensuring that the process by which citizens choose their elected officials is fair.

Like Florida, other states have recognized that legislative redistricting is fundamental to ensuring that citizens choose their elected officials in an equitable manner. The Supreme Court of Pennsylvania stressed this very principle when it recently invalidated the Pennsylvania 2012 apportionment plan, stating that “[l]egislative redistricting ‘involves the basic rights of the citizens ... in the election of their state lawmakers.’ ”  *Holt v. 2011 Legislative Reapportionment Comm'n*, 7 MM 2012, — Pa. —, 38 A.3d 711, 716 (Pa. Jan. 25, 2012) (quoting *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556, 559 (1964)). The Supreme Court of Colorado has similarly emphasized that “[t]he basic purpose of the constitutional standards for reapportionment is to assure equal protection for the right to participate in the ... political process and the right to vote.” *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1241 (Colo.2002).

The recognition of the critical importance of redistricting in ensuring the basic rights of citizens to vote for the

representatives of their choice is highlighted by a series of voting cases from the United States Supreme Court, most notably in [Reynolds v. Sims](#), 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964):

***605** [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized....

....

... To the extent that a citizen's right to vote is debased, he is that much less a citizen.

[Id.](#) at 561–62, 567, 84 S.Ct. 1362.

In explaining the goal of legislative apportionment in terms of the rights of voters, the United States Supreme Court in

[Reynolds](#) emphasized:

Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race....

[Id.](#) at 565–66, 84 S.Ct. 1362.

In describing the significance of its prior jurisprudence in [Reynolds](#), the United States Supreme Court emphasized the importance of the right of voters to fair representation:

Furthermore, in formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation. In such cases, it is not that anyone is deprived of a vote or that any person's vote is not counted. Rather, it is that one electoral district elects a single representative and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one legislator, while his neighbor in the adjoining district votes for and is represented by two or more.

[Bandemer](#), 478 U.S. at 123, 106 S.Ct. 2797. In [Bandemer](#), the United States Supreme Court recognized that fairness in voting under the federal constitution extended to dilution of the right to vote based on districts that were drawn in a manner that favored a political party.

With fairness in drawing the legislative districts as the focus, [article III, section 21](#), imposes additional standards upon the Florida Legislature to follow in apportionment proceedings. [Article III, section 21](#), also provides Florida citizens with additional constitutional protections to ensure that their right to fair and effective representation is not impaired by the manner in which the legislative districts are drawn. These constitutional constraints imposed on the Legislature in drawing legislative districts are designed to “maximize electoral possibilities by leveling the playing field” for the increased protection of the rights of Florida's citizens to vote and elect candidates of their choice. [Brown v. Sec'y of State](#), 668 F.3d 1271, 1285 (11th Cir.2012).

Throughout these proceedings, the Attorney General, the Senate, and the House have asserted that the Legislature should have full discretion in balancing the constitutional criteria that apply to apportioning legislative districts. However, when addressing similar arguments that state legislatures should have full discretion in considering such

matters, the United States Supreme Court in  *Reynolds* eloquently stated: “We are cautioned about the dangers *606 of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”  377 U.S. at 566, 84 S.Ct. 1362.

Although the advent of new constitutional requirements undoubtedly increases the Legislature's apportionment obligations, the House and Senate plans still come to this Court with an initial presumption of validity.   *In re Apportionment Law–2002*, 817 So.2d at 824–25. This presumption serves to recognize the deference initially owed to legislative acts upon passage. Thus, what was true in 1972 regarding the respective roles of the Court and the Legislature in the apportionment process still holds true today:

[W]e emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

 *In re Apportionment Law–1972*, 263 So.2d at 799–800; see also   *In re Apportionment Law–2002*, 817 So.2d at 824 (same).

Even though we continue to recognize the presumption of validity that governs ordinary legislative acts, the operation

of this Court's process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in our obligations. Challenges to the constitutionality of ordinary legislative acts passed by the Legislature must be brought in a trial court and then reviewed by a district court of appeal. This Court has mandatory jurisdiction in those circumstances only if the legislative act is found to be unconstitutional. See art. V, § 3(b)(1), Fla. Const.

In contrast, the Court's mandatory review to determine the validity of apportionment plans every ten years derives from a different provision of the constitution: article III, section 16(c). The constitution specifies that the Attorney General “shall” file a petition for a declaratory judgment and that this Court “shall permit adversary interests to present their views.” Art. III, § 16(c), Fla. Const. In this type of original proceeding, the Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution. Because it is the obligation of this Court to enter a judgment declaring the joint resolution valid or invalid, the Court has routinely accepted that judicial relief would be warranted where the Legislature has “fail[ed] to reapportion according to federal and state constitutional requisites.”   *In re Apportionment Law–2002*, 817 So.2d at 824 (quoting  *In re Apportionment Law–1972*, 263 So.2d at 800).

This Court in  *In re Apportionment Law–1972*, 263 So.2d at 806, while cognizant that “[t]he propriety and wisdom of legislation are exclusively matters for legislative determination,” also recognized that the Legislature's authority was not unbridled. The Court observed that, although *607 “in accordance with the doctrine of separation of powers, [it would] not seek to substitute its judgment for that of another coordinate branch of the government,” pursuant to that same constitutional doctrine, the Court was also responsible for measuring legislative acts “with the yardstick of the Constitution.”  *Id.*

Unlike 2002, when “the requirements under the Florida Constitution [were] not more stringent than the requirements under the United States Constitution,”   *In re Apportionment Law–2002*, 817 So.2d at 824, now, the Florida Constitution imposes a higher standard on the

Legislature when formulating the state's apportionment plans. The citizens of Florida mandated additional constitutional imperatives for their elected representatives to follow when redrawing senatorial and representative districts.

The new requirements dramatically alter the landscape with respect to redistricting by prohibiting practices that have been acceptable in the past, such as crafting a plan or district with the intent to favor a political party or an incumbent. By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.

It is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid. We reject the assertions of the Attorney General and the House that a challenger must prove facial invalidity beyond a reasonable doubt. While there have been decisions of this Court reciting that principle with regard to legislative enactments, such as *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So.2d 134, 139 (Fla.2008), cited by the House, that principle of statutory construction was stated only once in an apportionment decision and was made in the context of an attack on multi-member districts. See *In re Apportionment Law—1972*, 263 So.2d at 805–06. Since 1972, we have never used that principle of statutory construction when enunciating the standard for our review of legislative apportionment, including our last comprehensive statement in 2002. Therefore, to use the standard of beyond a reasonable doubt would be a departure from our precedent in legislative apportionment jurisprudence.⁵

We conclude that the beyond a reasonable doubt standard is ill-suited for an original proceeding before this Court in which we are constitutionally obligated to enter a declaratory judgment on the validity of the legislative plans. Unlike a legislative *608 act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the “instructions” of the citizens as expressed in specific requirements of the Florida Constitution governing this process.

Because “legislative reapportionment is primarily a matter for legislative consideration and determination,” *In re Apportionment Law—1972*, 263 So.2d at 799–800, this Court will defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements. With an understanding that the Court's responsibility is limited to ensuring compliance with constitutional requirements, and endeavoring to be respectful to the critically important role of the Legislature, the Court has previously acknowledged that its duty “is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.” *In re Apportionment Law—1992*, 597 So.2d at 285.

This principle is in keeping with the United States Supreme Court's decision in *Perry v. Perez*, — U.S. —, 132 S.Ct. 934, 941, 181 L.Ed.2d 934 (2012), which stated that “redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.” In *Perez*, when it became clear that a state's redistricting plan would not obtain preclearance under Section 5 of the Voting Rights Act, a federal district court drew an interim redistricting plan without giving deference to the state's policy choices. In reversing the federal court's drawing of the plan, the Supreme Court explained that a federal district court may not wholly disregard policy choices made by a state's legislature, where those policy choices are not inconsistent with the United States Constitution or the Voting Rights Act. *Id.* at 943. The Supreme Court held that a “state plan serves as a starting point” for a federal district court because “[i]t provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps ... without displacing legitimate state policy judgments with the court's own preferences.” *Id.* at 941.

Perez is in conformity with the federal judiciary's strong preference to yield to states in making initial redistricting decisions as long as there is no violation of either the United States Constitution or the Voting Rights Act. As was emphasized in *Scott v. Germano* over 45 years ago, the “power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has

been specifically encouraged.”  *Germano*, 381 U.S. at 409, 85 S.Ct. 1525.

Any attempt to use  *Perez* in support of an argument that the state judiciary is constrained in performing its constitutionally mandated review takes the holding of  *Perez* out of context. In contrast to  *Perez*, this Court's initial review of the Legislature's joint resolution of apportionment does not require any balancing of concerns for federal versus state sovereignty. Nor is this Court engaged at this point in redrawing the plans. Rather, this Court is *required* by the state constitution to evaluate whether the Legislature's apportionment plans conflict with Florida's express constitutional standards. *See art. III, § 16(c), Fla.*

Const. The Supreme Court's concerns in  *Perez* regarding judicial overreach by the federal court in redrawing the state's apportionment plan do not apply to this original state proceeding, during *609 which this Court is mandated to assess the Legislature's compliance with constitutional standards. At this juncture, the Court plays no role in drawing the Legislature's apportionment plans, and the deference owed by the federal courts to the state in the drawing of the plan is not implicated.

In our initial review of the Legislature's plan, we recognize the limitations of this Court's responsibilities. At the same time, we acknowledge and accept our paramount responsibility in apportionment, as set forth by the Florida Constitution, to ensure that the adopted plans comply with the constitutionally required mandates. “In other words, it is this Court's duty to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards unconstitutional.”  *In re Legislative Districting of State*, 370 Md. 312, 805 A.2d 292, 316 (2002).

Where the legislative decision runs afoul of constitutional mandates, this Court has a constitutional obligation to invalidate the apportionment plan. To accept the Legislature's assurances that it followed the law without any type of inquiry or any type of meaningful review by this Court would render the Court's review of the new constitutional standards, and whether the Legislature complied with the new standards, essentially meaningless. To accept the Legislature's and Attorney General's position that this Court should not undertake a meaningful review of compliance with the new constitutional standards in this proceeding, but instead await challenges brought in trial courts over a period of

time, would be an abdication of this Court's responsibility under the Florida Constitution. This approach would also create uncertainty for the voters of this state, the elected representatives, and the candidates who are required to qualify for their seats.⁶

The question then becomes how this Court will accomplish its review in a meaningful way given the nature of this constitutionally required proceeding. Undoubtedly, this Court is limited by time to be able to relinquish for extensive fact-finding as we have undertaken in other original proceedings,⁷ or to appoint a commissioner to receive testimony and refer the case back to the appellate court together with findings that are advisory in nature only.⁸ A review of prior reapportionment decisions from 1972, 1982, and 1992 reveals that in the past, the Court has retained exclusive state jurisdiction to allow challenges to be later brought, and then, on one occasion, the Court appointed a commissioner to conduct fact-finding on a specific challenge pursuant to our apportionment original jurisdiction.⁹

In light of two distinct developments, our past approach is not determinative of our review in this post-2010 case. The first development, as mentioned above, is that in 2010, the voters imposed upon the Legislature explicit, additional state constitutional standards. In contrast to 2002, *610 where the challenges exceeded our limited scope of review because they were based on violations of federal law, the challenges in 2012 are based specifically on allegations that the plans facially violate the requirements of the new provisions of our state constitution.

The second development is that technology has continued to advance in the last decade, allowing this Court to objectively evaluate many of Florida's constitutionally mandated criteria without the necessity of traditional fact-finding, such as making credibility determinations of witnesses. In furtherance of the goal to conduct an objective evaluation of the plans, the Court required all plans, including alternative plans, to be submitted electronically in .doj format, allowing for every party and the Court to evaluate the plans using the same statistical analysis and data reports. To ensure that the Court would have the means to objectively evaluate the plans, the Court specified in its order the manner in which the House and Senate plans should be submitted to the Court in .doj format:

For each plan file submitted for the newly created apportionment plans, the Attorney General is directed to

specify the software used to create the plan, the data and criteria used in drafting the plan, the source of the data used in drafting the plan, and any other relevant information. The Attorney General is also directed to file along with the plan statistical reports for both the new plans and the last legally enforceable plans in searchable Portable Document Format (PDF), which include at a minimum the following from the 2010 Census: the population numbers in each district, the total voting age population (VAP) in each district, and the VAP of each racial and ethnic group in each district. Reports with additional information and statistics (e.g., compactness measurements), and reports for prior apportionment plans, may also be submitted in searchable PDF format.

The Attorney General is also directed to provide the Court with maps of the House and Senate apportionment plans depicting the new districts, which shall include maps depicting the entire state as well as regional maps. In addition to the maps depicting the districts, the Attorney General may also file maps depicting the apportionment plans with data overlays. For each such map, the Attorney General is directed to specify the data depicted in the data overlay and the source of that data. The Attorney General may also file maps other than maps depicting the new apportionment plans, including maps of prior apportionment plans with or without any data overlays.

In re Joint Resolution of Legislative Apportionment, No. SC12-1 (Fla. Sup.Ct. order filed Jan. 25, 2012). As for parties, the Court permitted the filing of alternative plans and ordered the parties to comply with the following requirements:

Parties submitting alternative plans must submit the alternative plans electronically in .doj format....

For each plan file submitted, the submitting party must specify the software used to create the plan, the data and criteria used in drafting each plan, the source of the data used in drafting the plan, and any other relevant information. The submitting party shall also specify whether the alternative plan is a partial or complete plan, and the population deviation for each district in the plan; if a partial plan is submitted, the submitting party must specify what county or counties are included in the partial plan. Parties may also submit *611 statistical reports related to each submitted plan in searchable PDF format.

For each submitted alternative plan, the submitting party must file map(s) depicting the alternative plan districts with this Court. At least one map shall be filed that reflects

the entire alternative plan. The submitting party may file additional maps showing regions or areas of interest. In addition to maps depicting the districts of the alternative plan, the submitting party may also file maps depicting the apportionment plans with data overlays, including maps of the prior plans. Each such map shall specify the data depicted in the data overlay and the source of that data. For each map filed with the Court, the submitting party shall file the map in electronic PDF format and provide the Court with fifteen (15) color paper copies.

Id. The only opponent in this case to submit an alternative plan was the Coalition, which submitted two alternative plans to this Court: an alternative Senate plan and an alternative House plan.¹⁰

The Court permitted alternative plans because alternative plans may be offered as relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent.¹¹ The Legislature is not obligated to accept alternative plans; this Court, however, may review them to evaluate whether the Legislature's adopted plans are contrary to law. *See, e.g., Holt*, 38 A.3d at 755, 2012 WL 360584, at *36; *Holt*, 38 A.3d at 755, 2012 WL 360584, at *36 (explaining that alternative plans may be used as proof that the final plan “contained subdivision splits that were not absolutely necessary”).

In furtherance of our goal to ensure that the Court had complete information, at the Court's direction, the Attorney General filed an appendix to the petition for declaratory judgment and filed the apportionment plans electronically in .doj format, which would allow this Court and the challengers to perform an objective statistical analysis of the plans submitted by using standard redistricting software. The House and Senate each developed and utilized its own web-based redistricting software, MyDistrictBuilder and District Builder, respectively. This Court had access to both MyDistrictBuilder and District Builder as well as the data in the House program, which included census data, American Community Survey data, and voter registration and elections data. We have also received the incumbent addresses *612 upon which the challengers based their claims that districts were drawn to favor incumbents.¹²

The type of information available for this original review is objective data.¹³ In performing its objective analysis

of the data, the Court did not rely on the figures or statistical analysis contained in the appendices filed by the FDP or the Coalition. Instead, the Court utilized the MyDistrictBuilder and District Builder software applications to evaluate the Legislature's apportionment plans and the Coalition's alternative plans. The Court utilized both software applications to evaluate voting-age population¹⁴ and to conduct a visual inspection of the districts. All of the maps depicting districts contained in this opinion were obtained using District Builder, except for a map depicting the City of Lakeland. This Court utilized MyDistrictBuilder when analyzing undisputed voter registration and election data because MyDistrictBuilder contained that data, but District Builder did not.¹⁵ Specifically, this Court utilized the registration and election data to conduct an analysis of minority voting behavior in evaluating challenges to individual districts. Further, this Court utilized this data to examine the overall political composition of the House and Senate plans, as well as the political composition of each challenged district.

The Court additionally acquired Maptitude for Redistricting and inputted into Maptitude the voter registration, political, and elections data utilized by MyDistrictBuilder. The Court also inputted the incumbent addresses into Maptitude. The Court utilized Maptitude to conduct additional *613 evaluation of the plans, such as the location of incumbents' addresses and calculations of the percentage of prior population retained by a district. This Court also examined graphical data overlays of voting-age population using Maptitude in evaluating certain challenged districts. Finally, the Court used ESRI Redistricting, also acquired by the Court, to generate compactness scores using compactness measurements of Reock and Area/Convex Hull, compactness measures that were used by the House in its plan data reports.

The controversy between the parties, set forth primarily by the House and Senate, is that no conclusion as to intent to favor a political party or incumbent can be made. The challengers contend that this Court is able to perform its review based on an assessment of statistical analysis, a visual examination of the plans, and an evaluation of legislative history. The challengers contend that this evidence will enable the Court to discern intent to favor or disfavor a political party or an incumbent because intent can be inferred from effect. We will discuss these arguments in more detail when we analyze the specific standards and apply them to the House and Senate plans.

Finally, we have the guidance of the many state courts that have similar provisions providing their respective state supreme courts with original jurisdiction.¹⁶ Those courts have, over the years, both validated and invalidated plans based on many of the same criteria now contained in Florida's constitution.¹⁷ As in those states, the Florida Constitution “expressly entrusts to this Court the responsibility, upon proper petition, to review the constitutionality of districting plans prepared and enacted by the political branches of *614 government and the duty to provide appropriate relief when the plans are determined to violate the United States and [Florida] Constitutions.” *In re Legislative Districting of State*, 370 Md. 312, 805 A.2d 292, 316 (2002).

With our important responsibility to ensure that the joint resolution of apportionment comports with both the United States and Florida Constitutions, and with full awareness of the inherent limitations in the process set out in the state constitution, we undertake our constitutionally mandated review of the facial validity of the Senate and House plans contained within Senate Joint Resolution 1176.

B. THE STANDARDS GOVERNING OUR ANALYSIS

Although this is the fifth time the Court has had the responsibility to undertake its constitutionally mandated review of legislative apportionment, it is the first time that the Court has been charged with defining and applying the criteria of [article III, section 21](#). This Court's interpretation of the language contained in [sections 16\(a\) and 21 of article III](#) begins with the basic principles spelled out by this Court in its 1972 apportionment decision:

Every word of the Florida Constitution should be given its intended meaning and effect. In construing constitutions, that construction is favored which gives effect to every clause and every part of it. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which gives it effect.

 *In re Apportionment Law—1972*, 263 So.2d at 807.

In accord with those tenets of constitutional construction, this Court “endeavors to construe a constitutional provision consistent with the intent of the framers and the voters.” *Zingale*, 885 So.2d at 282 (quoting *Caribbean Conservation Corp.*, 838 So.2d at 501). In ascertaining the intent of the voters, the Court may examine “the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document,” *In re Apportionment Law—1982*, 414 So.2d at 1048, with the view that a constitutional amendment must be assessed “in light of the historical development of the decisional law extant at the time of its adoption.” *Jenkins v. State*, 385 So.2d 1356, 1357 (Fla.1980).

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. The Federal Equal Protection Clause requires that districts conform to the one-person, one-vote standard. [Article III, section 16\(a\)](#), requires the Legislature to apportion both the Senate and the House in “consecutively numbered ... districts of either contiguous, overlapping or identical territory.”¹⁸

The new standards enumerated in [article III, section 21](#), are set forth in two tiers, each of which contains three requirements. The first tier, contained in [section 21\(a\)](#), lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process *615 or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. *See art. III, § 21(a), Fla. Const.* The second tier, located in [section 21\(b\)](#), enumerates three additional requirements in drawing district lines, the compliance with which is subordinate to those listed in the first tier of [section 21](#) and to federal law in the event of conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. *See art. III, § 21(b), Fla. Const.* The order in which the constitution lists the standards in tiers one

and two is “not [to] be read to establish any priority of one standard over the other within that [tier].” [Art. III, § 21\(c\), Fla. Const.](#)

We interpret the specific constitutional directive that tier two is subordinate to tier one in the event of conflict to mean that the Legislature's obligation is to draw legislative districts that comport with all of the requirements enumerated in Florida's constitution. However, should a conflict in application arise, the Legislature is obligated to adhere to the requirements of [section 21\(a\)](#) (tier one) and then comply with the considerations in [section 21\(b\)](#) (tier two) to the extent “practicable” or “feasible,” depending on the wording of the specific constitutional standard. With this basic framework in mind, we interpret the standards, beginning with the newly enacted tier-one standards and then moving to the newly enacted tier-two standards. After we explain and interpret the standards, we set forth how the standards interact for purposes of evaluating the apportionment plans.

1. Tier–One Standards

a. Intent to Favor or Disfavor a Political Party or an Incumbent

The first of the new and significantly different requirements in our state constitution is the provision in [article III, section 21\(a\)](#), providing that “[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” Although this requirement is entirely new to this state, at least five other states share a similar constitutional or statutory requirement.¹⁹ Florida's constitutional provision, like the constitutional provision requiring protection of racial and language minorities against discrimination, is a tier-one requirement under the state constitution, meaning that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process.

This new requirement in Florida prohibits what has previously been an acceptable practice, such as favoring incumbents and the political party in power. *See, e.g.,*  *In re Apportionment Law—1992*, 597 So.2d at 285. The desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties.²⁰ Thus, in 1992, when *616 the Democrats were in control of the Legislature and,

by default, the redistricting process, we rejected a claim of impermissible political gerrymandering, stating in full:

Finally, several of the opponents observe that the Joint Resolution is nothing more than a gerrymandering effort by the Democratic majority of the legislature to protect Democratic incumbents. We have little doubt that politics played a large part in the adoption of this plan. However, the protection of incumbents, standing alone, is not illegal, and none of the opponents seriously contend that the Joint Resolution is invalid because of political gerrymandering.

 *Id.*

A decade later, when faced with a claim that the Republican majority of the Legislature had improperly limited input from Democratic members, the United States District Court for the Southern District of Florida similarly observed that the “raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country.”   *Martinez v. Bush*, 234 F.Supp.2d 1275, 1297 (S.D.Fla.2002).

“The term ‘political gerrymander’ has been defined as ‘[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.’ ”  *Vieth v. Jubelirer*, 541 U.S. 267, 271 n. 1, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion) (quoting *Black’s Law Dictionary* 696 (7th ed. 1999)). While some states have sought to minimize the political nature of the apportionment process by establishing independent redistricting commissions to redraw legislative districts,²¹ Florida voters have instead chosen to place restrictions on the Legislature by constitutional mandate in a manner similar to the constitutions of other states.

The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process.

See, e.g.,  *Vieth*, 541 U.S. at 286, 124 S.Ct. 1769 (plurality opinion) (“[P]artisan districting is a lawful and common practice....”);  *Miller v. Johnson*, 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (“[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition....”).

Florida’s express constitutional standard, however, differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions. Political gerrymandering claims under the Equal Protection Clause of the United States Constitution focus on determining when partisan districting as a permissible exercise “has gone too far,”  *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion), so as to “degrade a voter’s or a group of voters’ influence on the political process as a whole.”  *Bandemer*, 478 U.S. at 132, 106 S.Ct. 2797 (plurality opinion); *see also Fla. Senate v. Forman*, 826 So.2d 279 (Fla.2002) (relying on the  *Bandemer* test for political gerrymandering claims *617 under Florida’s equal protection clause and overturning trial court finding of political gerrymandering).

In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. It does not reference the word “invidious” as the term has been used by the United States Supreme Court in equal protection discrimination cases, *see, e.g.*,  *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983), and Florida’s provision should not be read to require a showing of malevolent or evil purpose. Moreover, by its express terms, Florida’s constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually.

We recognize that any redrawing of lines, regardless of intent, will inevitably have an *effect* on the political composition of a district and likely whether a political party or incumbent is advantaged or disadvantaged. In fact, a plurality of the Supreme Court has quoted “one of the foremost scholars of reapportionment” as observing that “*every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.*”  *Bandemer*, 478 U.S. at 129 n. 10, 106 S.Ct. 2797 (quoting Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts* 7–8, in *Representation and Redistricting Issues* (Bernard Grofman, et al. eds. 1982)). In short, redistricting will inherently have political consequences, regardless of the intent used in drawing the lines. Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent. *See, e.g.*,  *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

The Senate argues that “it is a Sisyphean task to discern whether the Legislature had ... an [improper] intent.”²² To the extent that the Senate argues that our task is futile, endless, or impossible, we reject this argument. Rather, the Senate’s approach to permit each trial court to define the standards in a discrete proceeding, to make findings of fact based on the trial court’s interpretation of the standards, and to eventually have the cases work their way up to this Court would itself be an endless task.

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. While we agree that the standard does not prohibit political effect, the effects of the plan, the shape of district lines, and the demographics of an area are all factors that serve as objective indicators of intent. *See, e.g., Diaz v. Silver*, 978 F.Supp. 96, 104 (E.D.N.Y.1997) (concluding that because of the lack of compactness and the fact that incumbents were protected in 87% of the new districts, “[d]espite its conspicuous absence from any direct discussion, incumbency appears to have been the unacknowledged third-most-significant factor used when redistricting”), *aff’d*, *618 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997), and *aff’d sub nom. Acosta v. Diaz*, 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997), and *aff’d sub nom. Lau v. Diaz*, 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997). One piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead this Court to the conclusion that the plan was drawn for a prohibited purpose.

With respect to intent to favor or disfavor an incumbent, the inquiry focuses on whether the plan or district was drawn with this purpose in mind. As explained by the Eleventh Circuit Court of Appeals in upholding this specific constitutional provision as applied to Florida’s congressional redistricting, “the incumbency provision is neutral on its face, explicitly requiring that lines not be designed to help or handicap particular candidates based on incumbency or membership in a particular party. Far from ‘dictat[ing] electoral outcomes,’ the provision seeks to maximize electoral possibilities by leveling the playing field.” *Brown*, 668 F.3d at 1285.

At the outset, objective indicators of intent to favor or disfavor a political party can be discerned from the Legislature’s level of compliance with our own constitution’s tier-two requirements, which set forth traditional redistricting

principles. A disregard for these principles can serve as indicia of improper intent. *See, e.g., Sims*, 377 U.S. at 578, 84 S.Ct. 1362 (noting that a “desire to maintain integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory” undermines opportunities for political favoritism); *Pearson v. Koster*, 359 S.W.3d 35, 38 (Mo.2012) (stating that the purpose of the constitutional requirements that districts be contiguous, compact, and nearly equal in population is “to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as ‘gerrymander’” (quoting *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 61 (1912))).

The tier-two requirements of article III, section 21(b), are meant to restrict the Legislature’s discretion in drawing irregularly shaped districts; strict compliance with their express terms may serve to undercut or defeat any assertion of improper intent. *Cf. Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (stating that in racial gerrymandering context where race-neutral considerations are the basis for redistricting, and are not subordinated to race, a State can “defeat a claim that a district has been gerrymandered on racial lines”); *Vieth*, 541 U.S. at 335, 124 S.Ct. 1769 (Stevens, J., dissenting) (stating in proposing a standard for political gerrymandering claims that “[j]ust as irrational shape can serve as an objective indicator of an impermissible legislative purpose, other objective features of a districting map can save the plan from invalidation”). However, where the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred.

In making this assessment, we evaluate the shapes of districts together with undisputed objective data, such as the relevant voter registration and elections data, incumbents’ addresses, and demographics, as well as any proffered undisputed direct evidence of intent. We note that the Court has access to the same voter registration and election data used by the House in its redistricting software.

Similar to the partisan inquiry, the inquiry for intent to favor or disfavor an incumbent focuses on the shape of the district in relation to the incumbent’s legal residence, as well as other objective evidence *619 of intent. Objective indicators of intent may include such factors as the maneuvering of district

lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district. When analyzing whether the challengers have established an unconstitutional intent to favor an incumbent, we must ensure that this Court does not disregard obvious conclusions from the undisputed facts.

The Court emphasizes that mere access to political data cannot presumptively demonstrate prohibited intent because such data is a necessary component of evaluating whether a minority group has the ability to elect representatives of choice—a required inquiry when determining whether the plan diminishes a protected group's ability to elect a candidate of choice. *See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (DOJ Guidance Notice) (United States Department of Justice guidance notice requiring a functional analysis of voting behavior to determine whether retrogression has occurred). Likewise, the fact that the Senate or House, or their staff, may or may not have had the incumbents' addresses is not determinative of intent or lack of intent. And, as discussed in the challenges section below, the fact that there were more registered Democrats than registered Republicans in this state, but that there are more Republican-performing districts than Democratic-performing districts in both the newly drawn Senate and House plans, does not permit a conclusion of unlawful intent in this case. Rather, when the Court analyzes the tier-two standards and determines that specific districts violate those standards without any other permissible justification, impermissible intent may be inferred.

b. Minority Voting Protection

The next newly added provision in [article III, section 21\(a\)](#), provides that “districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process *or* to diminish their ability to elect representatives of their choice.” (Emphasis added.) The emphasized “or” separates two clauses in the preceding sentence, and each clause shares the same negative verb, “shall not be drawn.” As a plurality of this Court explained in *Standards for Establishing Legislative District Boundaries*, 2 So.3d at 189 (plurality opinion), “[t]his verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, *each of which must be satisfied.*” Accordingly, this portion

of [section 21\(a\)](#) imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice.

The dual constitutional imperatives “follow[] almost verbatim the requirements embodied in the [Federal] Voting Rights Act.” [Brown](#), 668 F.3d at 1280. The first imperative, that “districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process,” [art. III, § 21\(a\), Fla. Const.](#), is essentially a restatement of [Section 2](#) of the Voting Rights Act (VRA), which prohibits redistricting plans that afford minorities “less opportunity than other members of the electorate to participate in the political process.” [42 U.S.C. § 1973\(b\)](#) (2006). [Section 2](#) relates to claims of impermissible vote dilution.

Florida's second imperative, that “districts shall not be drawn ... to diminish *620 [racial or language minorities'] ability to elect representatives of their choice,” [art. III, § 21\(a\), Fla. Const.](#), reflects the statement codified in [Section 5](#) of the VRA prohibiting apportionment plans that have “the purpose of or will have the effect of diminishing the ability of any citizens ... on account of race or color ... to elect their preferred candidates of choice.” [42 U.S.C. § 1973c\(b\)](#) (2006). [Section 5](#) attempts to eradicate impermissible retrogression in a minority group's ability to elect a candidate of choice. Although [Section 5](#) applies only to “covered jurisdictions,” Florida's constitutional prohibition applies to the entire state.

Consistent with the goals of [Sections 2](#) and [5](#) of the VRA, Florida's corresponding state provision aims at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression. Interpreting Florida's minority voting protection provision in this manner gives due allegiance to the principles of constitutional construction, under which the Court considers “the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document.” *In re Apportionment Law—1982*, 414 So.2d at 1048. Before its placement on the ballot and approval by the citizens of Florida, sponsors of this amendment, including the Florida State Conference of NAACP Branches (NAACP) and Democracia Ahora, acknowledged that Florida's provision tracked the language of [Sections 2](#) and [5](#) and was perfectly consistent with both the letter and intent of federal law.

See Amici Curiae Br. of Fla. State Conference of NAACP Branches & Democratica Ahora, Inc., at 3–5, *Roberts v. Brown*, 43 So.3d 673 (Fla.2010) (No. SC10–1362). Those groups further contended that viewing “the requirements of [Florida’s provision as being] thoroughly consistent with the Voting Rights Act’s text and [placing an] emphasis on protecting the equal opportunities of minorities” did “not require extended analysis to see.” *Id.* at 8.

Moreover, all parties to this proceeding agree that Florida’s constitutional provision now embraces the principles enumerated in Sections 2 and 5 of the VRA. Because Sections 2 and 5 raise federal issues, our interpretation of Florida’s corresponding provision is guided by prevailing United States Supreme Court precedent. This approach not only corresponds to the manner in which this Court addressed Federal VRA claims in 1992, see *In re Apportionment Law–1992*, 597 So.2d at 280–82, but it squares with how other jurisdictions have interpreted comparable state provisions.²³

Florida’s provision is unique among the states in that it incorporates language from the VRA but does not explicitly reference the VRA.²⁴ We therefore review the *621 language of Sections 2 and 5, and how each has been judicially interpreted, to give meaning to our state counterpart. The Court nonetheless recognizes our independent constitutional obligation to interpret our own state constitutional provisions.

In our review, we conclude that in applying the federal provisions to the challenges and legislative justifications, the Court must necessarily approach the application of each federal provision differently due to the manner in which the Court reviews Florida’s constitutional provisions in a facial review of the apportionment plans. For example, in this case, the House and Senate use Florida’s minority voting protection provision as a justification for the manner in which they drew specific districts. The challengers, on the other hand, urge the Court to conclude that many of the districts were drawn to impermissibly dilute the voting strength of minorities and, in turn, the voting strength of the Democratic Party.

In contrast to the posture of the case in which this Court reviews Florida’s minority voting protection provision, Section 2 claims under the VRA are brought by plaintiffs who challenge the apportionment plan on the grounds of impermissible vote dilution. Section 5 of the VRA applies only to covered jurisdictions that must obtain preclearance by

the Department of Justice before an apportionment plan goes into effect; in Florida, only five counties are covered, not the entire state.

As explained by the United States Supreme Court, the VRA “was designed by Congress to banish the blight of racial discrimination in voting.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), and to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall “be denied or abridged ... on account of race, color, or previous condition of servitude.” *Voynovich v. Quilter*, 507 U.S. 146, 152, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (quoting U.S. Const. amend. XV). Sections 2 and 5 of the VRA “combat different evils.” *Keno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), and “differ in structure, purpose, and application.” *Georgia v. Ashcroft*, 539 U.S. 461, 478, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (quoting *Holder v. Hall*, 512 U.S. 874, 883, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (plurality opinion)). Section 2, specifically, applies nationwide and provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a) (2006).

A denial or abridgement of the right to vote in violation of Section 2 occurs when based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). Section 2 thus prohibits any practice or procedure that, when “interact[ing] with social and historical

conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.'" 

*622 *Voinovich*, 507 U.S. at 153, 113 S.Ct. 1149 (quoting  *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)). Importantly, Section 2 employs a "results" test, under which proof of discriminatory intent is not necessary to establish a violation of the section.  *Chisom v. Roemer*, 501 U.S. 380, 395, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991); see also *Bossier Parish Sch. Bd.*, 520 U.S. at 482, 117 S.Ct. 1491 ("[P]roof of discriminatory intent is not required to establish a violation of Section 2.").²⁵

The United States Supreme Court has commonly referred to one such prohibited practice or procedure under Section 2 as "vote dilution," which is the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate the strength into voting power.

 *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816. "[T]he usual device for diluting the minority voting power is the manipulation of district lines" by either fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them or "packing" them into one or a small number of districts to minimize their influence in adjacent districts.  *Voinovich*, 507 U.S. at 153–54, 113 S.Ct. 1149. For instance, under the interpretation of federal law, impermissible "packing" might occur when a minority group has "sufficient numbers to constitute a majority in three districts" but is "packed into two districts in which it constitutes a super-majority."  *Id.* at 153, 113 S.Ct. 1149.

The Supreme Court's leading case interpreting Section 2,  *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752, set out three "necessary preconditions" that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with Section 2. These preconditions require an individual challenging the plan to show that: (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive"; and (3) the majority population "votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."  *Id.* at 50–51, 106 S.Ct. 2752. When the three  *Gingles* preconditions are met, courts must then assess the totality of the circumstances to determine if the Section 2 "effects" test is met—that is, if minority voters'

political power is truly diluted.  *Johnson v. De Grandy*, 512 U.S. 997, 1013, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

A successful vote dilution claim under Section 2 requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed. See  *id.* at 1008, 114 S.Ct. 2647 ("[T]he first  *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."). Majority-minority districts are ones "in which a majority of the population is a member of a specific minority group."  *Voinovich*, 507 U.S. at 149, 113 S.Ct. 1149; see also  *623 *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion) ("In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population.").

By contrast, a crossover or coalition district "is one in which minority voters make up less than a majority of the voting-age population" but are, at least potentially, "large enough to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."  *Bartlett*, 556 U.S. at 13, 129 S.Ct. 1231. Influence districts are districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.  *Id.*

The showing of either an additional minority influence district or a crossover district, as opposed to an actual majority-minority district, is insufficient for Section 2 purposes; what is required is that "the minority population in the potential election district [be] greater than 50 percent."  *Id.* at 19–20, 129 S.Ct. 1231. Moreover, while "there is no § 2 right to a [minority] district that is not reasonably compact, the creation of a noncompact district does not compensate for the dismantling of a compact [minority] opportunity district."  *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430–31, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). As the United States Supreme Court has explained, "[t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals."  *Id.* at 434, 126 S.Ct. 2594. Therefore, with respect to the compactness

inquiry for Section 2 purposes specifically, there would be “no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates.” *Id.* at 433, 126 S.Ct. 2594.

Most recently, in *Perez*, 132 S.Ct. at 944, an eight-justice majority of the Supreme Court cited to the plurality decision in *Bartlett*, 556 U.S. at 13–15, 129 S.Ct. 1231 (declining to recognize a Section 2 claim where the district was composed of only 39% black voting-age population), to hold that a federal district court would have no basis for drawing a districting plan to create a “minority coalition opportunity district.” The *Perez* decision is of course binding precedent only as to the interpretation of Section 2 jurisprudence under the VRA and was specifically concerned with limiting the circumstances under which a federal district court could draw an interim apportionment plan.

Unlike the posture of a Section 2 VRA claim before a federal court, the Florida Supreme Court is charged with analyzing the apportionment plan to determine compliance with all constitutional provisions. Florida's provision now codifies these Section 2 principles, but the question is whether those principles set a floor, as well as a ceiling, for our interpretation of Florida's constitution—whether there would be a violation of Florida's minority protection provision with respect to vote dilution if the plan could be drawn to create crossover districts or even influence districts. The challengers assert that by overly packing minorities into single districts, the Legislature has acted to minimize the influence of not only minorities, but also Democrats in the surrounding districts. Where that claim has been made, we will consider that specific argument when reviewing the district challenges below.

In contrast to vote dilution claims under Section 2, Section 5 of the VRA is limited to particular “covered jurisdictions” and § 624 relates to claims of retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Ashcroft*, 539 U.S. at 478, 123 S.Ct. 2498. Section 5 “suspend[s] all changes in state election procedure,” including redistricting plans, in jurisdictions covered by the VRA “until they are submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General” of the United States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129

S.Ct. 2504, 2509, 174 L.Ed.2d 140 (2009); see also *Beer v. United States*, 425 U.S. 130, 133, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). Florida is not a covered jurisdiction for the purposes of Section 5, but the state does include five covered counties: Collier, Hardee, Hendry, Hillsborough, and Monroe. Florida's new constitutional provision, however, codified the non-retrogression principle of Section 5 and has now extended it statewide. In other words, Florida now has a statewide non-retrogression requirement independent of Section 5.

Preclearance under Section 5 is granted only if the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”

Nw. Austin, 129 S.Ct. at 2509, 129 S.Ct. 2504 (quoting 42 U.S.C. § 1973c(a) (2006)). A violation can be shown where the drawing of the district lines has “the purpose of or will have the effect of diminishing the ability of any citizens ... on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice.”

42 U.S.C. § 1973c(b).²⁶ The primary objective of Section 5 is to avoid retrogression. “[A] plan has an impermissible [retrogressive] ‘effect’ under § 5 only if it ‘would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’” *Bossier*, 520 U.S. at 478, 117 S.Ct. 1491 (quoting *Beer*, 425 U.S. at 141, 96 S.Ct. 1357). The existing plan of a covered jurisdiction serves as the “benchmark” against which the “‘effect’ of voting changes is measured.” *Id.*

In its 2006 reauthorization, Congress amended Section 5 to add the express prohibition against “diminishing the ability” of minorities “to elect their preferred candidate” as a response to the United States Supreme Court's 2003 decision in *Ashcroft*. This amended language mirrors the language of Florida's provision. Before the amendment to Section 5, the *Ashcroft* Court concluded that Section 5 granted to covered jurisdictions the discretion to trade off “safe” districts with “influence or coalition districts,” particularly if the new plan did not “change[] the minority group's opportunity to participate in the political process.” 539 U.S. at 482, 123 S.Ct. 2498.

Disagreeing with the United States Supreme Court's interpretation, Congress overruled *Ashcroft*, concluding that “trade-offs” that “would allow the minority community's

own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give ‘influence’ to the minority community while removing that community’s ability to elect candidates” were “inconsistent with the original and current purpose of Section 5.” *H.R.Rep. No. 109–478, at 44 (2006)*. As Congress explained, the new “Section 5 [was] intended to be specifically focused on whether the electoral power of the minority community [was] more, less, or just as *625 able to elect a preferred candidate of choice after a voting change as before.” *Id.* at 46. That is, “[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5.” *Id.* The United States Supreme Court has yet to interpret this aspect of Congress’s 2006 amendment.

Just as [Section 2](#) jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities’ ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5. However, the Court must remain mindful that we are interpreting an independent provision of the state constitution.

Certainly, by including the “diminish” language of recently amended Section 5, Florida has now adopted the retrogression principle as intended by Congress in the 2006 amendment. Accordingly, the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group’s ability to elect its preferred candidates. In other words, in addition to majority-minority districts, coalition or crossover districts that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan must also be recognized. *See Texas v. United States*, No. 11–1303 (TBG–RMC–BAH), 2011 WL 6440006, at *18–19, 831 F.Supp.2d 244, 265–68 (D.D.C. Dec. 22, 2011) (concluding that minority coalition districts are also included in the calculation of whether a new districting plan diminishes the ability of a minority group to elect a candidate of choice). We nonetheless conclude that under Florida’s provision, a slight change in percentage of the minority group’s population in a given district does not necessarily have a cognizable effect on a minority group’s ability to elect its preferred candidate of choice. This is because a minority group’s ability to elect a candidate of choice depends upon more than just population figures.

To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice. This has been termed a “functional analysis,” requiring consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past. The United States Department of Justice (DOJ) has defined what a functional analysis of electoral behavior entails:

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department’s view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data *626 in the submission is often helpful in making the requisite Section 5 determination.... Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.

DOJ Guidance Notice, 76 Fed. Reg. at 7471; *see also Texas*, 831 F.Supp.2d at 262–66, 2011 WL 6440006, at *15–18 (proposing a functional test similar to that of the DOJ).

We recognize that in certain situations, compactness and other redistricting criteria, such as those codified in [tier two of article III, section 21, of the Florida Constitution](#), will be compromised in order to avoid retrogression. Indeed, the DOJ has even noted that “compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to ... follow county, city, or precinct boundaries ... or, in some cases, require a certain level of compactness of district boundaries may need to give

way to some degree to avoid retrogression.” DOJ [Guidance Notice, 76 Fed. Reg. at 7472](#). Tier two of [article III, section 21](#), specifically contemplates this need, but only to the extent necessary. Therefore, as does the DOJ, in making our own assessment, we will rely upon “alternative or illustrative plans ... that make the least departure from [Florida’s] stated redistricting criteria needed to prevent retrogression.” *Id.* (emphasis added).

The Attorney General, the Senate, and the House all argue that an inquiry under Florida’s provision, like an inquiry under the Federal VRA, is too fact-intensive to be resolved in the instant original proceeding, which is limited to a narrow thirty-day window. In fact, the Senate takes the position that this Court should outright decline to review whether the Senate plan complies with this provision.

In oral argument, the attorney for the Senate stated that “[n]o rational person could expect seven appellate-court justices to resolve these extraordinarily tough factual issues.” This argument was in support of the Senate’s position that challenges based on the new constitutional provisions, including the minority voting protection provision, should await challenges brought in the trial court after validation of the plans.

We acknowledge that in 2002, this Court declined ruling on Federal VRA claims and race-based discrimination claims, instead leaving those claims to be brought on an “as-applied” basis. See   [In re Apportionment Law–2002, 817 So.2d at 825](#). Of course, as we have mentioned previously, at that time, there was no explicit state constitutional requirement, and it was entirely logical to defer such claims until after this Court determined the facial validity of the plans under the Florida Constitution.

Further, the Legislature, in its defense of the reason for drawing certain districts in a particular configuration, relies on the need to comply with the Federal VRA and the corresponding provision of the Florida Constitution. The Legislature asserts that it is far too difficult for this Court to review claims regarding diminishment of voting strength, but it nevertheless justifies the drawing of a number of districts on this basis.

If the Legislature is utilizing its interest in protecting minority voting strength as a shield, this Court must be able to undertake a review of the validity of that reason. Therefore, by the very nature of the challenges and the reasons advanced

for the shape of the districts, it is necessary to perform a facial review and analyze the objective data that we have available. Because [*627](#) a minority group’s ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida’s minority protection provision.

To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment. However, the United States Supreme Court has cautioned: “[W]e do not read ... any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.”  [Shaw, 509 U.S. at 655, 113 S.Ct. 2816](#). This is especially true in light of the United States Supreme Court’s admonition:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

 [Id. at 657, 113 S.Ct. 2816](#).

In a manner consistent with what is required to determine whether a district is likely to perform for minority candidates of choice, the Court’s analysis of this claim and any

defense for the manner in which the district was drawn will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history.²⁷ This approach is analogous to the review we undertook in 1992 of objective statistical data in order to facially decide [Section 2](#) claims. There, when analyzing whether the joint resolution complied with [Section 2](#) of the VRA, this Court held that its “analysis [would] include a consideration of all statistical data filed herein, including a breakdown of white, black, and Hispanic voting-age populations and voting registrations in the legislative districts contained in the Joint Resolution and in other proposed plans, none of which [were] disputed.”  *In re Apportionment Law—1992*, 597 So.2d at 282 (footnotes omitted).

Based on the foregoing, we analyze Florida's minority voting protection provision as safeguarding the voting strength of minority groups against impermissible dilution and retrogression.

c. Contiguity

The third of the tier-one standards is contiguity. The requirement that districts shall consist of contiguous territory exists in both [sections 16\(a\) and 21\(a\) of article III](#).²⁸ By including this standard in the ***628** first subsection of the new amendment, the voters made clear their intention to establish that the [section 21\(b\)](#) standards of compactness, nearly equal population, and utilizing political and geographical boundaries are subservient to the contiguity requirement.

This Court has defined contiguous as “being in actual contact: touching along a boundary or at a point.”   *In re Apportionment Law—2002*, 817 So.2d at 827 (quoting  *In re Apportionment Law—1992*, 597 So.2d at 279). “A district lacks contiguity ‘when a part is isolated from the rest by the territory of another district’ or when the lands ‘mutually touch only at a common corner or right angle.’ ”   *Id.* (quoting  *In re Apportionment Law—1992*, 597 So.2d at 279). No party has advocated that the interpretation of this constitutional provision has changed, and we interpret the clause in [section 21\(a\)](#) consistent with our previous interpretation of whether a district is contiguous under [section 16\(a\)](#).

2. Tier–Two Standards

We now turn to a discussion of the tier-two standards, which require that “districts shall be as nearly equal in population as is practicable,” that “districts shall be compact,” and that “districts shall, where feasible, utilize existing political and geographical boundaries.” [Art. III, § 21\(b\), Fla. Const.](#) Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards.

a. As Nearly Equal in Population as Practicable

Although the express requirement of equal population is new to the Florida Constitution, this Court's precedent establishes the importance of the federal one-person, one-vote requirement as both an apportionment principle and a proper starting point in judicial analysis. We evaluate this federal principle in conjunction with the newly enacted state constitutional requirement set forth in [article III, section 21\(b\)](#), requiring districts to be “as nearly equal in population as is practicable.”

As interpreted by the United States Supreme Court, the Equal Protection Clause of the Fourteenth Amendment mandates that “state legislatures be apportioned in such a way that each person's vote carries the same weight—that is, each legislator represents the same number of voters.”  *In re Apportionment Law—1992*, 597 So.2d at 278 (citing  *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). This concept, commonly referred to as the one-person, one-vote requirement, is determined “by analyzing the population figures in each district.”   *In re Apportionment Law—2002*, 817 So.2d at 825. In construing the one-person, one-vote requirement, this Court explained:

The Constitutions of Florida and the United States require that one man's vote in a district be worth as much as another. Mathematical exactness is not an absolute requirement in state apportionment plans; however, deviations, when unavoidable, must be de minimis. Whether a deviation is de

minimis must be determined on the facts of each case.

 *In re Apportionment Law—1972*, 263 So.2d at 802.

When discussing the one-person, one-vote requirement in 2002, this Court relied *629 on the United States Supreme Court and defined equal protection as

“requir[ing] that a State make an honest and good faith effort to construct districts ... *as nearly of equal population as is practicable*.”  *In re Senate Joint Resolution 2G*, 597 So.2d at 279] (quoting  *Reynolds*, 377 U.S. at 577, 84 S.Ct. 1362). In  *White v. Regester*, 412 U.S. 755, 764, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), the Supreme Court held that “minor population deviations among state legislative districts [do not] substantially dilute the weight of individual votes in larger districts so as to deprive individuals in these districts of fair and effective representation.”

  *In re Apportionment Law—2002*, 817 So.2d at 826 (emphasis added).

Although requiring mathematical exactness for congressional districts,²⁹ the United States Supreme Court has also explained that mathematical precision under the one-person, one-vote requirement is not paramount for state legislative districts when it must yield to other legitimate redistricting objectives, such as compactness and maintaining the integrity of political subdivisions:

[S]ome deviations from population equality may be necessary to permit States to pursue other legitimate objectives such as “maintain[ing] the integrity of various political subdivisions” and “provid[ing] for compact districts of contiguous territory.”  *Reynolds, supra* at 578 [84 S.Ct. 1362]. As the Court stated in  *Gaffney*, “a[n] unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and

apportionment arrangement.”  412 U.S. at 749 [93 S.Ct. 2321].

 *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (alterations in original).

Applying that body of law during the 2002 apportionment cycle before the most recent constitutional amendment, this Court rejected the argument that the one-person, one-vote standard would require the Legislature to utilize advanced computer technology to design districts “in exactly the same numerical size.”   *In re Apportionment Law—2002*, 817 So.2d at 826. We concluded that “[e]ven if the advent of computer-based redistricting software [had] lowered the maximum permissible deviation, ... the relatively minor deviation before us in [that] case [did] not lead to the conclusion that either the House or Senate plans [were] facially in violation of the one-person, one-vote requirement.”   *Id.* at 827. There, the House plan had a maximum percentage deviation between the largest and smallest number of people per representative (statistical overall range) of 2.79%, and the Senate plan had a maximum percentage deviation between the largest and smallest number of people per representative (statistical overall range) of 0.03%.   *Id.* at 826.

Now, the Florida voters have expressly spoken on the issue of population equality *630 in Florida's redistricting process. Article III, section 21(b), requires districts to be “as nearly equal in population as is practicable.” To interpret this provision, we apply the principles governing constitutional construction. The Court “endeavors to construe a constitutional provision consistent with the intent of the framers and voters,” *Zingale*, 885 So.2d at 282, and in construing the language of the Florida Constitution, “[e]very word of the Florida Constitution should be given its intended meaning and effect.”  *In re Apportionment Law—1972*, 263 So.2d at 807.

Florida's standard unmistakably uses the same language that the Supreme Court has used when interpreting the federal equal protection one-person, one-vote standard. See   *In re Apportionment Law—2002*, 817 So.2d at 826 (describing the federal one-person, one-vote criteria as requiring the Legislature to construct districts “as nearly of equal population as is practicable” (quoting  *In re Apportionment Law—1992*, 597 So.2d at 279)). Further, this

Court has relied on Supreme Court precedent to interpret the one-person, one-vote standard in a like manner.

The FDP and the Coalition assert that Florida's equal population requirement imposes a stricter standard than this Court has previously employed. The challengers' assertion therefore raises the question of whether compliance with the standard under the Florida Constitution is measured differently than how it has been measured under the United States Constitution; in other words, whether the Legislature has less room for flexibility in population deviation among the legislative districts because the requirement is now enshrined in the Florida Constitution.

We resolve this question by concluding that the voters' inclusion of this standard in the second tier of [article III, section 21](#), recognizes that, as under the federal constitution, strict and unbending adherence to the equal population requirement will yield to other redistricting considerations, but that those considerations must be based on the express constitutional standards. The Florida Constitution embraces this construction, expressly mandating that the equal population requirement give way to contiguity, the prohibition against the intent to favor an incumbent or political party, and the need to comply with the minority-protection provision. In addition, [article III, section 21](#), instructs that Florida's equal population requirement be balanced with both compactness and the use of political and geographical boundaries.

The United States Supreme Court has long recognized that although the Equal Protection Clause requires state legislatures to make an “honest and good faith effort” to construct districts “as nearly of equal population as is practicable,” there are legitimate reasons for states to deviate from creating districts with perfectly equal populations, including maintaining the integrity of political subdivisions and providing compact and contiguous districts. [Sims](#), 377 U.S. at 577, 84 S.Ct. 1362; see also [Brown](#), 462 U.S. at 842, 103 S.Ct. 2690.

We imbue Florida's provision with the same meaning, subject to this important caveat. Because obtaining equal population “if practicable” is an explicit and important constitutional mandate under the Florida Constitution, any deviation from that goal of mathematical precision must be based upon compliance with other constitutional standards. Accordingly, compliance with Florida's equal population

standard must be assessed in tandem with the other constitutional considerations.

b. Compactness

Compactness is the second of the tier-two standards. Because the requirement that districts “shall be compact” is a new ***631** constitutional requirement, the Court begins by defining it. Before 2010, “neither the United States nor the Florida Constitution require[d] that the Florida Legislature apportion legislative districts in a compact manner.” [In re Apportionment Law–2002](#), 817 So.2d at 831. Now, however, the Florida Constitution expressly requires that “districts shall be compact.” [Art. III, § 21\(b\)](#), Fla. Const. Although compactness is a new constitutional requirement in Florida, compactness is a well-recognized and long-standing constitutional standard in at least twenty state constitutions³⁰ and at least six state statutes.³¹

In defining this standard, as with the other standards, we start with the proposition that in interpreting constitutional provisions,

[f]irst and foremost, this Court must examine the actual language used in the constitution. “If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written.” The words of the constitution “are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense.” Additionally, this Court “endeavors to construe a constitutional provision consistent with the intent of the framers and the voters.” Constitutional provisions “must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.”

[Lewis v. Leon Cnty.](#), 73 So.3d 151, 153–54 (Fla.2011). Thus, a fundamental tenet of constitutional construction applicable in our analysis is that the Court will construe a constitutional provision in a manner consistent with the intent of the framers and the voters and will interpret its terms in their most usual and obvious meaning.

The Senate contends that this Court should not undertake to define compactness and instead leave that task to the Legislature. The Senate asserts that “compactness is ... the paradigmatic example of an elusive concept with no precise meaning.” However, as is universally recognized, it is the

exclusive province of the judiciary to interpret terms in a constitution and to define those terms. See [Lawnwood Medical Ctr., Inc. v. Seeger](#), 990 So.2d 503, 510 (Fla.2008) (“[I]t is the duty of this Court to determine the meaning of this constitutional provision.”); [Stephenson v. Bartlett](#), 355 N.C. 354, 562 S.E.2d 377, 384 (2002) (noting during the review of a legislative apportionment plan that “it is emphatically the province and duty of the *632 judicial department to say what the law is” (quoting [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803))).

This is particularly the case with the new constitutional standards on apportionment because the standards serve as a limit on the exercise of the Legislature's authority. Further, it is incumbent upon this Court to define the term in accordance with the intent of the voters, which, in this case, was to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination. See [Ervin v. Collins](#), 85 So.2d 852, 855 (Fla.1956) (“We are called on to construe the terms of the Constitution, an instrument from the people, and we are to effectuate their purpose from the words employed in the document.”).

A compactness requirement serves to limit partisan redistricting and racial gerrymanders. In fact, as the Illinois Supreme Court recognized, “compactness is ‘almost universally recognized’ as an appropriate anti-gerrymandering standard.” [Schrage v. State Bd. of Elections](#), 88 Ill.2d 87, 58 Ill.Dec. 451, 430 N.E.2d 483, 486 (1981) (quoting James M. Edwards, *The Gerrymander and “One Man, One Vote”*, 46 N.Y.U. L.Rev. 879, 893 (1971)); [Pearson](#), 359 S.W.3d at 38, 2012 WL 131425, at *2 (holding that the purpose of the constitutional requirements that districts be contiguous, compact, and nearly equal in population is “to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as ‘gerrymander’ ” (quoting [Hitchcock](#), 146 S.W. at 61)).

Courts around the country have generally defined the term “compactness” on a geographical basis. See, e.g., [Hickel v. Se. Conference](#), 846 P.2d 38, 45 (Alaska 1992) (defining compactness as “having a small perimeter in relation to the area encompassed”); [Schrage](#), 58 Ill.Dec. 451, 430 N.E.2d at 486 (defining compactness simply as meaning “closely united”); [Acker v. Love](#), 178 Colo. 175, 496 P.2d 75, 76 (1972) (defining the term as “a geographic area whose boundaries are

as nearly equidistant as possible from the geographic center of the area being considered”); [Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n](#), 211 Ariz. 337, 121 P.3d 843, 869 (App.2005) (“ ‘Compactness’ refers to length of the district’s borders. The shorter the distance around the district, the more compact the district.”); see also [Kilbury v. Franklin Cnty. ex rel. Bd. of Cnty. Comm’rs](#), 151 Wash.2d 552, 90 P.3d 1071, 1077 (2004) (reviewing various legislative redistricting cases like [Hickel](#) and [Acker](#); and concluding that the phrase “as compact as possible” does not mean “as small in size as possible,” but rather “as regular in shape as possible,” when reviewing a local government redistricting case).

Defining compactness geographically also conforms to the ordinary dictionary definition of the term. For example, the *Merriam-Webster’s Collegiate Dictionary* defines the word “compact” as “having a dense structure or parts or units closely packed or joined.” *Black’s Law Dictionary* defines “compact” as “closely or firmly united or packed ... having a small surface or border in proportion to contents or bulk.” *Black’s Law Dictionary* 281 (6th ed. 1990).

The Senate asserts, however, that the term includes both a geographical component and a functional component and should be construed to include such concepts as communities of interest. The Senate further refers this Court to other courts that have analyzed the term by examining functional factors such as whether constituents in the district are able to relate to and interact with one another, whether constituents in the district *633 are able to access and communicate with their elected representatives, or whether the district is united by commerce, transportation, and communication.³²

Those cases defining compactness as a functional concept derive from states that, for the most part, have different constitutional provisions from those in Florida and discuss the numerous requirements in tandem, including contiguity, geographical compactness, and respecting communities of interest and common interests. See, e.g., [Wilson](#), 4 Cal.Rptr.2d 379, 823 P.2d at 552 (discussing in tandem California’s state constitution’s requirements of contiguity and geographical compactness while also respecting communities of interest and considering constituents’ shared interests such as transportation facilities, similar work opportunities, and access to the same media of communication); [In re 2003 Legislative Apportionment of House of Representatives](#), 827 A.2d 810, 815 (Me.2003) (analyzing a claim where

by statute, the apportionment plan districts were required to be a “functionally contiguous and compact territory,” and to facilitate representation by minimizing impediments to travel within the district); [In re Reapportionment of Towns of Hartland, Windsor & W. Windsor](#), 624 A.2d at 330–31 (addressing Vermont’s constitutional mandates that seek to maintain “geographical compactness and contiguity” together with additional statutory requirements to consider and maintain “patterns of geography, social interaction, trade, political ties and common interests”).

Moreover, this position appears to be at odds with the Legislature’s prior position that the term “compact” under the Fair Districts Amendment did not include factors regarding functional compactness, where courts look to transportation links, communication, jobs, and other aspects that involve a community of interest analysis. See [Initial Brief at 13–14, Fla. Dep’t of State v. Fla. State Conference of NAACP Branches](#), 43 So.3d 662 (Fla.2010) (No. SC10–1375) (“A district that becomes less compact in order to promote a community of interest—or which deviates from a local boundary to further minority interests—might reflect a rational harmonization of such relative standards.” (emphasis added) (footnote omitted)).

We conclude that the language of the Florida Constitution does not give the term “compact” such an expansive meaning. If we were to include “communities of interest” within the term “compactness,” the Court would be adding words to the constitution that were not put there by the voters of this state. In construing the words used in the constitution, the Court is not at liberty to add words and terms that are not included in the text of the constitution. See [Pleus](#), 14 So.3d at 945 (“We remain mindful that in construing a constitutional provision, we are not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision.”).

Expanding the definition of compactness to include factors such as the ability to access and communicate with elected officials and their ability to relate and interact with one another would be contrary to the average voter’s understanding of compactness *634 and would be contrary to the usual and ordinary meaning of the word. In fact, using such a broad definition of this term would almost read out the requirement of compactness—enlarging this term to such a degree that it would frustrate the will of the people in passing this constitutional amendment. Accordingly, we hold that

when reviewing compactness, the term should be construed to mean geographical compactness.

Our consideration of the term “compact” as a geographical concept raises the issues of how it is to be measured and how other constitutional considerations will impact that measurement. The Senate and the Attorney General again urge the Court not to undertake a compactness assessment because determining whether an apportionment plan complies with this principle exceeds the scope of this Court’s limited review. The Senate specifically contends that compactness has no precise definition and, further, that this Court is incapable of determining whether the shape of the district is irregular due to other considerations that must go into the apportionment process, like equal population, protecting minority voting rights, and utilizing geographical and political boundaries. Since all of these policies must be balanced, the Senate maintains, Florida courts should simply defer to the Legislature’s judgment.

Contrary to the Senate’s and the Attorney General’s assertions, compactness does not require such a unique and factual determination that appellate courts are completely unable to review the matter absent a trial record. A significant number of states mandate that during the apportionment process districts be drawn compactly, and at least fourteen of those states vest original jurisdiction to review legislative apportionment in the state supreme court.³³ Given that other state supreme courts have accomplished a similar task without much difficulty, we reject any suggestion that this Court lacks a similar ability to evaluate whether the Legislature complied with the compactness requirement in Florida. Having made that determination, we decide how this Court will go about measuring compactness.

As a geographical inquiry, a review of compactness begins by looking at the “shape of a district”; the object of the compactness criterion is that a district should not yield “bizarre designs.” [Hickel](#), 846 P.2d at 45; see also [Kilbury](#), 90 P.3d at 1077 (“[T]he phrase ‘as compact as possible’ does not mean ‘as small in size as possible,’ but rather ‘as regular in shape as possible.’”). Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement. [Hickel](#), 846 P.2d at 45 (“Compact districting should not yield ‘bizarre designs.’”); [Schrage](#), 58 Ill.Dec. 451, 430 N.E.2d at 487 (“A visual examination of Representative District 89 reveals a tortured, extremely elongated form which is not compact in any sense.”); [In re Livingston](#),

96 Misc. 341, 160 N.Y.S. 462, 469–70 (N.Y.Sup.Ct.1916) (noting that the challenged district was “most irregular in shape [and] really grotesque,” and holding *635 that “[i]f the constitutional provision relating to compactness means anything, this district, as laid out, manifestly does not conform to it”); see also  *Shaw*, 509 U.S. at 635–36, 113 S.Ct. 2816 (describing a snake-like district that was drawn so bizarrely that it “inspired poetry: ‘Ask not for whom the line is drawn; it is drawn to avoid thee’” (quoting Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: ‘When It Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing’?*, 14 Cardozo L.Rev. 1237, 1261 n. 96 (1993))).

In addition to a visual examination of a district's geometric shape, quantitative geometric measures of compactness have been used to assist courts in assessing compactness.³⁴ In fact, there is commonly used redistricting software that includes tools designed to measure compactness. The House actually used two such measurements. First, the House utilized the Reock method (circle-dispersion measurement), which measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.

Second, the House used the Area/Convex Hull method in its analysis, which measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district. The measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1. Both measures used by the House have gained relatively broad acceptance in redistricting.

Despite this Court's use of visual and numerical measurements of geographic compactness, our review of that mandate cannot be considered in isolation. Other factors influence a district's compactness, including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice.

The Florida Constitution does not mandate, and no party urges, that districts within a redistricting plan achieve the highest mathematical compactness scores. Given Florida's unique shape, some of Florida's districts have geographical

constraints, such as those located in the Florida Keys, that affect the compactness calculations. Other times, lower compactness measurements may result from the Legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact. See, e.g.,  *Commonwealth ex rel. Specter v. Levin*, 448 Pa. 1, 293 A.2d 15, 19 (1972) (“[A]ttempts to maintain the integrity of the boundaries of political subdivisions ... will in reality make it impossible to achieve districts of precise mathematical compactness. A great many if not most of the counties, cities, towns, boroughs, townships and wards in this Commonwealth *636 have a geographical shape which falls far short of ideal mathematical compactness.”).

Thus, if an oddly shaped district is a result of this state's “irregular geometry” and the need to keep counties and municipalities whole, these explanations may serve to justify the shape of the district in a logical and constitutionally permissible way. Nevertheless, non-compact and “bizarrely shaped districts” require close examination. As explained by the Supreme Court of Alaska in *Hickel*, if

“corridors” of land that extend to include a populated area, but not the less-populated land around it, [the district] may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

Hickel, 846 P.2d at 45–46.

Since compactness is set forth in [section 21\(b\)](#), the criteria of [section 21\(a\)](#) must predominate to the extent that they conflict with drawing a district that is compact. However, if a district can be drawn more compactly while utilizing political and geographical boundaries and without intentionally favoring a political party or incumbent, compactness must be a yardstick by which to evaluate those other factors. Among the [section 21\(b\)](#) criteria, the standard for compactness is that the district “shall be compact” without qualification.

In sum, we hold that compactness is a standard that refers to the shape of the district. The goal is to ensure that districts are logically drawn and that bizarrely shaped districts are

avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements.

c. Utilizing Existing Political and Geographical Boundaries

In tandem with compactness, [article III, section 21\(b\)](#), requires that “districts shall, where feasible, utilize existing political and geographical boundaries.” Unlike the mandate of compactness, this requirement is modified by the phrase “where feasible,” suggesting that in balancing this criterion with compactness, more flexibility is permitted. We begin by interpreting the terms “political and geographical boundaries,” remaining mindful that, as with all of the constitutional provisions, our goal is to construe the provision in “such manner as to fulfill the intent of the people, never to defeat it.” [Zingale, 885 So.2d at 282](#). Further, we construe the provision by looking to the “purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document.” *In re Apportionment Law—1982, 414 So.2d at 1048*.

The interpretation given by a plurality of the Court explains the purpose of this provision and the proper interpretation:

The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such as

one senate district that was challenged in   [Resolution 1987, 817 So.2d at 824–25](#)—are avoided. Since *the “city” and “county” terminology honors this community-based standard for drawing legislative and congressional boundaries*, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

[Standards for Establishing Legislative Dist. Boundaries, 2 So.3d at 187–88](#) (emphasis added). In that case, we accepted ***637** the argument that the term “political boundaries” primarily encompasses municipal or county boundaries. The FDP likewise in its brief argues that the “basic purpose of this provision is to keep communities together and sensibly adhere to natural boundaries across the state.” Certainly, cities and counties would be existing political boundaries.

Consistent with this approach, the House in its brief emphasizes that the House plan was drawn with respect for county integrity, stating as follows:

[C]ounty lines were usually preferable to other boundaries, because county lines are the most readily understood, consistently compact, functional, and stable. County boundaries are substantially less likely to change than municipal boundaries, and—unlike municipalities—all counties are contiguous. Moreover, although all Floridians have a home county, millions live outside any incorporated area. Additionally, by using a strategy of keeping counties whole, the House Map necessarily keeps many municipalities whole within districts. And importantly, numerous Floridians advocated an emphasis on county boundaries at the twenty-six public meetings during the summer of 2011.

House Brief at 12–13 (footnotes omitted). The House additionally asserts that there is an advantage in using county lines in order to further other constitutional goals such as compactness:

[T]he House's consistent respect for county boundaries provided the additional benefit of creating compact districts. And many testified to the Legislature that their idea of compactness supported preserving county integrity where practicable. Where county lines could not serve as the district line, the House relied on municipal boundaries and geographic boundaries such as railways, interstates, state roads, and rivers. Consistent with other public testimony, the House resolved to draw accessible districts

with understandable shapes—without fingers, bizarre shapes, or “rat tails.”

Id. at 13–14 (citations omitted).

On the other hand, the Senate takes the position that the “political and geographical boundaries requirement directly presents the kind of ‘fact-intensive’ issues that cannot be meaningfully reviewed in this truncated proceeding.” Ironically, in contradiction to the position of the House, the Senate asserts that “it is a ‘plain fact’ that boundary requirements tend[] to conflict with compactness norms.” The Senate argues that the requirement of utilizing political boundaries is “internally inconsistent,” necessitating choices between political boundaries and geographical boundaries. Although the House in its brief points to the “numerous Floridians” who advocated an emphasis on county boundaries at the twenty-six public meetings, the Senate does not acknowledge that public viewpoint.³⁵

The Senate argues that since Florida's Constitution provides the Legislature with the choice of political or geographical boundaries, the choice of boundaries was a matter that should be left entirely to the discretion of the Legislature. During oral argument, counsel for the Senate further alleged that Florida was “unique among the fifty states to count geographical boundaries.” In actuality, many other states have constitutional requirements that require the consideration of geographical *638 boundaries.³⁶ Again, consistent with the holding of other states, this Court is likewise able to evaluate whether the Legislature complied with that requirement in Florida. Accordingly, we turn to our construction of the meaning of “political and geographical boundaries” as contained within our state constitution.

The Senate argues for a pick-and-choose legislative discretion regarding which boundaries to choose from, including a very broad list that encompasses not only easily ascertainable political boundaries, such as counties and municipalities, but extending even to “man-made demarcations,” such as “well-traveled roadways.” While discretion must be afforded to accommodate for well-recognized geographical boundaries, the decision to simply use any boundary, such as a creek or minor road, would eviscerate the constitutional requirement—as well as the purpose for the requirement, which is aimed at preventing improper intent.

The Senate's approach that almost anything can be a “geographical boundary” may be why the opponents of the Senate's plan criticize the Senate's plan for not only lack of compactness but also for containing the same “finger-like extensions,” “narrow and bizarrely shaped tentacles,” and “hook-like shape [s],” which are constitutionally suspect and often indicative of racial and partisan gerrymandering.

We reject the Senate's view because it would render the new constitutional provision virtually meaningless and standardless. We accept the House's view of geographical boundaries that are easily ascertainable and commonly understood, such as “rivers, railways, interstates, and state roads.” Together with an analysis of compactness, an adherence to county and city boundaries as political boundaries, and rivers, railways, interstates and state roads as geographical boundaries will provide a basis for an objective analysis of the plans and the specific districts drawn. In addition, we also reject the contention that following a municipal boundary will necessarily violate the compactness requirement. In a compactness analysis, we are reviewing the general shape of a district; if a district has a small area where minor adjustments are made to follow either a municipal boundary or a river, this would not violate compactness.

There will be times when districts cannot be drawn to follow county lines or to include the entire municipalities within a district. The City of Lakeland in its challenge to the Senate plan asserts a violation of this provision because the Senate plan splits the City of Lakeland into two state Senate districts. We will analyze this argument further, but certainly not every split of a municipality will violate this prohibition; the constitutional directive is only that “existing political and geographical boundaries” should be used “where feasible.”

3. How These Standards Interact

Having set forth the constitutional standards, we must now decide the appropriate framework in which to evaluate how these standards interact. This includes a determination of how best to approach challenges to the joint resolution of apportionment.

An examination of the explicit language used in the Florida Constitution is the *639 necessary starting point for any analysis of constitutional provisions. *See Zingale, 885 So.2d at 282.* The text of the constitution provides unambiguous direction for the analysis of how these constitutional

standards interact. It provides that the tier-two standards are subordinate and shall give way where compliance “conflicts with the [tier-one] standards or with federal law.” *Art. III, § 21(b), Fla. Const.* Although the tier-two standards are subordinate to the tier-one requirements, the constitution further instructs that no standard has priority over the other within each tier. *See art. III, § 21(c), Fla. Const.* Consequently, the Legislature is tasked with balancing the tier-two standards together in order to strike a constitutional result, but this Court remains “sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus.” *Miller, 515 U.S. at 915–16, 115 S.Ct. 2475.*

Florida’s tier-two standards—that districts shall be as nearly equal in population as is practicable, shall be compact, and shall utilize existing political and geographical boundaries where feasible—circumscribe the Legislature’s discretion in drawing district lines, requiring it to conform to traditional redistricting principles. *See id. at 916, 115 S.Ct. 2475* (defining “traditional” redistricting principles to include “compactness, contiguity, and respect for political subdivisions”); *Bush v. Vera, 517 U.S. 952, 959–60, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996)* (plurality opinion) (noting federal district court’s conclusion that “traditional redistricting principles” include “natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions”). Indeed, the extent to which the Legislature complies with the sum of Florida’s traditional redistricting principles serves as an objective indicator of the impermissible legislative purpose proscribed under tier one (i.e., intent to favor or disfavor a political party or an incumbent).

In other words, the goal of the tier-two requirements is “to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as ‘gerrymander.’ ” *Pearson, 359 S.W.3d at 38, 2012 WL 131425, at *2* (quoting *Hitchcock, 146 S.W. at 61*). There is no question that the goal of minimizing opportunities for political favoritism was the driving force behind the passage of the Fair Districts Amendment. *See Standards for Establishing Legislative Dist. Boundaries, 2 So.3d at 181* (plurality) (“The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations.”).

Both the Coalition and the FDP maintain that Florida’s tier-two principles are not only independent constitutional requirements, but provide the Court with indicators of how well the Legislature complied with the tier-one criteria. They allege that population deviations, lack of compactness, and failure to utilize political and geographical boundaries serve as tools used by the Legislature to engage in the intentional act of favoring (or disfavoring) a political party or an incumbent. The House agrees with this position: “Indeed, the purpose of other standards—such as compactness, equal population, and adherence to political boundaries—was to prohibit political favoritism by constraining legislative discretion.” House Brief at 22.

Likewise, this Court held the new standards to have “a natural relation and connection,” all directed at the “overall goal of ... requir[ing] the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations.” *Standards for Establishing Legislative Dist. Boundaries, *640 2 So.3d at 181.* We agree that in the context of Florida’s constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms. *See Vieth, 541 U.S. at 335, 124 S.Ct. 1769* (Stevens, J., dissenting) (“[I]rrational shape can serve as an objective indicator of an impermissible legislative purpose....”); *Schrage, 58 Ill.Dec. 451, 430 N.E.2d at 486* (“[C]ompactness is ‘almost universally recognized’ as an appropriate anti-gerrymandering standard.” (quoting James M. Edwards, *The Gerrymander and “One Man, One Vote,”* 46 N.Y.U. L.Rev. 879, 893 (1971))).

As was stated in *Reynolds, 377 U.S. at 578, 84 S.Ct. 1362*, a “desire to maintain integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory” undermines opportunities for political favoritism. Of course, the correlation between a lack of compliance with traditional redistricting principles and impermissible intent cannot be considered in isolation. In addition to prohibiting improper intent, tier one forbids the Legislature to draw districts that diminish minorities’ ability to elect representatives of choice or deny minorities an equal opportunity to participate in the political process. *See art. III, § 21(a), Fla. Const.* Given this requirement, efforts to preserve or create minority districts could be misinterpreted as an action intended to favor (or disfavor) a political party or an incumbent.

The challengers assert that minority protection has been used as a pretext for drawing districts with the intent to favor a political party or an incumbent. This is, of course, a troubling assertion because that would frustrate rather than further the overarching purpose of the Fair Districts Amendment.

In examining the reasoning behind drawing a district in a particular way, we remain cognizant that both federal and state minority voting-rights protections may require the preservation or creation of non-compact districts or may help to explain the shape of a challenged district. Therefore, the reason for drawing lines a certain way may be the result of legitimate efforts by the Legislature to comply with federal law or Florida's tier-one imperative. *Cf.* DOJ Guidance Notice, 76 Fed. Reg. 470 at 7472 (“[C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria.”).

The fact that the tier-two principles expressly yield to this requirement in tier one demonstrates that the Florida Constitution specifically contemplates this need, but only to the extent necessary. Where it can be shown that it was possible for the Legislature to comply with the tier-two constitutional criteria while, at the same time, not diminishing minorities' ability to elect representatives of choice or denying minorities an equal opportunity to participate in the political process, the Legislature's plan becomes subject to a concern that improper intent was the motivating factor for the design of the district. It is critical that the requirement to protect minority voting rights when drawing district lines should not be used as a shield against complying with Florida's other important constitutional imperatives; the Court's obligation is to ensure that “every clause and every part” of the language of the constitution is given effect where “an interpretation can be found which gives it effect.” *In re Apportionment Law—1972*, 263 So.2d at 807.

Because compliance with the tier-two principles is objectively ascertainable, it provides a good starting point for analyzing *641 challenges to the Legislature's joint resolution. Where adherence to a tier-one requirement explains the irregular shape of a given district, a claim that the district has been drawn to favor or disfavor a political party can be defeated. Where it does not, however, further inquiry into the Legislature's intent becomes necessary.

In determining whether the plans are constitutionally valid, we have considered the role of the alternative plans submitted

by the Coalition. If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression of protected minority and language groups and also apportions the districts in accordance with tier-two principles so as not to disfavor a political party or an incumbent, this will provide circumstantial evidence of improper intent. That is to say, an alternative plan that achieves all of Florida's constitutional criteria without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan.

It is with this global approach to determining the validity of the Legislature's House and Senate apportionment plans in mind that we turn to the challenges raised to the apportionment plans before this Court.

C. CHALLENGES TO THE APPORTIONMENT PLANS

1. General Challenges

We next proceed to examine the Coalition's and the FDP's arguments that they claim demonstrate improper intent on the part of the Legislature in drawing the apportionment plans.

a. Partisan Imbalance as Demonstrative of Intent

At the time the apportionment plans were drawn in 2012, of the 120 seats in the House, 39 were held by Democrats and 81 by Republicans, and of the 40 seats in the Senate, 12 were held by Democrats and 28 by Republicans. The position of Governor was held by a Republican. The Coalition and the FDP essentially allege that with the Republicans in charge of drawing the apportionment plans, the plans were drawn with the intent to favor the Republican Party.

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.

We further note that in the two cases cited by the FDP, *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 220 Ariz. 587, 208 P.3d 676 (2009), and *Good v. Austin*, 800 F.Supp. 557 (E.D.Mich.1992), the courts were discussing political fairness or competitiveness, not the *intent* of the drafting party to favor or disfavor a political party. As discussed in *Arizona Minority Coalition*, 208 P.3d at 687, the Arizona Constitution requires the commission drafting the plan to favor competitive districts when doing so is practicable and would not cause significant detriment to other goals. In *Good*, 800 F.Supp. at 561–62, a federal court tasked with drawing the congressional districts in Michigan outlined testimony given by dueling experts in a trial, which included descriptions of the statistical analyses done to determine whether a plan was politically fair; political fairness is one of *642 the many “relevant secondary criteria” recognized by federal courts in congressional apportionment. Here, although effect can be an objective indicator of intent, mere effect will not necessarily invalidate a plan. With this in mind, we review the FDP’s claim that the partisan imbalance of the Legislature’s plan reflects an intent to favor Republicans and to disfavor Democrats.

We first address voter registration and acknowledge the reality that based on the 2010 general election data, of the voters in the state who registered with an affiliation with one of the two major parties, 53% were registered as Democrats and 47% were registered as Republicans. The challengers point out that in contrast to the statewide statistics showing that registered Democrats outnumber Republicans, the Senate and House plans contain more districts in which registered Republicans outnumber registered Democrats than vice versa. As of 2010, in the Senate plan there were 18 of 40 Senate districts (45.0%) in which registered Democrats outnumbered registered Republicans, and 22 Senate districts (55.0%) in which registered Republicans outnumbered registered Democrats. In the House plan, there were 59 of 120 House districts in which the registered Democrats outnumber registered Republicans (49.2%), and 61 districts in which registered Republicans outnumber registered Democrats (50.8%).

While Democrats outnumber Republicans statewide in voter registration, this fact does not lead to the conclusions asserted by the challengers that these statistics demonstrate that the plans were drawn with intent to favor Republicans. Although there are more registered Democrats than Republicans,

as of 2010, there were over 2.5 million voters who are not registered as Democrats or Republicans. Further, voter registration is not necessarily determinative of actual election results. The actual election results show that the existence of more registered Democrats than registered Republicans statewide has not necessarily translated into Democratic Party victories in statewide elections. To illustrate, Florida last elected a Democratic governor, Lawton Chiles, in 1994.

In further support of their argument that the apportionment plan shows partisan imbalance reflective of impermissible intent to favor a political party, the challengers rely on actual statewide election results. In the 2010 gubernatorial election, Governor Rick Scott, a Republican, received 48.7% of the overall vote and Alex Sink, a Democrat, 47.6% of the overall vote. Of the major-party-affiliated voters, Scott received 50.6% of the vote, and Sink 49.4%. However, under the Senate plan, Governor Scott would have won in 26 Senate districts (65.0%), and Sink in 14 Senate districts (35.0%). Similarly, under the House plan, Scott would have won in 73 House districts (60.8%), and Sink in 47 House districts (39.2%).

In the 2008 presidential election, President Barack Obama, a Democrat, received 50.9% of the overall state vote and Senator John McCain, a Republican, received 48.1% of the overall state vote. Of the major-party-affiliated voters, 51.4% voted for Obama and 48.6% for McCain. Yet in the Senate plan, Obama would have won in 16 Senate districts (40.0%), while McCain would have won in 24 Senate districts (60.0%). Likewise, in the House plan, Obama would have won in 53 House districts (44.2%), while McCain would have won in 67 House districts (55.8%).

We do not agree that the partisan imbalance in the Senate and House plans demonstrates an overall intent to favor Republicans in this case. Explanations other than intent to favor or disfavor a political party could account for this imbalance. *643 First, it has been observed that Democrats tend to cluster in cities, which may result in a natural “packing” effect, regardless of where the lines are drawn. A plurality of the United States Supreme Court has explained:

Whether by reason of partisan districting or not, party constituents may always wind up “packed” in some districts and “cracked” throughout others. *See* R. Dixon, Democratic

Representation 462 (1968) (“All Districting Is ‘Gerrymandering’ ”); Schuck, 87 Colum. L.Rev. at 1359. Consider, for example, a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions. Under that system, political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a “natural” packing effect. See  *Bandemer*, 478 U.S. at 159 [106 S.Ct. 2797] (O'Connor, J., concurring in judgment).

 *Vieth*, 541 U.S. at 289–90, 124 S.Ct. 1769 (plurality). Second, the imbalance could be a result of a legitimate effort to comply with VRA principles or other constitutional requirements. Although the FDP summarily argues that the partisan imbalance cannot be a result of such attempts, it fails to explain why.

We reject any suggestion that the Legislature is required to compensate for a natural packing effect of urban Democrats in order to create a “fair” plan. We also reject the suggestion that once the political results of the plan are known, the Legislature must alter the plan to bring it more in balance with the composition of voters statewide. The Florida Constitution does not require the affirmative creation of a fair plan, but rather a neutral one in which no improper intent was involved.

Although we have rejected the challenge that statewide voter registration and election results demonstrate an overall intent to favor the Republican party, we evaluate these statistics when examining individual districts.

b. History of Resistance to the Amendments

The Coalition next takes issue with the fact that the Legislature “attempted every possible legal maneuver to keep the FairDistricts Amendments from becoming law” and then attempted to invalidate the congressional amendment in federal court. However, evidence that the Legislature resisted efforts to make the new constitutional standards enforceable

law does not equate to evidence that the Legislature would then intentionally disregard that law once it was in effect.

c. “Gentlemen's Agreement” as Indicative of Intent

The Coalition next points to a “gentlemen's agreement” between the House and Senate, by which each chamber would “rubber stamp” the other chamber's plan, allowing each to protect its own incumbents without interference from the other. Although the Joint Resolution was passed with both chambers voting to approve the other chamber's plan, it is uncontroverted that each chamber agreed to draft its own plan without input from, debate from, or interference by the other. The challengers assert that this “gentlemen's agreement” is indicative of improper intent. The fact that the House did not debate or amend the Senate's plan or that the Senate did not debate or amend the House plan is legally irrelevant. From the beginning of the process, it was clear that each chamber would embark on its separate approach to redistricting, using different software and inputting different data. The fact that the process occurred on two different tracks without formal communication or coordination *644 between the two chambers or that there was a “gentlemen's agreement” does not provide circumstantial evidence of improper intent.

d. Failure to Adopt the Coalition's Alternative Plans

The Coalition takes issue with the Legislature's treatment of its proposed alternative plans, which the Coalition also submitted to this Court. Specifically, the Coalition states that the Senate and House did not properly consider the Coalition's plans, which the Coalition argued contained less population deviation, were more compact, and better utilized political and geographical boundaries. We do not consider the failure of the Legislature to adopt the Coalition's alternative plans to be indicative of an improper intent.

e. Legislature's Failure to Introduce Proposed Plans at Public Hearings

In this claim, the Coalition appears to ascribe improper motive to the failure of the Legislature to introduce proposed apportionment plans during the public hearings to ensure that the plans were fully aired in public. Although a review of the public hearing testimony reveals that many individuals were upset that the Legislature was soliciting their comments in the

absence of a plan, some individuals recognized that there may be legitimate reasons for the Legislature's approach. *Compare* Public Hrg. Tr. 1140 (“[W]hy couldn't the Legislature have come up with a map that we could then look at and see how it affects Wakulla County and Lafayette County and then have them testify and see what is going on[?]”); Public Hrg. Tr. 1153–54 (“This process and these hearings are very troubling. The Legislature has invited the public to comment, but you don't give us anything to comment on. Where are the maps? This isn't a conversation.”); *with* Public Hrg. Tr. 1154–55 (“[I]f you would come in with maps drawn then we would be hearing from all of the naysayers that ... you met in a back room, smoke filled room and drew the maps yourself and now you are just wanting us to rubber stamp them.”); Public Hrg. Tr. 2798 (“You have correctly taken a common sense approach by seeking public input before the maps are drawn and not afterwards.”). More importantly, the Florida Constitution imposes no such requirement on the Legislature, and we conclude that this aspect of the process is not indicative of intent to produce partisan plans.

Having determined that none of the above general challenges should be used in this facial review of the validity of the House and Senate plans, we proceed to analyze the compliance of the House plan as a whole with the constitutional standards and then examine the challenges to the individual House districts. We then analyze the Senate plan and districts in the same manner.

2. The House Plan

a. Overall Challenges

Tier–One Requirements

Intent to favor or disfavor a political party or an incumbent. The first requirement that we address in looking at the overall plan is this important constitutional requirement, the purpose of which is to prevent the drawing of districts designed to protect a political party or an incumbent. We see no overall objective indicia of improper intent with respect to the House plan. It is undisputed that the House plan pits both Democratic and Republican incumbents against each other. While we recognize that the new districts on average retain 59.7% of the population of their predecessor districts, this fact standing alone does not demonstrate intent to favor incumbents.

***645** Finally, as discussed below, the House plan has complied with the tier-two standards, making improper intent less likely. Indeed, the purpose of the tier-two standards—equal population, compactness, and utilizing political and geographical boundaries—is to prohibit political favoritism by constraining legislative discretion.

Florida minority voting protection provision. The FDP generally alleges that the House plan improperly overpacks black voters into minority districts to dilute their vote elsewhere. To the extent this argument is made, it is without merit. Under the House plan, there are twelve black majority-minority districts³⁷ and sixteen Hispanic majority-minority districts.³⁸ None of the black majority-minority districts is a super-majority district requiring the Legislature to “unpack” it on this record. As to the sixteen Hispanic majority-minority House districts, eleven do have large percentages: District 103 (82.1%), District 105 (69.0%), District 110 (89.5%), District 111 (93.0%), District 112 (73.0%), District 113 (66.8%), District 114 (66.0%), District 115 (65.5%), District 116 (84.4%), District 118 (81.2%), and District 119 (86.8%). These high percentages could be explained by the fact that the Hispanic population in Miami–Dade County, where these districts are located, is densely populated. The challengers have failed to establish that another majority-minority district for either black or Hispanic voters potentially could have been created. 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.

To the extent that the opponents contend that the overall House plan amounts to retrogression under the Florida Constitution, we conclude that this argument is also without merit. The record reveals that the House undertook a functional analysis when drawing its plan in order to guard against retrogression. As to black majority and crossover House districts, the fact that there is one fewer black crossover district as compared to the benchmark plan does not alter this conclusion because one additional black majority-minority district has emerged from a previously existing crossover district. Apportionment plans that increase minority voting strength are entitled to preclearance under [Section 5](#), *see*

 *Ashcroft*, 539 U.S. at 477, 123 S.Ct. 2498, and we conclude that the same principle applies under Florida law.

With respect to House districts with sizeable Hispanic populations, we likewise conclude that there has been no unconstitutional retrogression under the Florida Constitution. Because three new Hispanic majority-minority districts have emerged *646 from previously existing influence or crossover districts, the Hispanic influence in the remaining number of districts has shifted. No challenger has established or alleged that this change has affected the Hispanic voters' ability to elect a person of their choice in the respective districts.

Contiguity. No party challenges contiguity as to the House plan. Upon a review of the plan, we conclude that this plan does not violate the contiguity requirement under [article III, sections 16\(a\) and 21\(a\), of the Florida Constitution](#).

Tier–Two Requirements

Equal population. In looking at this constitutional requirement, the 2010 census data shows that Florida has a total population of 18,801,310, and the ideal population for each House district is 156,678 individuals. The most populated district in the House plan is District 75, which has a population of 159,978 (an additional 3,300 individuals than the ideal, or a deviation of 2.11%), and the least populated district is District 76, which has a population of 153,745 (2,933 fewer individuals than the ideal, or a deviation of –1.87%). Thus, the total deviation is 3.97%. This is 1.18% higher than the 2.79% population deviation the Court approved in 2002.

The House aptly acknowledges that “[c]onsiderations of compactness and emphasis on county integrity, of course, had to be weighed against other considerations, including population equality.” For example, the House explains that it set a population deviation upper limit that would allow Charlotte County, whose population deviated only slightly from the ideal, to remain whole.

Compactness. A visual inspection of the plan reveals that it as a whole appears to be compact and that only a few districts are highly irregular. A visual inspection of the plan reveals that there are districts that are clearly less compact than other districts, with visually unusual shapes. These include Districts 70, 88, and 117. Under the House plan, only three districts have significantly low compactness scores

using both Reock and Area/Convex Hull: House Districts 88, 117, and 120. We note that Districts 70, 88, and 117 are majority-minority or minority-opportunity districts, and they are discussed more thoroughly below in conjunction with challenges to individual districts. We also note that District 120 includes the unusual geography of the Florida Keys and will therefore necessarily score low on the compactness scales.

Political and geographical boundaries. The House explains that in considering the appropriate balance of equal population, compactness, and adherence to existing boundaries, it emphasized county integrity while adhering to other tier-two standards. As explained in the House's brief: “Where practicable, it sought to keep counties whole within districts, or to wholly locate districts within counties, depending on county populations. Where not feasible, the House sought to ‘anchor’ districts within a county—tying the geography representing a majority or plurality of the district's residents to one county.” The House also considered municipal boundaries and geographical features, but decided that “county lines were usually preferable to other boundaries.” The underlying reason for this approach as expressed in the House's brief was that

[c]ounty boundaries are substantially less likely to change than municipal boundaries, and—unlike municipalities—all counties are contiguous. Moreover, although all Floridians have a home county, millions live outside any incorporated area. Additionally, by using a strategy of keeping counties whole, the House Map necessarily keeps many municipalities whole within districts. And importantly, numerous Floridians advocated *647 an emphasis on county boundaries at the twenty-six public meetings during the summer of 2011.

(Footnote omitted.) A review of the House plan reveals that it consistently used county boundaries where feasible, leaving thirty-seven of sixty-seven counties whole.

The House further explained that “[w]here county lines could not serve as the district line, the House relied on municipal boundaries and geographic boundaries such as railways, interstates, state roads, and rivers.” As previously discussed, we have adopted the House's view of geographical boundaries as those that are easily ascertainable and commonly understood (e.g., rivers, railways, interstates, and state roads).

Conclusion as to Overall Challenges to the House Plan

A review of the House plan and the record reveals that the House engaged in a consistent and reasoned approach, balancing the tier-two standards by endeavoring to make districts compact and as nearly equal in population as possible, and utilizing political and geographical boundaries where feasible by endeavoring to keep counties and cities together where possible. Although the House plan has a higher population deviation than in the past, the House has explained that this deviation was necessary to achieve other required objectives, such as consistent use of county boundaries. The House further asserts that its “consistent respect for county boundaries provided the additional benefit of creating compact districts.”

In addition, the House approached the minority voting protection provision by properly undertaking a functional analysis of voting strength in minority districts. A facial review of the House plan reveals no dilution or retrogression under the Florida Constitution. Further, we find no objective plan-wide indicia of improper attempt to favor or disfavor a political party or incumbent.

b. Challenges to Individual House Districts

We discuss the challenges to the individual House districts in turn. We conclude that the challengers have not demonstrated that any of these districts violate the Florida Constitution.

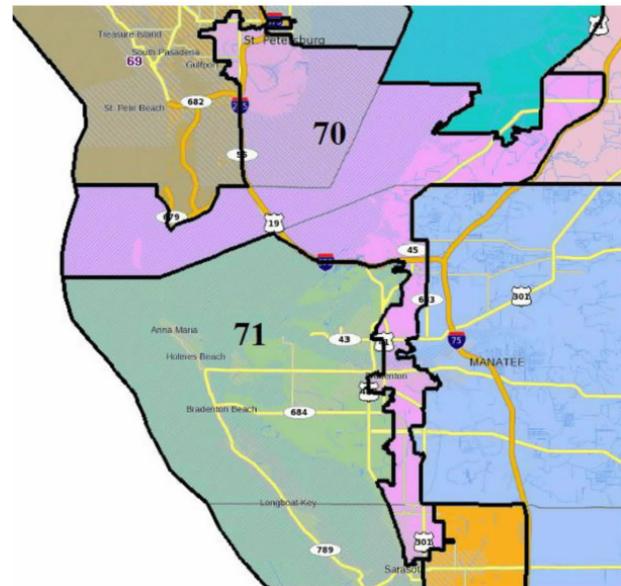
House District 38

The FDP summarily alleges that District 38 retains a high percentage of the population from its predecessor district in order to benefit the incumbent in that district. However, the FDP does not point to any additional indicators of improper intent, and we deny this claim.

House District 70

The FDP contends that District 70 is non-compact and fails to utilize boundaries because it cuts across four counties (Pinellas, Hillsborough, Manatee, and Sarasota) as well as three major metropolitan areas (St. Petersburg, Bradenton, and Sarasota) and splits the town of Palmetto. The FDP also contends that District 70 is overly packed with minorities and that the House should have drawn the district with more natural boundary lines in order to allow those minorities to have a greater influence in neighboring District 71. The Coalition, on the other hand, raises no objection to this district.

District 70 is a black-opportunity district (black VAP of 45.1%; Hispanic VAP of 15.3%). It extends into four counties, taking in the areas with the highest concentration of minorities from St. Petersburg, Bradenton, and Sarasota. Significantly, part of District 70 extends into Hillsborough County, which is a covered jurisdiction under [Section 5](#) of the VRA, and must obtain preclearance from the DOJ. District 70 is depicted below.



*648 District 70 is strikingly similar to its predecessor district, old District 55, which has a black VAP of 49.4% and a Hispanic VAP of 13.6% and which also reached into St. Petersburg, Bradenton, and Sarasota. In adopting District 70, the Legislature stated that its intent was to comply with [Section 5](#) of the VRA:

[I]t is the intent of the Legislature to establish State House District 70, which is consistent with [Section 5](#) of

the federal Voting Rights Act; does not deny or abridge the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice....

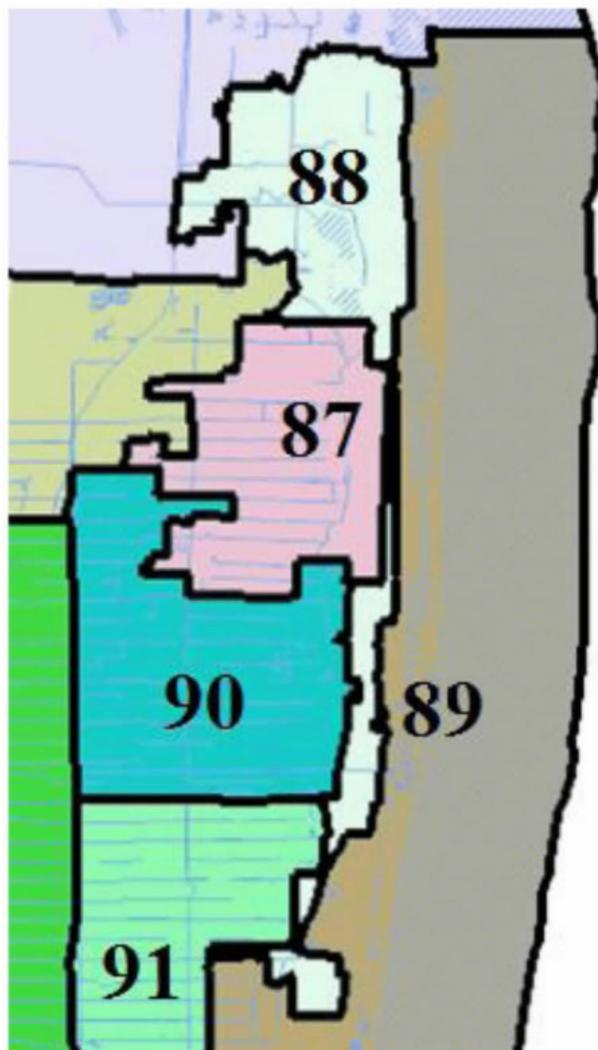
Fla. S.J. Res. 1176, at 22 (Reg. Sess. 2012) (SJR 1176).

Tier-two requirements must yield when necessary to comply with federal law (here, [Section 5](#) of the VRA) and Florida's minority voting protection provision. Although the FDP summarily asserts that District 70 is overly packed with minorities and that it could have been drawn differently to be more compact and to better utilize boundaries, the FDP has not demonstrated that this can be done without causing retrogression.

House District 88

The FDP contends that District 88, located near the east coast of Palm Beach County, was drawn to benefit the Republican Party under the guise of preserving that district as a black majority-minority district. To prove this point, the FDP claims that new District 88 is the least compact of all the House districts, asserting that non-compact districts are often a sign of partisan gerrymanders. The Coalition, on the other hand, does not challenge this district.

***649** District 88 is an odd-shaped, long, and thin district with jagged edges. It is contained entirely in Palm Beach County, running adjacent to coastal District 89 through the county, stretching from Lake Park and Riviera Beach south to Delray Beach.



District 88 is clearly visually non-compact, and the compactness measures confirm this with a Reock score of 0.08 and an Area/Convex Hull score of 0.34. Under either scale, this district has the lowest compactness measurements of all the districts in the 2012 House plan.

District 88 is a black majority-minority district, with a black VAP of 51.8%. The predecessor to District 88, old District 84 in the benchmark plan, was also a black majority-minority district, with a black VAP of 53.5%. This district was drawn differently in 2002, oriented westward and inland from West Palm Beach rather than southward.

The Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature explained that its intent was

to establish State House District 88, which is consistent with Section 2 of

the federal Voting Rights Act; does not deny or abridge the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice; is more compact than the comparable district in the benchmark plan; is nearly equal in population as practicable....

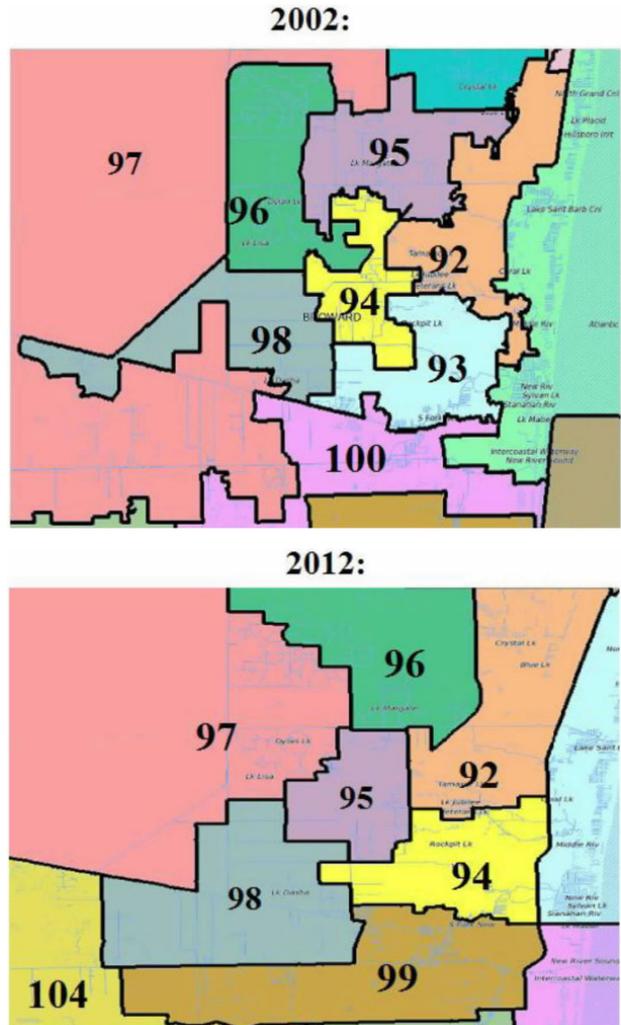
***650** SJR 1176 at 27. The House Staff Analysis further explains that “Palm Beach County has produced a majority-minority Black district in years past and this district recreates that opportunity. However, this district does it in a different manner than the current district.” Fla. H. Comm. on Reapp., CS/HJR 6011 (2012) Staff Analysis at 33–34 (Jan. 30, 2012) (House Staff Analysis).

The tier-two requirement of compactness must yield if it conflicts with the requirement to adhere to Florida's minority voting protection provision. Here, the record reflects that the House considered this interplay. When questioned about whether this district violated the compactness requirement, the record shows the House determined that the configuration of District 88 was more compact than the configuration of its predecessor district and more compact than two potential alternatives. Further, the House conducted an analysis of the voting behavior of minority districts. The FDP does not assert or demonstrate that the district can be drawn more compactly while also adhering to Florida's minority voting protection provision. Accordingly, this claim fails.

House District 99

The Coalition alleges that the Legislature drew District 99 with the intent to disfavor a black Democratic incumbent who currently represents District 93 under the 2002 House plan, a black majority-minority district with a black VAP of 50.9%. Old District 93 is now the equivalent of District 94, which remains a black majority-minority district (black VAP of 54.6%) under the 2012 House plan. The Coalition contends that the incumbent's residence was intentionally placed one block outside of his current district and instead placed in District 99, which neighbors new District 94 to the south, to pit him against another Democratic incumbent. Our review reveals that he has indeed now been drawn into District 99, a majority-white district (white VAP of 54.3% and Hispanic VAP of 29.1%).

However, this may be incidental to wide-sweeping changes made by the House in this region of the state. As compared to the 2002 plan, the 2012 House plan is much more compact with respect to District 94 and its neighboring districts. The 2002 and 2012 plans for this region of the state are depicted below.

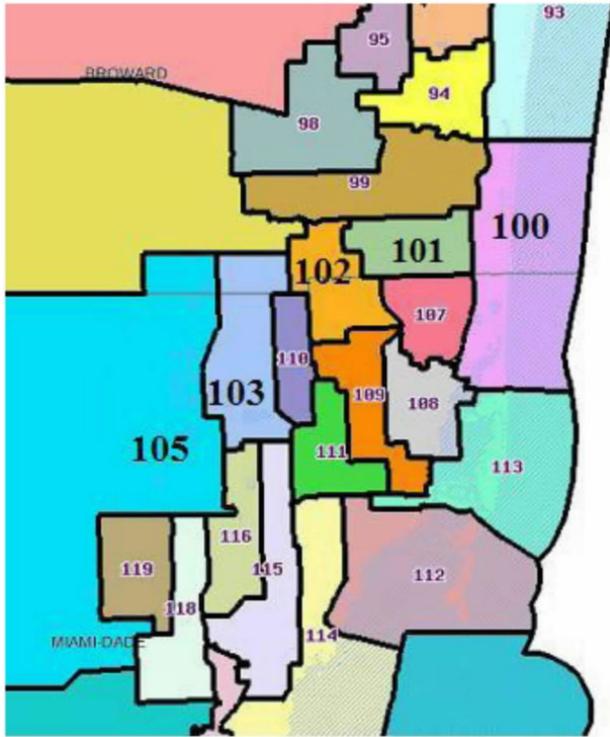


***651** The Coalition does not contend that the districts violate the standards of equal population, compactness, or utilizing political and geographical boundaries. We conclude that there are no objective indicia of intent to disfavor an incumbent on this record.

House Districts 100, 101, 102, 103, and 105

The FDP generally alleges that Districts 100, 101, 102, 103, and 105 do not utilize political boundaries because they cut through various cities in Miami–Dade County. The FDP also alleges that District 105 divides three counties and therefore

fails to utilize political boundaries. The area is depicted below:



*652 While these House districts do cut through multiple cities, they keep other cities intact. Importantly, this area of Miami-Dade County is heavily and densely populated with numerous cities adjacent to each other.

Moreover, the minority voting protection provision comes into play, because several of the objected-to districts are minority districts. District 101 is a black and Hispanic coalition district (black VAP of 36.4% and Hispanic VAP of 33.7%). District 102 is a black majority-minority district with a black VAP of 52.1%. District 103 is a Hispanic majority-minority district with a Hispanic VAP of 82.1%. The FDP has not shown that it was feasible for the Legislature to keep more municipalities together in this heavily populated area while comporting with Florida's minority voting protection provision.

District 105 is located in Collier, Broward, and Miami-Dade Counties; it is a Hispanic majority-minority district with a Hispanic VAP of 69.0%. The predecessor to District 105 (old District 112) was also a Hispanic majority-minority district with a Hispanic VAP of 71.4%. Collier County, a county in which part of District 105 is located, is one of the five Florida counties that must obtain preclearance from the DOJ under Section 5 of the VRA. As previously explained, Section 5 prohibits diminishing a minority group's

ability to elect the representative of its choice; however, it differs from Florida's minority voting protection provision in terms of territory covered. It therefore alters the geographical scope of the retrogression analysis. Because Section 5 applies only to the five covered counties, it protects *653 from retrogression minority voting strength in only those counties.

See 42 U.S.C. § 1973c. Therefore, Section 5 is violated unless the ability of a minority group to elect a representative of its choice in that covered county does not diminish. District 105's predecessor also included portions of Collier County and drew from Hispanic populations in Miami-Dade and Broward Counties. As explained by the House Staff Analysis: "A similarly built district [to District 105] has been a majority-minority Hispanic district in years past and this district recreates that opportunity." House Staff Analysis at 35.

The FDP has not demonstrated that it was feasible for the Legislature to configure District 105 differently while comporting with Section 5 of the VRA and Florida's minority voting protection provision.

House Districts 115 and 117

The FDP summarily alleges that Districts 115 and 117, both of which are located in Miami-Dade County, are non-compact and do not utilize political and geographical boundaries. Districts 115 and 117 are Hispanic majority-minority districts, with Hispanic VAPs of 65.5% and 55.2%, respectively. District 117 also has a black VAP of 37.0%. We have recognized that the tier-two requirements of compactness and utilizing existing political and geographical boundaries must yield when necessary in order to avoid conflict with tier-one requirements. The FDP does not allege how either district could be drawn differently to be more compact without violating Florida's minority voting protection provision. Accordingly, the FDP has failed to satisfy its burden of proof with respect to these two districts.

c. Conclusion as to the House Plan

We conclude that the Coalition and the FDP have not successfully demonstrated that the House plan violates one or more of the constitutional standards. In making this determination, we have reviewed the challenges to the House plan as a whole and the challenges to individual districts. 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.

3. The Senate Plan

a. Overall Challenges

In reviewing the Senate plan, we begin by evaluating overall adherence to the constitutional requirements. Then we evaluate a claim that the Senate plan was renumbered for the purpose of favoring incumbents by allowing them to be eligible to serve for longer than they would have otherwise. Finally, we consider the challenges to individual districts brought by the Coalition, the FDP, and the City of Lakeland. We emphasize that our analysis takes into consideration both the overall challenges and the results of our analysis of challenges to individual districts. In addition, in looking at the approach used in developing the Senate plan, where appropriate, we compare it to the approach used in developing the House plan, which we have upheld. We make that comparison not because the process used by the House and its approach on compliance with the standards is the only way to approach apportionment, but because overall the House's approach to ensuring compactness and utilizing consistent political and geographical boundaries led to a plan that has withstood the challenges to its validity. Further, the House's use of political and elections data to engage in protecting minority districts allowed the House to engage in the appropriate functional analysis of the districts. Finally, we *654 note that the process employed by the House included openly considering different plans that the Redistricting Subcommittee analyzed for factors such as compactness and note the fact that the House plan pits incumbents against one another.

Tier-One Requirements

Intent to favor or disfavor a political party or an incumbent. In evaluating the Senate plan, we first address this important constitutional requirement, the purpose of which is to prevent the drawing of a plan or districts designed to protect a political party or an incumbent. We conclude that the Senate plan is rife with objective indicators of improper intent which, when considered in isolation do not amount to improper intent, but when viewed cumulatively demonstrate a clear pattern.

First, the Coalition alleges that the Senate plan does not pit incumbents against each other, and the Senate has not contested this. This Court was provided with the addresses of 21 incumbents and has confirmed that of the addresses provided, none of the incumbents would run against another incumbent.

Second, the new districts on average are composed of 64.2% of their predecessor districts. While this percentage is just an average, our below analysis of the individual district challenges reveals that at least some incumbents appear to have been given large percentages of their prior constituencies. These percentages are of even greater concern given that the 2002 Senate plan was drawn at a time when intent to favor a political party or an incumbent was permissible and there were no requirements of compactness or utilizing existing boundaries.

Third, as discussed further below, the Senate admittedly renumbered the Senate plan in order to allow incumbents to be eligible to serve longer than they would have otherwise. Not only do we conclude that this renumbering was improper as it was intended to favor incumbents, but we note that the renumbering process indicates that the Senate specifically considered incumbent information when renumbering the districts.

Fourth, although we do not consider the partisan balance of the plan as evidence of intent, the FDP alleges that the 2012 Senate plan has two *fewer* Democratic districts than the 2002 plan based on voter registration. However, because voter registration alone is not an accurate measure of how districts perform, we do not consider this as conclusive evidence of improper intent.

Fifth, the majority (70.0%) of under-populated districts are Republican-performing districts when the 2010 gubernatorial and 2008 presidential elections are considered. Population deviations are at the heart of the requirement of one-person, one-vote, which generally requires that district populations be nearly equal to ensure that every individual's vote counts as much as any other's. Under-populated districts are comparatively over-represented. Thus, it appears that under the Senate plan, individuals residing in Republican-performing districts are over-represented as compared to individuals living in Democratic-performing districts.

Florida's minority voting protection provision. The FDP and the Coalition contend that the Senate's overall plan

amounts to vote dilution and retrogression under the Florida Constitution. The Coalition further asserts that when engaging in its retrogression analysis, the Senate interpreted Florida's provision too strictly by limiting the data upon which it relied and failing to conduct the required functional analysis. While this failure is relevant to other defects in the plan, we conclude ***655** on this record that the Senate plan does not facially dilute a minority group's voting strength or cause retrogression under Florida law.

No opponent has demonstrated that the Senate plan facially dilutes minority voting strength as a whole under the Florida Constitution. The FDP has not submitted any alternative plans, and the Coalition's alternative Senate plan does not demonstrate that an additional majority-minority district can be created. 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.

Nor has any challenger demonstrated that the Senate plan retrogresses as a whole under Florida law. There are as many Senate minority districts as there were under the 2002 Senate benchmark plan with what appears to be commensurate voting ability. Although there is one fewer Hispanic influence district, there are now two additional Hispanic majority-minority districts when compared to the 2002 benchmark. Districts that increase minority voting strength when compared to the benchmark are entitled to preclearance under [Section 5](#), see  *Ashcroft*, 539 U.S. at 477, 123 S.Ct. 2498, and we conclude that the same principle applies under Florida law.

Contiguity. The FDP contends that the Senate plan “stretches [contiguity] to its limits,” but notably does not argue that any of districts under the Senate plan are not contiguous. In looking at the Senate plan, it is clear that this plan does not violate the contiguity requirement under [article III, sections 16\(a\) and 21\(a\), of the Florida Constitution](#).

Tier–Two Requirements

Equal population. In looking at this constitutional requirement, the 2010 census data shows that Florida has a total population of 18,801,310, and the ideal population for each Senate district is 470,033 individuals. The most populated district in the Senate plan is District 3, which has

a population of 474,685 (an additional 4,652 individuals, or a deviation of 0.99%), and the least populated district is District 23, which has a population of 465,343 (4,690 fewer individuals or a deviation of –1.00%). Thus, the total deviation is 1.99%. As to Florida's standard, we must view the population deviation in conjunction with the other tier-two standards.³⁹

Compactness. The Senate contends that the Court should find that the Senate plan is facially compact because the plan is now more compact than the 2002 plan. We reject this comparison as evidence of compliance because the 2002 Senate plan had no requirement for compactness and thus ***656** cannot serve as an adequate benchmark in establishing adherence to the newly added compactness requirement.

A visual inspection of the plan reveals a number of districts that are clearly less compact than other districts, with visually bizarre and unusual shapes. These districts include Districts 1, 3, 6, 9, 10, 12, 14, 19, 27, 29, 30, and 34. Districts with the lowest Reock and Area/Convex Hull scores are Districts 1, 6, 12, 19, 34, and 40. As explained above in our discussion of the standards, we reject the Senate's definition of compactness as including communities of interest.

Political and geographical boundaries. Unlike the House, the Senate did not use any consistent definition of political and geographical boundaries. Some districts adhere to county boundaries (e.g., District 5), while others freely split counties and follow a variety of roads and waterways, including minor residential roads and creeks (e.g., District 1). In some districts, the Senate constantly switched between different types of boundaries within the span of a few miles.

Conclusion as to Overall Challenges to the Senate Plan

We recognize that the Senate did not have the benefit of our opinion when drawing its plan. However, 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. We again note that while the existing boundaries requirement is stated as “where feasible” and the equal population requirement is stated in terms of “as is practicable,” the compactness requirement does not contain those modifiers; rather, the constitutional expression is that “districts *shall* be compact.” The concept of “communities of interest” is not part of the constitutional term “compactness.”

Although we hold that the Senate plan does not facially dilute or retrogress under Florida law as a whole, we further conclude that the Senate failed to conduct a functional analysis as to retrogression in order to properly determine when, and to what extent, the tier-two requirements must yield in order to avoid conflict with Florida's minority voting protection provision. Although the Senate touts its adherence to the recommendations of the Florida NAACP and LatinoJustice PRLDEF regarding minority districts, this does not absolve the Senate of its independent responsibility to draw an apportionment plan that adheres to *all* of the constitutional requirements.

The record is clear that in drawing districts for the 2012 apportionment cycle, the Senate employed an incorrect and incomplete retrogression analysis. Based on the record, the Senate formulated its apportionment plan without reference to election results or voter-registration and political party data; instead, it relied on voting-age population data and attempted to maintain the core of a new Senate district's predecessor district (which the Senate apparently knew had performed for a certain minority group in the past).⁴⁰ Although it *657 was acknowledged during the February 9, 2012, Senate floor debate that the use of voter and election performance data to safeguard minority voting opportunities is consistent with accepted practice in other states and is a data set that the DOJ uses when evaluating whether to preclear a covered jurisdiction under Section 5 of the VRA, it was also stated that the Senate need not rely on such data when undertaking its retrogression analysis. Not only does this position ignore the DOJ's guidance on this issue requiring a functional approach, *see* DOJ Guidance Letter, at 7471 (“[C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination.”), but it has been squarely rejected by at least one federal court. *See Texas*, 831 F.Supp.2d at 260, 2011 WL 6440006, at *12 (“[S]imple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans.”). As a result, the Senate did not properly consider when tier-two requirements must yield in order to avoid conflict with Florida's minority voting protection provision.

Finally, applying expansive definitions to the tier-two standards and failing to follow a consistent approach in applying the standards undermine the purpose of article III, section 21, which was intended to restrict legislative discretion in an effort to level the playing field and to

prevent gerrymandering. *See*  *Pearson*, 359 S.W.3d at 38, 2012 WL 131425, at *2 (explaining that the purpose of constitutional requirements that districts be contiguous, compact, and nearly equal in population is “to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as ‘gerrymander’” (quoting  *Hitchcock*, 146 S.W. at 61)).

A review of the individual districts, discussed below, reveals constitutional violations. These districts illustrate the Senate's inconsistent approach as to the tier-two standards and the ramifications of the failure to conduct a functional analysis as to retrogression.

b. Numbering Scheme

We first address the numbering of the Senate plan. With respect to numbering, the Florida Constitution states only that Senate districts shall be “consecutively numbered.” Art. III, § 16(a), Fla. Const. However, because the Constitution requires that Senate terms must be staggered, the number of a Senate district determines the years in which elections must be held for that district. *See*  art. III, § 15(a), Fla. Const. Here, the issue we must address is whether the Senate districts were renumbered with the intent to favor incumbents, in violation of article III, section 21(a). Specifically, the Coalition contends that by renumbering the apportionment plan so that incumbents eligible for reelection in 2012 would receive a chance to serve for a maximum of ten years, rather than eight, the Senate plan violates the prohibition on favoring incumbents.

*658 Unquestionably, the numbering of a Senate district, whether given an odd or even number, directly affects the length of time a senator may serve. *See*  art. III, § 15(a), Fla. Const.  Article III, section 15(a), provides for staggered Senate terms. In accordance with that requirement, the constitution requires Senate elections to occur in particular districts in alternating general election years, with the year of the election to be determined by whether the district is designated by an odd or even number. *Id.* (“Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four.”). The constitution further provides that at the election

next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms. *Id.*

Moreover, any senator who represents a district where a change in the district lines has resulted in a change in constituency must stand for reelection in the next general election after reapportionment. In our decision on the validity of the apportionment plan in 1982, we addressed the effect of reapportionment on “holdover Senate terms” as part of our “jurisdiction to resolve all issues ... arising under [Article III, section 16\(c\)](#).” *In re Apportionment Law—1982*, 414 So.2d at 1045. In that case, senators in several odd-numbered districts were elected to four-year terms in 1980. The question before

this Court was whether the provisions of [article III, section 15\(a\)](#), required that the terms of these senators be truncated to two years or whether the terms would hold over until the next scheduled election for those districts in 1984. *Id.* at 1046. We concluded that “the Florida Constitution, by its provisions, requires, upon reapportionment, that senate terms be truncated when a geographic change in district lines results in a change to the districts constituency.” *Id.* at 1047–48. Our conclusion was based on the language of [article III, section 1](#), which mandates that senators be elected from the districts they represent, as well as the final clause of [article III, section 15\(a\)](#). *Id.* at 1050. Thus, whether a Senate district is given an even or odd number determines both whether a senator will serve a two-year term or a four-year term prior to reapportionment and whether the senator will serve a two-year term upon election following the reapportionment.

In 2002, the Court rejected the argument of several challengers who asserted that “the newly created Senate districts are invalid because the Legislature changed the numbering of the newly created Senate districts from the existing Senate districts in order to circumvent the constitutional legislative term limit provisions.” [!\[\]\(045cd8d47efe9de8120dbf0d15124123_img.jpg\) !\[\]\(737674c49c7c64f16fe03d764a548047_img.jpg\)](#) *In re Apportionment Law—2002*, 817 So.2d at 831. In rejecting the claim, the Court “conclude[d] that the theoretical possibility that some current senators may be able to serve ten years in the Florida Senate is not a sufficiently important dependent matter arising under [article III, section 16, Florida Constitution](#), that we should address it at this time.” [!\[\]\(040b1ae37118ab2384c51fa36ee4f102_img.jpg\) !\[\]\(b9e554e1b24e060d579fba060f34c95e_img.jpg\)](#) *Id.*

The question we must first answer is whether, as a result of the new requirements in [article III, section 21\(a\)](#), prohibiting apportionment plans that have the intent of favoring incumbents, the numbering of Senate districts is now

a matter for this Court's review under [article III, section 16](#). In light of the addition of the [article III, section 21\(a\)](#), provision that no “apportionment plan ... shall be drawn with the intent to favor or disfavor ... an incumbent,” the challengers assert that the Senate's apportionment plan was renumbered for the benefit of incumbents, in ***659** violation of the Florida Constitution. The Senate has asserted that the provisions of [article III, section 21](#), apply only to the drawing of district lines and not the numbering scheme.

We reject the Senate's assertion that numbering is excluded from the evaluation under the standards set forth in [article III, section 21](#). This Court “endeavors to construe a constitutional provision consistent with the intent of the framers and the voters.” *Zingale*, 885 So.2d at 282; *see also Gray*, 125 So.2d at 852. “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.’ ” *Caribbean Conservation Corp.*, 838 So.2d at 501 (quoting *Advisory Op. to the Governor—1996 Amendment 5 (Everglades)*, 706 So.2d 278, 281 (Fla.1997)).

While the introductory clause of [article III, section 21](#), states that the provision applies “[i]n establishing legislative district boundaries,” subsection (a) then states that “no apportionment *plan* or district shall be drawn with the intent to favor or disfavor ... an incumbent.” (Emphasis added.) The numbers of the Senate districts are unquestionably part of the “apportionment plan” for purposes of reviewing whether the plan is designed with the intent to favor or disfavor an incumbent. The Joint Resolution necessarily defines the boundaries of each district by its number. *See, e.g.*, SJR 1176 at 52 (“District 1 is composed of: (a) That part of Escambia County consisting of: 1. All of voting tabulation districts 15, 18, 19, 20, 21....”). Further, the numbering of the districts determines the length of the terms senators will serve following apportionment, [!\[\]\(646869a5c9c88531ae41e50ad8af3b92_img.jpg\)](#) [art. III, § 15\(a\), Fla. Const.](#), as well as the maximum length of time each senator will be eligible to serve, [!\[\]\(e664683c95c720edde83b7be871bf3b5_img.jpg\)](#) [art. VI, § 4\(b\)\(1\)-\(2\), Fla. Const.](#) Thus, not only is it a matter for our review in determining the validity of the apportionment plan in light of the addition of [article III, section 21](#), but the Legislature is prohibited from numbering the districts with the intent to favor or disfavor an incumbent. *See art. III, 21(a), Fla. Const.*

In this case, the clear intent of the constitutional provisions is to prevent the Legislature from passing an apportionment

plan that has a built-in bias favoring an incumbent. Adopting a renumbering system that significantly advantages incumbents by increasing the length of time that they may serve by two years most assuredly favors incumbents. Further, purposefully manipulating the numbering of the districts in order to allow incumbents to serve in excess of eight years would also appear to frustrate the intent of the voters when the term limits amendment was adopted. See  *Advisory Op. to Atty. Gen.—Ltd. Political Terms in Certain Elective Offices*, 592 So.2d 225, 228 (Fla.1991) (discussing the purpose of the term limit amendment prior to its placement on the ballot).⁴¹

We now turn to the Coalitions allegation that the Senate plan was in fact renumbered to benefit incumbents. Clearly, the *660 numbering of a district determines not only the length of each senators individual term, but also determines the length of the maximum consecutive period of time a senator will be eligible to serve in the Senate. Under  [article VI, section 4\(b\), of the Florida Constitution](#), “No person may appear on the ballot for re-election” to the office of Florida senator “if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.” It should first be emphasized that the Florida Constitution does not limit senators to a maximum of eight consecutive years. Rather, the constitution prohibits anyone who has already served for eight years from standing for reelection. Conversely, any senator who has served for less than eight years is not prohibited from seeking reelection.

The interaction between the term-limit provision of  [article VI, section 4\(b\)](#), and the staggering of Senate terms under  [article III, section 15\(a\)](#), determines the overall length of time a senator will be eligible to serve. Under these provisions, most senators who are first elected in general election years as scheduled by  [article III, section 15\(a\)](#), will be eligible to serve for a maximum of eight consecutive years in the Senate. An exception applies to senators who are first elected to two-year terms in the election following reapportionment; these senators, if subsequently reelected, will have served only six years at the conclusion of their second terms, making them eligible for reelection to a third term of four years, thereby allowing them to serve up to ten years. A senator may also be eligible to serve longer than eight years if the senator was first elected in a special election. See § 100.101, Fla. Stat. (2011) (providing that a special election or special primary election shall be held “[i]f a vacancy occurs

in the office of state senator or member of the state house of representatives”).

The Coalition's claim is based on the fact that by altering the district numbers of certain incumbents during reapportionment, the Senate has changed the year certain senators must stand for reelection, the length of the terms of office these senators will serve, and, ultimately, the maximum length of time such senators will be eligible to serve. Thus, a senator elected in an even-numbered district in 2006 would, if subsequently reelected in 2010 and 2012,⁴² serve a final term of two years from 2012 to 2014. By changing the district number from even to odd, that senator's final term would not expire until 2016, allowing the senator to serve for a maximum of ten years. Similarly, a senator elected from an odd-numbered district in 2008, by running in an even-numbered district in 2012, would be eligible to serve for a maximum of ten years. Without the reversal of numbers from odd to even, or from even to odd, each of these senators would have served for a maximum of eight years.

In this case, there is no question that district numbers were assigned with the intent to favor incumbents. The Senate Committee on Reapportionment published its first proposed plan on November 28, 2011. The plan was formally introduced at the committee's next meeting on December 6, 2011, as Senate Joint Resolution 1176. In this version of the Senate plan, the distribution of district numbers across the state was essentially unchanged from *661 the 2002 Senate plan. Under that original numbering, at least 16⁴³ out of the 29 non-term-limited incumbents would have been eligible to serve a maximum of eight years and three incumbents would have been eligible to serve a maximum of nine years.

On December 30, 2011, however, the Committee on Reapportionment published a Committee Substitute to the plan proposed on November 28. Under the new plan, 39 districts were assigned new numbers. The Coalition asserts that as a result of the renumbering, 28 out of 29 incumbents would be eligible for ten- or eleven-year terms. Because the Court was not provided the addresses for every incumbent senator, the Court cannot verify the correctness of that statement although it does not appear to be a disputed fact. We can verify that at least the 16 senators that were previously eligible for eight years will now be eligible to serve a maximum of ten years, and the three incumbents originally eligible for nine years will be eligible to serve for eleven years.⁴⁴ None of the senators for whom this Court was

provided addresses will be limited to a maximum of eight years under the new numbering scheme.

In the bill analysis attached to the Committee Substitute, Senate staff wrote that the changes in numbering were based on whether each senator had served a two-year or a four-year term prior to redistricting. Specifically, staff wrote that the Committee Substitute “[a]ssigns odd-numbered districts in a manner equitable to senators elected to terms of two years or less prior to redistricting and assigns even-numbered districts in a manner equitable to senators elected to four year terms prior to redistricting.” Fla. S. Comm. on Reapp., CS for SJR 1176 (2012), Staff Analysis 13 (rev. Jan. 16, 2012). In a section entitled “Effect of Proposed Changes,” the analysis stated:

Reapportionment in 2012 will change the constituencies of all senate districts, and many senate terms will be truncated. Twenty-five (25) senators elected in 2010, or in special elections thereafter, will have served terms shortened to two years or less. Two of those 25 senators not only will get truncated terms but also will be disqualified from appearing on the ballot for reelection (Senator from the 26th District and Senator from the 34th District).

An equitable method for numbering would be to assign odd numbers to districts represented by senators serving shortened two-year terms prior to redistricting; allowing them to seek election to full four-year terms after redistricting. Such a balance avoids the inequity of some senators having terms shortened to two years (or less) both before and after redistricting, while others have the opportunity to serve full four-year terms both before and after redistricting. Only 20 odd numbers are available, however, and assigning 23 is not possible.

To reconcile the provisions cited above and achieve an equitable result, professional staff considered not only the incidence of shortened senate terms but also when senators were first elected to the Senate (and when they would be disqualified from appearing on the ballot for reelection).

Id. at 10–11 (emphasis added).

Article III, section 21(a), prohibits any apportionment plan from being drawn with *662 the intent to favor an incumbent. The Senate has argued that the renumbering of its plan does not in fact “favor” incumbents; rather, the Senate maintains that the result of the numbering was merely to compensate certain incumbents who served truncated, two-

year terms prior to redistricting by allowing them to serve longer terms if they are reelected. As the Senate conceded in a prior reapportionment case, however, “elected officials have no property rights to the office to which they have been elected.” *In re Apportionment Law—1982*, 414 So.2d at 1046. To the contrary, it is the voters who have the rights in the process by which their representatives are elected.

The Senate's plan plainly favors certain incumbents by renumbering districts to allow them to serve longer than they would otherwise be eligible to serve. Because we conclude that the plan was drawn with the intent to favor incumbents, in violation of [article III, section 21\(a\)](#), we declare the renumbering in the apportionment plan to be invalid.

c. Challenges to the Senate Districts

We now turn to an examination of the challenges raised as to specific Senate districts. We first discuss the districts that we find to be in violation of the Florida Constitution. Then we discuss the district challenges that the Court rejects. Finally, we discuss the challenge brought by the City of Lakeland.

Northwest Florida: Senate Districts 1 and 3

The FDP and the Coalition contend that Districts 1 and 3 in the Panhandle violate the constitutional standards of compactness, utilizing political and geographical boundaries where feasible, and no intent to favor incumbents. Our facial review of both of these districts confirms that at least two constitutional standards were violated: compactness and utilizing existing political and geographical lines where feasible. The Senate's failure to adhere to these constitutional standards appears to be based on the erroneous belief that, in the drawing of the districts, the factor of “communities of interest” could be elevated above the constitutional mandates.

Although the Senate's stated motivation was a desire to keep coastal communities together and separate from rural communities, it is also significant that District 1 keeps 86.1% of its predecessor district (old District 4), and District 3 keeps 82.6% of its predecessor district (old District 2). Both of these percentages are far greater than the average for the Senate plan (64.2%). Because there is no constitutionally valid justification for the deviation from the constitutional standards, we are obligated to declare these districts invalid.

As the below map shows, Districts 1 and 3 are horizontal districts in northwest Florida. District 1 stretches east to west through the coastal areas of five counties, and District 3 takes in the non-coastal areas to the north of District 1.



***663** Both districts contain a majority-white voting-age population.⁴⁵ Thus, no considerations with respect to Florida's minority voting protection provision come into play. Both districts are visually non-compact as they stretch through the Panhandle, and the compactness measures confirm this. District 1 received a Reock score of 0.12 (closer to 1 is better), and an Area/Convex Hull score of 0.46 (closer to 1 is better). District 3 received a 0.24 Reock score and a 0.74 Area/Convex Hull score.

The districts are bounded to the east by Gulf, Calhoun, and Gadsden Counties. The more critical and constitutionally suspect boundary is the boundary between Districts 1 and 3, which follows no consistent political or geographical boundary. Instead, the district dividing line follows a variety of boundaries, switching between major roads (Interstate 10), minor roads, county lines, city boundaries, major waterways, rivers, and even creeks. It is evident that although the Senate followed numerous different boundaries when drawing Districts 1 and 3, often switching between different types of boundaries within the span of a few miles, it sacrificed compactness not to comply with the requirements of equal population or utilizing political or geographical boundaries, but rather to create a coastal district and an inland rural district.

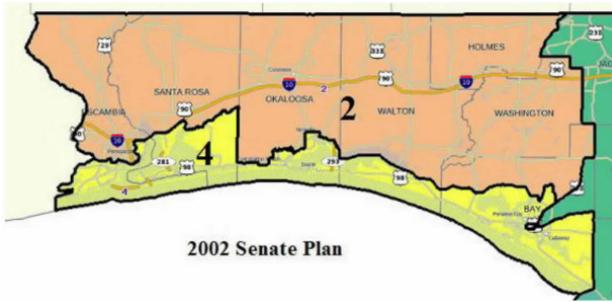
In passing the Joint Resolution, the Legislature stated its intent was to “establish Senate District 1, which ties coastal communities of the Florida Panhandle in Escambia, Santa Rosa, Okaloosa, Walton, and Bay Counties,” and to “establish Senate District 3, which ties rural Panhandle communities in Escambia, Santa Rosa, Okaloosa, Walton, Bay, Washington, Holmes, and Jackson Counties.” SJR 1176 at 38. The Senate staff analysis indicates that the coastal and rural districts were created based on public testimony received by the Legislature.⁴⁶

***664** Although the Senate staff analysis points to selected testimony in favor of the horizontal orientation, a review of the public hearings demonstrates that the public testimony in support of horizontal coastal and rural districts was by no means unanimous. While members of the public testified that they wanted coastal areas together and separate from rural areas because of common interests, other members of the public testified in support of vertical districts that would unite counties.

We commend the Legislature for holding multiple public hearings and obtaining public input. However, the Legislature is required to follow the requirements in the constitution, including the requirements that districts be drawn “as nearly equal in population as is practicable,” to be “compact,” and to “where feasible, utilize existing political and geographical boundaries.” Art. III, § 21(b), Fla. Const. While the equal population and political and geographical boundaries requirements are stated in terms of “as nearly as is practicable” or “where feasible,” the compactness requirement is not modified by such qualifiers but framed in terms of “shall.” As explained above, maintaining communities of interest is not a constitutional requirement, and comporting with such a principle should not come at the expense of complying with constitutional imperatives, such as compactness.

A review of the Coalition's alternative plan reveals that it was possible to draw districts in the Panhandle that are more visually compact and keep more counties together; only one county, Okaloosa County, is split in the Coalition's plan. Further, when drawing the districts to be compact and utilize consistent political boundaries, the Coalition districts also retain less of the core population of predecessor districts—66.2% and 58.4%—closer to the average (64.2%) of the Senate plan.

The orientation of Districts 1 and 3 is in fact very similar to the composition of Districts 2 and 4 in 2002, depicted below. Although part of Okaloosa County is now included in District 1, that area consists in large part of the Eglin Air Force Base. The incumbents in Districts 1 and 3 both live in Okaloosa County and would represent largely the same constituencies as they did under the 2002 plan.



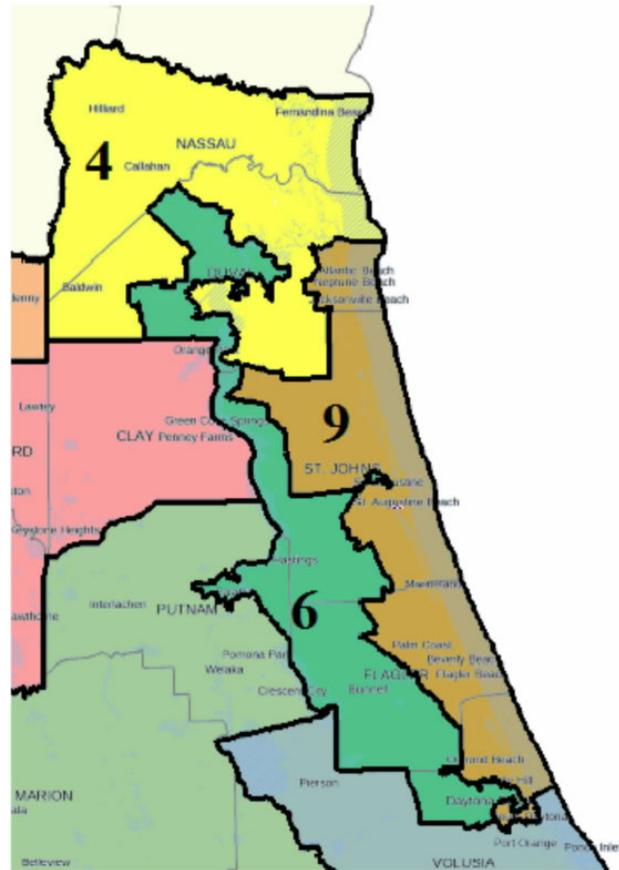
***665** The drawing of the districts sacrificed compactness—a constitutional imperative—in order to keep coastal communities together. Further, although the Senate followed numerous different boundaries when drawing Districts 1 and 3, often switching between different types of boundaries within the space of a few miles, it sacrificed compactness, not in a reasoned balancing effort to comply with the requirements of equal population or to utilize political or geographical boundaries such as municipal or county boundaries, but rather to create a coastal district and an inland rural district.

We also consider it significant that in doing so, a high percentage of population from predecessor districts was retained to the benefit of the incumbents. While it is not only the fact that the districts maintained overwhelming percentages of the former core constituencies in isolation, in the context of our overall analysis of this district, it is significant. There is no valid constitutional justification for the decision to draw Districts 1 and 3 in this configuration, and we conclude that Districts 1 and 3 are constitutionally invalid.

Northeast Florida: Senate Districts 6 and 9

The FDP and the Coalition challenge District 6 on the grounds that the Senate used Florida's minority voting protection provision as a pretext for partisan favoritism and violated the requirements of compactness and utilizing political and geographical boundaries. Based on the objective data before this Court, we conclude that District 6 violates constitutional mandates by sacrificing compactness and utilizing boundaries when not necessary to do so to avoid conflict with the minority voting protection provision.

District 6 begins at the northern edge of Duval County, meanders through Jacksonville, and then stretches southward across five counties to Daytona Beach, with arms to Palatka and St. Augustine. District 6 is adjacent to neighboring District 9, which stretches along the coast from north of Jacksonville Beach to South Daytona with District 6 on its western border. Districts 6 and 9 are depicted below.



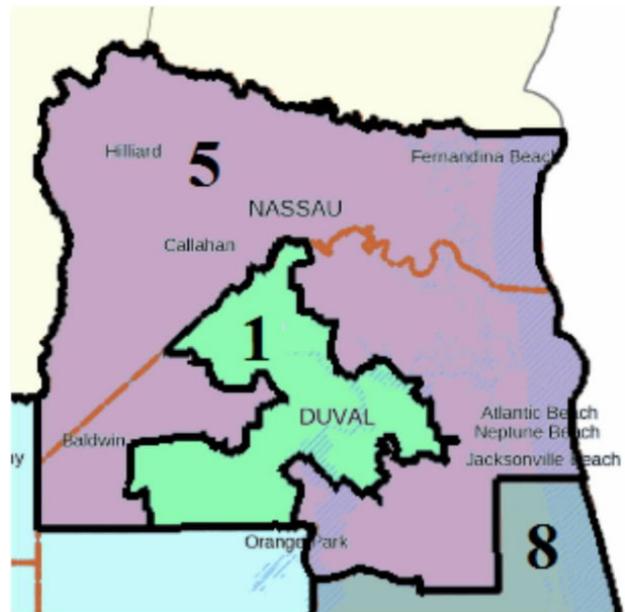
***666** District 6 is not compact visually, and the mathematical measures of compactness confirm this. District 6 received a Reock score of 0.12 (closer to 1 is better), and an Area/Convex Hull score of 0.43 (closer to 1 is better). Although part of District 6's western border follows the St. Johns River, it is evident that its non-compactness is not a result of attempting to utilize an existing political or geographical boundary. Neighboring District 9 is also visually not compact as a result of having District 6 on its western border, and it received a Reock score of 0.15 and an Area/Convex Hull score of 0.61.⁴⁷

The stated justification for the configuration of District 6 is minority voting protection. As we have explained previously, because the Senate never performed an appropriate functional analysis, the reliability of this justification is questionable. District 6 is a black opportunity district, with a black VAP of 47.7%. District 6 is not a majority-minority district, and neither was its predecessor in the benchmark ***667** Senate plan. The benchmark district, old District 1, had a black VAP of 46.9%. In short, this is not a district where the Senate's goal was to create a majority-minority district.

While the percentage falls short of a majority, District 6 is one in which an analysis of voting behavior that this Court is able to perform using the House's redistricting software and the House's voter registration and election data reveals that black voters are likely able to elect their representative of choice. District 6 would perform Democratic; it would have voted 58.7% for Sink (D) in the 2010 gubernatorial election, 63.3% for Obama (D) in the 2008 presidential election, and 52.0% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 58.0% of registered voters, and 69.4% of the registered Democrats would be black (showing opportunity for black voters among Democrats). Further, 87.2% of the black voters would be registered Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 57.6% of registered voters, 69.2% of the Democrats would be black, and 92.2% of the black voters would be Democrats. Black voters would have also controlled the Democratic primary, with 67.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice.

The Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature stated that it intended to “tie [] communities of similar socioeconomic characteristics in the northeastern portion of the state from the St. Johns River basin to Interstate 95 between Daytona Beach and Jacksonville, consistent with traditional, race-neutral redistricting principles” and to create a district with “a near majority black voting-age population, comparable to that of the existing district.” SJR 1176 at 39.⁴⁸ District 6 retains 70.3% of its predecessor district (old District 1). However, as discussed above, the Senate in drawing this district did not perform a functional analysis, but rather focused on keeping the core of old District 1. Old District 1, however, was drawn at a time when compactness was not a constitutional imperative. Because compactness is now a requirement, the Legislature is permitted to violate compactness only when necessary to avoid conflict with tier-one standards, including the minority voting protection provision.

In support of its argument, the Coalition submitted a proposed alternative plan that includes a black opportunity district contained entirely within Duval County (Coalition District 1). That district is depicted below.



***668** Coalition District 1 has a black VAP of 42.4%. While we recognize that this is lower than the black VAP of the benchmark District 1 (which has a black VAP of 46.9%), our inquiry does not end there. An examination of voting strength must be conducted. The equivalent district under the Coalition's alternative plan would perform Democratic; it would have voted 57.3% for Sink (D) in the 2010 gubernatorial election, 61.0% for Obama (D) in the 2008 presidential election, and 49.1% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 56.1% of registered voters, and 66.4% of the registered Democrats would be black (showing opportunity for black voters among Democrats). Further, 86.8% of the black voters would be registered Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 55.8% of registered voters, 65.8% of the Democrats would be black, and 91.6% of the black voters would be Democrats. Black voters would have also controlled the Democratic primary, with 64.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice.⁴⁹

***669** Thus, the Coalition has demonstrated that District 6 can be drawn much more compactly and remain a minority-opportunity district. In addition to being much more visually compact, the compactness measurements are much better. Coalition District 1 scores a 0.32 on Reock and a 0.66 on Area/Convex Hull, compared to Senate District 6, which scores a 0.12 on Reock and 0.43 on Area/Convex Hull.

We recognize that our role is not to select the “best plan.” However, the Coalition’s plan demonstrates that Senate District 6 violates the constitutional standards of compactness and utilizing existing political and geographical boundaries. The alternative plan shows how political and geographical boundaries can be better utilized and demonstrates how District 6 can be made more compact by placing it entirely within Duval County rather than stretching southward across five counties to Daytona Beach, without violating Florida’s minority voting protection provision.

Further, although adjoining District 9, standing alone, is not invalid, the reason for its lack of compactness and failure to utilize political and geographical boundaries was its location adjacent to District 6. As a result of District 6 being made more compact, District 9 becomes more compact as well.

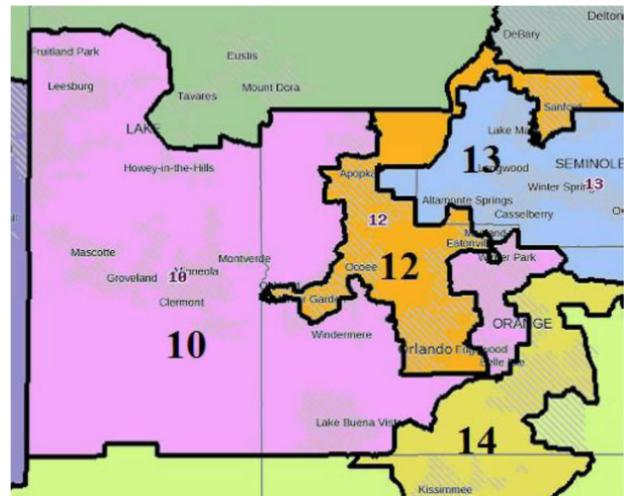
The Senate violated the compactness standard in drawing Districts 6 and 9, and it failed to perform the functional analysis necessary to properly determine when compactness should yield because of a conflict with the tier-one standard of minority voting protection. This is also indicative of intent to favor incumbents and a political party. By keeping District 6 in the same configuration of old District 1, the Senate retained a high percentage of the population of predecessor districts not only for new District 6, which retains 70.3%, but for new District 9, which retains 69.7%. Moreover, the configuration of District 6 draws in Democratic neighborhoods that would otherwise be contained in the surrounding districts. There is no valid justification for Districts 6 and 9. Contrary to any arguments presented either in the Senate’s briefs or during oral argument, there is no constitutional impediment to the alternatives set forth in the Coalition plan, which comply with the constitutional requisites. Accordingly, we conclude that Districts 6 and 9 are constitutionally invalid.

Central Florida: Senate Districts 10 and 12

The Coalition next asserts that District 10 was drawn to favor an incumbent, and the FDP contends that District 12 uses Florida’s minority voting protection provision as a pretext for partisan favoritism. While the challenges are based on different grounds, we consider these claims in tandem because the Senate justifies the boundaries of District 10 based in part on its assertion that it was required to draw District 12 in the manner that it did in order to ensure minority voting protection. Thus, we start with District 10, then review District 12, and conclude that District 10, as drawn, violates the constitution.

The Coalition asserts that District 10 violates [article III, section 21](#), because this district was gerrymandered into a bizarre shape in order to include a particular incumbent’s residence and provide him with a safe Republican seat. The Coalition further asserts that the district barely misses another incumbent’s residence that is located on the border between District 10 and District 13, preventing two incumbent Republicans from running against each other.

A visual examination of the challenged districts is set forth below:



*670 As shown in the above map, District 10 is located mostly on the west side of Orlando, and this portion of the district is fairly compact, following county lines on its west and south sides, continuing until it reaches District 12 on the eastern side, and District 14, which is a Hispanic majority-minority district, on the southeastern side. At that point, District 10 squeezes in between Districts 12 and 14 through a small stretch of land less than half of a mile wide in order to create an odd-shaped appendage that reaches out toward District 13, picking up Belle Isle, Edgewood, and Winter Park. The appendage is approximately 12 miles long at its longest portion and 8.5 miles wide at its widest, with the majority of the portion being between two and five miles in width. Based on undisputed information provided to this Court in conjunction with this review, an incumbent lives in the appendage.⁵⁰ The district line between Districts 10 and 13 stops just short of another Republican incumbent’s residence by following the boundary between the cities of Winter Park and Maitland for approximately 3.5 miles.

Although the compactness measures for District 10 reflect that the district is, overall, relatively compact (Reock: 0.36; Area/Convex Hull: 0.75), District 10 is visually non-compact

as a result of the bizarrely *671 shaped appendage. *See, e.g., Hickel, 846 P.2d at 46* (“[A]ppendages attached to otherwise compact areas may violate the requirement of compact districting.”).⁵¹

The dividing line between the District 10 appendage and surrounding Districts 12, 13, and 14 does not consistently follow any particular political or geographical boundary, sometimes following parts of the city boundaries for Belle Isle, Winter Park, and Edgewood, but other times constantly shifting from major roads to minor roads to railroad tracks. In looking to the population deviation, we note that District 10 is one of the most populated districts with 3,995 people above the ideal population.

Of course, tier-two standards must yield if the Legislature cannot comply with the requirements of both tier one and tier two. The Legislature asserts that District 10 was drawn in this manner because of Districts 12 and 14. District 14 is a new Hispanic majority-minority district with a Hispanic VAP of 50.5%; there was no predecessor Hispanic majority-minority district in the 2002 Senate plan. District 12 is a coalition district with a 40.0% black VAP and 20.9% Hispanic VAP. Notably, District 12 is not a black majority-minority district, nor was its predecessor in the benchmark Senate plan.

District 12, which is located in the western and northern portions of the Orlando area, takes in the areas with the highest concentration of black residents from Orlando, Ocoee, Winter Garden, Apopka, Maitland, Winter Park, and Sanford. It is not a visually compact district, and the compactness measures confirm this (Reock: 0.24; Area/Convex Hull: 0.41). It extends into two counties, running in a relatively narrow path on the west end of Orlando and extending upwards and to the east, hugging the top of the area, with a few portions reaching out.

The Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature explained that its intent was to “tie[] urban communities of similar socioeconomic characteristics in Orange and Seminole Counties, consistent with traditional, race-neutral redistricting principles” and create a district with “a majority-minority voting-age population, comparable to that of the existing district.” SJR 1176 at 41. The predecessor to District 12 was old District 19, a coalition district with a black VAP of 33.1% and a Hispanic VAP of 35.5%. District 12 retained 49.0% of its predecessor district.

As discussed above, the Senate in drawing this district did not perform a functional analysis. Here, the Senate in essence asserts that the districts in the Orlando area do not need to be compact because of a focus on increasing minority voting strength. However, the Senate failed to consider whether this goal could be obtained by performing an analysis that adheres to all of the constitutional criteria.⁵²

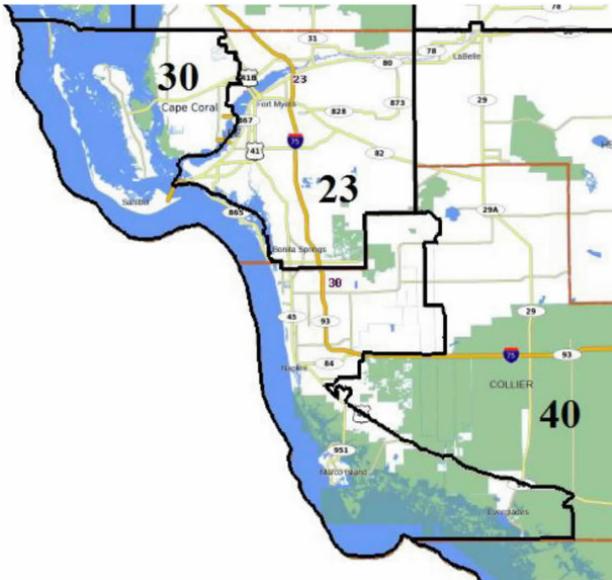
In reviewing both Districts 10 and 12, we conclude that District 10, which is visually non-compact and clearly encompasses an incumbent in an appendage, is constitutionally defective. Although the Legislature contends that District 10 was drawn because of concerns of not diluting minority voting strength in surrounding districts or causing unlawful retrogression, the Senate never performed the functional analysis necessary to ensure that the reasoning was constitutionally valid. Nothing in the *672 record reflects that the process of drawing the districts in this area recognized the importance of balancing the constitutional values.

After reviewing the compactness of District 10, as well as its failure to observe boundaries and the location of incumbents in this area, and in light of the Senate's failure to conduct a functional analysis as to District 12, we conclude that there is no valid constitutional justification for District 10. Based on the objective data before this Court, we conclude that District 10 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. District 10 is constitutionally invalid.

Southwest Florida: Senate District 30

The FDP argues that District 30 was drawn with the intent to favor an incumbent in violation of the Florida Constitution. As evidence, the FDP points to the fact that District 30 contains a high percentage of its former constituency, is non-compact, and fails to utilize political and geographical boundaries. After examining all the constitutional requirements, we conclude that the district as drawn violates the Florida constitutional standards that districts “shall be compact” and utilize political and geographical boundaries where feasible. Further, the failure to comply with the tier-two standards, in the absence of any constitutionally valid justification, objectively indicates intent to favor an incumbent.

District 30 is located in Collier and Lee Counties. It stretches from Cape Coral, extends over water to Sanibel Island and back over water to Fort Meyers Beach, and then travels down the west coast all the way to the Everglades, encompassing Naples and Marco Island as it winds its way down. The map of District 30, below, best shows its odd-shaped configuration, which resembles an upside-down alligator.



***673** District 30 is a white-majority district (white VAP of 78.4%). District 30 retains 84.9% of its constituency from old District 37 and a shape nearly identical to its predecessor district. It is visually non-compact, and the mathematical measures of compactness support this conclusion, with a Reock score of 0.18 and an Area/Convex Hull score of 0.56 (closer to 1 is better).

In terms of political and geographical boundaries, District 30 is bounded to the north and south by county lines, but the district cuts through the city of Bonita Springs, and the mainland's only connection to Sanibel Island is a bridge that is cut in half by the district line. Thus, in addition to being non-compact, District 30 splits counties, municipalities, and geographical features.

In passing the joint resolution, the Legislature stated its intent with respect to this district was to “tie [] coastal communities in Lee and Collier Counties.” SJR 1176 at 47. The Senate districts surrounding coastal District 30 are Districts 23, 28, and 40. Districts 23 and 28 are both white-majority districts (white VAPs of 75.2% and 87.9%, respectively). They are visually and numerically much more compact than District 30⁵³ and do not need to comply with Florida's minority

voting protection provision. District 40, on the other hand, is in a covered county under [Section 5](#) of the VRA.

With the exception of the boundary it shares with District 40, District 30 does not need to be configured to avoid diminishing minority voting strength, and thus the Legislature is required to draw District 30 to be “as nearly equal in population as is practicable,” to be “compact,” and to “where feasible, utilize existing political and geographical boundaries.” [Art. III, § 21\(b\), Fla. Const.](#)

The aforementioned stated legislative intent demonstrates that in creating District 30, the Legislature intended to tie coastal communities together. However, as we have discussed in analyzing the constitutional phrase “compactness” and our discussion of Districts 1 and 3, maintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives. We also consider it significant that District 30 maintained a large percentage of the same constituency as the predecessor district. On this record, there is no valid constitutional justification for the Legislature's decision to draw District 30 in this manner. District 30 is constitutionally invalid.

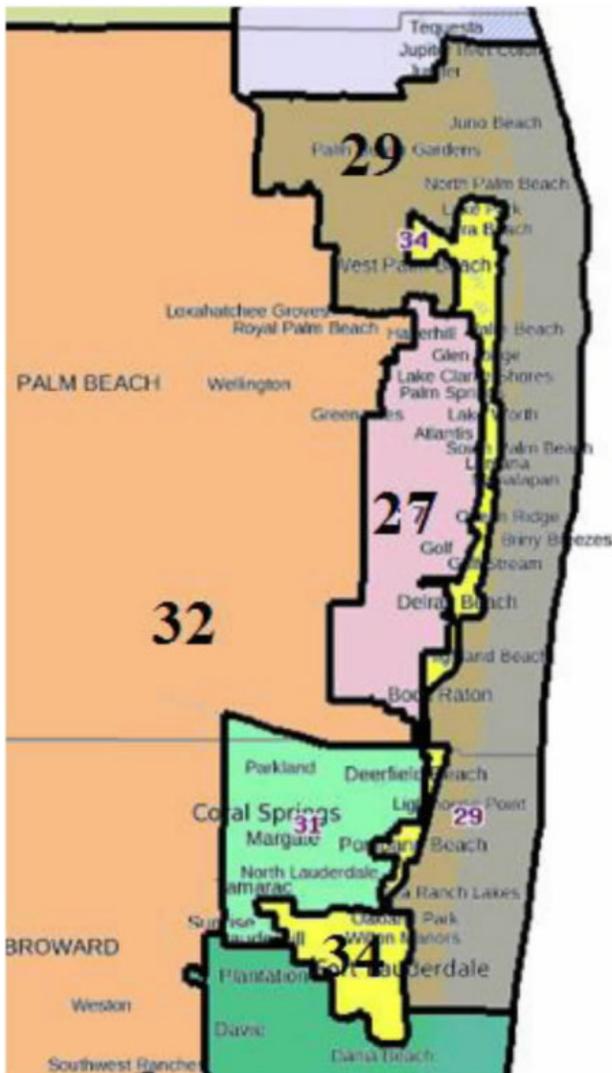
Southeast Florida: Senate Districts 29 and 34

The FDP and the Coalition contend that Districts 34 and 29 are not compact. Additionally, the Coalition argues that the Senate plan keeps the black voting-age population in District 34 the same as it was in the predecessor district, without undertaking the required functional analysis. The Coalition argues that the Senate included as many Democrats as possible into this district in order to dilute their votes elsewhere. The Coalition asserts that this evidences intent to favor an incumbent and a political party. Specifically, the Coalition contends that the decision to draw District 34 this way was a ploy to keep the neighboring Republican incumbent seat safe in District 29 by using minority protection as a pretext for partisan favoritism. We conclude that both districts are constitutionally invalid because they are not compact, do not utilize political and geographical boundaries where feasible, and ***674** appear to have been drawn with the intent to favor an incumbent and a political party.

District 34 is a narrow district stretching approximately fifty miles from Riviera Beach and Lake Park in Palm Beach County southwards in a narrow strip to Fort Lauderdale in Broward County. At its narrowest point, which is in Boca

Raton, District 34 is less than a mere tenth of a mile wide, connected by the I-95 corridor. Following a jagged path south, District 34 slices through cities and neighborhoods, often gathering up residents on one side of a residential street but not the other.

District 29, which is adjacent to District 34, is a long and narrow coastal district that snakes along the outer banks and eastern shoreline to the east of District 34. District 29 begins in Jupiter, wraps around the top of District 34 to take in Palm Beach Gardens, then travels south in a narrow sliver along the coast through Lake Worth, Palm Beach, Boca Raton, and Pompano Beach to Fort Lauderdale. These districts are depicted in the map below.



Districts 34 and 29 are clearly not compact, and the mathematical measurements confirm this. Under the Reock method of measurement, District 34 scores a low 0.05 (closer to 1 is better)—the least compact of all of the Senate districts;

District 34 does not fare much better under the Area/Convex Hull method of measurement, scoring 0.25 (closer to 1 is better). As a result of the shape of District 34, District 29 is also visually non-compact, and it has a Reock score of just 0.15 and an Area/Convex Hull *675 score of 0.56. In addition, these districts do not adhere to a consistent boundary as they travel through counties and cities.

Unquestionably, minority protection was an important factor in considering how to draw District 34 because it is a black majority-minority district with a black VAP of 55.8%. As it travels down the coast, the district takes in the neighborhoods with the highest concentrations of black residents in Broward and Palm Beach Counties. The incumbent for this district is a Democrat. In the benchmark plan, the predecessor to District 34 (old District 29) was also a black majority-minority district, having a black voting-age population of 60.7%.⁵⁴ District 34's shape is similar to the shape it had under the 2002 Senate plan, and the district retains 79.4% of its prior population.

Neighboring District 29's shape is also similar to the shape it had under the 2002 Senate plan, and it retains 82.1% of its prior population. The incumbent for this district is a Republican. It is a white-majority district, having a white VAP of 79.4%. Its predecessor (old District 25) was also a white-majority district under the 2002 benchmark plan, having a white VAP of 78.0%.

The Legislature's stated intent with respect to District 34 was to preserve minority voting opportunities. The Legislature explained that its intent was to “tie[] communities of similar socioeconomic characteristics along Interstate 95 and U.S. 1 in Palm Beach and Broward Counties, consistent with traditional, race-neutral redistricting principles” and to create the district with “a majority black voting-age population, comparable to that of the existing district.” SJR 1176 at 48. The Senate staff analysis further explains that the configuration of District 34 “preserves the core of a district that has consistently elected candidates preferred by minority voters.” Senate District Descriptions at 1014. Under the 2012 Senate plan, District 34 would be solidly Democratic, and an analysis of voting behavior indicates that the district will likely afford black voters the ability to elect candidates of their choice.⁵⁵

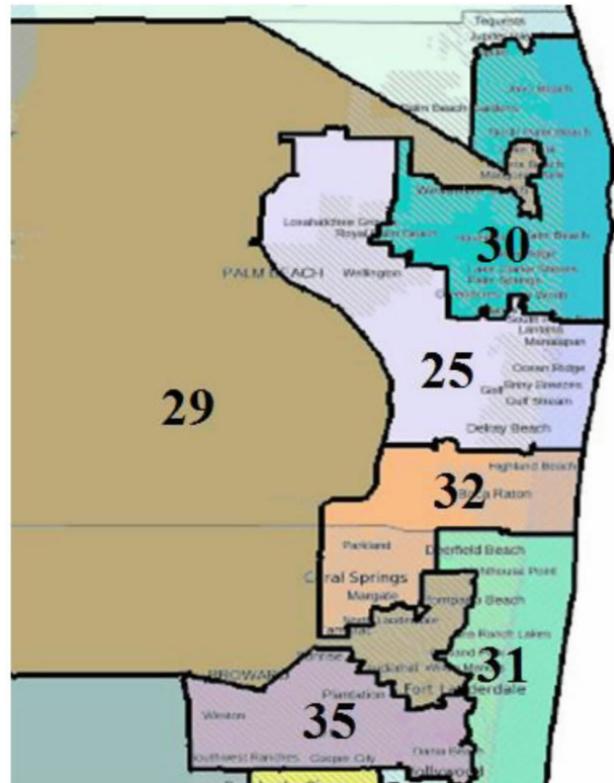
As to District 29, the Senate acknowledged that the district was adjacent to a minority-opportunity district, stating that it was creating a district that “ties the coastal communities of

Broward and Palm Beach Counties; is equal in population to other districts; follows political and geographical boundaries; [and] is adjacent to a minority-opportunity district to its west and the Atlantic Ocean to the east.” SJR 1176 at 46 (emphasis added).⁵⁶

Of course, the requirement of compactness must yield when necessary to avoid a conflict with the tier-one standard of protecting minority voting. However, as we *676 have previously discussed, the Senate in drawing minority districts did not perform a functional analysis, but rather focused on keeping the core of the minority districts under the 2002 Senate plan. The 2002 Senate plan, however, was drawn at a time when compactness was not a constitutional imperative.

We also consider the partisan favoritism claim. Every Senate district immediately surrounding District 34 (Districts 27, 31, 32, and 36), *except* for District 29, is a majority-white district that would perform Democratic.⁵⁷ Unlike the surrounding districts, District 29 would remain competitive, but lean Republican in terms of election results,⁵⁸ and the incumbent in this district is a Republican. The challengers essentially maintain that District 34 was drawn to take Democratic voters out of District 29 to keep it competitive under the guise of maintaining District 34 as a black majority-minority district. The current configuration would, in effect, favor a Republican incumbent.

The Coalition has submitted an alternative plan that shows a different configuration for this area that is more compact overall.



*677 For a point of reference, the Coalition District 29 is equivalent to the Senate District 34 (black majority-minority districts under both plans with black VAPs of 55.7% and 55.8%, respectively), and an analysis of voting behavior likewise reveals that Coalition District 29 will likely afford black voters the ability to elect candidates of their choice.⁵⁹ We note that the non-diminishment standard does not prohibit any change to existing boundaries or to population percentages of a previously existing black majority-minority district. The Coalition's plan makes the area, as a whole, more compact than the corresponding area under the Senate plan.

Under the Senate plan, the districts surrounding District 34 have the following compactness measurements (closer to 1 is better): District 27 (Reock: 0.23; Area/Convex Hull: 0.82); District 29 (Reock: 0.15; Area/Convex Hull: 0.56); District 31 (Reock: 0.43; Area/Convex Hull: 0.85); District 32 (Reock: 0.49; *678 Area/Convex Hull: 0.92); and District 36 (Reock: 0.25; Area/Convex Hull: 0.63). Including the scores for District 34, the average Reock score of these districts is 0.27, and the average Area/Convex Hull score is 0.67.

As a comparison, under the Coalition's plan, the districts surrounding its District 34 equivalent (Coalition District 29), including that district itself, have the following compactness

measurements: District 25 (Reock: 0.32; Area/Convex Hull: 0.67); District 29 (Reock: 0.42; Area/Convex Hull: 0.76); District 30 (Reock: 0.37; Area/Convex Hull: 0.77); District 31 (Reock: 0.18; Area/Convex Hull: 0.77); District 32 (Reock: 0.35; Area/Convex Hull: 0.75); and District 35 (Reock: 0.38; Area/Convex Hull: 0.78). These districts in the Coalition's plan have, on average, a Reock score of 0.34 and an Area/Convex Hull score of 0.75, improving upon the Senate plan's compactness. While the role of alternative plans is not to select the "best plan," the Coalition's plan demonstrates that the Senate was able to draw districts in this region of the state to better comply with Florida's compactness requirement while, at the same time, maintaining a black majority-minority district.

In order to evaluate the partisan favoritism claim, we further evaluate the effect of this more compact configuration on the political composition of the districts. As a result of the black Democratic voters in the long narrow strip of District 34 between West Palm Beach and Pompano Beach being dispersed into surrounding districts under the Coalition's plan, rather than being concentrated in District 34, the equivalent to District 29 in the Coalition plan—Coalition District 31—becomes Democratic.⁶⁰ The Coalition's plan creates five Democratic districts in this area, as opposed to the four Democratic districts in the 2012 Senate plan.⁶¹ The Democratic voters in this area of the state are concentrated and the area is largely Democratic; the Coalition's plan does not appear to purposefully draw Democratic districts but rather to draw logical, compact districts in a neutral manner.

We conclude that the Senate's decision to draw this region in a less compact manner is indicative of intent to favor an incumbent and a political party by keeping District 29 essentially the same as its predecessor district. Further, in drawing this area of the state, the Senate violated the compactness requirement by simply keeping the cores of the previously existing districts without performing a functional analysis and endeavoring to draw compact districts that also adhere to Florida's minority voting protection provision.

There is no constitutionally valid justification for Districts 29 and 34. Although the Senate's stated intent in drawing these districts was also to "tie [] communities of similar socioeconomic characteristics along Interstate 95 and U.S. 1 in Palm Beach and Broward Counties," SJR 1176 at 48, there is no demonstrated community of interest that is being maintained, and, importantly, utilizing political and geographical boundaries

and mandating compactness are constitutional requirements, whereas maintaining communities of interest is not. In this case, we conclude that the only reason for maintaining this configuration based on the 2002 Senate plan was to benefit an incumbent and a political party in general. Districts 29 and 34 are constitutionally invalid.

Remaining Challenged Districts

We now briefly discuss the remaining challenged districts, all of which we reject because no constitutional violation has been shown.

Senate District 4. The FDP summarily challenges District 4, alleging that it could have been drawn in a manner such that the district lines crossed fewer county boundaries. District 4 includes all of Nassau County and then reaches into Duval County twice, stopping at the Duval county line and including any portions of Duval County that are not within Districts 6 or 9. However, in order to satisfy the equal population requirement, the district cannot be contained entirely within Nassau County. Thus, this claim fails.

Senate District 15. The Coalition challenges District 15 on the basis that it was configured to favor an incumbent by removing from his district parts of Hillsborough County because he is unpopular in that county. Regardless of whether the facts relied upon by the Coalition are true, there are simply no objective indicators of improper intent. District 15 is not oddly shaped or strangely contorted and the objected—to portion of the district now follows a county boundary where it did not before. The Coalition has failed to carry its burden with respect to this district.

Senate Districts 25 and 26. The FDP summarily asserts that Districts 25 and 26 fail to utilize political and geographical boundaries, because they split multiple counties and cities and because District 26 extends across most of the peninsula from near the Atlantic Ocean to near the Gulf of Mexico. While it may be possible that Districts 25 and 26 could have been drawn to split fewer counties and cities while adhering to the remaining constitutional requirements, the FDP does not demonstrate that this can be done.

Senate Districts 28 and 33. The FDP summarily alleges that Districts 28 and 33 retain high percentages of the populations from their predecessor districts in order to benefit the incumbents in those districts. In challenging these districts, the FDP does not point to any other indicators of improper intent, and we deny these challenges.

Senate District 38. The Coalition argues that the Legislature over-packed this district with Democrats in order to dilute the Democratic vote elsewhere. District 38 is a black majority-minority district located in Miramar, Miami Gardens, and North Miami with a black VAP of 58.3%. Its predecessor district under the 2002 benchmark plan (old District 33) is also a black majority-minority district with a black VAP of 59.2%. District 38 is visually compact, and the compactness measurements reflect this with a Reock score of 0.55, and an Area/Convex Hull score of 0.83 (closer to 1 is better). The comparable district under the Coalition's alternative plan, Coalition District 33, is not a black majority-minority district, containing a black VAP of just 48.3%, and is visually less compact, with correspondingly lower compactness scores (Reock: 0.33; Area/Convex Hull: 0.69). The Coalition has not carried its burden to demonstrate *680 that District 38 violates constitutional mandates.

Senate Districts 35 and 36. The Coalition contends that Districts 35 and 36 were both drawn to protect the incumbents in those districts in that the Senate plan consolidates black and Hispanic voters into neighboring districts in order to retain in Districts 35 and 36 much of the same population the incumbents in these districts now serve. We conclude that the Coalition has not satisfied its burden of proof, as it appears there could be valid justifications for the shape of each district. Both districts are defined by their surrounding districts, which include minority districts. Further, neither district is contorted or strangely shaped given these considerations.

District 35 is a coastal district bounded to the east by the Atlantic Ocean and to the west by two majority-minority districts, District 37 (Hispanic VAP of 83.7%), and District 38 (black VAP of 58.3%), as well as District 40, which has a black VAP of 35.1% and a Hispanic VAP of 39.8%. The predecessors to Districts 37 and 38 are also majority-minority districts in the benchmark plan,⁶² and District 40's predecessor in the benchmark plan, old District 39, contains similar voting-age populations with a black VAP of 29.1% and a Hispanic VAP of 43.0%. Significantly, District 40 includes three covered counties (Monroe, Collier, and Hendry Counties) for purposes of Section 5 preclearance under the VRA. District 40 reaches around District 37 and District 35 and necessarily affects the configuration of the districts in the Miami–Dade County area.

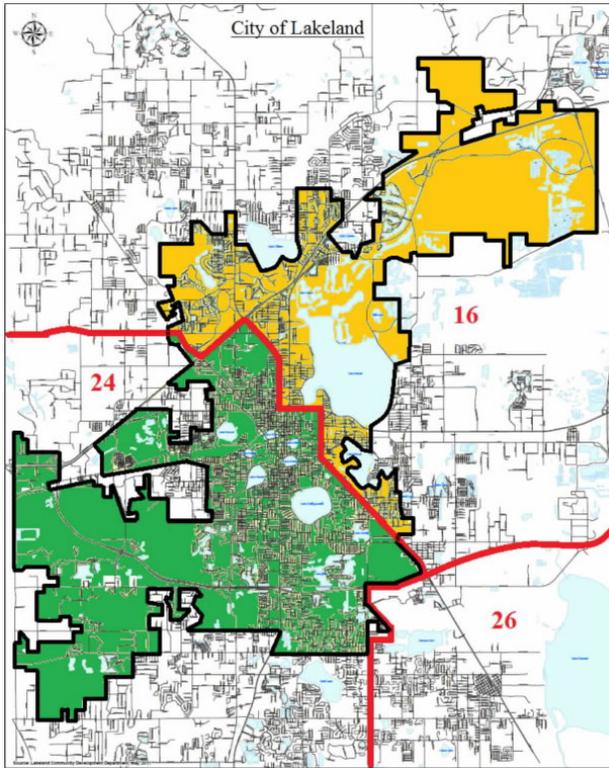
District 36 is bounded to the east by the Atlantic Ocean, to the north by District 34, a black majority-minority district (black VAP of 55.8%), and to the south by District 38, black majority-minority district (black VAP of 58.3%). As discussed in more detail above, the predecessor districts to Districts 34 and 38 were also black majority-minority districts. However, as previously discussed, although the Coalition offers an alternative configuration for this area, the corresponding district to District 38 in the Coalition's plan reduces the black VAP below that of a majority and makes the district less compact. We conclude that the Coalition has not carried its burden of proof with respect to these districts.

d. City of Lakeland

In the final individual challenge to the 2012 Senate plan, the City of Lakeland alleges that the Legislature violated the requirement of [article III, section 21\(b\)](#), to utilize existing political boundaries where feasible. Lakeland claims that the Senate plan ignored Lakeland's municipal boundaries and bifurcated the city into two Senate districts, District 24 and District 16. Lakeland contends that the record of legislative proceedings is devoid of any factual predicate upon which the Senate could have relied when it determined that it was not feasible to utilize Lakeland's existing municipal boundaries.⁶³ In contrast to other areas of the state where the splitting of municipalities was necessitated by population sizes and the close proximity between major municipalities, Lakeland has asserted that such a justification does not apply to it because of its location.

*681 As argued by Lakeland, the Senate's failure to utilize Lakeland's municipal boundary split the city into two pieces. Lakeland asserts that the western piece consists of approximately 40.9 square miles, contains 63,292 citizens, and is included in District 24 (old District 21). The eastern piece consists of approximately 33.8 square miles, contains 34,130 citizens of Lakeland and is included in District 16 (old District 15). In addition, the southwest portion of Lakeland also borders District 26 (old District 17), but that district does not dissect any part of Lakeland.

The below map from the Lakeland's brief depicts graphically the split of Lakeland:

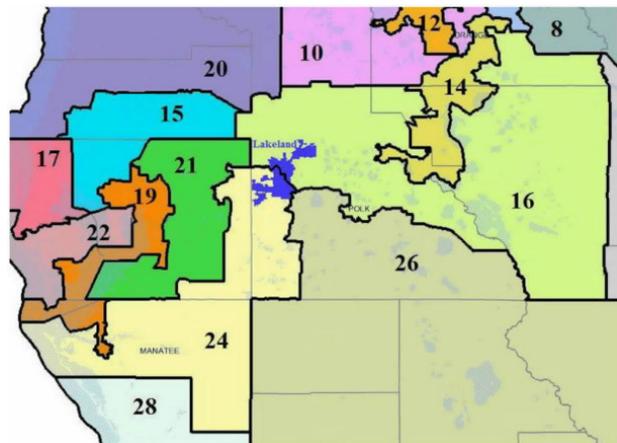


As described in Lakeland's brief:

Senate District 24 includes portions of western Polk and eastern Hillsborough counties, along with a substantial majority of Manatee County. Beginning in the northwest corner of the district in eastern Hillsborough County, the district includes *all* of the municipal boundaries of Plant City. Heading approximately ten (10) miles east from Plant City into western Polk County, *the northeastern corner of the district boundaries cuts directly through the center of the City of Lakeland, taking the more populated southwestern portion of the City, while leaving the northeastern half behind.* Heading south from Plant City and Lakeland, the district captures an approximately fifteen (15) to twenty (20) mile wide swath of mostly rural land in eastern Hillsborough and western Polk counties, widening on the Hillsborough side just before

the Manatee County border. Upon *682 reaching the southern borders of Polk and Hillsborough counties, the district expands to include virtually all of Manatee County. The district boundaries follow the entire eastern, western, and southern borders of Manatee County, with only a small portion in the northwest of the county omitted from this district. Along the Manatee County coast, the district captures the entire city limits of several beachfront cities, including Anna Maria, Holmes Beach, and Bradenton Beach, and the vast majority of Bradenton and Palmetto. Overall, Senate District 24 is approximately forty-five (45) miles wide at its widest point (the entirety of Manatee County), with a maximum height of approximately fifty-five (55) miles (from Lakeland to the southern border of Manatee County).

The below map depicts the City of Lakeland in context of the surrounding districts (Lakeland is on the border between Districts 16 and 24, near the center of the map):



While Lakeland asserts that the Senate plan does not comply with [article III, section 21\(b\)](#), because it failed to utilize its municipal boundary, the Florida Constitution does not require the Legislature to use every municipal boundary. The requirement of [section 21\(b\)](#) is that the Legislature should utilize political and geographical boundaries where feasible.

As we discussed in our analysis of this standard, unlike the House's approach, the Senate failed to adhere to any consistent definition of "political and geographical boundary." This is especially evident because in the case of District 24, the Senate placed part of inland Lakeland with the coastal communities of Manatee County, whereas in Districts 1 and 3, the Senate justified the split of five counties by claiming it wanted to keep the coastal communities together.

***683** The only explanation for the splitting of Lakeland on this record occurred during the Senate floor debate when a senator inquired as to why the City of Lakeland had been divided. In response, the Chair of the Senate Committee on Reapportionment replied that the Senate's first consideration was creating two minority districts in Orlando and one minority district in Tampa and from there, he described the various boundaries of the district including those places where the political and geographical boundaries were utilized. He concluded, stating:

In redistricting as you have suggested in your question requires us to balance priorities and this area of the state as you have suggested does represent a convergence and a reconciliation of many different priorities.... And I think you make an excellent argument ... that we could have done that, but at this point any change to this part of the region would have ripple [effects] throughout the entire area and in the bordering districts, and we believe that this arrangement that is in the proposal represented the best reconciliation of priorities.

Because the Senate operated under an inconsistent definition of "political and geographical boundaries" and did not have the benefit of this Court's interpretation of this important constitutional requirement, we conclude that when the Senate drew this portion of the plan, it did so with an incorrect understanding of both compactness and utilizing political and geographical boundaries. Also, to the extent that the ripple effect referred to was a result of concerns for minority protection, because no functional voting analysis was undertaken, the Senate's conclusions as to that constitutional principle are questionable. Because we are declaring the

Senate plan invalid based on a number of reasons, the Senate will have the opportunity to review Districts 16 and 24 and, after applying the correct definitions of these terms, determine whether it is feasible to utilize the municipal boundaries of Lakeland.

e. Conclusion as to the Senate Plan

We hold that the Senate plan is invalid. In doing so, we consider the fact that the Senate failed to conduct a functional analysis as to regression in order to properly determine when, and to what extent, the tier-two requirements must yield to avoid conflict with Florida's minority voting protection provision. Moreover, as to the requirements of compactness and utilization of existing boundaries, the Senate's expansive interpretations—interpretations we reject—and inconsistent use of these standards undermined the purpose of these requirements. Additionally, we conclude that the Senate plan is rife with objective indicators of improper intent.

We have examined and declared Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 to be in violation of constitutional requirements. We have also expressed our concerns with respect to the City of Lakeland. Finally, we declare the numbering scheme to be invalid because it was intended to benefit incumbents by making them eligible to serve for longer periods of time than they would have otherwise been eligible to serve. Accordingly, the Senate plan does not pass constitutional muster, and it is our duty under the Florida Constitution to declare it invalid.

IV. CONCLUSION

The Fair Districts Amendment changed the constitutional framework for apportionment, introducing significant reforms in the drawing of legislative districts. Before the passage of the Fair Districts Amendment in 2010, there is no question that the House and Senate plans would have passed constitutional muster and ***684** both would have been validated by this Court.

The citizens, through our state constitution, have now imposed upon this Court a weighty obligation to measure the Legislature's Joint Resolution with a very specific constitutional yardstick. The constitutional imperatives set forth in [article III, sections 16 and 21, of the Florida Constitution](#) are the instructions given to the Legislature

by the citizens, mandating how apportionment plans are to be drawn. These instructions are a further expression of the will of this state's citizens to ensure that their right to elect representatives is not frustrated as a result of partisan favoritism or incumbent protection.

The citizens have expressed their will, requiring the Legislature to “redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations” and “to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts ... are avoided.” *Standards for Establishing Legislative Dist. Boundaries*, 2 So.3d at 181, 187–88 (plurality opinion). The new constitutional provisions seek to level the playing field in how legislative districts are drawn. These mandates are specific, and the citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in [article III, sections 16 and 21](#). A failure to define these constitutional imperatives in a manner consistent with the will of the voters would frustrate the intended purpose of this new amendment.

We conclude that the challengers have demonstrated that the Senate plan, but not the House plan, violates the constitutional requirements. We therefore declare the Senate plan constitutionally invalid and the House plan constitutionally valid. The language of Senate Joint Resolution 1176 establishes that the Legislature intended the Senate and House plans to be severable from each other in the event either plan was held invalid. *See* SJR 1176, § 7, at 669.

The Court recognizes that this opinion represents the first time since the passage of the Fair Districts Amendment that this Court has judicially interpreted the newly added constitutional provisions of [article III, section 21](#). While we commend the Legislature for its efforts to interpret these standards, we also acknowledge that the Legislature lacked the benefit of our guiding construction. This Court understands that its obligations are not just to rule on the facial validity of the standards in this case, but to ensure that this decision charts a reliable course for the Legislature and the judiciary to follow in the future.

We have interpreted each of the new standards in this opinion, which are set forth in the two tiers of [article III, section 21\(a\), \(b\)](#). The first tier, contained in [section 21\(a\)](#), lists the

following three requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. We have explained as follows with respect to these standards. The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. By its express terms, Florida's ***685** constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. The minority voting protection provision imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice. Finally, districts must be contiguous.

The second tier, contained in [section 21\(b\)](#), lists the following three requirements: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts shall utilize existing political and geographical boundaries where feasible. These requirements circumscribe the Legislature's discretion in drawing district lines to guard against gerrymandering, requiring it to conform to traditional redistricting principles. The Legislature is required to make districts as nearly of equal population as is practicable, but deviations from equal population may be based on compliance with other constitutional standards. Compactness refers to the shape of the district; the goal is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements. As to utilizing political and geographical boundaries, we accept the House's view of geographical boundaries as those that are easily ascertainable and commonly understood, such as “rivers, railways, interstates, and state roads.” Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards. Importantly, the extent to which the Legislature complies with the requirements contained in tier two serves as an objective indicator of impermissible legislative purpose proscribed under tier one (e.g., intent to favor or disfavor a political party or an incumbent).

Because we have now defined Florida's new constitutional standards through this opinion, this Court has provided the Legislature with parameters for the application of the standards to the apportionment plan. Through our interpretation and review, we have attempted to provide the Legislature with direction as to the specific constitutional problems that we conclude have been proven and to the general problems with the entire Senate plan, including the renumbering of the districts. As the next phase of this apportionment process begins, we are confident the Legislature will apply these standards in a manner consistent with the interpretation we have heretofore provided, keeping as its goal a Senate plan that would pass constitutional muster. The Court views its constitutional obligation of drawing a plan to be the course of last resort.

In accordance with [article III, section 16\(d\)](#), the Governor and the Legislature must now follow the procedures enumerated therein, which govern the process that ensues when the Supreme Court of Florida declares an apportionment plan to be constitutionally invalid. The Legislature is now tasked by the Florida Constitution with adopting a new joint resolution of apportionment conforming to the judgment of this Court. Because we have declared the House's apportionment plan to be valid, the only plan that needs to be redrawn by the Legislature is the Senate plan.⁶⁴

*686 The Coalition has requested that this Court provide “clear instructions as to how to remedy the breach” if the Court were to find the plans to be “non-compliant.” However, the Court's role at this time is not to dictate the apportionment plan that the Court would draw, but to provide the Senate with sufficient guidance in our interpretation of the standards and our application of those standards.

We have held that Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid. The Legislature should remedy the constitutional problems with respect to these districts, redrawing these districts and any affected districts in accordance with the standards as defined by this Court, and should conduct the appropriate functional analysis to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries. As to the City of Lakeland, the Legislature should determine whether it is feasible to utilize the municipal boundaries of Lakeland after applying the standards as defined by this Court. In redrawing the apportionment plan, the Legislature is by no

means required to adopt the Coalition's alternative Senate plan. Finally, we have held that the numbering scheme of the Senate plan is invalid. Accordingly, the Legislature should renumber the districts in an incumbent-neutral manner.

Given the absolute urgency in complying with the strict time limits set forth in [article III, section 16\(c\)](#), stating that this Court “shall enter its judgment” within thirty days from the filing of the Attorney General's petition, our prior practice when determining the validity of the Legislature's joint resolution of apportionment has been to not allow a motion for rehearing.

In accordance with [article III, section 16\(c\)](#), of the [Florida Constitution](#), the Court enters this declaratory judgment declaring the apportionment plan of the House of Representatives as contained in Senate Joint Resolution 1176 to be constitutionally valid under the Florida Constitution and declaring the apportionment plan of the Senate as contained in Senate Joint Resolution 1176 to be constitutionally invalid under the Florida Constitution. As contemplated by the Florida Constitution, in accordance with [article III, section 16\(d\)](#), the Legislature now has the task to “adopt a joint resolution conforming to the judgment of the supreme court.” [Art. III, § 16\(d\), Fla. Const.](#)

No motion for rehearing shall be entertained. This case is final.

It is so ordered.

[LEWIS, QUINCE, LABARGA, and PERRY, JJ.](#), concur.

[LEWIS, J.](#), concurs with an opinion.

[LABARGA, J.](#), concurs with an opinion.

[PERRY, J.](#), concurs with an opinion.

[CANADY, C.J.](#), concurs in part and dissents in part with an opinion, in which [POLSTON, J.](#), concurs.

[LEWIS, J.](#), concurring.

While I concur with the majority decision, I write separately to address two aspects of this process, the second of which also applies to the entire reapportionment process in general. First, I commend the parties for superb briefing of the issues, as well as the professional demeanor and articulate presentations during oral argument. The quality of legal

representation has been exemplary and served to crystallize the issues presented to enable this Court and the parties to engage in a thoughtful and intelligent dialogue.

*687 Second, it must be recognized that the elements and standards that must be utilized in review of legislative plans for reapportionment have been expanded dramatically by the recent adoption of [article III, section 21 of the Florida Constitution](#). Thus, the redistricting process now involves a complex series of elements that this Court must evaluate to determine the validity of reapportionment plans. We have the constitutional obligation to conduct, to the best of our ability, the heightened review contemplated and expressed by the citizens of Florida who voted to add this amendment to our constitution. Further, in this first review under the new constitutional standards, we necessarily must engage in an analysis and application of those new standards in the context of this redistricting. However, despite our duty to review legislative reapportionment plans for constitutional compliance, I write to again reiterate and emphasize that this Court is limited to resolving only *facial* challenges to such plans.

In my concurrence to the majority decision approving the 2002 legislative reapportionment plans, I presented the historical background of the drafting of the 1968 Florida

Constitution. See   [In re Constitutionality of House Joint Resolution 1987](#), 817 So.2d 819, 834–36 (Fla.2002) (Lewis, J., concurring). This history revealed the intent of the drafters at that time in two respects with regard to the scope of this Court's review pursuant to [article III, section 16 of the Florida Constitution](#). First, the Constitutional Revision Commission sought to remove the bulk of litigation with regard to redistricting from the federal court system and to place it within the state court system. See   *id.*

(Lewis, J., concurring).⁶⁵ Second, and more pertinent to the plan we consider today, this history revealed that beyond the consecutive and territorial requirements enunciated in [section 16\(a\)](#), the drafters envisioned the scope of this Court's review of legislative reapportionment plans to be limited solely to whether the plans complied with the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See   [House Joint Resolution 1987](#), 817 So.2d at 834–36 (Lewis, J., concurring). For this reason, the strict time limit of thirty days could be considered facially reasonable for this Court to complete the review required by [article III, section 16](#), as contemplated by the drafters.

In my earlier concurrence, I addressed this structural temporal concern and concluded that the perception of the public with regard to this Court's ability to review plans of reapportionment conflicted with the time and structural limits placed upon this Court by the Florida Constitution:

Based upon the knowledge and expectations of the drafters, there would be no need for this Court to engage in the acceptance and adversarial testing of evidence, fact finding, or any other significant factual examinations of reapportionment plans.

In truth, this Court is not designed, nor is it structured, to engage in these types of activities....

*688 The issue today, therefore, is how this Court should address the collision of the framework of limited review enacted by the drafters of the 1968 Constitution, and the factual depth and complexity of the challenges brought by the opponents of the 2002 reapportionment plan. Certainly, the opponents' claims are based upon allegations of extraordinarily involved, fact-specific wrongs effected by the Legislature in drawing the proposed legislative districts. To be sure, advancing technology has also driven the process. This Court, however, is constrained by the limitations and parameters of [article III, section 16\(c\)](#). Due to the time restrictions and structural limitations imposed by the Florida Constitution, and absent clear error, *we have been afforded neither the constitutional time nor constitutional structure to engage in the type of fact-intensive, intricate proceedings required to adjudicate the vast majority of the claims presented by the opponents here or the responses of the legislative bodies. The 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 835–36 (Lewis, J., concurring) (emphasis added). Although ten years have elapsed since I first suggested the concerns with regard to fact-intensive challenges to reapportionment plans, nothing has improved and, indeed, with the addition of multiple new constitutional requirements than were mandated ten years before, *see art. III, § 21, Fla. Const.*, my concerns are equally, if not more, applicable in 2012.

I authored the opinion that authorized that the amendment that delineated additional standards for legislative redistricting be placed on the 2010 election ballot. *See Advisory Op.*

to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So.3d 175 (Fla.2009) (plurality opinion). This amendment, which has now become [article III, section 21 of the Florida Constitution](#), was intended to rectify the absence of constitutional standards to safeguard against alleged political gerrymandering and to respect geographic boundaries and compactness. Notably, in 2002, this Court rejected an equal protection challenge to a redistricting plan that at that time divided Marion County into four Senate districts. See *Florida Senate v. Forman*, 826 So.2d 279, 280 (Fla.2002). This Court reversed the circuit court's determination that the Senate plan constituted an impermissible political gerrymander. In reaching this decision, the Court noted that, unlike other state constitutions, the Florida Constitution contained no provisions requiring that the Legislature draw districts that treat similarly situated communities in a similar matter or give consideration to local boundaries:

The appellees' actual complaint is that the Senate plan should be declared unconstitutional because the Legislature ignored traditional principles of redistricting such as compactness and preservation of communities of interest.... However, in  [House Joint Resolution 1987](#), this Court specifically rejected this type of claim: “[N]either the United States nor the Florida Constitution requires that the Florida Legislature apportion legislative districts in a compact manner or that the Legislature preserve communities of interest.”  [817 So.2d at 831](#). See also  *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (“[T]raditional districting principles such as compactness ... and respect for political subdivisions ... are important not because they are constitutionally required—they are not....”); [ *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, *689 263 So.2d 797, 801 (Fla.1972)] (“[T]here is no requirement that district lines follow precinct or county lines.”).

Id. at 282.

The 2010 amendment reversed those legal principles and incorporated political and geographic boundary and compactness standards, along with others, into the Florida Constitution. See *Establishing Legislative Dist. Boundaries*, 2 So.3d at 181 (“The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination,

while respecting geographic considerations.”). By adopting additional redistricting standards to the Florida Constitution, it is clear that the citizens of Florida intended that this Court review legislative apportionment plans for constitutional compliance in greater detail than ever before. See *id.* at 183 (noting that [article III, section 21](#), “change[s] the standard of review to be applied when either the attorney general seeks a ‘declaratory judgment’ with regard to the validity of a legislative apportionment, or a redistricting plan is challenged”).

It was the decision of the citizens of Florida to implement the desired changes to our state constitution through the constitutional initiative process. We must never understate that the Florida Constitution belongs to the people of Florida. Therefore, we as a Court are required to conduct the heightened review envisioned by the citizens of our State when they voted to amend our state constitution. Thus, *to the extent possible*, we must evaluate the legislative reapportionment plans to determine whether they comply with the standards delineated in [article III, section 21](#), e.g., whether the plans were drawn with the intent to favor or disfavor a political party or an incumbent; whether the plans were drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process; whether the plans diminish the ability of language or racial minorities to elect representatives of their choice; whether the districts in the plans are compact; whether the plans utilize existing political and geographical boundaries where feasible; and whether the districts are as nearly equal in population as is practicable.

At the same time, I emphasize, as I did in 2002, that our current constitutional structure, with the thirty-day time limitation, does not permit this Court to develop, consider, and address all factual challenges to the legislative plans. Challenges that require expert testimony and complex factfinding are neither workable nor appropriate in this Court. Nothing in [article III, section 21](#), expanded the authority or jurisdiction of this Court to adjudicate as-applied challenges in the redistricting process. Were the opposite true, challenges that may warrant and should receive adversarial testing in a judicial forum would be relegated to hollow legal arguments without substance before this Court. The deadline and structural limitations placed upon this Court would inevitably result in the frustration of an intelligent, purposeful review of any factual challenge to reapportionment plans proposed by the Legislature.

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. See  [House Joint Resolution 1987](#), 817 So.2d at 824 (emphasizing that the Court would only pass “upon the facial validity of the plan and not upon any as-applied challenges”). In  *690 *Brown v. Butterworth*, 831 So.2d 683 (Fla. 4th DCA 2002), the Fourth District Court of Appeal articulated the distinction between a facial challenge to a reapportionment plan and an as-applied challenge:

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(VRA).

Id. at 686 (footnote omitted) (emphasis added). In the context of a challenge to a statute, the First District Court of Appeal explained that, “A facial challenge considers only the text of the statute, *not its application to a particular set of circumstances*, and the challenger must demonstrate that the statute’s provisions pose a present total and fatal conflict with applicable constitutional standards.” *Ogborn v. Zingale*, 988 So.2d 56, 59 (Fla. 1st DCA 2008) (emphasis added) (quoting  *Cashatt v. State*, 873 So.2d 430, 434 (Fla. 1st DCA 2004)).

Thus, our proper scope of review encompasses those challenges that may be determined from the reapportionment maps themselves and objective statistical data before us. During these expedited proceedings, modern technology has provided this Court with an abundance of information in a very short period of time. Nevertheless, despite the ease of access to data, the constitutional time limit under which this Court is constitutionally required to operate continues to provide a less than optimum forum to address for the

first time extremely complex issues related to whether the reapportionment plans comply facially with the standards articulated in [article III, section 21 of the Florida Constitution](#).

However, because we have been provided sophisticated technology, we are able to recognize patterns—or a lack thereof—when we evaluate the facial validity of the plans before us. We are also able to draw conclusions based upon those observations. The majority decision today reflects that while a variety of different rationales and concepts may be available for application in redistricting, the rationales or concepts actually used must be applied *consistently*. Applying a particular rationale in one part of Florida, but a completely different rationale in another part of the state, creates legitimate constitutional questions as to the boundaries drawn and the justifications for those boundaries as asserted by the drafters. Where a reapportionment plan adheres consistently to generally acceptable rationales and concepts with regard to the drafting of district boundaries, that plan is less likely to be called into question based upon a facial examination of the maps and objective statistical data.

The dissent contends that the Florida Constitution does not require consistency in the drawing of legislative reapportionment maps, and consistency need not be considered in the redistricting process. However, the dissent overlooks that where there is a marked absence of consistent logic in the drawing of legislative boundaries, the asserted reasons for constitutional deviations become excuses to avoid the standards mandated by our constitution. In this way, a lack of consistency directly contravenes the legitimacy of a plan.

Today’s decision also demonstrates that terms used within the newly adopted constitutional standards need definitional parameters. In *Establishing Legislative District Boundaries*, we stated the following with regard to the constitutional standard *691 that “districts shall, where feasible, utilize existing political and geographical boundaries”:

Although the phrase “political and geographical boundaries” used in the proposed amendments may be technically broader than the “city, county, and geographical boundaries” phrase used in the [ballot] summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms “city” and “county” are utilized in the summaries because they are more understandable to the average citizen than the legal concept of “political” boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly

what a “political boundary” may encompass. See [Askew v. Firestone](#), 421 So.2d 151, 155 (Fla.1982) (noting that voters “must be able to comprehend the sweep of each proposal” (quoting [Smathers v. Smith](#), 338 So.2d 825, 829 (Fla.1976))). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such as one senate district that was challenged in [Resolution 1987](#), 817 So.2d at 824–25—are avoided. Since the “city” and “county” terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

[2 So.3d at 187–88](#) (footnote omitted). The majority decision further clarifies that the term “geographical boundaries” does not encompass every tree, creek, railroad track, or road—no matter how small or obscure. Instead, the boundaries relied upon by legislators to draw district boundaries must be both logical and objectively reasonable.

The dissent asserts that the decision of the majority to reject the Senate reapportionment plan is based upon pure speculation and conjecture. I disagree and find that such political rhetoric does not assist an intelligent analysis and discussion. In the majority decision today, this Court rejects the Senate plan based *only* upon a facial examination of the reapportionment maps and the objective data provided. Therefore, contrary to the contention of the dissent, the Court has properly exercised judicial restraint in a manner that was both warranted and constitutionally necessary. It is obvious from the face of the maps and the data in our record that serious violations of [article III, section 21 of the Florida Constitution](#) have occurred. Moreover, we have a constitutional duty to recognize these violations and require that the Senate plan be amended so that the new standards adopted by the citizens of Florida are effectuated. Indeed, we would be derelict in our obligation under the Florida Constitution if we were to ignore these violations. Contrary to the suggestion by the dissent, there is no joy or pleasure in this exercise; we follow the constitution as the will of the people of Florida.

In conclusion, I recognize that the Florida Constitution of 2012 contains more elements and standards for redistricting than it did a decade ago, and the citizens of Florida expect

this Court to conduct a more detailed and probing review of legislative plans of reapportionment than ever before. While we as a Court must fulfill our constitutional obligations to the citizens of Florida to the fullest extent possible, our review must not extend beyond [*692](#) that which our constitutional structure and the limited time allotted under the constitution permits. Today, this Court has attempted to maintain that delicate, proper balance and conducted only a limited facial review of the joint resolution through examination of the reapportionment maps and objective statistical data. Therefore, I concur with the decision of the majority to approve the plan submitted by the Florida House of Representatives, but reject the plan submitted by the Florida Senate.

LABARGA, J., concurring.

I wholeheartedly concur with the scholarly and well-reasoned majority opinion which, in painstaking detail, fulfills the mandate set forth by the Constitution of Florida and its new redistricting amendment. It is important to keep in mind that the majority opinion approved the House plan because it met constitutional muster. It disapproved the Senate plan, not in haphazard fashion, but after carefully examining each district and detailing the reasons for disapproving specific districts. I write primarily to respond to the dissent's position that the thirty-day period provided for this proceeding by [article III, section 16](#), does not afford this Court sufficient opportunity to examine the plans.

While it would have been preferable to have the luxury of more time, we were able, given advances in technology, to carefully examine both plans and make a facial determination based on this undisputed data within the time allotted by the constitution. It would be a complete and unjustified derogation of our constitutional obligation if we ignore our constitutional mandate to examine the plans to determine whether they meet constitutional muster by simply saying we do not have the time. Moreover, it is illogical to conclude that we should ignore a clear mandate now contained in the Florida Constitution to address these new provisions, especially where a different process is not available within the constitutional time frame. This reasoning renders the new constitutional amendment essentially meaningless and runs counter to the intent of [article III, section 16\(c\)](#), that the validity of the plans be timely determined to provide for a more orderly election process.

The dissent also states that we conduct this constitutional proceeding as an appellate court and should therefore avoid

consideration of factual matters. This ignores the provision in [article III, section 16\(c\)](#), that requires this proceeding to be brought as an original proceeding in this Court. In this original proceeding, we have before us a plethora of census and other undisputed data upon which to evaluate the actions of the Legislature in creating these plans. Based on this data, the majority has, in a careful and considered fashion, determined that the House plan is valid and that the Senate plan suffers constitutional flaws that require us to declare it invalid. Our responsibility to the citizens to faithfully carry out our constitutional duty to the fullest extent possible—with the data and resources available to us in the proceeding dictated by the constitution—is made more pressing by the additional standards now contained in the newly enacted Fair Districts amendment. For these reasons, I write to concur.

PERRY, J., concurring.

I concur fully with my esteemed colleague, Justice Pariente, but write to highlight concern regarding the appearance that “the Legislature is utilizing its interest in protecting minority voting strength as a shield.” Majority op. at 626. While nothing in the record before us has proven that the Legislature so acted, I write to caution against even the appearance of the ***693** Legislature diminishing the ability of minority voters to elect effective representation. The appearance of impropriety is as bad as impropriety itself. I am fearful that we have cloaked ourselves in a permissive standard of review where the Legislature need not demonstrate its adherence to each of the new constitutional mandates.

It concerns me that under the guise of minority protection, there is—at the very least—an appearance that the redistricting process sought to silence the very representatives of the people the Legislature indicates it is trying to protect. ⁶⁶ For example, during floor debate one such representative, Senator Arthenia Joyner, rose in opposition to the redistricting plan, stating:

I believe that [the reapportionment plan] was prepared in violation of Florida's Redistricting standards. Specifically I believe the Legislature is poised to use the pretext of minority protection to advance an agenda that seeks to preserve incumbency and pack minority seats in order to benefit a particular party.

Packing a district with more minority voters than is necessary to create an opportunity to elect representatives of choice bleaches surrounding districts and limits the influence of minorities overall.

....

Our maps actually fail to create new opportunities for minorities to participate in the political process and elect their representatives of choice. While this plan does guarantee a certain number of black Legislators will be elected, it also ensures that we will be in a perpetual minority in the House and the Senate with little ability to advance an agenda that will benefit the very people we represent.

I believe this approach will, as it has in the past, continue to diminish the ability of our communities of color to impact the legislative process. The Legislature has shown a clear indifference to many of the issues we have fought for because we are a part of such a small minority. They just do not have to listen to our constituents.

....

... Ironically at precisely the same time so many were declaring their support of the Voting Rights Act. I am not aware of a single member of the Legislature who spoke out against the current Secretary of State's efforts to declare Section V of the Voting Rights Act inapplicable to the regions in Florida that have had heightened histories of racism.

Having thus expressed her concerns that minorities were packed into districts in numbers greater than necessary for them to elect the representative of their choice, thereby limiting their ability to influence adjacent districts, she was told “tough luck.”

Likewise, Senator Nan Rich rose in opposition, stating eloquently:

Two years ago ... the voters could not have spoken louder or with more clarity. They said they were tired of elected officials drawing seats that favored themselves or their party of choice and their voices could not have been stronger.

In an election when our Governor failed to get even a majority of the ***694** electorate, Floridians agreed on the Fair District standards by 63 percent, yet we are here today considering maps that I believe are drawn in violation of Fair District standards.

....

While everybody professed their great desire to support minority voters, I agree with my friend, Senator Joyner, who believes that for too long the so-called protection of minority voters has been used by this Legislature as a pretext to draw seats that preserve incumbency and advance the interest of a particular political party.

Bleaching seats in the name of minority protection is a practice that must be resisted. It ultimately diminishes the impact minority voters have in the governance of this state and makes it easy for communities of color to be neglected by the vast majority of elected officials.

....

In spite of all of that I believe the maps that are being passed out today look a lot like the ones the voters were hoping would be gone when they passed Amendment 6. This plan still protects incumbents. It still gerrymanders, it still has districts that meander around the state with no apparent logic and it will still very likely result in a Congressional delegation that is grossly disproportionate to the partisan makeup of this state.

Certainly, the Senate was tasked with maintaining the delicate balance between righting an historical, racist wrong and moving forward into an era of racial equality where one person, one vote is not quantified by the color of the voter. However, as stated by Justice Pariente:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by

our state legislatures demands close judicial scrutiny.

Majority op. at 627 (quoting [Shaw](#), 509 U.S. at 657, 113 S.Ct. 2816).

Further, while I also agree that “a minority group's ability to elect a candidate of choice depends upon more than just population figures,” majority op. at 625, 627, I cannot agree that there was a rational basis for the Senate to decide to turn a blind eye to population data when drawing their plan, *see* concurring in part and dissenting in part op. at 695. By refusing any attempt to draw more compact districts while maintaining the required racial proportions, there is at least the appearance that the Senate thumbed its nose at the will of the people. This Court finds that on this record, “the Senate plan does not facially dilute a minority group's voting strength or cause retrogression under Florida law,” majority op. at 655; however, when the outcome appears to be antithetical to minority interest, I am skeptical when the burden is not on the Legislature to demonstrate that despite such appearance, the underlying intent is ultimately valid. Because the Senate now has “the benefit of our opinion when drawing its plan[.]” majority op. at 656, it is my hope that there is no further appearance of misuse of Florida's minority voting protection provision.

*695 With all due respect, Justice Canady's reliance on [Perry](#) is misplaced. Significantly, there the federal court was tasked with redrawing the districts for the State of Texas; it was not a state court review under the state constitution. Secondly, the claims were presented under the Federal Voting Rights Act and the United States Constitution. The Supreme Court was balancing the right of the State of Texas to undergo the redistricting process without substituting its policies for that of the United States Supreme Court. [Perry](#), 132 S.Ct. at 941 (“This Court has observed before that ‘faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying’ a state plan—even one that was itself unenforceable—‘to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.’”) (quoting [Abrams v. Johnson](#), 521 U.S. 74, 79, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997)).

Here, we are tasked with reviewing the reapportionment plan by interpreting Florida's new constitutional minority protection provision. The people of Florida voted to add these new redistricting mandates. They “could not have spoken louder or with more clarity.” As recognized by the majority, the citizens of Florida have entrusted us to interpret and apply these constitutional standards. We cannot simply be a rubber stamp for the Legislature's interpretation of the constitution. We therefore “recognize [] our independent constitutional obligation to interpret our own state constitutional provisions.” Majority op. at 621.

CANADY, C.J., concurring in part and dissenting in part.

I concur in the majority's ruling that the redistricting plan for the House of Representatives is valid, but I dissent from the ruling that the plan for the Senate is invalid. With respect to the Senate plan, I conclude that the opponents have failed to overcome the presumption that a redistricting plan adopted by the Legislature is constitutional. Because it has not been shown that the Legislature's choices in establishing the district lines in the Senate plan are without a rational basis under the applicable constitutional requirements, I would validate that plan.

I.

This Court has recognized that legislative enactments are ordinarily “clothed with a presumption of constitutionality.” *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So.2d 134, 139 (Fla.2008). When the constitutional validity of a legislative enactment is challenged, “[t]o overcome the presumption [of constitutional validity], the invalidity must appear beyond reasonable doubt.” *Id.* (quoting *Franklin v. State*, 887 So.2d 1063, 1073 (Fla.2004)). We applied this presumption of constitutionality in our review of legislative redistricting plans in 1972, when we considered the first case in which we exercised our authority under [article III, section 16 of the Florida Constitution](#). In that decision we specifically acknowledged the controlling principle 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 Senate Joint Resolution No. 1305, 1972 Regular Session (In re Apportionment–1972)*, 263 So.2d 797, 805–06

(Fla.1972) (quoting  *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 772 (1914)). We also “emphasize[d] that legislative reapportionment is primarily a matter for legislative consideration and determination” *696 and that “the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.”  *Id.* at 799–800.

In 2002—in our most recent decision under [article III, section 16](#)—we rejected the argument “that the Legislature's joint resolution of apportionment is not presumptively valid.”

  *In re Constitutionality of House Joint Resolution 1987 (In re Apportionment–2002)*, 817 So.2d 819, 825 (Fla.2002). We unequivocally reaffirmed the view we adopted in 1972, holding “that the joint resolution of apportionment identified in [article III, section 16, Florida Constitution](#), upon passage is presumptively valid.”   *In re Apportionment–2002*, 817 So.2d at 825.

In our 2002 decision we also stated that under [article III, section 16](#), our review “is extremely limited.”   *In re Apportionment–2002*, 817 So.2d at 824. Recognizing the inherent limitations of a review process conducted by an appellate court during a thirty-day period, we acknowledged that we can “only pass upon the facial validity of the plan.”

  *Id.* We specifically held that the [article III, section 16](#), “proceeding before this Court is not the proper forum to address such a fact-intensive claim” as that presented by a claim under the Voting Rights Act of 1965,  42 U.S.C. §§ 1973–1973q (2006), or by a claim of political gerrymandering.   *In re Apportionment–2002*, 817 So.2d at 831. The majority of the panel took the view that under [article III, section 16](#), the Court had “not been afforded a structure to competently address claims that cannot be determined from the [redistricting] plan itself.”   *In re Apportionment–2002*, 817 So.2d at 836 (Lewis, J., concurring).

With today's decision, the majority of this Court effectively abrogates these precedents that recognized the circumscribed nature of the thirty-day review process under [article III, section 16](#), and the presumption of constitutionality with which a legislative redistricting plan is clothed. The Court

has now transformed the nature of the constitutional review process and cast aside the presumption of constitutionality. And it has done so in the absence of any argument from the opponents of the redistricting plan that we should recede from our precedent applying the presumption of constitutionality to redistricting plans.

The majority's departure from our precedents is not justified by the adoption in 2010 of [article III, section 21, Florida Constitution](#), which created certain additional “[s]tandards for establishing legislative district boundaries.” [Art. III, § 21, Fla. Const.](#) Although [section 21](#) unquestionably altered the scope of the issues to be considered in our review of a legislative redistricting plan, nothing in [section 21](#) changed the structure or nature of the thirty-day review process previously existing under [section 16](#). The text of [section 21](#) does not explicitly address the judicial review process. And it is unwarranted to conclude that [section 21](#) implicitly altered the structure or nature of the existing constitutional review process.

It may well be that some of those who supported the adoption of [section 21](#) desired to transform the redistricting process from what this Court has previously acknowledged it to be—“primarily a matter for legislative consideration and determination”—into a matter controlled by the largely discretionary rulings of the majority of this Court. [In re Apportionment—1972](#), 263 So.2d at 799–800. A different constitutional amendment to effect such a transformation in the redistricting process [§ 697](#) might have been proposed for the consideration of Florida's voters. But the voters who adopted [section 21](#) could not have known—from the text of the proposed amendment, much less the ballot summary—that such a transformation would be brought about by the adoption of [section 21](#).

Weighty reasons support adhering to our precedent establishing that redistricting plans adopted by the Legislature are presumed to be constitutionally valid and that this Court should “act with judicial restraint” in our review of such plans. [In re Apportionment—1972](#), 263 So.2d at 800. In [Perry v. Perez](#), — U.S. —, 132 S.Ct. 934, 941, 181 L.Ed.2d 900 (2012)—a case that was decided in January of this year presenting claims under the Voting Rights Act and the United States Constitution—the Supreme Court of the United States observed that “experience has shown the difficulty of defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches.”

The Supreme Court recognized the importance of ensuring that the lower court act to vindicate federal rights “without displacing legitimate state policy judgments with the court's own preferences.” [Id.](#) Although these observations in [Perry](#) are no doubt based in part on federalism concerns, it is clear that [Perry's](#) concern about the “difficulty of defining neutral legal principles” to ensure that the “policy judgments” of the “the elected branches” are not displaced by judicial “preferences” is applicable to not only federal but also state judicial intervention. [Id.](#)

The concerns voiced by the Supreme Court in [Perry](#) echo concerns articulated in prior decisions where the Supreme Court considered the definition of “discernible and manageable standards by which political gerrymander cases are to be decided.” [Davis v. Bandemer](#), 478 U.S. 109, 123, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Although a narrow majority of the Supreme Court has recognized the possibility of articulating such standards, a majority of the Supreme Court has never been able to agree on a particular test or set of tests.

In [Vieth v. Jubelirer](#), 541 U.S. 267, 306–07, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring in the judgment), Justice Kennedy recognized the “obstacle[]” presented by the continuing “absence of rules to limit and confine judicial intervention” in the adjudication of political gerrymandering claims: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” In his opinion for the plurality in [Vieth](#), Justice Scalia emphasized the importance of a solid and demonstrable criterion “to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.” [Id.](#) 541 U.S. at 291, 124 S.Ct. 1769 (plurality).

“The term ‘political gerrymander’ has been defined as ‘[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape to give one political party an unfair advantage by diluting the opposition's voting strength.’ ” [Id.](#) at 271 n. 1, 124 S.Ct. 1769 (quoting

Black's Law Dictionary 696 (7th ed. 1999)). A political gerrymandering claim is thus akin to a claim under section 21 that a district has been “drawn with the intent to favor or disfavor a political party or an incumbent.” Art. III, § 21(a), Fla. Const. And the concerns regarding “discernible and manageable standards,” *Bandemer*, *698 478 U.S. at 123, 106 S.Ct. 2797, to be utilized by judges in determining the validity of political gerrymandering claims are directly applicable to the context of an improper intent claim under section 21.

The justification for the rule of deference embodied in the presumption of constitutionality is not vitiated by the adoption of the particular standards contained in section 21. As the foregoing discussion shows, the justification for deference has a firm, widely acknowledged grounding with respect to the portion of section 21(a) that prohibits conduct akin to the conduct at issue in a political gerrymandering claim. The justification for deference also has a compelling basis with respect to the parts of section 21(b) concerning compactness and the use of existing political and geographical boundaries. Those standards do not embody inflexible, determinate requirements eliminating the exercise of legislative policy judgments in making the choices necessary to draw district lines.⁶⁷ By their very nature, those standards permit a range of choice by the Legislature in the drawing of district boundaries. Given that reality, the application of nondeferential review to the plan drawn by the Legislature after the Legislature has “weighed and evaluated” the proper balancing of the different “criteria and standards” of section 21(b), creates the danger of “displacing legitimate [legislative] policy judgments with the court's own preferences.” *Perry*, 132 S.Ct. at 941.

The circumscribed nature of the thirty-day constitutional review process provides an additional compelling reason for not abandoning the rational-basis review required by our precedent and the acknowledgement that our review “is extremely limited.” *In re Apportionment–2002*, 817 So.2d at 824. We conduct the constitutional review process as an appellate court without the benefit of any fact-finding proceedings. We can only rely on facts that are undisputed. It is impossible for us to thoroughly evaluate disputed fact-intensive issues. We have previously recognized that the adjudication of claims arising from the provisions of the Voting Rights Act—which are analogous to the provisions of section 21(a) protecting the rights of “racial or language minorities”—often involve a “fact-intensive” inquiry which

cannot be undertaken within the limits of our review pursuant to section 16. *In re Apportionment–2002*, 817 So.2d at 829. We are similarly constrained in the evaluation of factual issues relevant to a determination of improper intent. Given the structural *699 limitations imposed on our review, adherence to the presumption of constitutionality helps ensure that we avoid reliance on suspicion and surmise—rather than adjudicated facts—as a basis for declaring a redistricting plan constitutionally invalid.

These considerations point to the wisdom of adhering to our precedent that clothes a redistricting plan with a presumption of constitutionality and prevents us from declaring a plan invalid unless it is clear that “under any rational view that may be taken of the [redistricting plan], it is in positive conflict with” the requirements of our constitution. *In re Apportionment–1972*, 263 So.2d at 806 (quoting *Bowden*, 64 So. at 772). Failing to adhere to that precedent creates the risk of having our decisions adjudicating the validity of redistricting plans decline into a species of “‘it-is-so-because-we-say-so’ jurisprudence.”⁶⁸

II.

Reasonable questions and concerns can certainly be raised about certain choices the Legislature made in drawing district lines. But the proper analysis of constitutionality cannot be driven by questions and concerns. Instead, under our precedents, the analysis of constitutionality must focus on whether there is a rational relationship between the choices made by the Legislature and the constitutional standards. The majority, however, takes a very different approach than the approach required by our precedents.

The foundation of the majority's decision is constructed from three interrelated elements: (1) the effective repudiation of the presumption of constitutionality and the rational-basis scrutiny it entails; (2) the imposition of judicially created extra-constitutional constraints on the Legislature's utilization of political and geographical boundaries in the drawing of district lines; and (3) conclusions of fact based solely on suspicion and surmise.

The majority acknowledges the presumption of constitutionality but carries out its review of the Senate district plan in a manner that is heedless of the limits imposed by that presumption. The majority thus applies a

strict-scrutiny analysis rather than the rational-basis review required by our precedents.

The majority imposes a requirement to use “consistent” boundaries, majority op. at 656, 663, in the drawing of district lines—a requirement that is nowhere to be found in the text of [section 21](#) and that cannot reasonably be implied from the text. This judicial requirement of “consistent” utilization of boundaries has far-reaching consequences and is subject to no “rules to limit and confine judicial intervention.” [Vieth](#), 541 U.S. 267, 307, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment).

Based on nothing more than suspicion and surmise, the majority concludes that certain district lines were drawn with improper intent—when there is an evident, rational, permissible basis for the drawing of those lines. The majority fails to recognize the structural limitations of our review process, which preclude the adjudication of fact-intensive claims.

The most salient legal consequence of the majority's decision is that we can no longer say that the “primary responsibility for [redistricting] ... rests with the Legislature.” [In re Apportionment—1972](#), 263 So.2d at 800. The most salient practical consequence of the majority's decision is the unsettling of four minority Senate districts *700 —Districts 6, 12, 14, and 34—drawn by the Legislature to ensure compliance with the requirement of the constitution that districts “not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.” [Art. III, § 21\(a\), Fla. Const.](#)

The majority's opinion leaves much in a state of uncertainty. As the majority acknowledges, in their initial brief, the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (“Coalition”) stated that if “this Court finds that any or all of [the constitutional] standards are breached, the non-compliant plans should be returned to the Legislature with *clear instructions as to how to remedy the breach.*” Brief of the Coalition at 16, [In re Joint Resolution of Reapportionment](#), No. SC12–1 (Feb. 17, 2012) (emphasis added). As the discussion to follow shows, the majority has failed to consistently provide such clarity.

III.

I now turn to the grounds relied on by the majority for invalidating the Senate Plan. First, I will address why the majority's decision to invalidate the numbering of Senate districts adopted by the Legislature is unwarranted under [section 21](#). Next, I will discuss the specific districts in the Senate plan with which the majority finds fault. With respect to each of these districts, neither the opponents nor the majority have shown the absence of a rational basis under the constitutional standards for the lines drawn by the Legislature. Finally, I will explain my disagreement with the majority's comments regarding the City of Lakeland's challenge.

Senate District Numbering

I would reject the challenge to the numbering of districts in the Senate plan. [Section 21](#) is a limitation on the power of the Legislature only with respect to “establishing legislative district boundaries.” [Art. III, § 21, Fla. Const.](#) The prohibition on action to “favor or disfavor ... an incumbent” applies only to the manner in which district lines are “drawn.” [Art. III, § 21\(a\), Fla. Const.](#) The numbering of the Senate districts is totally unrelated to any advantage incumbent senators will obtain vis-à-vis challenger candidates. The majority stretches the text of [section 21](#) to reach legislative decisions that are not within the scope of [section 21](#).

Senate Districts 1 and 3

The majority contends that Senate Districts 1 and 3 were drawn without respecting any consistent political or geographical boundary lines and that the districts are not compact. The majority rejects as illegitimate the Legislature's asserted interest in maintaining a coastal community of interest in one district and a rural community of interest in the other district. The majority also asserts that the configuration of the districts shows that they were drawn improperly to favor the incumbent senators from each of the districts. The majority's analysis with respect to these districts illustrates how it has cast aside the presumption of constitutionality and departed from the proper confines of our limited review.

[Section 21](#) provides that “districts shall, where feasible, utilize existing political and geographical boundaries.” [Art. III, § 21\(b\), Fla. Const.](#) This provision does not require

that the Legislature make a choice between using either political boundaries or geographical boundaries. Indeed, the text clearly contemplates that both political and geographical boundaries will be utilized. The majority, however, *701 imposes a requirement of consistency that is designed to limit the exercise of policy judgment by the Legislature under section 21. See majority op. at 656, 663. This is a purely judicially created extra-constitutional requirement. It amounts to a judicial assertion that the constitution is violated if political boundaries and geographical boundaries are not utilized in a fashion that suits judicial sensibilities. It cannot be reconciled with the text of section 21.

In the context of legislative districting, compactness will necessarily be a matter of degree. It is not a standard that is subject to a neat, objective test. On the contrary, the requirement is inherently vague. (The requirement that districts be compact is akin in its vagueness to a rule of court requiring that appellate briefs be brief.) In section 21, the compactness standard is on an equal footing with the standards related to equal population and the utilization of political and geographical boundaries. The Legislature thus may exercise its policy judgment to utilize political and geographical boundaries even when doing so may result in a district that is less compact than it might otherwise be.

In the case of Senate Districts 1 and 3, the Legislature's choice to utilize certain political boundaries and geographical boundaries has resulted in the creation of districts that are less compact than many other districts in the Senate plan. It cannot be said, however, that the drawing of the district lines for Districts 1 and 3 has no rational basis related to the constitutional standards.

The majority's rejection of the Legislature's consideration of communities of interest is wholly unwarranted. Nothing in section 21 provides that the standards set forth there—along with those in section 16—are the exclusive, legitimate considerations that may be taken into account by the Legislature in drawing district lines. “[M]aintaining communities of interest” has been recognized as a “traditional districting principle[.]”  *Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Although the Legislature is not constitutionally required to maintain communities of interest, nothing in the constitution precludes the Legislature from giving consideration to such a traditional districting principle. The voters adopting section 21 would have had no way of knowing—either from the text of the amendment or the ballot summary—that the proposed

amendment would preclude the Legislature from considering existing communities of interest. Such a limitation on legislative authority should not be read into the constitution by implication.

Finally, the majority's conclusion that these districts were drawn with an improper intent to favor the incumbent senators is based on suspicion and surmise. It is indeed ironic that the majority relies on this factor as a ground for invalidating these districts when the only alternative Senate district map submitted to the Court reconfigures these districts but in a way that also maintains the two incumbent senators in different districts.

Senate Districts 6 and 9

The Senate cogently describes the challenge to Senate District 6 as based on the assertion that

the Legislature (or this Court) should engage in a deliberate effort to dismantle functioning minority districts and replace them with districts with cognizably lower minority voting age population (VAP), without a shred of evidence either that the lower numbers will not “diminish” minority voters [] “ability to elect” or any evidence (or even credible allegation) that these gratuitous reductions will enhance *minority* (as opposed to Democratic) opportunities elsewhere.

*702 Reply Brief of the Florida Senate at 6–7, *In re Joint Resolution of Reapportionment*, No. SC12–1 (Feb. 23, 2012).

In accepting this unwarranted challenge, without the benefit of any fact-finding proceeding on the contested retrogression issue, the majority decides that—based on the subordinate compactness standard—it is empowered to make an ad hoc determination concerning how much minority voting strength can be diminished without transgressing the unequivocal constitutional prohibition on drawing district lines “to diminish” the “ability” of “racial or language minorities” “to elect representatives of their choice.” Art. III, § 21(a), Fla. Const. This can be reconciled with neither the plain

meaning of *diminish*—“to make less or cause to appear less,” *Webster’s Third International Dictionary* 634 (1993)—nor the law interpreting the analogous provision in [section 5](#) of the Voting Rights Act, [42 U.S.C. § 1973c](#) (2006).

Relying on an alternative proposed by the Coalition, the majority thus concludes that District 6 could be reconfigured by reducing its black VAP from 47.7 percent in the Legislature’s plan to a black VAP of 42.4 percent in the Coalition’s plan. Majority op. at 666–67, 667–68. Under the majority’s approach, the current functioning minority district will be replaced by a district in which the 2006 Democrat candidate for governor received less than a majority of the vote. By comparison, in both the benchmark district and the district adopted by the Legislature the 2006 Democrat candidate for governor obtained a majority. The differences in performance admittedly are not large, but the differences are at the margin where many elections are decided.⁶⁹ The Legislature undoubtedly had a rational basis for the conclusion that the configuration of District 6 as adopted was necessary to avoid prohibited retrogression in the ability of blacks to elect a representative of choice.⁷⁰ Blithely observing that the justification for Senate District 6 under the nonretrogression rule is “questionable,” the Court substitutes its determination for the judgment of the Legislature. Majority op. at 683. In doing so, the majority ignores the presumption of constitutionality and the constitutional priority given to the protection of “racial or language minorities.” See [Art. III, § 21\(a\)](#), Fla. Const.

*703 The majority also ignores the findings of the three-judge panel in [Martinez v. Bush](#), 234 F.Supp.2d 1275, 1298–99 (S.D.Fla.2002), that “[t]here is a substantial degree of racially polarized voting in ... northeast Florida” and that

[i]n any district in [that area] in which blacks do not comprise a majority or near majority of actual voters, it is likely that the black candidate of choice (if different from the candidate of choice of non-black voters) will not often prevail; instead, the candidate of choice of non-black voters will prevail.

Such findings are highly relevant to the “functional analysis” of retrogression to which the majority refers.

See, e.g., majority op. at 625, 654, 656. Contrary to the majority’s conclusion, there is no reliable functional analysis establishing that the alternative district mandated today by this Court is a district that ensures that the ability of black voters to elect a senator “of their choice” is not diminished. [Art. III, § 21\(a\)](#), Fla. Const. And the majority has cited no case authority under [section 5](#) of the Voting Rights Act in which a district plan was upheld against a retrogression challenge where a choice was made to reduce the minority VAP in a performing minority district in a manner similar to that mandated by the Court today.

The alternative district proposed by the Coalition is unquestionably more compact than Senate District 6. But the compactness standard of [section 21\(b\)](#) is unquestionably subordinate to the requirements of [section 21\(a\)](#) that protect the rights of minority voters. By mandating the creation of a more compact district in which the voting influence of black voters is diminished, the majority fails to give effect to the constitutional protection for minority voters required by [section 21\(a\)](#).

The majority recognizes that the configuration of District 9 flows from the configuration of District 6 in the Legislature’s plan and invalidates District 9 based on the conclusion that Districts 6 is invalid. Because I disagree with the conclusion regarding District 6, I also disagree with the conclusion regarding District 9.

Senate Districts 10 and 12

The majority invalidates Senate District 10 based on suspicion, surmise, and speculation. Suspicion and surmise are the predicates for the conclusion that District 10 was drawn with an improper intent to favor the incumbent senator. Speculation is the predicate for the conclusion that District 12—drawn to protect the rights of minority voters in a performing minority district—might have been drawn in a different manner without retrogressing.

The reality is that the configuration of Senate District 10 can reasonably be understood to result directly from the drawing of District 12 as a nonretrogressive district where there is currently a performing black district, together with the drawing of District 14 as a new Hispanic-majority district with a Hispanic VAP of 50.5 percent. No one has challenged and the majority does not question the configuration of District 14, the new Hispanic-majority district. With respect

to District 12, the majority faults the Legislature for failing to perform a “functional analysis.” Majority op. at 671. In contrast with what it offered as a rationale for its decision with respect to District 6, the majority provides no analysis with respect to the maintenance of black voters' ability to elect the candidate of their choice in District 12 and fails to suggest any alternative configuration for District 12 that it would deem to be nonretrogressive.

The majority's opinion with respect to Districts 10 and 12 can only be described as conclusory. It illustrates as vividly as *704 anything in the opinion how the majority's acknowledgment of the presumption of constitutionality is meaningless. Rather than reviewing the persuasiveness of the opponents' allegations of unconstitutionality, the majority puts the burden on the Legislature to affirmatively prove constitutionality and then invalidates District 10 because “[n]othing in the record reflects that the process of drawing the districts in this area recognized the importance of balancing the constitutional values.” Majority op. at 671–72. And by failing to articulate a clear rationale that would guide the Legislature in remedying the supposed constitutional violation, the majority makes it more likely that the Court will ultimately determine that it must draw the district lines for the Florida Senate.

Senate District 30

The majority invalidates Senate District 30 based on the conclusion that the district is not compact and was drawn with an improper intent to favor the incumbent senator. The majority faults the district for having an “odd-shaped configuration.” Majority op. at 672. As it did with respect to Districts 1 and 3, the majority dismisses the legitimacy of the Legislature's consideration of a coastal community of interest in the fashioning of District 30. I reject the majority's conclusion with respect to the utilization of a coastal community of interest for the reasons I previously expressed in the discussion of Districts 1 and 3. In addition, the majority gives short shrift to the impact on District 30 of the configuration of adjoining District 40, which flows from the requirements of [section 5](#) of the Voting Rights Act. The boundary between Districts 30 and 40 constitutes roughly one-third of the 313-mile perimeter of District 30. And the majority fails to reckon with the reality that the coastal geography of Florida will necessarily result in some districts with an odd-shaped configuration. The objectors have not

overcome the presumption of constitutionality with which Senate District 30 is clothed.

Senate Districts 29 and 34

The majority declares Senate Districts 29 and 34 invalid on the ground that they are not compact. The majority concludes that the configuration of both districts is driven by an improper intent to favor the incumbent senator in District 29. The majority relies on an alternative majority black district suggested by the Coalition to show that District 34 could have been drawn in a different fashion to meet the requirement of nonretrogression. This alternative majority black district has a configuration which is itself far from neatly compact. Here, the majority once again—based on suspicion and surmise regarding improper intent—simply substitutes its judgment for the Legislature's judgment, without any showing that the judgment of the Legislature is not rationally related to the requirements of the constitution.

The City of Lakeland

The majority has neither accepted nor rejected the challenge made to the Senate district plan by the City of Lakeland. Instead, the majority expresses its “concerns.” Majority op. at 683. This is no way to adjudicate a claim of constitutional invalidity.

The City essentially argues that [section 21](#) precluded the Legislature from dividing the City into two different Senate districts. I would reject this argument. Nothing in [section 21](#) prohibits the Legislature from drawing district lines through municipalities. The reality is that many municipalities will necessarily be divided by legislative district lines. The district line drawn through the City of Lakeland largely follows geographical boundaries—including Interstate 4 and United States Highway 98. In order to accept the City's argument, *705 this Court would simply have to substitute its preference for the policy choice made by Legislature. The presumption of constitutionality enjoyed by the districting plan precludes this result. The City has failed to establish that the Senate district line which traverses the City is not rationally related to the standards of Florida's Constitution.

For reasons I have already explained, I disagree with the majority's condemnation—in its discussion of the City of Lakeland's claim—of the Senate's use of “an

inconsistent definition of ‘political and geographical boundaries.’ ” Majority op. at 683. I also disagree with the majority's condemnation of the Senate's supposed “incorrect understanding of both compactness and utilizing political and geographical boundaries.” *Id.* Any suggestion that the use of geographical boundaries is somehow less acceptable than the use of political boundaries is totally at odds with the text of [section 21](#), which establishes no preference for political over geographical boundaries. Any suggestion that the Legislature must choose between political and geographical boundaries and consistently follow that choice is likewise totally at odds with the text of [section 21](#), which does not expressly require such consistency and cannot reasonably be understood as implying a requirement of such consistency.

In the majority's analysis, the presumption that redistricting plans adopted by the Legislature are constitutional—a presumption that this Court unanimously reaffirmed ten years ago—is a quickly vanishing presumption. “As the cloud is consumed and vanisheth away,”⁷¹ so goes the presumption of constitutionality—consumed by the majority's strict-scrutiny analysis. I dissent from this unwarranted expansion of the power of this Court.

POLSTON, J., concurs.

All Citations

83 So.3d 597 (Mem), 37 Fla. L. Weekly S181

IV.

Footnotes

- 1 Amendment 6 adopted identical standards for congressional redistricting. The Legislature's congressional redistricting plan is not currently before us.
- 2 The House and Senate submitted briefs in support of the Joint Resolution. Briefs in opposition to the Joint Resolution were submitted by the following entities: (1) the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (together “the Coalition”); (2) the Florida Democratic Party (FDP); and (3) the City of Lakeland. The Attorney General filed a brief, which did not take a position on whether the plans should be approved, but instead argued for an extremely limited review and for allowing all fact-based challenges to be brought subsequently in a trial court. The Florida State Conference of NAACP Branches, which did not take a position for or against the Joint Resolution, directed its comments solely to the interpretation of the Federal Voting Rights Act and Florida's constitutional minority voting protection provision. Finally, the Florida State Association of Supervisors of Elections filed a comment to make the Court aware of the qualifying deadlines for the Florida Legislature and Congress under the Florida Statutes.
- 3 This constitutional provision is still in effect and has not been changed, other than a minor revision in subsections (b) and (f) to provide that if the Court is required to apportion the state, it must file “an order making such apportionment” with the custodian of state records.
- 4 See  [In re Apportionment Law–1972](#), 263 So.2d 797 (Fla.1972); [In re Apportionment Law–1982](#), 414 So.2d 1040;  [In re Senate Joint Resolution 2G, Special Apportionment Session 1992 \(In re Apportionment Law–1992 \)](#), 597 So.2d 276 (Fla.1992);   [In re Apportionment Law–2002](#), 817 So.2d at 832. In [In re Constitutionality of House Joint Resolution 25E](#), 863 So.2d 1176 (Fla.2003), this Court was required to determine the validity of a House Joint Resolution after the House redrew districts in response to the Department of Justice's objection that one of those districts was retrogressive within the meaning of Section 5 of the Voting Rights Act with respect to Hispanic voters.
- 5 There is a difference between the Court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court's role in interpreting statutes; this Court

has stated its responsibility in construing statutes differently. For example, in [Tyne v. Time Warner Entertainment](#), 901 So.2d 802, 810 (Fla.2005), in upholding a statute as constitutional, the Court stated that it had “an obligation to give a statute a constitutional construction where such a construction is possible.”

This Court has stated that it is

committed to the fundamental principle that it has the duty if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a statute in favor of its constitutional validity and to construe a statute, if reasonabl[y] possible, in such a manner as to support its constitutionality—to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity.

[Id.](#) (quoting [Corn v. State](#), 332 So.2d 4, 8 (Fla.1976)).

6 According to the comment filed on behalf of the Florida State Association of Supervisors of Election, the qualifying date for all federal, state, county, and district candidates is between June 4 and June 8, 2012, pursuant to [section 99.061, Florida Statutes](#).

7 See, e.g., [Lightbourne v. McCollum](#), 969 So.2d 326, 329 (Fla.2007) (relinquishing in an all writs original proceeding to the trial court for that court to make factual findings on lethal injection and to then file those findings with this Court so this Court could make the ultimate determination).

8 See, e.g., *State ex rel. Clark v. Klingensmith*, 126 Fla. 124, 170 So. 616, 618 (1936).

9 See *Milton v. Smathers*, 351 So.2d 24 (Fla.1977).

10 After the deadline for the submission of briefs and alternative plans had passed, the Coalition sought to file a supplemental appendix, including a revised alternative House plan. The Court denied that request, and the supplemental appendix was stricken. See *In re Joint Resolution of Legislative Apportionment*, No. SC12–1 (Fla. Sup.Ct. order filed Feb. 22, 2012).

11 In 1982, this Court concluded that because the proceeding was limited to reviewing the facial constitutional validity of the joint resolution, “the suggestion that we should adopt an alternative plan [was] not permissible in these proceedings.” *In re Apportionment Law–1982*, 414 So.2d at 1052. We did not conclude that alternative plans were impermissible for the purposes of constitutional comparison. With the advent of the new amendment codified in [article III, section 21, of the Florida Constitution](#), portions of which bear a striking resemblance to the Federal Voting Rights Act, we deem it necessary, as we did in 1992, to review alternative apportionment plans to assess effect and intent. See [In re Apportionment Law–1992](#), 597 So.2d at 282 n. 7 (permitting all interested parties to file alternative apportionment plans in support of their arguments with respect to whether or not the Joint Resolution impermissibly discriminated against a minority group).

12 We ordered the production of the incumbents' addresses upon which the opponents rely in their arguments. See *In re Joint Resolution of Legislative Apportionment*, No. SC12–1, Order on Incumbents' Addresses (Fla. Sup.Ct. order filed Feb. 21, 2012). The Attorney General, Florida Senate, and Florida House of Representatives were given the opportunity to advise the Court regarding whether any of the addresses were inaccurate and, if so, to provide the correct address.

13 In that regard, although the Court did not strike the affidavit of the Florida Democratic Party's expert, as requested by the House and Senate, the Court did not rely on that affidavit, instead conducting its own independent analysis using objective data.

14 The voting-age population numbers contained in MyDistrictBuilder were consistent with those contained in District Builder. With respect to the Legislature's apportionment plans, these voting-age population numbers were also consistent with the Attorney General's appendix.

15 The House recognized that this data was required in order to evaluate compliance with Florida's minority voting protection provision as well as the Federal Voting Rights Act, and it included the data in MyDistrictBuilder. See Open Data and Code for MyDistrictBuilder, <http://mydistrictbuilder.wordpress.com/opendata> (last visited Mar. 6, 2012) (“Elections data is required to comply with: Sections 2 and 5 of the federal Voting Rights Act; and [Florida's Constitution, Article III, Sections 20\(a\) and 21\(a\)](#), which both read, ‘districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language

minorities to participate in the political process or to diminish their ability to elect representatives of their choice' ”). The Senate chose to omit this data from District Builder. The District Builder Help Manual states: “Recent changes to the Florida Constitution require that districts not be ‘drawn with the intent to favor or disfavor a political party or an incumbent.’ ... With this new language, the mere presence of political metrics in the interface for building districts could create a perception, unsubstantiated and inaccurate though it may be, that partisan factors influenced how districts were drawn. The Senate, in an abundance of caution, therefore departed from traditional practice and chose to omit voter registration counts and election results from District Builder’s dashboard.” District Builder Help Manual, <https://db10.flsenate.gov/db1/help> (last visited Mar. 6, 2012).

- 16 See Ark. Const. art. VIII, § 5; Cal. Const. art. XXI, § 3(b); Colo. Const. art. V, § 48(e); Conn. Const. art. III, § 6(d); Haw. Const. art. IV, § 10; Idaho Const. art. III, § 2(5); Ill. Const. art. IV, § 3(b); Iowa Const. art. III, § 36; Kan. Const. art. X, § 1(b); Mass. Const. amend. art. CI, § 3; Me. Const. art. IV, pt. 1, § 3; Md. Const. art. III, § 5; Mich. Comp. Laws §§ 3.71, 4.262; N.J. Const. art. II, § 2, ¶ 7; Ohio Const. art. XI, § 13; Or. Const. art. IV § 6(3)(b); Pa. Const. art. II § 17(d); Vt. Stat. Ann. tit. 17, § 1909(a), (f); Wash. Rev.Code § 44.05.130.
- 17 Compare *In re Reapportionment of Colo. Gen. Assembly*, No. 11SA282, 2011 WL 5830123, — P.3d — (Colo. Nov. 15, 2011) (invalid); *Twin Falls Cnty. v. Idaho Comm’n on Redistricting*, No. 39373, 2012 WL 130416, 152 Idaho 346, 271 P.3d 1202 (Idaho Jan. 18, 2012) (invalid); *Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 58 Ill.Dec. 451, 430 N.E.2d 483 (1981) (invalid); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784 (Iowa 1972) (invalid); *In re Legislative Districting of the State*, 370 Md. 312, 805 A.2d 292 (2002) (invalid); *Hartung v. Bradbury*, 332 Or. 570, 33 P.3d 972 (2001) (invalid); *Holt v. 2011 Legislative Reapportionment Comm’n*, No. 7 MM 2012, 2012 WL 360584, — Pa. —, 38 A.3d 711 (Pa.2012) *Holt v. 2011 Legislative Reapportionment Comm’n*, No. 7 MM 2012, 2012 WL 360584, — Pa. —, 38 A.3d 711 (Pa.2012) (invalid); *In re Reapportionment of Towns of Hartland, Windsor and W. Windsor*, 160 Vt. 9, 624 A.2d 323 (1993) (invalid), with *Harvey v. Clinton*, 308 Ark. 546, 826 S.W.2d 236 (1992) (valid); *Wilson v. Eu*, 1 Cal.4th 707, 4 Cal.Rptr.2d 379, 823 P.2d 545 (1992) (valid); *In re Reapportionment of the Colo. Gen. Assembly*, 46 P.3d 1083 (Colo.2002) (valid); *Fonfara v. Reapportionment Comm’n*, 222 Conn. 166, 610 A.2d 153 (1992) (valid); *Kawamoto v. Okata*, 75 Haw. 463, 868 P.2d 1183 (1994) (valid); *Bonneville Cnty. v. Ysursa*, 142 Idaho 464, 129 P.3d 1213 (2005) (valid); *Beaubien v. Ryan*, 198 Ill.2d 294, 260 Ill.Dec. 842, 762 N.E.2d 501 (2001) (valid); *In re Legislative Districting of Gen. Assembly*, 196 N.W.2d 209 (Iowa 1972) (valid); *In re Stovall*, 273 Kan. 731, 45 P.3d 855 (2002) (valid); *In re 2003 Legislative Apportionment of House of Representatives*, 827 A.2d 810 (Me.2003) (valid); *Legislative Redistricting Cases*, 331 Md. 574, 629 A.2d 646 (1993) (valid); *McClure v. Sec’y of the Commonwealth*, 436 Mass. 614, 766 N.E.2d 847 (2002) (valid); *Leroux v. Sec’y of State*, 465 Mich. 594, 640 N.W.2d 849 (2002) (valid); *In re Reapportionment of Towns of Woodbury & Worcester*, 177 Vt. 556, 861 A.2d 1117 (2004) (valid).
- 18 We have previously interpreted “consecutively numbered” to not require districts to be consecutively numbered such that each district is adjacent to the next numbered district. See *In re Apportionment Law—1982*, 414 So.2d at 1050.
- 19 States that share a similar constitutional provision include California and Washington. See, e.g., art. XXI, § 2(e), Cal. Const.; Wash. Const. art. II, § 43(5). Idaho, Iowa, Montana and Oregon codify similar provisions by statute. See Idaho Code § 72–1506; Iowa Code § 42.4(5); Mont.Code § 5–1–115; Or.Rev.Stat. § 188.010(2).
- 20 The observation made by journalist Bill Cotterell highlights past redistricting practices by quoting a politically powerful Democratic senator and Senate president: “The legendary Senator Dempsey Barron once said running redistricting was like owning a prized hunting dog about to have puppies.” Bill Cotterell, *A Process*

Free of Politics (Wink, Wink), Tallahassee Democrat (Feb. 22, 2012), available at <http://www.tallahassee.com/article/20120223/COLUMNIST03/202230328/BillCotterell-process-free-politics-wink-wink>.

- 21 See, e.g., [Ariz. Const. art. IV, pt. 2, § 1\(3\)](#) (added by initiative measure in 2000); [Cal. Const. art. XXI, § 2](#) (added by initiative measure in 2008); [Idaho Const. art. III, § 2\(2\)](#) (created in 1994); [Wash. Const. art. II, § 43](#) (added by constitutional amendment in 1982).
- 22 A “Sisyphean” task is one synonymous with futile and endless labor. The term “Sisyphean” derives from “Sisyphus,” a “cruel King of Corinth condemned forever to roll a huge stone up a hill in Hades only to have it roll down again on nearing the top.” *The American Heritage Dictionary of the English Language* (4th ed. 2000). A “Sisyphean task,” then, is one that is “[e]ndlessly laborious or futile.” *Id.*
- 23 Several jurisdictions require the state’s redistricting body to expressly comply with the VRA when drawing district lines. See [Ariz. Const. art. IV, pt. 2, § 1\(14\)\(A\)](#); [Cal. Const. art. XXI, § 2\(d\)\(2\)](#); [Colo.Rev.Stat. § 2–1–102\(1\)\(a\)\(II\)](#); [10 Ill. Comp. Stat. 120/5–5\(a\)](#), [\(d\)](#); [Iowa Code § 42.4](#); [Mich. Comp. Laws § 3.63\(b\)\(ii\)](#); [Mich. Comp. Laws § 4.261a](#); [Mont.Code Ann. § 5–1–115\(2\)](#); [N.C. Gen.Stat. § 163–132.1B\(a\)](#); [Or.Rev.Stat. § 188.010](#); [Tenn.Code Ann. § 3–1–103\(6\)](#). Courts interpreting these standards have not departed from prevailing United States Supreme Court precedent. See, e.g., *Vandermost v. Bowen*, 53 Cal.4th 421, 137 Cal.Rptr.3d 1, 269 P.3d 446, 447 n. 39 (2012) (relying on Supreme Court precedent to discuss Sections 2 and 5 in relation to state provision requiring compliance with the VRA).
- 24 Like Florida’s, the District of Columbia’s provision does not expressly reference the VRA, but the District of Columbia’s appellate court has construed it in conformity with Section 2 of the VRA. See *Kingman Park Civic Ass’n v. Williams*, 924 A.2d 979, 987 (D.C.2007) (relying on Section 2 precedent from the Supreme Court to review a claim under provision disallowing redistricting plans that have “the purpose and effect of diluting the voting strength of minority citizens” (quoting [D.C. Code § 1–1011.01\(g\)](#))).
- 25 The United States Supreme Court has recognized that vote dilution claims can be brought separate and apart from statutory claims based on the VRA. The Equal Protection Clause prohibits racial vote dilution where the plaintiff establishes that the electoral scheme was adopted with the intent to racially discriminate. See [City of Mobile v. Bolden](#), 446 U.S. 55, 62, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion); see also *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1266 (11th Cir.2002) (citing [Bolden](#) for the proposition that “[i]n order to state a racial vote dilution claim under the Constitution, intent to racially discriminate must be shown”).
- 26 While Florida’s provision borrows language from Section 5, it does not incorporate the portion of Section 5 placing the burden of proof on the covered jurisdiction to establish the requirements necessary to obtain preclearance.
- 27 The Court utilized the House political data and software in analyzing all of these figures.
- 28 Section 16(a) specifically requires that that districts be “of either contiguous, overlapping or identical territory.” Neither of the latter two requirements in this standard, that districts must be of overlapping or identical territory, is at issue in the instant petition. This Court has never defined the term “overlapping,” and it has never come into play under the Constitution of 1968. The phrase “identical territory” refers to multi-member districts. See [In re Apportionment Law–1972](#), 263 So.2d at 806–07. A multimember district is a district in which the same voters elect more than one representative to serve a geographical area that could be divided into several areas, each represented by a single person. See [Whitcomb v. Chavis](#), 403 U.S. 124, 142, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). As has been the case since 1982, the 2012 apportionment plan consists solely of single-member districts as to both the House and Senate plans.
- 29 Congressional districts fall under a stricter standard under the federal constitution. Any variance, no matter how small, must be justified, unless it can be shown that the variance occurred despite an effort to achieve precise mathematical equality. [Karcher v. Daggett](#), 462 U.S. 725, 730, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). The United States Supreme Court has noted that “congressional districts are not so intertwined and

- freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous.” [White v. Weiser](#), 412 U.S. 783, 793, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).
- 30 States that constitutionally require compactness during reapportionment include Alaska, California, Colorado, Hawaii, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wisconsin. See [Alaska Const. art. VI, § 6](#); [Ariz. Const. art. IV, pt. 2, § 1\(14\)](#); [Cal. Const. art. XXI, §§ 2\(d\), \(e\)](#); [Colo. Const. art. V, § 47](#); [Haw. Const. art. IV, § 6\(4\)](#); [Ill. Const. art. IV, § 3\(a\)](#); [Me. Const. art. IV, pt. 1, § 2](#); [Md. Const. art. III, § 4](#); [Mo. Const. art. III, § 2](#); [Mont. Const. art. V, § 14\(1\)](#); [Neb. Const. art. III, § 5](#); [N.J. Const. art. IV, § 2](#); [N.Y. Const. art. III, § 4](#); [Ohio Const. art. XI, § 9](#); [Pa. Const. art. II, § 16](#); [R.I. Const. art. VII, § 1](#); [art. VIII, § 1](#); [S.D. Const. art. III, § 5](#); [Vt. Const. ch. II, §§ 13, 18](#); [Va. Const. art. II, § 6](#); [Wash. Const. art. II, § 43\(5\)](#); [W.V. Const. art. VI, § 4](#); [Wis. Const. art. IV, § 4](#).
- 31 States that codify a compactness requirement by statute include Idaho, Michigan, Minnesota, Mississippi, New Mexico, and North Dakota. See [Idaho Code Ann. § 72–1506](#); [Iowa Code § 42.4\(4\)](#); [Mich. Comp. Laws § 4.261](#); [Minn.Stat. § 2.91\(2\)](#); [Miss.Code Ann. § 5–3–101](#); [N.M. Stat. §§ 2–8D–2, 2–7C–3](#); [N.D. Cent. Code Ann. § 54–03–01.5](#). The District of Columbia also statutorily requires compactness in redistricting. See [D.C.Code § 1–1011.01](#).
- 32 [Wilson v. Eu](#), 1 Cal.4th 707, 4 Cal.Rptr.2d 379, 823 P.2d 545, 552 (1992); [In re 2003 Legislative Apportionment of House of Representatives](#), 827 A.2d 810, 815 (Me.2003); [In re Legislative Districting of State](#), 475 A.2d at 443; [Schneider v. Rockefeller](#), 31 N.Y.2d 420, 340 N.Y.S.2d 889, 293 N.E.2d 67 (1972); [Parella v. Montalbano](#), 899 A.2d 1226, 1252 (R.I.2006); [In re Reapportionment of Towns of Hartland, Windsor & W. Windsor](#), 160 Vt. 9, 624 A.2d 323, 330–31 (1993).
- 33 States requiring compactness and that vest original jurisdiction in the Supreme Court include California, Colorado, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Vermont, and Washington. See [Cal. Const. art. XXI, § 3\(b\)](#); [Colo. Const. art. V, § 48\(e\)](#); [Haw. Const. art. IV, § 10](#); [Idaho Const. art. III, § 2\(5\)](#); [Ill. Const. art. IV, § 3\(b\)](#); [Iowa Const. art. III, § 36](#); [Me. Const. art. 4, pt. 1, § 3](#); [Md. Const. art. III, § 5](#); [Mich. Comp. Laws §§ 3.71, 4.262](#); [N.J. Const. art. II, § 2, ¶ 7](#); [Ohio Const. art. XI, § 13](#); [Pa. Const. art. II § 17\(d\)](#); [Vt. Stat. Ann. tit. 17, § 1909\(a\), \(f\)](#); [Wash. Rev.Code § 44.05.130](#).
- 34 See, e.g., [League of United Latin Am. Citizens v. Perry](#), 548 U.S. 399, 455 n. 2, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (Stevens, J., concurring in part and dissenting in part) (“[T]wo standard measures of compactness are the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district.”); [Vieth](#), 541 U.S. at 348, 124 S.Ct. 1769 (Souter, J., dissenting) (“[C]ompactness ... can be measured quantitatively in terms of dispersion, perimeter, and population ratios, and the development of standards would thus be possible.”).
- 35 At each of the twenty-six hearings held at different locations around the State, the public gave recommendations for the House, Senate, and congressional plans, and preserving county boundaries was a common request.
- 36 At least five state constitutions require geographical boundaries or features to be considered, including Alaska, Arizona, Hawaii, Maryland, and Washington. See, e.g., [Alaska Const. art. VI, § 6](#); [Ariz. Const. art. IV, pt. 2, § 1\(14\)](#); [Haw. Const. art. IV, § 6](#); [Md. Const. art. III, § 4](#); [Wash. Const. art. II, § 43\(5\)](#). In all except Hawaii, the state constitutions also require consideration of political or county boundaries.
- 37 These House districts, with their corresponding black voting-age populations (VAPs) are as follows: District 8 (50.0%), District 13 (50.7%), District 14 (50.7%), District 46 (52.1%), District 61 (51.3%), District 88 (51.8%),

District 94 (54.6%), District 95 (57.7%), District 102 (52.1%), District 107 (56.9%), District 108 (62.9%), and District 109 (50.6%).

38 These House districts, with their corresponding Hispanic voting-age populations are as follows: District 43 (54.9%), District 48 (53.0%), District 62 (51.9%), District 87 (50.0%), District 103 (82.1%), District 105 (69.0%), District 110 (89.5%), District 111 (93.0%), District 112 (73.0%), District 113 (66.8%), District 114 (66.0%), District 115 (65.5%), District 116 (84.4%), District 117 (55.2%), District 118 (81.2%), and District 119 (86.8%).

39 Citing [Larios v. Cox](#), 300 F.Supp.2d 1320, 1339 (N.D.Ga.2004), *aff'd*, [542 U.S. 947](#), 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004), the FDP also raises a separate claim as to equal population, arguing that the Senate plan deviates from equal population not to serve any rational purpose, but rather to discriminate against Democrats, minorities, and certain regions of the state. The FDP argues that this is done by systematically over-populating Democratic and minority districts. Having examined the numbers, we conclude that the FDP has not established a violation of the equal population provision on this basis alone. This case stands in contrast to [Larios](#), where the population deviations were only barely within the 10% overall range and the evidence was clear that the deviation was the result of the Legislature's belief that the 10% overall range was a "safe harbor," within which it could engage in a systematic and express strategy to over-represent rural areas and Democrats, the party in power.

40 See Senate Brief at 1 ("Staff prepared the proposal without reference to election results [or] voter-registration data..."); *id.* at 4 ("The Senate also formulated the Senate Plan without reference to political party [or] voter registration ... data..."); Senate Comm. on Reapportionment Hrg. Tr. 6323–26 (Dec. 6, 2011) (explaining the use of voting-age population, but not the use of data regarding registered voters or election results); Senate Floor Debate Tr. 6613 (Jan. 17, 2012) (statement by the Chair of the Senate Committee on Reapportionment that to prevent backsliding, the Senate looked at the 2002 Senate plan and used voting-age population numbers to maintain majority-minority districts); *id.* at 6758 (statement by the Senate reapportionment committee chair that voting-age population rather than voting performance data were used); Senate Floor Debate Tr. 6831–33 (Feb. 9, 2012) (acknowledging that House used voter performance data to create effective minority-opportunity districts, but stating that the Senate "saw no need for this type of information" because it "know[s] that [its] minority opportunity districts do not diminish minority voting strength" by (1) preserving minority opportunity districts with little statistical/geographical change to ensure continued undiminished ability, and (2) following the districts proposed by the Florida NAACP and LatinoJustice organizations).

41 [Article VI, section 4\(b\)\(1\)-\(2\)](#), is the current term limit provision of the Florida Constitution and was adopted by citizen initiative in 1992. The initiative petition itself stated:

The people of Florida believe that politicians who remain in office too long may become preoccupied with re-election and become beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.

[Political Terms in Certain Elective Offices](#), 592 So.2d at 226.

42 As all of the district lines for each Senate district have changed in the 2012 Senate plan, resulting in a change in constituency, all senators must stand for reelection in the next general election after the 2012 reapportionment. See [In re Apportionment Law–1982](#), 414 So.2d at 1047–48.

43 This Court was provided with the addresses for only 21 of the 29 non-term-limited senators.

44 Two senators were eligible to serve for 10 years under the November 28 numbering. The district numbers for those incumbents have not changed from odd to even, and they remain eligible to serve for 10 years.

45 The voting-age populations of the two districts are as follows. District 1: black VAP 12.5%; Hispanic VAP 5.2%; white VAP 77.5%. District 3: black VAP 14.4%; Hispanic VAP 3.5%; white VAP 78.1%.

- 46 See New Senate Districts, District Descriptions (S000S9008) (Senate Staff Document), in Petition for Declaratory Judgment, Appendix at 1006, *In re Senate Joint Resolution of Legislative Apportionment 1176*, No. SC12–1 (Fla. Feb. 10, 2012) (Senate District Descriptions) (“The committee heard testimony at the ... public hearings and at the October 5, 2011, Senate Reapportionment Committee meeting that rural and agricultural interests in the northern part of the Panhandle have different traditions and representational needs than the urban and tourism interest in the southern part of the Panhandle. Additionally, the committee heard testimony pointing out that commerce and communication flow east and west along the main transportation corridors of the region, Interstate 10 and U.S. Highway 98, not north and south....”); *id.* (“District 1 is supported by the same testimony as District 3. Its horizontal configuration recognizes the differences between the rural North and the urban South. District 1 honors the request of members of the public who called for representation that reflects their distinct communities.”).
- 47 Newly created District 9 would perform Republican; it would have voted 57.5% for Scott (R) in the 2010 gubernatorial election, 57.2% for McCain (R) in the 2008 presidential election, and 59.6% for Crist (R) in the 2006 gubernatorial election. Of the registered voters in District 9, 44.5% would be Republican.
- 48 The Senate staff analysis further explains that “District 6 preserves the core of an existing district that has long elected an African–American member to the Senate. The district connects communities in the northeastern portion of the state from the St. Johns River basin to Interstate 95 between Daytona Beach and Jacksonville.” Senate District Descriptions at 1007.
- 49 Contrary to the Senate's representations at oral argument, the federal district court order in   [Martinez v. Bush](#), 234 F.Supp.2d 1275, 1298–99 (S.D.Fla.2002), does not require this Court to reach an opposite conclusion.   [Martinez](#) involved Section 2 vote dilution claims based on the Legislature's 2002 House, Senate, and congressional apportionment plans; it did not address claims regarding [Section 5](#) diminishment. See   [id.](#) at 1298–1324. The district court in   [Martinez](#) most certainly never found that reducing the black voting-age population from 46.9% (the percentage under the 2002 benchmark) in District 6 to 42.4% (the percentage in the equivalent district under the Coalition's alternative plan) would diminish the ability of black voters in this part of the state to elect candidates of choice. The Senate's after-the-fact reliance on   [Martinez](#) to justify its decision to draw District 6 in this manner is therefore unavailing.
- 50 When a senator asked during the January 17, 2012, floor debate if any incumbent lived in the appendage of newly numbered Senate District 10, the response given was that if an incumbent lived there it was “news to me,” even though the incumbent who lived there was present during the debate.
The incumbent addresses provided to the Court verify that an incumbent does in fact live in the part of District 10 that we refer to as the appendage.
- 51 The rest of the district is relatively compact, which is reflected in the compactness scores.
- 52 While no party challenges District 14, the Senate likewise should perform the necessary analysis on that district as well.
- 53 District 23 has a Reock score of 0.45 and an Area/Convex Hull score of 0.81. District 28 has a Reock score of 0.37 and an Area/Convex Hull of 0.89.
- 54 The opponents do not contend that the change from 60.7% to 55.8% resulted in retrogression under Florida law.
- 55 District 34 would have voted 82.1% for Sink (D) in the 2010 gubernatorial election, 84.9% for Obama (D) in the 2008 presidential election, and 77.0% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 67.7% of registered voters, 67.0% of the Democrats would be black (showing opportunity for black voters among Democrats), and 85.2% of black voters in this district would be Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 73.1% of voters; 69.7% of the Democrats would be black (opportunity); and 90.9% of the black voters would be Democrats (cohesion).
- 56 The Senate staff analysis likewise recognizes that District 29 “is adjacent to a minority-opportunity district (District 34) to its west.” Senate District Descriptions at 1012.

- 57 District 27 has a white VAP of 65.9% and would perform Democratic. District 31 has a white VAP of 53.3% and would perform Democratic. District 32 has white VAP of 57.7% and would perform Democratic. District 36 has a white VAP of 50.7% and would perform Democratic.
- 58 District 29 would have voted 47.7% for Sink (D) and 49.9% for Scott (R) in the 2010 gubernatorial election, 51.0% for Obama (D) and 48.2% for McCain (R) in the 2008 presidential election, and 48.7% for Davis (D) and 49.1% for Crist (R) in the 2006 gubernatorial election.
- 59 Coalition District 29 would be Democratic and would have voted 79.8% for Sink (D), 82.6% for Obama (D), and 75.1% for Davis (D) in the 2010 gubernatorial, 2008 presidential, and 2006 gubernatorial elections, respectively. In that district, 68.3% of registered voters would be Democrats, 65.5% of registered Democrats would be black (showing opportunity among black voters), and 85.1% of registered black voters would be Democrats (showing cohesion among black voters). In terms of actual voters based on 2010 general election data, Democrats would make up 73.0% of voters, 68.2% of the Democrats who voted would be black (opportunity); and 90.5% of the black voters would be Democrats (cohesion).
- 60 Coalition District 31 would be solidly Democratic and would have voted 54.9% for Sink (D), 58.2% for Obama (D), and 56.5% for Davis (D).
- 61 The comparable districts surrounding Coalition District 29 (Coalition Districts 25, 30, 31, 32, and 35) are majority-white districts (white VAP of 71.0%, 55.9%, 61.2%, 68.0%, and 56.0%, respectively). Each of these districts would be solidly Democratic. The election results for these districts are as follows: Coalition District 25 (61.4% Sink (D), 36.0% Scott (R); 63.3% Obama (D), 36.0% McCain (R); 63.4% Davis (R), 34.6% Scott (R)); Coalition District 30 (55.7% Sink, 41.6% Scott; 60.0% Obama, 39.3% McCain; 56.6% Davis, 41.2% Crist); Coalition District 31 (54.9% Sink, 42.7% Scott; 58.2% Obama, 41.0% McCain; 56.5% Davis, 41.2% Crist); Coalition District 32 (56.7% Sink, 40.9% Scott; 59.9% Obama, 39.5% McCain; 58.6% Davis, 39.6% Crist); Coalition District 35 (59.8% Sink, 37.8% Scott; 61.4% Obama, 37.8% McCain; 60.1% Davis, 38.0% Crist).
- 62 Old District 36 with a Hispanic VAP of 79.2% and old District 33 with a black VAP of 59.2%.
- 63 Although the City of Lakeland also claims that the Senate plan favors incumbents by giving each incumbent a protected district, it does not rely on any specific allegations regarding the two districts in which Lakeland is split. Instead, it relies on an argument made by the Coalition, which does not reference Lakeland specifically.
- 64 Accordingly, any ultimate responsibility of the Court regarding reapportionment would be limited to the redrawing of the Senate plan, and this would occur only if the revised Senate apportionment plan is declared to be invalid. See *art. III, § 16(f), Fla. Const.*
- 65 The drafting of the 1968 Florida Constitution occurred after three successive reapportionment plans were invalidated by the federal courts on the basis of equal protection violations. A federal district court ultimately assumed the responsibility for redistricting the State of Florida. See *id.* at 833–34 (Lewis, J., concurring); see also *Swann v. Adams*, 263 F.Supp. 225, 226–28 (S.D.Fla.1967) (noting the “[j]udicial apportionment of the Florida Legislature is required” and delineating a reapportionment plan that provided for 48 Senate districts and 119 House of Representative districts).
- 66 I note that each of the House members of the Florida Conference of Legislative Black State Legislators voted against the reapportionment plan. Floor Vote on SJR 1176, 2012 Session (Fla. Feb. 3, 2012), <http://www.myfloridahouse.gov/Sections/Bills/floorvote.aspx?VoteId=12689&BillId=48155&&>.
- 67 The requirement from [section 21\(b\)](#) that “districts shall be as nearly equal in population as is practicable” does lend itself to a determinate test. In [Brown v. Thomson](#), 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (quoting [Reynolds v. Sims](#), 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)), the Supreme Court determined that the requirement from the Equal Protection Clause of the Fourteenth Amendment that electoral districts be “as nearly of equal population as is practicable” allowed “minor deviations from mathematical equality.” The Supreme Court then concluded that “an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.” [Id.](#) In adopting the amendment that has been codified in [section 21](#), the people of Florida chose to add to their constitution the well-defined phrase “of nearly equal population as practicable.” Because it uses the identical

language as the prior cases interpreting the equal population requirement under the Fourteenth Amendment, the equal population standard of [section 21\(b\)](#) must be interpreted in accordance with those well-established precedents. Cf. [Fla. Dep't of Revenue v. City of Gainesville, 918 So.2d 250, 263 \(Fla.2005\)](#) (“In the absence of any indication in the Constitution to the contrary, we conclude that the term ‘municipal or public purposes’ [as used in a newly enacted statute] should be construed in accordance with the definition utilized by the Court in its prior decisions.”).

68 [Webster v. Reprod. Health Servs., 492 U.S. 490, 552, 109 S.Ct. 3040, 106 L.Ed.2d 410 \(1989\)](#) (Blackmun, J., concurring in part and dissenting in part).

69 Pursuant to calculations performed by the software purchased by this Court, in District 1 of the 2002 Benchmark Senate Plan, 54.49 percent of voters selected the Democrat candidate for governor (Jim Davis) in the 2006 gubernatorial election, while 43.28 percent of voters selected the Republican candidate (Charlie Crist). In the Legislature's proposed District 6, 52.02 percent of voters selected the Democrat in that election and 45.71 percent selected the Republican. In contrast, in the Coalition's District 1, only 49.06 percent of voters selected the Democrat and 48.61 percent selected the Republican. And, ironically, in its appendix, the Coalition offered an even less persuasive figure. The Coalition asserted that only 48.1 percent of voters in its proposed District 1 voted for the Democrat in the 2006 gubernatorial election.

70 I wholeheartedly agree with the view—cited by the majority—articulated in [Shaw v. Reno, 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 \(1993\)](#), that “[r]acial classifications of any sort pose the risk of lasting harm to our society.” I also agree with the majority's rejection of “any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision.” Majority op. at 627. Although the nonretrogression provision of [section 21\(a\)](#) does not require the Legislature to draw covered minority districts in a manner that rigidly preserves or increases the minority VAP with each redistricting, the doctrine of nonretrogression does require the Legislature to draw the boundaries of performing minority ability districts so that the districts will continue to perform as minority ability districts.

71 *Job 7:9* (King James).



KeyCite Yellow Flag - Negative Treatment

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89 So.3d 872
Supreme Court of Florida.

In re SENATE JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT 2–B.

No. SC12–460.

|
April 27, 2012.

Synopsis

Background: After state's decennial legislative apportionment plan for state Senate districts was declared constitutionally invalid, [83 So.3d 597](#), Attorney General petitioned for declaratory judgment regarding validity of revised plan adopted by legislature.

Holdings: The Supreme Court held that:

[1] opponents could not raise new challenges concerning districts that they had not previously challenged in the earlier declaratory judgment proceeding regarding original plan, nor raise different challenges to districts that they unsuccessfully challenged on other grounds in the earlier proceeding;

[2] challenged redrawn district was not facially unconstitutional; and

[3] evidence did not support claim that two redrawn legislative districts were tailor-made for two incumbents.

Declaratory judgment entered.

[Pariante, J.](#), filed a concurring opinion.

[Canady, C.J.](#), and [Polston, J.](#), concurred in result.

[Perry, J.](#), filed an opinion concurring in part and dissenting in part, in which [Quince, J.](#), concurred.

West Headnotes (22)

[1] **States** Method of apportionment in general

The overall goal of voter-approved Amendment 5 (Fair Districts Amendment) to the Florida Constitution, regarding apportionment of state legislative districts, is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations, as well as to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts are avoided. [West's F.S.A. Const. Art. 3, § 21.](#)

1 Cases that cite this headnote

[2] **Constitutional Law** Redistricting and reapportionment

States Legislative Districts and Apportionment

Voter-approved Amendment 5 (Fair Districts Amendment) to the Florida Constitution, regarding apportionment of state legislative districts, imposes upon the Legislature more stringent requirements as to apportionment than the United States Constitution and prior versions of the state Constitution. [West's F.S.A. Const. Art. 3, § 21.](#)

1 Cases that cite this headnote

[3] **Declaratory Judgment** Jurisdiction of particular state courts

Under the Supreme Court's plenary authority to review the Legislature's apportionment plans for state legislative districts, the Supreme Court has jurisdiction to resolve all issues by declaratory judgment. [West's F.S.A. Const. Art. 3, §§ 16\(c\), 21.](#)

1 Cases that cite this headnote

[4] **Declaratory Judgment** Elections
States Judicial review and control

The overarching question to be considered by the Supreme Court in a declaratory judgment proceeding regarding the Legislature's apportionment plans for state legislative districts is the constitutional validity of the plans contained within the Legislature's joint resolution of apportionment, and the Court makes this determination by examining whether the Legislature has operated within the constitutional limitations placed upon it when apportioning the state's legislative districts. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

2 Cases that cite this headnote

[5] **States** 🔑 Judicial review and control

Although the Legislature's apportionment plans for state legislative districts come to the Supreme Court with an initial presumption of validity, the process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in the Court's obligations; in this type of original proceeding for declaratory judgment, the Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

1 Cases that cite this headnote

[6] **Declaratory Judgment** 🔑 Elections

States 🔑 Judicial review and control

In a declaratory judgment proceeding regarding the Legislature's apportionment plans for state legislative districts, the Supreme Court is responsible for measuring legislative acts with the yardstick of the Constitution, and judicial relief is warranted where the Legislature has failed to reapportion according to federal and state constitutional requisites. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

[7] **States** 🔑 Judicial review and control

Opponents of the Legislature's apportionment plan for state legislative districts bear the burden of establishing a constitutional violation, but facial invalidity need not be proven beyond a reasonable doubt; instead, the Supreme Court will defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements. *West's F.S.A. Const. Art. 3, § 21.*

[8] **Declaratory Judgment** 🔑 Elections

States 🔑 Judicial review and control

Understanding that the Supreme Court's responsibility, in a declaratory judgment proceeding regarding the Legislature's apportionment plans for state legislative districts, is limited to ensuring compliance with constitutional requirements, and endeavoring to be respectful to the critically important role of the Legislature, the Court's duty is not to select the best plan, but rather to decide whether the one adopted by the Legislature is valid. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

[9] **States** 🔑 Judicial review and control

Where the legislative decision regarding apportionment of state legislative districts runs afoul of constitutional mandates, the Supreme Court has a constitutional obligation to invalidate the apportionment plan. *West's F.S.A. Const. Art. 3, § 21.*

[10] **Declaratory Judgment** 🔑 Subjects of relief in general

States 🔑 Judicial review and control

Position of opponent of Legislature's reapportionment plan for legislative districts in state Senate, that there was insufficient evidence from which to conclude that two districts would meet constitutional requirements, erroneously inverted the burden of proof in declaratory judgment proceeding before the Supreme Court; opponent bore the burden of establishing a constitutional violation. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

[11] Res Judicata  Res Judicata

Where a judgment on the merits was reached in a prior action, the principle of res judicata will bar a subsequent action between the same parties on the same cause of action.

[12] Res Judicata  Claims or causes of action in general

Res judicata applies to claims that could have been raised in the former proceeding.

1 Cases that cite this headnote

[13] Res Judicata  Theories or grounds of recovery

Res Judicata  Theories or grounds of recovery in general

Res Judicata  Family and domestic relations

Under res judicata, a point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot again be drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

[14] Res Judicata  Res Judicata

Res Judicata  Dismissal of appeal

Under res judicata, a judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unreversed.

[15] Res Judicata  Res Judicata

Doctrine of res judicata provides finality to judgments, predictability to litigants, and stability to judicial decisions.

[16] Courts  Previous Decisions in Same Case as Law of the Case

Res Judicata  Res Judicata

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.

[17] Res Judicata  Constitutional law, civil rights, and discrimination in general

Res Judicata  Election law

States  Judicial review and control

In declaratory judgment proceeding regarding Legislature's revised reapportionment plan for state legislative districts, which plan was adopted after Supreme Court had declared certain state Senate districts in original plan to be unconstitutional, opponents could not raise new challenges concerning districts that they had not previously challenged in the earlier declaratory judgment proceeding regarding original plan, nor raise different challenges to districts that they unsuccessfully challenged on other grounds in the earlier proceeding; permitting opponents to raise challenges that could have been addressed in earlier proceeding would allow a serial attack on Legislature's joint resolution in such a manner that it would require the Supreme Court, rather than the Legislature, to draw the reapportionment plan, and would be fundamentally unfair. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

[18] Res Judicata  Constitutional law, civil rights, and discrimination in general

Claims of opponents of legislature's revised reapportionment plan for state legislative districts, which plan was adopted after Supreme Court had declared certain state Senate districts in original plan to be unconstitutional, that other districts, which were not changed in the revised plan, were gerrymandered or non-compact, could have been raised in earlier declaratory judgment proceeding regarding original plan, and thus, Supreme Court would not consider

the claims in declaratory judgment proceeding regarding revised plan. *West's F.S.A. Const. Art. 3, §§ 16(c), 21.*

[19] States — Population as basis and deviation therefrom

States — Political subdivisions; multi-member or floterial districts

Redrawn legislative district for seat in state Senate, in legislature's revised reapportionment plan which was adopted after Supreme Court had declared other state Senate districts in original plan to be unconstitutional, was not facially unconstitutional; challenged district was redrawn to change boundary with second district that previously had been declared unconstitutional, legislature justified new boundary based on need to equalize population, legislature chose not to draw a boundary that would alter the compactness of a third district that was composed solely of three whole counties and that had not previously been challenged, and both of the alternative plans submitted to Supreme Court substantially altered third district, rendering second district less compact and making other trade-offs in the region. (Per curiam, with three justices concurring and two justices concurring in result.) *West's F.S.A. Const. Art. 3, § 21.*

[20] States — Judicial review and control

Evidence did not support claim that two redrawn legislative districts for seats in state Senate, in legislature's revised reapportionment plan which was adopted after Supreme Court had declared original plan to be unconstitutional, were tailor-made for two incumbents; one redrawn district retained only 12.3 percent of its predecessor district, two incumbents were located in that redrawn district, and after-the-fact announcement that one of the incumbents would be moving to a neighboring district did not demonstrate an impermissible intent in redrawing the districts. *West's F.S.A. Const. Art. 3, § 21.*

[21] States — Judicial review and control

Evidence did not demonstrate improper intent of legislature to provide safe, open seats for two Republican candidates who would have otherwise had to run against one another in a Republican primary, when redrawing two legislative districts for seats in state Senate, in legislature's revised reapportionment plan which was adopted after Supreme Court had declared original plan to be unconstitutional; revised plan moved the line of one district to follow a county boundary and moved part of boundary for other district to follow a county boundary where it had not done so before, revised plan improved compactness of affected districts, and districts were not odd-shaped, nor did they have appendages that reached out to clearly encompass an incumbent. *West's F.S.A. Const. Art. 3, § 21.*

[22] States — Judicial review and control

Evidence that neighboring redrawn state Senate district retained a high percentage of its prior population did not establish that challenged redrawn district was configured to favor an incumbent, in legislature's revised reapportionment plan which was adopted after Supreme Court had declared original plan to be unconstitutional. *West's F.S.A. Const. Art. 3, § 21.*

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Opinion

PER CURIAM.

In this second phase of Florida's decennial legislative apportionment process, the Court's constitutional obligation is to determine the validity of the apportionment plan set forth in Senate Joint Resolution 2–B (SJR 2–B). In that joint resolution, the Legislature adopted a revised plan apportioning Florida's Senate districts after this Court declared the original Senate *877 apportionment plan to be constitutionally invalid. See [In re Senate Joint Resolution of Legislative Apportionment 1176 \(In re Apportionment Law—March 2012\)](#), 83 So.3d 597 (Fla.2012).

The declaratory judgment this Court entered on March 9, 2012, expressly declared invalid the Senate's numbering scheme and eight Senate districts, Districts 1, 3, 6, 9, 10, 29, 30, and 34. [Id.](#) at 683. It also charged the Legislature with considering the feasibility of using the City of Lakeland's municipal boundaries to keep that city wholly intact. [Id.](#) at 686. The Court then directed the Legislature to adopt a new joint resolution “conforming to the judgment of the supreme court” as set forth in [article III, section 16\(d\), of the Florida Constitution](#). *Id.*

In accordance with the Court's declaratory judgment, the Legislature reconvened by special session, the end result of which was the Legislature's March 27, 2012, adoption of SJR 2–B. The Attorney General thereafter petitioned the Court to determine the validity of the revised Senate apportionment plan set forth in SJR 2–B. As in the original proceeding initially before this Court in *In re Apportionment Law—March 2012*, the Court is once again tasked with the mandatory obligation entrusted to us by [article III, section 16\(c\), of the Florida Constitution](#) to render a declaratory judgment determining the validity of the Legislature's revised Senate plan.¹

In reaching its decision, the Court has carefully considered the submissions of both those supporting and those opposing the plan.² The Court has also considered the alternative plans that both the Florida Democratic Party (FDP) and the Coalition have submitted in support of their arguments. Finally, the Court has held oral argument. For the reasons set forth in this opinion, we declare the redrawn plan apportioning the districts for the Florida Senate to be constitutionally valid under the Florida Constitution.

I. BACKGROUND

The Legislature originally passed Senate Joint Resolution 1176 (SJR 1176), apportioning *878 this state into 120 House districts and 40 Senate districts on February 9, 2012. The next day, the Attorney General filed a petition in this Court for a declaratory judgment to determine the validity of the legislative apportionment plans contained within SJR 1176. Following the Attorney General's filing, this Court “permit[ted] adversary interests to present their views,” as required by [article III, section 16\(c\), of the Florida Constitution](#). The Court also permitted opponents of the legislative apportionment plans to submit alternative plans.³

In reviewing the validity of the apportionment plan, this Court first examined the historical evolution of article III of the Florida Constitution, noting that prior to 2010, the Court's review was limited to determining whether the Legislature's apportionment plans

complied with (1) the general provisions of the United States Constitution, which set forth the

one-person, one-vote standard under the Equal Protection Clause, and (2) the specific provisions of the state constitution, article III, section 16(a), requiring districts to be “consecutively numbered” and to consist of “contiguous, overlapping or identical territory.”

 *In re Apportionment Law—March 2012*, 83 So.3d at 598. A review of the Court's precedent revealed that prior to 2010, Florida's constitutional requirements were “not more stringent than the requirements under the United States Constitution.”  *Id.* at 602 (quoting *In re Constitutionality of House Joint Resolution 1987 (In re Apportionment Law—2002)*,   817 So.2d 819, 824 (Fla.2002)).

[1] [2] After the voters approved Amendment 5 (Fair Districts Amendment) for inclusion in the Florida Constitution on November 2, 2010, the standards governing legislative apportionment “greatly expand[ed],” restraining “legislative discretion in drawing apportionment plans.”

 *Id.* at 599. The “overall goal” of this amendment was “[t]o require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations” as well as “to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts ... are avoided.” *Id.* (quoting *Advisory Op. to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So.3d 175, 181, 187–88 (Fla.2009) (plurality opinion)). The Fair Districts Amendment—now codified in the Florida Constitution as article III, section 21—imposed upon the Legislature “more stringent requirements as to apportionment than the United States Constitution and prior versions of the state constitution.” *Id.*

This Court succinctly summarized the new standards guiding the apportionment process of this state in the following manner:

The new standards enumerated in article III, section 21, are set forth in two tiers, each of which contains three requirements. The first tier, contained in section 21(a), lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be

drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. *879 The second tier, located in section 21(b), lists three additional requirements, the compliance with which is subordinate to those listed in the first tier of section 21 and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. *See art. III, § 21(b), Fla. Const.* The order in which the constitution lists the standards in tiers one and two is “not [to] be read to establish any priority of one standard over the other within that [tier].” *Art. III, § 21(c), Fla. Const.*

Id. The Court then defined these new standards and the manner in which they interact. *See id.* at 614–41.

After extensively reviewing the various objections raised by opponents to the original House and Senate apportionment plans with these standards at the fore, the Court held “the challengers [had] demonstrated that the Senate plan, but not the House plan, violate[d] the constitutional requirements.” *Id.* at 684. The Court therefore entered a judgment declaring “the Senate plan constitutionally invalid and the House plan constitutionally valid.” *Id.* We agreed with the House that “[t]he language of Senate Joint Resolution 1176 establishe[d] that the Legislature intended the Senate and House plans to be severable from each other in the event either plan was held invalid.” *Id.* “Because we [had] declare[d] the House's apportionment plan to be valid, the only plan that need[ed] to be redrawn by the Legislature [was] the Senate plan.” *Id.*

As to this Court's specific objections to the Senate plan, we concisely set forth our holding with the goal of providing direction to the Legislature:

We have held that Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid. The Legislature should remedy the constitutional problems with respect to these districts, redrawing these districts and any affected districts in accordance with the standards as defined by this Court, and should

conduct the appropriate functional analysis to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries. As to the City of Lakeland, the Legislature should determine whether it is feasible to utilize the municipal boundaries of Lakeland after applying the standards as defined by this Court.... Finally, we have held that the numbering scheme of the Senate plan is invalid. Accordingly, the Legislature should renumber the districts in an incumbent-neutral manner.

Id. at 686.

This Court's holding was fourfold, directing the Legislature to (1) redraw the eight invalid districts and those districts affected by the redrawing with this Court's interpretation of the standards as a guidepost; (2) conduct a functional analysis of voting behavior for the purposes of complying with Florida's minority voting protection provision; (3) determine whether it would be feasible to utilize the municipal boundaries of the City of Lakeland after applying the standards as defined by this Court; and (4) adopt an incumbent-neutral numbering scheme. As to the remainder of the challenges, this Court concluded that the opponents of the Senate plan failed to establish any constitutional violation with respect to other districts, including Districts 4, 15, 25, 26, 28, 33, 35, 36, and 38. *Id.* at 676–78.

The Court did not instruct the Legislature to redraw the entire plan or to change other, unspecified districts, although we *880 recognized that correcting constitutional deficits as to certain districts may require changes to districts that were not specifically declared invalid. *See id.* at 686 (“The Legislature should remedy the constitutional problems with respect to these districts, redrawing these districts and any affected districts in accordance with the standards as defined by this Court....”). Indeed, the Court cautioned that “[i]n redrawing the apportionment plan, the Legislature [was] by no means required to adopt the Coalition's alternative Senate plan.” *Id.* at 686. We expressed that our role was not one

of “dictat[ing] the apportionment plan that the Court would draw,” but one of “provid[ing] the Senate with sufficient guidance in our interpretation of the standards and our application of those standards.” *Id.* at 686. In other words, the Court “provided the Legislature with parameters for the application of the standards to the apportionment plan” and “attempted to provide the Legislature with direction as to the specific constitutional problems that ... [had] been proven and to the general problems with the entire Senate plan.” *Id.* at 685.

In response to this Court's March 9, 2012, declaratory judgment, and in accordance with [article III, section 16\(d\)](#), the Governor called a fifteen-day special legislative apportionment session to enable the Legislature to “adopt a joint resolution conforming to the judgment of the supreme court.” *Id.* at 686 (quoting [art. III, § 16\(d\), Fla. Const.](#)). The Legislature reconvened to accomplish this task, during which several committee hearings and floor debates ensued.⁴ At least one entire Senate committee hearing was dedicated to the issue of renumbering, after which the Senate decided upon a lottery method for randomly assigning districts with either even or odd numbers.

On March 27, 2012, the Legislature passed SJR 2–B, which again apportioned this state into forty Senate districts. The Legislature's revised Senate plan redrew the eight previously invalidated districts and also changed the boundaries of multiple other districts, which the Senate asserts were the result of the changes made to the eight invalidated districts. Because of the Senate's revisions, twenty-six of the original forty Senate districts were reconfigured in some manner, with the City of Lakeland now kept wholly within one Senate district. The revised Senate plan also randomly renumbered each legislative district, and no one challenges the new numbering or the process by which the districts were renumbered.

[3] Following the passage of SJR 2–B, and pursuant to [article III, section 16\(c\)](#), the Attorney General has again petitioned this Court to determine the validity of the revised Senate apportionment plan contained in that joint resolution. This Court has “permit[ted] adversary interests to present their views.” [Art. III, § 16\(c\), Fla. Const.](#) “Under this Court's plenary authority to review legislative apportionment plans, we now have ‘jurisdiction to resolve all issues by declaratory judgment arising under [article III, section 16\(c\), Florida Constitution.](#)’ ” [In re Apportionment Law—March 2012](#), 83 So.3d at 600 (quoting *In re Apportionment Law Appearing*

as *Senate Joint Resolution 1 E, 1982 Special Apportionment Session (In re Apportionment Law—1982)*, 414 So.2d 1040, 1045 (Fla.1982)).

*881 II. ANALYSIS

[4] As we stated in our prior opinion, the “overarching question to be considered by the Court in this declaratory judgment proceeding is the constitutional validity of the plans contained within the Legislature’s joint resolution of apportionment.”  *Id.* at 604 (citing *In re Apportionment Law—2002*,   817 So.2d at 824; *In re Apportionment Law—1982*, 414 So.2d at 1052). The Court makes this determination “by examining whether the Legislature has operated within the constitutional limitations placed upon it when apportioning the state’s legislative districts.” *Id.*

[5] [6] Although the Legislature’s apportionment plans “come to this Court with an initial presumption of validity,” the “process in apportionment cases is far different than the Court’s review of ordinary legislative acts, and it includes a commensurate difference in our obligations.” *Id.* at 606. “In this type of original proceeding, the Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution.” *Id.* This Court is “responsible for measuring legislative acts ‘with the yardstick of the Constitution,’ ” *id.* at 607, and judicial relief is warranted “where the Legislature has ‘fail[ed] to reapportion according to federal and state constitutional requisites.’ ” *Id.* at 606 (quoting *In re Apportionment Law—2002*,   817 So.2d at 824).

[7] [8] [9] Opponents of the apportionment plan bear the burden of establishing a constitutional violation. *See id.* at 653 (“[T]he FDP has failed to satisfy its burden of proof with respect to these two districts.”). However, facial invalidity need not be proven beyond a reasonable doubt. *See id.* at 607. Instead, “this Court will defer to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.” *Id.* at 608. “[U]nderstanding that the Court’s responsibility is limited to ensuring compliance with constitutional requirements, and endeavoring to be respectful to the critically important role of the Legislature,” the Court’s “duty ‘is not to select the

best plan, but rather to decide whether the one adopted by the legislature is valid.’ ” *Id.* (quoting *In re Senate Joint Resolution 2G, Special Apportionment Session 1992* ( *In re Apportionment Law—1992*), 597 So.2d 276, 285 (Fla.1992)). “Where the legislative decision runs afoul of constitutional mandates, this Court has a constitutional obligation to invalidate the apportionment plan.” *Id.* at 609.

It is with this standard and the constitutional framework set forth in [article III, sections 16 and 21, of the Florida Constitution](#) in mind that we review the opponents’ various challenges to the revised Senate plan. We begin with an evaluation of the opponents’ generalized challenges. These challenges focus on improper intent and the functional analysis of minority voting behavior for the purposes of analyzing compliance with Florida’s minority voting protection provision. Then, we consider the challenges to individual districts brought by the opponents. Finally, we conclude that the opponents have failed to satisfy their burden of demonstrating any constitutional violation in this facial review.

A. General Challenges to the Revised Senate Plan

1. Intent to Favor or Disfavor a Political Party or an Incumbent

In the current proceeding, both the FDP and the Coalition allege that the Senate apportionment plan, as redrawn, impermissibly *882 favors incumbents as a whole. These challenges, taken together, assert that the new plan avoids pitting incumbents against each other, the new plan retains the core of previous districts for multiple incumbents, and the partisan balance of the plan demonstrates a severe partisan skew.

In challenging the invalidated Senate plan in the prior proceeding, the opponents asserted similar challenges.⁵ After considering the challenges, we did not direct the Legislature to redraw the entire Senate plan, but rather directed its attention to remedying specific constitutional deficiencies. In this proceeding, we must be mindful that we are reviewing the Senate plan after the Legislature has redrawn it pursuant to our March 2012 decision. Here, the FDP and Coalition have failed to present new facts demonstrating the Legislature redrew the plan with an improper intent. In light of the posture of this case, this Court’s

direction in its prior decision, and the facts in this record, we reject these challenges.

2. NAACP's Challenge

The NAACP primarily asserts that this Court lacks sufficient evidence to undertake a functional analysis of minority voting behavior for the purposes of analyzing whether challenged districts comply with Florida's provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice. As areas of particular concern, the NAACP points to two black minority Senate districts, Redrawn District 9 in Duval County and Redrawn District 31 in Broward County.

Although the NAACP acknowledges that a functional analysis *does* include a review of the types of data this Court previously considered,⁶ the group nevertheless contends that where the minority population percentage of an “ability to elect” district is lowered and pushed to the very edge of that ability, a “risk” arises that the minority group will lack the ability to elect candidates of its choice. The NAACP asserts that in such an instance, the Legislature must demonstrate that the plan will not result in diminishment. The NAACP's position erroneously inverts the burden of proof. *See* [In re Apportionment Law—March 2012](#), 83 So.3d at 624 n. 26 (noting that Florida's constitutional provision does “not incorporate the portion of Section 5 placing the burden of proof on the covered jurisdiction to establish the *883 requirements necessary to obtain preclearance”).

The information the NAACP requests this Court to consider, which includes data regarding endogenous⁷ and racially contested elections to discern racial polarization, is undoubtedly relevant to a functional analysis of minority voting behavior. Nothing in our prior opinion precludes the Legislature from considering prospectively the type of information that the NAACP requests the Court to evaluate in this proceeding. Fatal to the NAACP's claim, however, is the group's acknowledgment that the information it wishes the Court to consider is not before this Court; the group expressly recognizes that “[t]his Court does not currently have before it a record sufficient to determine the extent that significant reduction of the black voting age population in a district would, in light of racially polarized voting, diminish the ability of black voters to continue electing their candidate of choice.”

[10] The NAACP further advances that the 2010 United States Senate and the 2008 presidential elections results are probative in assessing the presence and extent of racially polarized voting, in that each election pits a black candidate against non-black candidates. However, the NAACP then concedes that the available data “does not include a sufficient number of racially-contested elections” and that the foregoing elections “are not overwhelmingly probative of the extent of racially polarized voting.” The NAACP's contention that there is a “risk” in Florida that Redrawn Districts 9 and 31 will diminish the ability of black voters to elect representatives of their choice is not based on facts, but on speculation. In essence, the NAACP asserts that there is simply insufficient evidence from which to conclude that Redrawn Districts 9 and 31 will meet constitutional requirements. Because the NAACP's position erroneously inverts the burden of proof in this proceeding, and the NAACP has not met its burden of proof, we reject all aspects of this claim.

B. Challenges to Individual Senate Districts

1. Barred Challenges

Both the FDP and the Coalition challenge numerous districts in this proceeding that the Court did not previously declare to be in violation of constitutional requirements and that the Legislature did not materially alter when it redrew the Senate plan. The Senate asserts that this second-phase proceeding is limited to reviewing only whether the Legislature complied with the Court's specific mandate.

In its brief, the Senate asserts that the principle of res judicata applies to bar this Court's consideration of challenges to districts that were not changed, although at oral argument the Senate focused on the notion of “fundamental fairness.” Specifically, the Senate argues that given the posture of these proceedings, it would be fundamentally unfair to allow opponents to object to unchanged districts because these arguments could have been presented in the opponents' initial challenges and the Legislature no longer has the ability to remedy any defects this Court would now identify.

[11] [12] [13] [14] [15] Where a judgment on the merits was reached in a prior action, the principle of res judicata will bar “a subsequent action between the same parties on the *884 same cause of action.” *Youngblood v. Taylor*, 89 So.2d 503, 505 (Fla.1956). Importantly, this rule

also applies to claims that *could have been raised* in the former proceeding. *Id.* This Court has fully explained res judicata as follows:

Inhering in all courts of civilized nations and, as is said in one case, an obvious rule of expediency and justice, res adjudicata is a fundamental doctrine universally recognized. No better enunciation of it, perhaps, can be found than that given by Black in his work on Judgments. He states it in two main rules, as follows: First, a point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot again be drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different; and, Second, a judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unreversed. Black on Judgments (2d Ed.) vol. 2, § 504.

 *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla.2001) (quoting *McGregor v. Provident Trust Co.*, 119 Fla. 718, 162 So. 323, 327 (1935)). “Thus, the doctrine of res judicata provides finality to judgments, predictability to litigants, and stability to judicial decisions.” *Id.*

[16] 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. As the Court explained:

The question then becomes how this Court will accomplish its review in a meaningful way given the nature of this constitutionally required proceeding. Undoubtedly, this Court is limited by time to be able to relinquish for extensive fact-finding as we have undertaken in other original proceedings, or to appoint a commissioner to receive testimony and refer the case back to the appellate court together with findings that are advisory in nature only.

 *In re Apportionment Law—March 2012*, 83 So.3d at 609 (footnote omitted). After determining that the Court could perform a meaningful facial review based on the use of technology and a review of alternative plans, the Court concluded:

With our important responsibility to ensure that the joint resolution of apportionment comports with both the United States and Florida Constitutions, and with full awareness of the inherent limitations in the process set out in the state constitution, we undertake our constitutionally mandated review of the facial validity of the Senate and House plans contained within Senate Joint Resolution 1176.

 *Id.* at 614.

There is no question that in now examining the redrawn districts, the Court is not *885 precluded from examining the plan as a whole to see if consistent principles were applied by the Legislature in drawing the overall plan. Yet, the Court will not ignore the effect of what occurred in our prior review, in which the Coalition and the FDP filed comprehensive briefs raising multiple facial challenges. Based on the issues raised, this Court reviewed the apportionment plan, determining, among other things, that specific Senate districts must be declared invalid and providing specific direction as to how to correct the problems. The Legislature's task was then to pass a new joint resolution "conforming to the judgment of the supreme court." Art. III, § 16(d), Fla. Const. The Legislature had only this one opportunity to correct any deficiencies.

[17] Now, both the Coalition and the FDP raise new challenges concerning districts that they did not previously challenge and raise different challenges to some of the districts that they unsuccessfully challenged on other grounds. Permitting these parties to raise challenges that clearly could have been addressed in the first proceeding would allow a serial attack on the joint resolution in such a manner that it would require this Court, rather than the Legislature, to draw the apportionment plan. This would defeat the very purpose of article III, section 16, which gives to the Legislature the primary duty of drawing the plans and providing the Legislature with one chance to correct any deficiencies.

With similar reasoning, the Court addressed a comparable circumstance in a ballot summary case. See *Advisory Op. to Att'y Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So.2d 501 (Fla.2006). There, the Court had previously held that the 2003 Proposed Amendment could not be placed on the ballot because the first sentence of the ballot summary was misleading and thus did not comply with section 101.161(1), Florida Statutes. See *id.* at 502 (citing *Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 902 So.2d 763 (Fla.2005)).

In response, the sponsor again invoked the petition process of article XI, section 3, to propose the same constitutional amendment, but this time removed the first sentence of the ballot summary of the 2003 Proposed Amendment, which the Court had previously found objectionable. *Id.* at 503. The opponents then challenged other terms in the ballot title and summary as also being misleading. The Court held as follows:

The opponents of the 2003 Proposed Amendment argued that the phrase "local government comprehensive land use plans" was misleading. We did not address this argument in *Land Use Plans*. However, because our opinions addressing citizen initiatives are intended to enable proponents to remedy any flaws in the ballot language, the fact that we found only the first sentence of the ballot summary defective indicates that we implicitly rejected other challenges to the ballot summary. To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely.

... All alleged deficiencies with the terms in the ballot title and summary should have been raised in the first case in which we considered this proposed amendment. *Allowing piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.* Cf. [Juliano](#), 801 So.2d at 105 ("[T]he doctrine of res judicata *886 provides finality to judgments, predictability to litigants, and stability to judicial decisions.").

Id. at 505 (emphasis added).

For the reasons addressed above, we hold that res judicata does not apply in this case. However, we agree with the Senate that when reviewing this apportionment plan after portions of the initial plan were held to violate constitutional mandates, the Court must consider the fact that other districts were either not challenged or challenges to those districts were rejected.

Certainly the Court understands that the Florida Constitution imposes a critical obligation in the redistricting process to ensure that the constitutional mandates are followed. However, the process must also work in an orderly and balanced manner. Although the challengers have asserted that the Court has discretion to review the entire plan, the Court's decision did not require the Legislature to redraw the entire plan. It would be fundamentally unfair to entertain challenges in this second-phase proceeding that could have been made and were not, or to entertain challenges that were made and rejected, after the Legislature is no longer able to correct any alleged deficiencies.

[18] Based on the reasoning above, we briefly look at the challenges made by the opponents to districts that were not materially changed in the redrawing to see if those challenges could have been raised earlier. First, the opponents challenge

numerous districts that the Legislature did not change at all. Specifically, the Coalition challenges Districts 17, 19, and 22 in the redrawn Senate plan (Districts 15, 19, and 22 in the prior plan, respectively), asserting among other things that these districts should be declared invalid because they are an “egregious gerrymander in order to prevent the creation of what would otherwise be a naturally-occurring toss-up district in the area.” In addition, the Coalition challenges District 18 in the redrawn Senate plan (District 20 in the prior plan) as being non-compact and avoiding the use of existing political or geographical boundaries in order to favor a member of the House who has declared his candidacy for this open Senate district. In looking to the claims raised, the Coalition could have brought them in the prior proceeding. As it would be fundamentally unfair to entertain such challenges now, we do not consider them.

In addition, the opponents also challenge particular districts that were changed only minimally. We review such challenges to determine whether the basis of the challenge could have been raised in the prior proceeding. The FDP alleges that Redrawn District 32 (District 25 in the prior plan) is invalid because it is non-compact and is erroneously based on the communities of interest principle. The Coalition also challenges this district as being drawn to benefit an incumbent. The FDP asserts that Redrawn District 39 (District 40 in the prior plan) is invalid because it is visually and statistically non-compact, crosses multiple geographical and political boundaries, and lacks a tier-one justification. The Coalition contends that the same district is non-compact and was drawn to favor incumbents and to confine the influence of Democratic votes to as few districts as possible. Although both of these districts underwent *de minimis* changes when the Legislature redrew the plans, the changes do not relate to the arguments raised. Thus, the parties do not get a second bite at the apple—in other words, a second challenge to virtually the same district—in this second-phase proceeding.

2. Districts Previously Invalidated, But Now Unchallenged

In our prior decision, we invalidated Districts 1 and 3 (now Redrawn Districts 1 *887 and 2) because when the Legislature drew these districts to create one rural and one coastal district, the resulting districts violated two constitutional standards: compactness and utilizing existing political and geographical lines where feasible.  *In re Apportionment Law—March 2012*, 83 So.3d at 662. In

response, the Legislature reconfigured these districts by following county and municipal boundaries. By doing so, the revised plan made both districts more visually compact, a conclusion that is also supported by the mathematical compactness scores. No party challenges either of these districts. We conclude that the Legislature properly complied with this Court's mandate.

We also declared prior District 30 (which resembled an upside-down alligator) to be invalid because the district “violate[d] the Florida constitutional standards that districts ‘shall be compact’ and utilize political and geographical boundaries where feasible. Further, the failure to comply with the tier-two standards, in the absence of any constitutionally valid justification, objectively indicate[d] intent to favor an incumbent.”  *Id.* at 672. The Legislature redrew this district, which is now Redrawn District 23. Based on the new configuration, the district is more visually compact and the mathematical scores for compactness bear this out. Further, although under the invalidated Senate plan, this district retained 84.9% of the population of its predecessor district, when it was redrawn to become more compact, that percentage dropped to 59.8%. No opponent challenges this district. We conclude that the Legislature properly complied with this Court's mandate.

3. Non-Barred Challenges to Individual Districts

District 8 (Northeast Florida)

[19] The Coalition and the FDP challenge Redrawn District 8 in northeast Florida. The FDP contends that Redrawn District 8 is invalid because it is non-compact and splits counties. The Coalition argues that Redrawn District 8 is invalid because it was configured with the intent to favor a political party and it splits the City of Daytona Beach. The crux of the Coalition's claim is that the Legislature chose to split Daytona Beach's Democratic community in order to favor the Republican Party in Districts 6 and 8. Both the FDP and the Coalition have submitted alternative plans to support their challenges. In its reply brief, the NAACP asserts that the newly revised plan is detrimental to black voters in Daytona Beach.

The districts presently challenged were reconfigured by the Legislature as a result of redrawing northeast Florida after this Court held that District 6 in the invalidated plan was unconstitutional. In revising the plan, Invalid District 6 became Redrawn District 9, Invalid District 9

became Redrawn District 6, and District 8 retained the same number. In light of the Legislature's reconfiguration of Invalid District 6, the boundaries of which are now entirely within Duval County, the configurations of Districts 8 and 9 in the invalidated Senate plan (Redrawn Districts 8 and 6, respectively) were altered. District 7 to the northwest, a district consisting of and contained within three counties, remained unaltered. After the region was redrawn, Redrawn District 6 is now composed of three whole counties with additional population taken from northeast Volusia County, including part of the City of Daytona Beach.⁸ Redrawn District 8 is located in ***888** and divides three counties: Volusia, Lake, and Marion. It is these county and city splits, as well as the asserted non-compactness of Redrawn District 8, upon which the challengers rely.

The Senate justifies the decision to draw the boundary between Redrawn Districts 6 and 8 through Daytona Beach on the basis of the need to equalize population. In other words, rather than draw population from Clay County in District 7—and thereby altering a compact district that was previously unchallenged—when reconfiguring this area, the choice was made to enter Volusia County. During the Senate floor debate, the only alternative plan submitted for consideration and debate affected the northeastern region of Florida, including District 7, without a commensurate increase in compliance with Florida's constitutional requirements. Both of the alternative plans submitted to this Court also substantially alter District 7, rendering Redrawn District 6 less compact and making other trade-offs in northeast Florida. See [In re Apportionment Law—March 2012](#), 83 So.3d at 608 (recognizing that our duty “is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid” (quoting [In re Apportionment Law—1992](#), 597 So.2d at 285)).

Further, although the Coalition asserts that “[b]y splitting Daytona Beach, which votes heavily Democratic, the Legislature was able to maintain Republican performance in Districts 6 and 8,” reconfiguring the districts in the manner under the alternative plans has only a minor effect on the political composition of Redrawn District 8 and little to no effect on Redrawn District 6. Redrawn District 8 is competitive under the Legislature's plan and remains competitive in both of the alternative plans before this Court. In all three plans, Governor Scott (R) would have won the 2010 gubernatorial election, President Obama (D) would have won the 2008 presidential election, former Governor

Crist (R) would have won the 2006 gubernatorial election, and registered Democrats would outnumber registered Republicans. Moreover, in all three plans, Redrawn District 6 remains a solidly Republican-performing district.

In light of the posture of this case and the fact that District 7 was previously unchallenged, is compact, and is composed solely of three whole counties and that reconfiguring this area requires making Redrawn District 6 less compact, we cannot conclude on the record in this second-phase proceeding that District 8 is facially invalid. The FDP and the Coalition have failed to carry their burden of proof to demonstrate that District 8 was drawn with the intent to favor a political party.

Districts 10, 13, and 14 (Orlando Area)

Redrawn Districts 10, 13, and 14 are challenged (Districts 13, 10, and 14 in the invalidated Senate plan, respectively). The Coalition contends that Redrawn Districts 10 and 13 were “tailor-made” for two incumbents and that the Legislature failed to eliminate the constitutionally suspect appendage. The FDP challenges Redrawn District 13 on the grounds that it is non-compact and still has an appendage. The FDP also summarily challenges Redrawn District 14 on the grounds of compactness.

These districts are located in the Orlando area, which was redrawn as a result of this Court invalidating District 10 (now Redrawn District 13) during the prior apportionment proceeding. This Court specifically invalidated District 10 in that plan (now Redrawn District 13) on the grounds that it was non-compact and appeared to be drawn to favor an incumbent who lived in the “appendage” located on the eastern side of the district. See [In re Apportionment Law—March 2012](#), 83 So.3d at 671. The shape of District 10 was necessarily related to the shapes of neighboring minority Districts 12 and 14, but the Senate in drawing Districts 12 and 14 did not perform a functional analysis. See [id.](#) at 671 & n. 52. District 12 was “a coalition district with a 40.0% black [voting-age population (VAP)] and 20.9% Hispanic VAP.” [Id.](#) at 671. District 14 was a “new Hispanic majority-minority district with a Hispanic VAP of 50.5%; there was no predecessor Hispanic majority-minority district in the 2002 Senate plan.” *Id.*

In redrawing the Orlando area, the Legislature conducted a functional analysis of the minority districts and evaluated whether they could be drawn more compactly and whether the

appendage could be eliminated. This stands in stark contrast to the approach taken when drawing the now-invalidated Senate plan, in which “[n]othing in the record reflect[ed] that the process of drawing the districts in this area recognized the importance of balancing the constitutional values.” *Id.* at 671–72. The Legislature redrew District 12 and slightly changed District 14, eliminating the narrow corridor between them. The Legislature concluded, however, that it could not completely eliminate the appendage without impairing minority voting rights in Districts 12 and 14, and it drew the resulting district (Redrawn District 13) east of Orlando by following county lines where possible.

[20] The available evidence does not support the Coalition's argument that Redrawn Districts 10 and 13 were “tailor-made” for two incumbents. Redrawn District 13 retains only 12.3% of its predecessor district, and two incumbents are located in Redrawn District 13. The Coalition's assertion of an after-the-fact announcement that one of the incumbents would be moving to a neighboring district does not demonstrate on this record that the Legislature redrew these districts with impermissible intent.

The Coalition and the FDP's alternative plans do not demonstrate that the redrawn Orlando districts are invalid. The Coalition's plan does not eliminate the “appendage,” but rather configures it differently. The FDP's alternative plan eliminates the appendage by incorporating it into Districts 12 and 14, reducing the black VAP in FDP District 12 to 31.3% and the Hispanic VAP in FDP District 14 to 46.5%. A functional analysis as to FDP District 12 raises concerns that the district will not perform as one in which black voters will likely have the ability to elect the representatives of their choice. FDP District 12 would perform Democratic,⁹ but black voters would make up less than a majority of Democrats,¹⁰ and black voters would *not* have controlled the Democratic primary (only 38.7% of the Democrats voting in the 2010 primary would have been black). Further, the reduction of District 14's Hispanic VAP below a majority raises potential Section 2 issues.¹¹

On this record, we conclude that the Coalition and the FDP have not carried their burden of proof to demonstrate that *890 the redrawn Orlando districts are constitutionally invalid.

Districts 21 and 26 (Heartland area)

[21] The Coalition challenges Redrawn Districts 21 and 26. Specifically, the Coalition argues that a last-minute amendment was intended to provide safe, open seats for two Republican candidates (one a House representative, the other a former House representative) who would have otherwise had to run against one another in a Republican primary. These districts were initially redrawn as a result of the decision to make the City of Lakeland whole in the redrawn plan and were then amended during the Senate debate to move Plant City into a Hillsborough County district.

Contrary to the Coalition's assertion, we conclude that the record does not demonstrate that an improper intent behind the amendment was “obvious.” The amendment not only moved Plant City, but it also made improvements to the plan. It moved the line of District 24 to follow a county boundary and also moved part of the boundary for District 21 to follow a county boundary where it did not before. In addition, the amendment improved the compactness of the affected districts.

This is not a situation where an odd-shaped district or appendage reaches out to clearly encompass an incumbent.

See, e.g., *In re Apportionment Law—March 2012*, 83 So.3d at 671 (“[W]e conclude that District 10, which is visually non-compact and clearly encompasses an incumbent in an appendage, is constitutionally defective.”). Rather, the amendment made improvements—both with respect to following county boundaries and compactness—and was based on a logical justification. Finally, we note that both the Coalition and the FDP's alternative plans also place the two candidates in separate Senate districts. On this record, we conclude that the Coalition has failed to carry its burden of proof.

The FDP also raises a challenge to Redrawn District 21 on a different basis, summarily asserting that while Redrawn District 21 is relatively compact according to quantitative measures, it is visually non-compact and crosses through a number of county boundaries. The FDP states that Redrawn District 21 was configured to favor an incumbent.

[22] Although the FDP asserts that Redrawn District 21 was drawn to benefit an incumbent, it does not offer any supporting argument, but instead notes that neighboring Redrawn District 32 retains a high percentage of its prior population. The FDP relies on its alternative plan, which it claims is more compact. However, the FDP's plan only makes slight improvements to the compactness of Redrawn District

21 and makes wide-sweeping changes to the surrounding area, including changes to a district to which we rejected a challenge in the last proceeding (Redrawn District 32, which was District 25 in the invalidated Senate plan). We conclude that the FDP has failed to establish a constitutional violation with respect to this district.

III. CONCLUSION

In the prior proceeding, this Court directed the Legislature to adopt a new joint resolution of legislative apportionment conforming to the judgment of the Court. Pursuant to this Court's directive, the Legislature adopted a revised Senate apportionment plan that sought to remedy the constitutional infirmities apparent on the face of the invalidated Senate plan. In this proceeding, we conclude that the opponents have failed to demonstrate that the revised Senate plan as a whole or with respect to any individual district violates *891 Florida's constitutional requirements. Therefore, pursuant to [article III, section 16\(c\), of the Florida Constitution](#), the Court enters this declaratory judgment declaring the revised Senate apportionment plan as contained in Senate Joint Resolution 2–B to be constitutionally valid under the Florida Constitution.

No motion for rehearing shall be entertained. This case is final.

It is so ordered.

[PARIENTE](#), [LEWIS](#), and [LABARGA](#), JJ., concur.

[PARIENTE](#), J., concurs with an opinion.

[CANADY](#), C.J., and [POLSTON](#), J., concur in result.

[PERRY](#), J., concurs in part and dissents in part with an opinion, in which [QUINCE](#), J., concurs.

[PARIENTE](#), J., concurring.

“The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.” So said Chief Justice John Marshall nearly two centuries ago. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389, [5 L.Ed. 257 \(1821\)](#). The Florida Constitution is “not a grant of power but a limitation upon power” of the government. [In re Senate Joint Resolution of Legislative](#)

[Apportionment 1176 \(In re Apportionment Law—March 2012\)](#), 83 So.3d 597, 599 (Fla.2012).

In 2010, the people of this state passed Amendment 5 (the Fair Districts Amendment), which imposed significant limitations upon the power of the Legislature to apportion legislative districts. As adopted, those limitations, which are now codified in article III, section 21, of the Florida Constitution, were entitled “standards for establishing legislative district boundaries.” By approving the Fair Districts Amendment, the voters of this state clearly expressed that employing partisan favoritism to draw legislative districts was prohibited and that neutrality to partisan and incumbent interests was required.

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. As explained by Justice Lewis in his concurring opinion in the prior proceeding, the thirty-day time limit was reasonable in 1968 given the very limited review envisioned by the drafters of the provision.

See [In re Apportionment Law—March 2012](#), 83 So.3d at 687 (Lewis, J., concurring). Yet, the structure meant to accommodate a limited review remains unchanged, despite the addition of extensive new standards that “dramatically alter[ed] the landscape with respect to redistricting.” [Id.](#) at 607 (majority op.).

For the first time this year, the Legislature has had to adhere to the newly enacted constitutional standards and the first time this Court has had to interpret and apply the standards, presenting unique challenges for the Legislature, the opponents, and the Court. First, neither the House nor the Senate had the benefit of this Court's interpretation of the constitutional standards *before* the initial plans were drawn. Second, the opponents did not have the assistance in the initial proceeding of this Court's guidance on the importance of alternative plans in allowing this Court to perform a meaningful facial review.

This Court had a formidable task in the first round of redistricting to both interpret *892 the newly enacted standards and then attempt to apply those standards in a meaningful way when reviewing the 120 House districts and the 40 Senate districts within thirty days. In this second-phase proceeding, during which this Court again has only thirty

days, the Court was faced with the challenge of looking at the newly drawn districts and determining if the Senate adopted a new redistricting plan “conforming to the judgment of the supreme court.” *Art. III, § 16(d)*, Fla. Const.

The Coalition and the FDP assert that the Court should re-examine all of the districts and that the Court has a separate constitutional obligation to review the plan for adherence to the constitutional standards even if no one objects. Counsel for the FDP asserts that we have “total discretion.” I do not agree that this Court has “total discretion” to substitute its policy preferences for legislative decisions. Rather, this Court’s role is to determine whether a violation of the constitution has been established. See *In re Apportionment Law—March 2012*, 83 So.3d at 608 (“[T]his Court will defer to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.”).

I have concurred in the majority’s conclusion that each opponent has failed to satisfy its burden to demonstrate in this second-phase proceeding that the revised Senate plan violates Florida’s constitutional requirements. I write, however, to address barriers currently existing that appear to prevent the will of the voters from being fully realized. The first is time—specifically, the extremely strict time limitations under which the Legislature and this Court must both operate. The second is the process, in that an inherently political body is responsible for drawing the apportionment plans. The third is the standards set forth in the Amendment, which require this Court to discern the Legislature’s “intent,” a difficult inquiry even under more realistic time frames.

The voters have spoken that neutrality, and not partisan politics, must be the polestar of legislative apportionment. However, I am concerned that the constraints relating to the time, the process, and the standards in combination have prevented the will of voters as expressed by the passage of the Amendment from being fully effectuated.

TIME CONSTRAINT: TIME IS NOT ON OUR SIDE

First, I examine the *temporal constraints*, both on this Court and on the Legislature. This Court’s mandatory review, which must be undertaken within a restrictive thirty-day time frame, is not easily reconciled with determining intent and related issues. While we acknowledged that the Court’s role was “unquestionably circumscribed by the extremely short time

frame set forth in article III, section 16(c), of the Florida Constitution,” we emphasized that “such a limitation cannot deter the Court from its extremely weighty responsibility entrusted to us by the citizens of this state through the Florida Constitution to interpret the constitutional standards and to apply those standards to the legislative apportionment plans.” *In re Apportionment Law—March 2012*, 83 So.3d at 599. 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,” *id.* at 631 (quoting *Lewis v. Leon Cnty.*, 73 So.3d 151, 153–54 (Fla.2011)), 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.

*893 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 688 (Lewis, J., concurring) (quoting *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 836 (Fla.2002) (Lewis, J., concurring)).

Time is therefore the first critical barrier to a more meaningful review, and those time limitations are apparent throughout the constitutionally mandated process—not just this Court’s review. In fact, rather than the Legislature being able to review and pass an apportionment plan shortly after the census data is received, the Florida Constitution actually prevents the Legislature from passing a joint resolution apportioning the state until “its regular session in the second year following each decennial census.” *Art. III, § 16(a)*, Fla. Const. What this means in practical terms is that the Legislature could not meet in “regular session” to apportion the state until 2012, *even though* the decennial census data was completed and delivered to the State of Florida by the United States Census Bureau the previous year in mid-March 2011.¹² Therefore, even though the Legislature was able to conduct public meetings during 2011, which it did, and even though

it had a number of staff working on the mechanics of the redistricting software and considering plans, the Legislature could not debate and pass a joint resolution until 2012. This delay compressed the process of apportionment, court review, and redrawing the lines into a few short months before the qualifying period for legislative candidates.¹³

In this case, the Legislature convened for its regular session on January 10, 2012. The Legislature did not pass its joint resolution until February 9, 2012, and the Attorney General filed the petition for declaratory judgment the very next day, February 10, 2012, requiring this Court to issue its final opinion within thirty days as provided by the constitution. Then, after this Court held on March 9, 2012, that the Senate plan was invalid, in accordance with the same constitutional framework, the Governor was required to and did convene a special session within five days, and the Legislature was then required to and did pass its new joint resolution within the mandated fifteen days on March 27, 2012. The Attorney General filed its petition on April 5, 2012, and this Court again had only thirty days to review and determine whether to approve or invalidate the new plan.

Throughout this entire process, the Court was reminded by the Secretary of *894 State, who filed comments in both cases, that the *qualifying* period for all legislative districts would commence on June 4, 2012, and would end on June 8, 2012, creating additional time pressures for this Court and continued uncertainty for the candidates seeking to run for the legislative districts.¹⁴ In addition, Florida has five counties covered under Section 5 of the Federal Voting Rights Act, meaning that the Department of Justice or the District Court for the District of Columbia must undertake its own separate review and pre-clear the apportionment plans. It has become clear that the time frames that were placed in the Florida Constitution in 1968 are no longer realistic, especially in light of the newly enacted Fair Districts Amendment. Unless the process is changed, the Legislature, and this Court, will again in ten years be placed under these unrealistic time constraints.

Many of the other states do not have this long delay after the receipt of the decennial census data. For example, in New Jersey, the apportionment must be completed by a legislative apportionment commission shortly after receiving the census data. *See* art. IV, § 3, ¶ 1, N.J. Const. In fact, the majority of states (32 to be exact) completed the initial apportionment plans for legislative districts in 2011, some of which were later struck down by courts or amended.¹⁵

I would urge the Legislature in the next session and the Constitutional Revision Commission when it meets in 2018 to study the process with particular attention to the concerns of *time*. Unquestionably, a longer time frame in which the Legislature can debate and adopt a plan and this Court can review the plan would constitute a more orderly approach.

PROCESS CONSTRAINT: THE POLITICS OF REDISTRICTING

Next, I address the concerns of *process*. The Florida Constitution continues to place discretion in the Legislature to draw electoral districts, but simultaneously commands that the Legislature and individual legislators turn a “blind eye” to the effects of drawing the lines when doing so. In other words, the Fair Districts Amendment changed the standards governing the manner in which the Legislature accomplishes that task, adding an express prohibition against partisan and incumbent favoritism to eliminate the partisan nature of the apportionment process.

At oral argument, counsel for the Senate asserted that in light of the purpose of the Fair Districts Amendment, when the Legislature apportioned the state into legislative districts, it was “not looking at red and blue.” That certainly was the intent behind the amendment. The question, however, is whether this purpose can be truly effectuated when a political body is the body tasked with drawing the plan.

Politics are a seemingly “inevitable” consideration entering into the apportionment calculus.  *In re Apportionment Law—March 2012*, 83 So.3d at 616. If it is this *895 Court's role to be the guardian of the constitution's intent, I believe that changes must be made to the process to ensure that the purpose of the amendment—to take politics out of the apportionment equation—can be fully realized. In my view, it would be wise at this juncture to seriously examine the adoption of an independent apportionment commission to oversee this inherently political task. This is not a criticism of those who drew the plans, but simply an acknowledgment of the reality. “The desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties.”  *Id.* at 615. It is undeniable that the “raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country.”

 *Id.* at 616 (quoting   *Martinez v. Bush*, 234 F.Supp.2d 1275, 1297 (S.D.Fla.2002)).

The creation of an independent commission as a means to reform the process is not a novel concept. Other states have established independent redistricting commissions to redraw legislative districts. *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(3) (added by initiative measure in 2000); Cal. Const. art. XXI, § 2§ 2 (added by initiative measure in 2008); Idaho Const. art. III, § 2(2)§ 2(2) (created in 1994); Wash. Const. art. II, § 43 (added by constitutional amendment in 1982). In fact, even in Florida, numerous proposals have been advanced, but never adopted, for the creation of such a commission over the years.

As far back as 1992—almost two decades before the Fair Districts Amendment was approved by the voters of Florida—Justice Overton suggested that an “independent reapportionment commission” would be a “more efficient and less expensive process to develop a reapportionment plan.”

 *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So.2d 276, 286 (Fla.1992) (Overton, J., concurring). Similarly, members of the 1998 Constitutional Revision Commission, including Commissioner Evans–Jones and Judge Barkdull, submitted several proposals to amend the Florida Constitution by creating various types of independent commissions to apportion this state into legislative districts. *See* Fla. Const. Revision Comm’n, Proposal Nos. 85, 148, 162, 172, 177 (1998). Most recently, this Court reviewed a citizen initiative petition to amend the constitution to include tasking a commission with apportioning this state, but that initiative was struck from the ballot as having a misleading ballot summary and not containing a single subject. *See*

 *Advisory Op. to Att’y Gen. re Indep. Nonpartisan Comm’n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So.2d 1218, 1225–26, 1229 (Fla.2006). Since that time, no similar initiative or proposal has resurfaced in this state. In my view, the time has come for this state to reevaluate the value of an independent apportionment commission.

STANDARDS CONSTRAINT: IS INTENT AN UNWORKABLE STANDARD?

Finally, I question whether an intent-based standard is the most effective for accomplishing the goal of the Fair

Registered Voters:

Districts Amendment. As explained above, one of the overarching goals of the Amendment was to “require the Legislature to redistrict in a manner that prohibits favoritism or discrimination.”  *In re Apportionment Law—March 2012*, 83 So.3d at 598 (quoting *Advisory Op. to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So.3d 175, 181 (Fla.2009)). In furtherance of that goal, the *896 newly added standards include the requirement that “[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” Art. III, § 21(a), Fla. Stat§ 21(a), Fla. Stat. Importantly, this standard focuses on prohibiting drawing the districts with impermissible *intent*.

Intent is a difficult, although not impossible, inquiry. At least five other states share a similar constitutional or statutory requirement,¹⁶ but case law from those states applying that standard has been scarce.¹⁷ Given the nature of our review, this Court focused on “objective indicators of intent,” particularly adherence to the tier-two standards of equal population, compactness, and utilizing political and geographical boundaries where feasible.  *In re Apportionment Law—March 2012*, 83 So.3d at 618.

Here, the opponents of the revised Senate plan point to the unbalanced effects of the plan as indicative of impermissible intent. Specifically, they contend that the partisan balance of the plan demonstrates a severe partisan skew in favor of the Republican Party. However, Florida’s amendment was intended to “prohibit[] intent, *not effect*.” *Id.* (emphasis added). As counsel for the Senate noted during oral argument, “there are going to be political consequences ... but the constitution does not prohibit adverse effect,” rather “[i]t prohibits adverse intent.”

The Coalition and the FDP point to elections results data from the redrawn Senate plan as demonstrating that the statewide partisan imbalance favors the Republican Party. Below is a comparison of the invalidated Senate plan, the redrawn Senate plan, the Coalition’s alternative plan, and the FDP’s alternative plan using the metrics of registered voters, the 2010 gubernatorial election, the 2008 presidential election, and the 2006 gubernatorial election.

Statewide: ¹⁸

53% Democrat

47% Republican

Invalidated Senate:	18 Democrat (45%)	22 Republican (55%)
Redrawn Senate:	19 Democrat (47.5%)	21 Republican (52.5%)
Coalition:	20 Democrat (50%)	20 Republican (50%)
FDP:	21 Democrat (52.5%)	19 Republican (47.5%)

2010 Gubernatorial Election:

Statewide: ¹⁹	48% Sink (D)	49% Scott (R)
Invalidated Senate:	14 Sink (35%)	26 Scott (65%)
Redrawn Senate:	15 Sink (37.5%)	25 Scott (62.5%)
Coalition:	18 Sink (45%)	22 Scott (55%)
FDP:	17 Sink (42.5%)	23 Scott (57.5%)

2008 Presidential Election:

Statewide:	51% Obama (D)	48% McCain (R)
Invalidated Senate:	16 Obama (40%)	24 McCain (60%)
Redrawn Senate:	17 Obama (42.5%)	23 McCain (57.5%)
Coalition:	23 Obama (57.5%)	17 McCain (42.5%)
FDP:	21 Obama (52.5%)	19 McCain (47.5%)

2006 Gubernatorial Election:

Statewide:	45% Davis (D)	52% Crist (R)
Invalidated Senate:	13 Davis (32.5%)	27 Crist (67.5%)
Redrawn Senate:	12 Davis (30%)	28 Crist (70%)
Coalition:	13 Davis (32.5%)	27 Crist (67.5%)
FDP:	13 Davis (32.5%)	27 Crist (67.5%)

*897 This partisan imbalance naturally raises questions. In this case, however, I ultimately agree with the majority's conclusion that "[i]n light of the posture of this case, this Court's direction in its prior decision, and the facts in this

record," the Coalition and the FDP have "failed to present new facts demonstrating the Legislature redrew the plan with an improper intent." Majority op. at 882.

This does not mean that challenges on the basis of partisan imbalance should always be rejected in the future. The Florida Constitution mandates that “[n]o apportionment *plan* or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” Art. III, § 21(a), Fla. Const. (emphasis added). Clearly, under the plain text of the constitutional provision, this Court may consider whether the overall *plan* was drawn with impermissible intent. In my view, there is certainly a point at which severe partisan imbalance will reflect impermissible intent. Defining that threshold for future cases, however, is a difficult undertaking. It is a challenging task to discern impermissible from neutral intent based on the data before this Court.

By comparison, Arizona has removed intent from the partisan-favoritism inquiry by instead requiring “competitive districts” to the extent practicable. As discussed in [Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission, 220 Ariz. 587, 208 P.3d 676 \(2009\)](#), the Arizona Constitution requires the commission drawing an apportionment plan to abide by the following principle: “To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.” [Id. at 681](#) (quoting Ariz. Const. art. IV, pt. 2, § 1(14)). Further, the commission is required to exclude “[p]arty registration and voting history data ... from the initial phase of the mapping process[,]” but may use that data to “test maps for compliance.” Ariz. Const. IV, pt. 2, § 1(15). Other states’ laws mandate that districts shall not be drawn so as to unduly favor a person or political party without an express intent or purpose element.²⁰

*898 Restricted to only a facial review of the Legislature’s *intent*, there will be times when this Court may seriously question the drawing of certain lines or the partisan balance of the plan but nevertheless uphold it because impermissible intent has not been proven based on the limited nature of the record before us. This is especially true because “any redrawing of lines, regardless of intent, will inevitably have an effect on the political composition of a district and likely whether a political party or incumbent is advantaged or disadvantaged.” [In re Apportionment Law—March 2012, 83 So.3d at 617](#). Accordingly, given the strict time-frame under which we must necessarily operate and the limited record before us, the “intent” standard in the Fair Districts Amendment may ultimately serve to undercut the goal of the voters in passing the Amendment.

CONCLUSION

The bottom line is that while the goal of the new amendment is laudatory, it is imperative that there be further exploration of the limitations of time, process, and the language of the “intent” standard. These issues are deserving of a closer look, with an eye toward assuring that the will of the voters can be fully realized. I urge the Legislature in the next session and the Constitutional Revision Commission when it meets in 2018 to study the process with particular attention to these concerns. Alternatively, the citizen initiative process could be employed once again to propose additional changes that would more completely effectuate the intent of the voters in passing the Fair Districts Amendment.

PERRY, J., concurring in part and dissenting in part.

I concur in the majority except as to its rejection of the challenge to District 8. I would find that Redrawn District 8 is constitutionally invalid because it is 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.

“It is this Court’s duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid.” [In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 607 \(Fla.2012\)](#). As we stated in our prior ruling,

Because “legislative reapportionment is primarily a matter for legislative consideration and determination,” [In re Apportionment Law—1972, 263 So.2d at 799–800](#), this Court will defer to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.

[Id. at 608](#) However, I would not defer to the Legislature’s decision here because there has been a violation of the constitutional requirements for compactness and following political or geographic boundaries without tier one justification.

As previously noted,

“[T]he usual device for diluting the minority voting power is the manipulation of district lines” by either fragmenting the minority voters among several districts where a bloc-voting majority can *899 routinely outvote them or “packing” them into one or a small number of districts to minimize their influence in adjacent districts.

Id. at 622 (citing  *Voinovich v. Quilter*, 507 U.S. 146, 153–54, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993)). We additionally noted:

While discretion must be afforded to accommodate for well-recognized geographical boundaries, the decision to simply use any boundary, such as a creek or minor road, would eviscerate the constitutional requirement—as well as the purpose for the requirement, which is aimed at preventing improper intent.

Id. at 638.

I would find that Redrawn District 8 has clearly been drawn with the intent to favor a political party to the detriment of a racial minority community. The effect of the Senate plan was to divide a historically black community—which is also a largely Democratic-voting community—into the surrounding community thereby diluting the voting power and even the influence of that historically black community. The district is visually non-compact, consisting of three counties, all of which are split (Volusia is split into three districts—Districts 6, 8 and 10; Marion is split into three districts—Districts 5, 8 and 11; and Lake is split into two districts—8 and 11). Further, the northern boundary of Redrawn District 8 does not follow consistent geographical boundaries—traveling down minor roadways for just over three miles, International Speedway Boulevard (State Road 92) for 9.2 miles, another set of minor roadways for 1.6 miles, no political or geographical boundary for nearly 8 miles, another minor roadway for 3.3 miles, and then no political geographical boundary for nearly three more miles until it reaches the Volusia–Flagler County line—splitting the City of Daytona Beach. Its southern border likewise does not follow any consistent political or geographical boundaries, switching between major roads, minor roads, county lines, city boundaries, rivers, and lakes.

As before, the Senate has “switched between different types of boundaries within the span of a few miles.” *Id.* at 656.

As asserted by the Coalition, it appears that 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. I agree with the Coalition's assertions that the partisan skew is not the result of a “natural packing effect” of urban Democrats, but of systematic choices by the Legislature to favor the Republican Party. Additionally, I agree with the NAACP that the redrawn district is detrimental to black voters in Daytona Beach and that that community “accustomed to being represented by the candidate of its choice, would be stranded in a district in which it most certainly will not be able to elect its candidate of choice or one responsive to its interests and needs.”

The dividing line through Daytona Beach cuts through the heart of a concentrated black, Democratic community in Daytona Beach, dispersing those voters into the surrounding districts, which have a majority-white voting age population²¹ *900 and would perform Republican (Redrawn District 6 would perform solidly Republican,²² and Redrawn District 8 is a more competitive district, but leans Republican in its voting patterns²³). In contrast to the composition of the surrounding areas, Daytona Beach—standing alone—would perform strongly Democratic.²⁴ The Senate argues that the split was made on the basis of needing to equalize the population. However, the Senate has not demonstrated that it was not feasible to use existing political and geographic boundaries here.

By finding that this Court “cannot conclude on the record ... that District 8 is facially invalid,” the majority permits the division of a community surrounding a historically black college in a way that was avoidable because that community, alone, does not comprise a majority vote. The justification seems to be that because the inclusion of the community as a whole cannot create a majority-minority district, there is no constitutional requirement that the Legislature attempt to keep it intact. This ruling contradicts the constitutional requirement that districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice. *See art. III, § 21(a)*, Fla. Const.

The majority determines that “the FDP and Coalition have failed to present new facts demonstrating the Legislature redrew the plan with an improper intent.” Majority op. at 882. As I stated in my concurring opinion, “I am fearful that we have cloaked ourselves in a permissive standard of review where the Legislature need not demonstrate its adherence to each of the new constitutional mandates.”  *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d at 693 (Perry, J., concurring). With today's ruling, I am fearful that we have created a precedent that will preclude this community from ever being able to successfully challenge being split into two districts because it will never be “retrogressive” from this point. This ruling sends a signal that *901 it is permissible under the provisions of our

constitution to divide and conquer a racial or language minority group before they are able to reach a majority voting bloc.

Because I would find that Redrawn District 8 is noncompact, does not follow consistent geographic and political bounties, and splits Daytona Beach to the detriment of black voters and diluting their minority voting power and influence, I dissent to that portion of the majority's decision.

QUINCE, J., concurs.

All Citations

89 So.3d 872, 37 Fla. L. Weekly S319

Footnotes

- 1 In the prior proceeding, we set forth the data and software we used in evaluating the apportionment plans and alternative plans. See  *In re Apportionment Law—March 2012*, 83 So.3d at 610–12. In evaluating the revised Senate plan and alternative plans in this case, we used the same data and software, with the exception of utilizing Maptitude, and not ESRI, to generate Reock compactness scores.
- 2 The following parties have filed briefs in opposition to the redrawn Senate plan: (1) the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (together “the Coalition”); (2) the Florida Democratic Party (FDP); and (3) the Florida State Conference of NAACP Branches (NAACP). The Florida Senate was the only party to file an answer brief. The following parties filed comments. The City of Lakeland filed a comment stating that it supported the Senate districts as set forth in SJR 2–B, but requesting that the city be preserved within one district in the event this Court invalidated the plan. The Florida State Association of Supervisors of Elections filed a comment directed to the applicable time frames that Florida's Supervisors of Elections are mandated to follow. The Secretary of State filed a comment providing a summary of various statutory deadlines and other legal requirements that pertain to Florida's elections. This comment includes a discussion as to the Department of Justice's preclearance of the five Florida counties covered under Section 5 of the Federal Voting Rights Act. Finally, Marion County submitted a letter to the Court protesting the division of Marion County into three separate districts. Because the letter was received after the deadline for submissions had passed and did not otherwise comply with the Court's March 13, 2012, scheduling order, the Court struck the letter and has not considered it in reaching its decision.
- 3 In that proceeding, this Court received alternative plans from only one opponent, the Coalition. See  *In re Apportionment Law—March 2012*, 83 So.3d at 610–11.
- 4 The Senate Committee on Reapportionment met on three separate dates: March 14, 20, and 21, 2012. The Senate debated the revised apportionment plan on March 22, 2012. The House Redistricting Committee met on March 14 and 26, 2012. The House debated the revised apportionment plan on March 27, 2012.
- 5 The FDP and Coalition asserted that the invalidated Senate plan as a whole violated the constitutional prohibition on intent to favor a political party or an incumbent because incumbent senators were interviewed by staff and asked about their districts before the districts were drawn, the plan as a whole over-packed

Democrats into certain districts to prevent them from influencing other districts, the plan was designed to favor incumbents because no incumbent was paired against any other incumbent and the new districts retained large percentages of the population from their predecessor districts, and the numbering scheme of the Senate plan favored incumbents by providing them with longer terms than they would have ordinarily received. The Legislature has since renumbered the plan in an incumbent-neutral manner.

6 In facially evaluating whether a given district would lead to diminishment under Florida law, this Court specifically considered the following relevant data sets: (1) voting-age population broken down by race; (2) political and minority-group breakdowns of the 2010 gubernatorial election; (3) political and minority-group breakdowns of the 2008 presidential election; (4) political and minority-group breakdowns of the 2006 gubernatorial election; (5) political and minority-group breakdown of voters from the 2010 general election, including both registered voters and those registered voters who actually voted; and (6) political and minority-group breakdowns of the 2010 primary elections.

7 Endogenous races are elections in a single district that are held for the purpose of electing that district's legislative representative. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020 n. 8 (8th Cir.2006).

8 Without this additional population, Redrawn District 6 would have been under-populated by more than 100,000 people.

9 FDP District 12 would have voted 60.5% for Sink (D) in the 2010 gubernatorial election, 64.5% for Obama (D) in the 2008 presidential election, and 49.3% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 50.1% of the registered voters.

10 44.9% of the Democrats would be black. As to the registered voters who actually voted in the 2010 general election, Democrats would make up 48.3% of the registered voters and 43.0% of the Democrats would be black.

11 Because District 14 has no predecessor district, retrogression is not a concern in this proceeding.

12 Press Release, United States Census Bureau, Media Advisory—Census Bureau Ships Local 2010 Census Data to Florida (Mar. 16, 2011), <http://2010.census.gov/news/releases/operations/cb11-cn94.html>.

13 As the comment filed by Secretary of State in this case explained, during the statutory qualifying period, each person seeking nomination or election to the Florida Legislature must file qualifying papers with the Department of State.  § 99.061(1), Fla. Stat. (2011). Among the qualifying documents is a candidate oath

identifying the specific legislative district sought by the candidate.  § 99.061(7)(a)22., Fla. Stat. (2011); R. 1S-2.0001, Fla. Admin. Code.

14 The Secretary of State emphasized in this case that “[c]andidate qualifying is district-specific; a candidate cannot change districts after qualifying. A legally-enforceable apportionment plan for the Florida Senate must be in place before the qualifying period so that prospective candidates will be able to determine whether they will run for office and in which district they will be located.”

15 Those states are Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin.

16 States that share a similar constitutional provision include California and Washington. See, e.g., art. XXI, § 2(e), Cal. Const. (“Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”); Wash. Const. art. II, § 43(5) (“The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.”). Idaho, Iowa, Montana, and Oregon codify similar provisions by statute. See *Idaho Code* § 72-1506(8) (“Counties shall not be divided to protect a particular political party or a particular incumbent.”); *Iowa Code* § 42.4(5) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group...”); *Mont.Code* § 5-1-115(3) (“A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress.”); *Or.Rev.Stat.* § 188.010(2) (“No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.”).

- 17 One commentator has observed that “intent is difficult to identify and courts in other states have been reluctant to enforce similar criteria.” Michael P. McDonald, *Redistricting Developments of the Last Decade—and What’s on the Table in This One*, 10 Election L.J. 313, 315 (2011).
- 18 Reflecting percentage of individuals registered with the two major parties.
- 19 Reflecting percentage of overall statewide vote each candidate received.
- 20 See, e.g., Haw. Const. art. IV, § 6 (“In effecting such redistricting, the commission shall be guided by the following criteria: ... 2. No district shall be so drawn as to unduly favor a person or political faction.”); 29 Del.Code § 804 (“Each district shall, insofar as is possible: ... (4) Not be created so as to unduly favor any person or political party.”).
- 21 The voting-age populations of the two districts are as follows. Redrawn District 6: black VAP 10.6%; Hispanic VAP 5.6%; white VAP 81.4%. Redrawn District 8: black VAP 10.0%; Hispanic VAP 9.3%; white VAP 78.7%. Thus, contrary to the FDP’s argument, there are no impermissible diminishment concerns when compared to the appropriate benchmark district.
- 22 The data for Redrawn District 6 is as follows: 41.8% of registered voters would be registered as Republicans, as opposed to the 36.3% who would be registered as Democrats; 50.8% of the voters who would have turned out for the 2010 general election would have been registered Republicans, as opposed to the 33.8% who would have been registered Democrats. Further, results from the 2010 gubernatorial, 2008 presidential, and 2006 gubernatorial elections confirm that Redrawn District 6 would perform Republican: 59.0% for Scott, 56.6% Senator McCain, and 59.1% for Crist, respectively.
- 23 The data for Redrawn District 8 shows that 39.5% of registered voters would be registered as Democrats, as opposed to the 36.0% who would be registered as Republicans. On the other hand, 44.3% of the voters who would have turned out for the 2010 general election would have been registered Republicans, as opposed to the 38.2% who would have been registered Democrats. Further, results from the 2010 gubernatorial, 2008 presidential, and 2006 gubernatorial elections illustrate that Redrawn District 8 would be competitive, but would lean Republican: 52.8% for Scott, 50.4% for Obama, and 53.0% for Crist, respectively.
- 24 The data reveals that 55.0% of registered voters in Daytona Beach would have been registered as Democrats, as opposed to the 22.4% who would be registered as Republicans. Moreover, 54.5% of the voters who would have turned out for the 2010 general election would have been registered Democrats, as opposed to the 29.5% who would have been registered Republicans. Results from the 2010 gubernatorial, 2008 presidential, and 2006 gubernatorial elections confirm that Daytona Beach would most likely perform Democratic: 61.4% for Sink, 69.2% for Obama, and 60.4% for Davis, respectively.

118 So.3d 198
 Supreme Court of Florida.

The FLORIDA HOUSE OF
 REPRESENTATIVES, et al., Petitioners,

v.

The LEAGUE OF WOMEN VOTERS
 OF FLORIDA, et al., Respondents.

No. SC13-252.

July 11, 2013.

Synopsis

Background: Legislature petitioned to prevent Circuit Court from hearing lawsuit challenging validity of plan to apportion districts for state Senate.

Holdings: The Supreme Court, [Pariente, J.](#), held that:

[1] Circuit Court had subject matter jurisdiction to adjudicate fact-based challenges to the validity of legislative apportionment plan;

[2] declaratory judgment issued by Supreme Court, while binding as to the facial validity of the plan, did not preclude future fact-based challenges to the plan; and

[3] Legislature's assertion that claims in complaint challenging the validity of plan in the Circuit Court were identical to those raised and resolved by the Supreme Court in its facial review proceedings was insufficient to provide a basis for the Supreme Court to grant relief through the issuance of an extraordinary writ.

Petition denied.

[Perry, J.](#), filed specially concurring opinion

[Canady, J.](#), filed dissenting opinion, joined by [Polston, C.J.](#)

West Headnotes (4)

[1] **States** 🔑 Judicial review and control

The circuit court, as a court of competent jurisdiction, had subject matter jurisdiction to adjudicate fact-based challenges to the validity of legislative plan to apportion districts for state Senate; the Supreme Court conducted only a facial review the apportionment plan, and did not pass upon any as-applied challenges during the 30-day review period mandated by the legislative apportionment section of the state constitution. [West's F.S.A. Const. Art. 3, § 16.](#)

2 Cases that cite this headnote

[2] **States** 🔑 Judicial review and control

A primary impetus for the enactment of that which became legislative apportionment section of the Florida Constitution was the desire to remove the bulk of redistricting litigation from the federal courts and place it directly in the state court system. [West's F.S.A. Const. Art. 3, § 16.](#)

[3] **Declaratory Judgment** 🔑 Construction and operation of judgment

Res Judicata 🔑 Election law

Res Judicata 🔑 Constitutional law, civil rights, and discrimination in general

Declaratory judgment issued by the Supreme Court, in which it determined the plan to apportion districts for state Senate at issue to be valid, while binding as to the facial validity of the plan, did not preclude future fact-based challenges to the plan; the Supreme Court's apportionment decisions had always contemplated the potential of subsequent challenges to the validity of the legislative apportionment plan, and it could only render a declaratory judgment as to the challenges presented to it, which, pursuant to the state Constitution, were facial in nature. [West's F.S.A. Const. Art. 3, § 16\(c, d\).](#)

1 Cases that cite this headnote

[4] **Prohibition** 🔑 Particular proceedings

Legislature's assertion that claims in complaint challenging validity of legislative plan to apportion districts for state Senate in the circuit

court were identical to those claims that were raised and resolved by the Supreme Court in its facial review proceedings was insufficient to provide a basis for the Supreme Court to grant relief through the issuance of an extraordinary writ prohibiting the circuit court from hearing any lawsuit challenging the plan's validity, absent a showing that the allowing the circuit court to proceed on such claims would interfere with the Supreme Court's exercise of jurisdiction over determining the facial validity of the plan. *West's F.S.A. Const. Art. 3, § 16.*

1 Cases that cite this headnote

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Opinion

PARIENTE, J.

The Florida Legislature has filed a petition for writ of prohibition or in the alternative to invoke this Court's constitutional authority to issue all writs necessary to the complete exercise of its jurisdiction, seeking to prevent a circuit court from hearing a lawsuit that challenges the validity of the 2012 plan apportioning districts for the Florida Senate.¹ We have jurisdiction to consider the extraordinary writs, and both sides in this case agree that this Court, rather

than the First District Court of Appeal, should review the petition. *See art. V, § 3(b)(7), Fla. Const.*

The crux of the issue presented by the Legislature's petition for extraordinary writ relief is whether this Court has exclusive jurisdiction over redistricting challenges that assert violations of *200 article III, section 21, of the Florida Constitution, and whether that jurisdiction is limited to the decisions rendered by this Court during the initial thirty-day period of review mandated by article III, section 16, of the Florida Constitution. Last year, we reviewed the 2012 legislative apportionment plan under our article III, section 16, jurisdiction, ultimately upholding its validity after initially invalidating the Senate map. *See*  *In re Senate Joint Resolution of Legislative Apportionment 2–B (“Apportionment II”)*, 89 So.3d 872 (Fla.2012);  *In re Senate Joint Resolution of Legislative Apportionment 1176 (“Apportionment I”)*, 83 So.3d 597 (Fla.2012).

The Legislature's view is that once the apportionment plan is validated through this Court's article III, section 16, review, no further challenges can be brought—either in this Court or in the circuit court—alleging violations of the constitutional redistricting standards enumerated in article III, section 21. Specifically, the Legislature contends that this Court's 2012 review of the legislative apportionment plan in  *Apportionment I* and *Apportionment II* foreclosed all future challenges to the constitutionality of the plan under the Florida Constitution, thereby barring the circuit court complaint in this case.

For the reasons more fully explained below, we reject the Legislature's argument and deny the extraordinary writ petition because this Court has never interpreted its article III, section 16, review as granting this Court exclusive jurisdiction over all claims relating to legislative apportionment and limiting its jurisdiction to consider those claims to an initial thirty-day review period. Instead, under its interpretation of article III, section 16, this Court has always conducted a *facial* review of the validity of the legislative apportionment plan and has consistently contemplated the possibility of subsequent fact-based challenges to the plan. Further, specifically with respect to the declaratory judgment language in article III, section 16(d), this Court has always rendered a declaratory judgment that is binding only as to the facial validity of the plan, which could never preclude subsequent fact-based challenges.

While the 2010 introduction of express new standards into the Florida Constitution to govern the redistricting process changed the extent of this Court's [article III, section 16](#), review—in that the Court is now constitutionally required to conduct a more in-depth review of an apportionment plan to effectuate the intent of the voters who enacted the [article III, section 21](#), standards in 2010—the new standards did not change the fundamental nature of this Court's initial thirty-day review. In 2012, our review under [article III, section 16](#), remained the same as it has always been—a facial review based on objective, undisputed evidence in the limited record before the Court.

Accordingly, although this Court endeavored to fulfill its constitutional obligation in [Apportionment I](#) and [Apportionment II](#) to conduct a meaningful review of the 2012 legislative apportionment plan and to provide guidance regarding the proper interpretation of the new constitutional standards, our precedent remains clear that subsequent challenges based on factual evidence not considered or available in this Court's initial thirty-day review may be brought and argued in a court of competent jurisdiction. In other words, our recognition and awareness of the importance of providing stability to the plan given an imminent election in 2012—including, as the Florida Constitution explicitly contemplates, allowing the Legislature to correct obvious deficiencies in the Senate map apparent on the face of the record in [Apportionment I](#)—did not alter our established *201 precedent. Consistent with our prior cases, our facial review left open the possibility of future fact-intensive claims and did not preclude the future discovery or development of evidence, which could never have been a part of this Court's limited record under our [article III, section 16](#), review, that would demonstrate a violation of the standards the Florida voters enacted in 2010. We therefore hold that the circuit court has subject matter jurisdiction to adjudicate fact-based challenges to the validity of the 2012 legislative apportionment plan, that the circuit court's exercise of jurisdiction in this case will not interfere with the binding judgment of this Court, and that the Legislature thus has not met its burden of demonstrating entitlement to relief.

FACTS AND BACKGROUND

In 2010, the Florida voters approved an amendment to the Florida Constitution providing for express new state constitutional standards to govern the once-in-a-decade apportionment of legislative districts. These standards,

now enumerated in [article III, section 21](#), of the Florida Constitution, are set forth in two tiers, with each tier containing three requirements. The first tier provides: (1) that no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) that districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) that districts shall consist of contiguous territory. [Art. III, § 21\(a\), Fla. Const.](#) The second tier lists three additional requirements, which are subordinate to the requirements in the first tier and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts shall, where feasible, utilize existing political and geographical boundaries. [Art. III, § 21\(b\), Fla. Const.](#)

With these new, expanded state constitutional standards in place, the Legislature during its 2012 session engaged in its once-in-a-decade process of creating new district boundaries for the state's 120 House of Representatives and 40 Senate districts. This legislative reapportionment process culminated on February 9, 2012, in the approval of a joint resolution of legislative apportionment. The next day, as required by [article III, section 16\(c\)](#), of the Florida Constitution, the Attorney General petitioned this Court for a declaratory judgment to determine the validity of the Legislature's apportionment plan as enacted.

[In Apportionment I](#), 83 So.3d at 600, this Court declared the plan apportioning districts for the Florida House of Representatives to be “facially valid,” but determined that the plan apportioning districts for the Florida Senate was “facially invalid under [article III, section 21](#).” In particular, the Court declared the Senate map's numbering scheme invalid “because it was intended to benefit incumbents by making them eligible to serve for longer periods of time than they would have otherwise been eligible to serve” and declared eight individual Senate districts “to be in violation of constitutional requirements.” [Id.](#) at 683.

Thereafter, sitting in a special session as contemplated by [article III, section 16\(d\)](#), of the Florida Constitution, the Legislature adopted a revised plan on March 27, 2012, eighteen days after this Court declared the original plan apportioning districts for the Senate to be facially invalid. After the Attorney General again petitioned this Court to

render its constitutionally mandated declaratory judgment determining the validity of the revised apportionment *202 plan, this Court upheld the facial validity of the revised plan. See [Apportionment II](#), 89 So.3d at 877. A plurality opinion of this Court declared the redrawn Senate map “constitutionally valid under the Florida Constitution.” *Id.* The plurality concluded that the challengers had “failed to satisfy their burden of demonstrating any constitutional violation in this facial review.” *Id.* at 881.

On September 5, 2012, the League of Women Voters of Florida, Common Cause, seven individually named plaintiffs (collectively “the Coalition”), and the National Council of La Raza² 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 [article III, section 21](#). Subsequently, the Legislature moved to dismiss the complaint with prejudice, contending that the circuit court lacks subject matter jurisdiction to adjudicate a challenge to the 2012 legislative apportionment plan and that the claims were identical to those previously rejected during this Court’s [article III, section 16](#), review.

In an order dated January 17, 2013, the circuit court denied the Legislature’s motion to dismiss. Citing to this Court’s decision in the 2002 reapportionment case, [In re Constitutionality of House Joint Resolution 1987 \(“In re Apportionment Law–2002”\)](#), 817 So.2d 819, 828 (Fla.2002), the circuit court stated that this Court “has never held that it has exclusive jurisdiction over challenges to legislative redistricting plans.” Instead, the circuit court explained, this Court “has repeatedly stated that it was limited to a ‘facial’ review and that consideration of more fact-intensive ‘as-applied’ claims” would be more appropriate in a court of competent jurisdiction that provides an opportunity for the presentation of evidence and witness testimony and allows for factual findings based on the evidence presented. The circuit court emphasized that this Court “had many opportunities” during the 2012 redistricting litigation “to declare that its jurisdiction on the subject was exclusive.” Because this Court did not make any statements indicating such exclusive jurisdiction, the circuit court stated that it would “not presume by [the Court’s] silence that the [C]ourt meant to overturn its previous pronouncements that as-applied claims are properly brought in circuit court.”

Further, the circuit court reasoned that it could not “determin[e] from the pleadings themselves” in this case whether the claims raised by the Coalition are identical to the facial claims considered by this Court in [Apportionment I](#) and [Apportionment II](#), as the Legislature contends, or whether these new claims are in actuality as-applied challenges, as the Coalition argues. The circuit court stressed that it does not intend “to enter any judgment in this case that is contradictory to, or inconsistent with, the opinions of the Florida Supreme Court in [Apportionment I](#) or [Apportionment II](#).” The circuit court then concluded as follows:

To the extent that the plaintiffs [(the Coalition)] seek only a rehash of facial arguments made before the Florida Supreme Court, they will be disappointed. But to the extent their claims are as-applied challenges to the plans, they are entitled to develop and to present relevant evidence to support their claims. *203 The [Legislature] likewise [is] entitled to prepare and present contrary evidence in defense.

Accordingly, the circuit court denied the Legislature’s motion to dismiss. The Legislature now seeks extraordinary relief from the circuit court’s order in the form of a writ of prohibition or a constitutional writ pursuant to this Court’s all writs authority directing the circuit court to dismiss the Coalition’s complaint.

ANALYSIS

The Florida Constitution authorizes this Court to “issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.” [Art. V, § 3\(b\)\(7\), Fla. Const.](#) This Court has set forth the prohibition standard as follows:

Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. It is preventive and not corrective in that it commands

the one to whom it is directed not to do the thing which the supervisory court is informed the lower tribunal is about to do. Its purpose is to prevent the doing of something, not to compel the undoing of something already done.

 *Roberts v. Brown*, 43 So.3d 673, 677–78 (Fla.2010) (quoting *English v. McCrary*, 348 So.2d 293, 296–97 (Fla.1977)).

With respect to all writs relief, this Court has explained that the constitutional all writs provision “does not constitute a separate source of original or appellate jurisdiction. Rather, it operates as an aid to the Court in exercising its ‘ultimate jurisdiction,’ conferred elsewhere in the constitution.” *Williams v. State*, 913 So.2d 541, 543 (Fla.2005); see also *St. Paul Title Ins. Co. v. Davis*, 392 So.2d 1304, 1305 (Fla.1980) (“The all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court’s all writs power cannot be used as an independent basis of jurisdiction....”).

The Legislature raises three distinct claims in support of its petition for extraordinary relief. First, the Legislature asks this Court to issue a writ of prohibition, contending that the circuit court lacks subject matter jurisdiction over the Coalition’s complaint because this Court has exclusive jurisdiction under article III, section 16, to determine the validity of a legislative apportionment plan under state constitutional standards. Second, the Legislature argues that even if the circuit court has subject matter jurisdiction to hear the Coalition’s challenges, this Court should exercise its all writs authority because this Court has already entered a declaratory judgment “binding upon all the citizens of the state,” art. III, § 16(d), Fla. Const., determining the apportionment plan to be valid, which precludes the Coalition’s subsequent challenges. Third, the Legislature contends that this Court should exercise its all writs jurisdiction because the Coalition’s challenges to the Senate map are identical to the challenges this Court has already rejected, and therefore it is impossible for the Coalition to prevail in this litigation without the circuit court overturning this Court’s factual and legal determinations in *Apportionment II*. We address each of the Legislature’s arguments in turn.

I. The Prohibition Claim: Whether This Court Has Exclusive and Limited Subject Matter Jurisdiction Under Article III, Section 16

[1] The Legislature’s first argument is that this Court should issue a writ of prohibition because this Court has exclusive jurisdiction over legislative reapportionment under article III, section 16, of the Florida Constitution. The Legislature’s primary argument on this point is, in effect, that this Court’s exclusive jurisdiction *204 is limited. In other words, the Legislature does not contend as its primary argument that the Coalition’s underlying complaint should be transferred to this Court for consideration, but rather that the claims contained in the Coalition’s complaint attacking the validity of the Senate map based on the article III, section 21, standards are completely precluded. We reject the Legislature’s prohibition argument for several reasons.

First, this Court’s precedent clearly demonstrates that the Court has never considered its jurisdiction over challenges to a legislative apportionment plan to be exclusive and limited to the constitutionally mandated thirty-day review. Instead, this Court has consistently conducted only a facial review of the plan’s validity during our thirty-day automatic review pursuant to article III, section 16. See, e.g.,   *In re Apportionment Law—2002*, 817 So.2d at 824–25 (explaining that the Court passes only “upon the facial validity of the plan and not upon any as-applied challenges”);  *In re Senate Joint Resolution 2G, Special Apportionment Session 1992 (“In re Apportionment Law—1992”)*, 597 So.2d 276, 282, 285 (Fla.1992) (considering challenges under the Voting Rights Act (VRA) to the extent the Court was able to do so based on “statistical data filed” in the case, “none of which was disputed,” and concluding that “[g]iven the limitations of our review, including both time constraints and the unavailability of specific factual findings, we conclude that the Joint Resolution does not discriminate against minorities,” but allowing subsequent VRA challenges to be brought); *In re Apportionment Law Appearing as Senate Joint Resolution 1E, 1982 Special Apportionment Session (“In re Apportionment Law—1982”)*, 414 So.2d 1040, 1052 (Fla.1982) (stating that “[i]n this apportionment process, the sole question to be considered by this Court in this proceeding is the facial constitutional validity” of the joint resolution, and declaring that the apportionment plan “is valid on its face”);  *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305, 1972 Regular Session (“In re*

Apportionment Law—1972”), 263 So.2d 797, 808 (Fla.1972) (“The Florida Constitution contemplates that our judgment in these proceedings be limited to a declaration that the apportionment plan on its face is either valid or invalid....”).

This is true of our most recent decisions in the 2012 apportionment cases as well, which are replete with statements characterizing the nature of our review as a facial one. See, e.g.,  *Apportionment I*, 83 So.3d at 600 (concluding “that the Senate plan is *facially* invalid under [article III, section 21](#), and further conclud[ing] that the House plan is *facially* valid” (emphasis added));  *id.* at 604 (“[I]n light of challenges raised by the opponents of the plans, we examine whether the Legislature’s apportionment plans are *facially* consistent with these requirements.” (emphasis added));  *id.* at 610 (“[T]he challenges in 2012 are based specifically on allegations that the plans *facially* violate the requirements of the new provisions of our state constitution.” (emphasis added)); see also  *Apportionment II*, 89 So.3d at 881 (“Finally, we conclude that the opponents have failed to satisfy their burden of demonstrating any constitutional violation in this *facial* review.” (emphasis added)).

Second, in our apportionment decisions in 1972, 1982, and 1992, this Court specifically retained exclusive jurisdiction to consider subsequent challenges the Court could not have adjudicated during the limited thirty-day review period mandated by [article III, section 16](#). See  *In re Apportionment Law—1992*, 597 So.2d at 285–86; *In re Apportionment Law—1982*, 414 So.2d at 1052;  *In re Apportionment Law—1972*, 263 So.2d at 822. In 2002, *205 this Court instead provided that subsequent challenges could be brought in a court of competent jurisdiction. See   *In re Apportionment Law—2002*, 817 So.2d at 832. If this Court’s jurisdiction was limited to the automatic thirty-day review, as the Legislature contends, then the Court could not have retained jurisdiction to hear subsequent challenges in 1972, 1982, and 1992, nor could we have deferred resolution of factual issues in 2002 to a court of competent jurisdiction. Indeed, in *Florida Senate v. Forman*, 826 So.2d 279, 282 (Fla.2002), this Court addressed the merits of a subsequent challenge to the 2002 legislative apportionment plan, which was filed in circuit court, and plainly did not decide the case on jurisdictional grounds. See  *Brown v. Butterworth*, 831 So.2d 683, 685 (Fla. 4th DCA 2002) (“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.”).

Third, the Legislature’s position that all challenges to the validity of the 2012 legislative apportionment plan could have been brought only during the constitutionally mandated review this Court conducted under [article III, section 16](#), would directly contravene the intent of the framers and voters in passing the 2010 constitutional amendment establishing “stringent new standards for the once-in-a-decade apportionment of legislative districts.”  *Apportionment I*, 83 So.3d at 597. Under the Legislature’s view of this Court’s jurisdiction as exclusive and limited, any evidence discovered outside of the limited record available to the Court during the thirty-day review period mandated by [article III, section 16](#), could never be evaluated or tested through an adversarial process.

For example, if evidence were discovered that would demonstrate a constitutional violation in the form of direct evidence of improper partisan or discriminatory intent that could not have been reviewed during this Court’s [article III, section 16](#), facial review, according to the Legislature’s position there would be no possible remedy for the constitutional violation. This interpretation would directly contravene the purpose of the 2010 amendment and undermine the will of the voters in placing more stringent standards on the Legislature through the adoption of [article III, section 21](#), of the Florida Constitution. Simply put, the framers and voters clearly desired more judicial scrutiny of the legislative apportionment plan, not less. Further, when the 2010 amendment was proposed and passed, the framers and voters were entitled to rely on this Court’s precedent from 1972 through 2002, which contemplated the possibility of future, fact-based challenges. See, e.g.,  *Fla. Dep’t of Revenue v. City of Gainesville*, 918 So.2d 250, 264 (Fla.2005) (explaining the principle of statutory and constitutional construction that prior judicial interpretations are presumed to be known and adopted unless a contrary intention is expressed).

[2] Fourth, although the Legislature points to the historical context that resulted in the adoption of [article III, section 16](#), as support for its position, the Legislature’s approach would actually undermine the purpose behind this constitutional

provision. Specifically, the Legislature argues that [article III, section 16](#), was created to prevent extended litigation over the validity of the legislative apportionment plan. However, a closer examination of the history surrounding the adoption of [article III, section 16](#), reveals that the primary purpose behind the creation of this Court's initial thirty-day review of the ***206** plan's validity was in actuality to remove redistricting litigation from the purview of the *federal* courts. As Justice Lewis explained in a 2002 concurring opinion joined by three other justices, “a primary impetus for the enactment of that which became [article III, section 16 of the Florida Constitution](#) was the desire to remove the bulk of redistricting litigation from the federal courts and place it directly in the state court system.”   *In re Apportionment Law—2002*, 817 So.2d at 834 (Fla.2002) (Lewis, J., concurring, joined by three other justices).

Under the Legislature's view, state court jurisdiction over the legislative apportionment plan would be limited to only those claims this Court could review in thirty days, which both by time and process are confined to the legislative record. See  *Apportionment II*, 89 So.3d at 893 (Pariente, J., concurring) (“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.”). Any fact-intensive challenges as to discriminatory intent against a racial or language minority—discrimination now explicitly prohibited by the Florida Constitution under [article III, section 21\(a\)](#)—would then have to be brought in federal court, provided the claim meets the requirements of the Federal Voting Rights Act. Indeed, the resulting federal litigation would be the very situation [article III, section 16](#), was created to avoid.

Fifth, the Legislature's attempt to distinguish this Court's apportionment decision in 2002, which specifically contemplated the possibility of subsequent challenges to the legislative apportionment plan in a court of competent jurisdiction, see   *In re Apportionment Law—2002*, 817 So.2d at 832, is unavailing. The Legislature contends that because the Court resolved all relevant state constitutional issues in 2002 and therefore contemplated future challenges based only on the federal constitution, the 2002 apportionment decision cannot support the Coalition's claim that it is entitled to file subsequent challenges to the 2012 plan based on the state constitution. However, none of the state constitutional issues the Court addressed in 2002

required findings of fact. By contrast, with the adoption of the [article III, section 21](#), standards in 2010, “intent,” which is an inquiry that can often involve disputed issues of fact, is now a key element in the analysis of the Legislature's compliance with the Florida Constitution's redistricting standards. While this Court endeavored to address the issue of intent in  *Apportionment I* and *Apportionment II* within the inherent constraints of our review, it is clear that, unlike in 2002, subsequent fact-based challenges with respect to the new state constitutional standards could possibly be argued based on factual evidence not considered or available in the limited record before this Court during our [article III, section 16](#), review.

Sixth, the Legislature's reliance on  *Roberts*, 43 So.3d 673, to support its argument that this Court's jurisdiction over legislative reapportionment is exclusive, is misplaced. *Roberts* was not a redistricting case, but rather concerned this Court's advisory opinion jurisdiction to evaluate constitutional amendments proposed by citizen initiative. We reasoned in *Roberts* that “a pre-election challenge to a citizen initiative proposed constitutional amendment is always in the nature and form of requesting an advisory opinion, which is specifically contemplated and addressed in the Florida Constitution to be exclusively within the authority of this Court.”  *Id.* at 680. We specifically explained that a circuit court is *without jurisdiction* to render such an advisory opinion. See  *id.* at 683 ***207** (“Circuit courts are not authorized to issue advisory opinions.”). This is a critical distinction because in the apportionment context, this Court's judgment is not an advisory opinion, and circuit courts are not without jurisdiction to address fact-based challenges to the constitutionality of statutes.

In addition, as the Court pointed out in  *Roberts*, 43 So.3d at 679, the issuance of advisory opinions is within the *exclusive jurisdiction* of the Florida Supreme Court pursuant to [article V, section 3\(b\)\(10\)](#), of the Florida Constitution, which provides that this Court “[s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.” By contrast, with respect to any and all challenges to a legislative apportionment plan, no such specific grant of mandatory jurisdiction appears in [article V](#)—the provision of the constitution governing this Court's jurisdiction—and thus the sole basis for determining whether the Court's jurisdiction

is exclusive for all apportionment challenges lies in the provisions of [article III, section 16](#). Unlike [article V, section 3\(b\)\(10\)](#), which provides a specific grant of jurisdiction over a particular legal matter to this Court, [article III, section 16](#), has never been interpreted to provide that this Court has exclusive jurisdiction over any and every challenge to the validity of a legislative apportionment plan.

Further, in *Roberts*, this Court had previously determined that the proposed amendments at issue satisfied the single-subject requirement and that the accompanying ballot titles and summaries complied with [section 101.161, Florida Statutes \(2008\)](#). [43 So.3d at 675–76](#). Both of these issues are questions of law that are resolved by an examination of the language of the proposed amendment, ballot title, and summary. By contrast, in the reapportionment context, many of the claims can—and do—raise factual issues, on which this Court is not equipped to rule during its thirty-day facial review. *See, e.g.*, [Apportionment I, 83 So.3d at 653](#) (“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.” (emphasis added)).

Finally, we note that although we declined in *Apportionment I* and *Apportionment II* to simply rubber-stamp the legislative apportionment plan and instead analyzed the new state constitutional standards in the context of our [article III, section 16](#), review, our decisions in the 2012 reapportionment cases were based solely on objective evidence and undisputed facts in the limited record before the Court. As Justice Labarga observed in his separate concurrence in *Apportionment I*, “it is illogical to conclude that we should ignore a clear mandate now contained in the Florida Constitution to address these new provisions, especially where a different process is not available within the constitutional time frame.” [Id. at 692](#) (Labarga, J., concurring). Further, as explained by Justice Lewis, it is clear that the new [article III, section 21](#), standards present the possibility of future fact-intensive challenges that require proper development in a court “structurally equipped to conduct complex and multi-faceted analyses with regard to many factual challenges to the 2012 legislative reapportionment plan.” [Id. at 689](#) (Lewis, J., concurring). Accordingly, for all these reasons, we deny the Legislature’s request for a writ of prohibition and conclude that the circuit

court has subject matter jurisdiction to adjudicate *208 the Coalition’s claims. We turn next to the Legislature’s all writs arguments.

II. The All Writs Claims: Whether the Circuit Court’s Exercise of Jurisdiction Interferes with the Binding Judgment of This Court

The Legislature raises two arguments as to why this Court should exercise its all writs jurisdiction to preclude the Coalition’s claims from proceeding further on the basis that the circuit court’s exercise of jurisdiction interferes with the binding judgment of this Court, as well as with this Court’s complete exercise of its jurisdiction over legislative reapportionment under [article III, section 16, of the Florida Constitution](#). The Legislature’s first all writs argument is that even assuming the circuit court has subject matter jurisdiction to hear the Coalition’s claims, the “declaratory judgment” rendered by this Court in *Apportionment II*, which “shall be binding upon all the citizens of the state,” pursuant to [article III, section 16\(d\), of the Florida Constitution](#), precludes these subsequent challenges. The Legislature’s second argument is that the claims raised by the Coalition in the complaint are, in fact, identical to those already rejected by this Court in [Apportionment I](#) and *Apportionment II*. We address each argument in turn.

A. Whether the “Declaratory Judgment” Rendered By This Court Precludes Future Challenges

[3] First, the Legislature argues that even if the circuit court has subject matter jurisdiction to hear the Coalition’s claims, since this Court rendered a declaratory judgment in *Apportionment II* determining the 2012 legislative apportionment plan to be valid, further challenges are barred. In support of its argument, the Legislature relies on [article III, section 16\(c\)-\(d\)](#), which provides as follows:

(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION. A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state.

Art. III, § 16, Fla. Const.

We reject the Legislature's argument regarding the meaning of the declaratory judgment language in [article III, section 16\(d\)](#). In fact, in *Apportionment I*, the Legislature and the Attorney General advocated a different view, asserting that this Court should await challenges to the plan brought in the circuit courts over time. Indeed, the Senate took the position that “this Court should outright decline to review” whether the Senate map complied with the minority voting protection provision and contended that challenges based on [article III, section 21](#), “should await challenges brought in the trial court after validation of the plans.”  *Apportionment I*, 83 So.3d at 626; *see also id.* (observing that, at oral argument, “the attorney for the Senate stated that ‘[n]o rational person could expect seven appellate-court justices to resolve these extraordinarily tough factual issues’”).³

***209** Contrary to the Legislature's current contention that subsequent challenges are precluded, however, this Court's apportionment decisions have always contemplated the potential of subsequent challenges to the validity of the legislative apportionment plan. For example, in 1972, this Court specifically interpreted the “declaratory judgment” issued by this Court under [article III, section 16](#), to be limited to a declaration of facial validity or invalidity.

See  *In re Apportionment Law—1972*, 263 So.2d at 808. In 2002, the Court 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. *See*   *In re Apportionment Law—2002*, 817 So.2d at 829. Thus, the proper interpretation of [article III, section 16\(c\)-\(d\)](#), consistent with this Court's precedent, is that the declaratory judgment rendered by this Court pursuant to [article III, section 16](#), is binding as to the facial validity of the apportionment plan, but not to subsequent fact-based challenges.

Indeed, we can render a declaratory judgment only as to the challenges that have been presented to the Court, which, under our [article III, section 16](#), review, are facial

in nature. In other words, pursuant to [article III, section 16](#), this Court is charged with the responsibility to render a declaratory judgment as to the facial validity of a plan in order to provide certainty as to its facial validity prior to the upcoming election. Thus, all future attacks on the plan's facial validity are precluded by the declaratory judgment rendered pursuant to [article III, section 16\(c\)-\(d\)](#), but fact-intensive claims that are not, and could never be, the subject of this Court's [article III, section 16](#), review cannot be precluded. Simply put, this Court did not render a declaratory judgment in  *Apportionment I* or *Apportionment II* regarding such claims.

Contrary to the dissent's argument that this Court's prior interpretations of the declaratory judgment language in [article III, section 16](#), are dicta, the Court's interpretation of that provision dating back to 1972 was in actuality integral to its holding that attacks on the validity of the apportionment plan “based upon factual situations” were not properly before the

Court. *See*  *In re Apportionment Law—1972*, 263 So.2d at 808. In noting the proximity of the election, this Court specifically held in 1972 that it was “only determining the validity of the apportionment plan *on its face*” and that the “Florida Constitution contemplates that our judgment ... be limited to a declaration that the apportionment plan on its face is either valid or invalid.” *Id.* (emphasis added). The Court specifically concluded that, “[u]nder [Fla. Const., art. III, § 16\(c\)](#), F.S.A., we have rendered a ‘declaratory judgment’ determining the validity of the apportionment plan on its face” and explicitly contemplated the possibility of future proceedings “relating to the validity of the apportionment plan.”  *Id.* at 822.

Similarly, in 2002, a majority of this Court explained that “the opponents to the 2002 redistricting plan may address the allegations and responses in a trial court of competent jurisdiction which can properly receive testimony, accept evidence, and render a judgment based upon the entirety of the facts,”   *In re Apportionment Law—2002*, 817 So.2d at 836 (Lewis, J., concurring, joined by three other justices)—which is exactly what subsequently occurred

***210** in *Forman*, 826 So.2d 279. Certainly, if this Court's interpretations dating back to 1972 as to the meaning of [article III, section 16\(c\)-\(d\)](#), were merely dicta, the subsequent challenges adjudicated in 1972, as well as the challenge brought in the trial court and eventually adjudicated in this Court in *Forman* in 2002, would have been improper. In other words, contrary to the dissent's assault on the majority's

reasoning, it is the dissent that has construed one provision out of the entire constitutional scheme in a manner that is inconsistent with this Court's precedent and with the purpose behind this Court's [article III, section 16](#), review.

Further, when the 2010 amendment was proposed and passed, the framers and voters were entitled to rely on this Court's precedent and our consistent interpretation of the declaratory judgment required by [article III, section 16](#), as a determination of only the facial validity of the plan. See [Fla. Dep't of Revenue](#), 918 So.2d at 264. In other words, while the framers and voters expanded greatly the restrictions on the Legislature in apportioning districts—and correspondingly expanded the scope of this Court's review of the Legislature's compliance with the constitutional redistricting requirements—they also reasonably expected that this Court would continue to adhere to its precedent that did not preclude subsequent, fact-based challenges after the Court's declaratory judgment regarding the facial validity of the plan. The Legislature's interpretation of this provision, which would preclude any challenges to the plan outside the thirty-day review period mandated by [article III, section 16](#), directly contravenes the purpose of the 2010 amendment and undermines the will of the voters in placing more stringent standards on the redistricting process through the adoption of [article III, section 21](#), of the Florida Constitution. As we have stated, the framers and voters clearly desired more judicial scrutiny, not less. See [Apportionment I](#), 83 So.3d at 607 (“By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.”).

The Legislature contends, however, that this Court's refusal in its plurality decision in *Apportionment II* to address claims that could have been, or were, brought in *Apportionment I* is a recognition of the preclusive effect of the Court's declaratory judgment. However, *Apportionment II*, like *Apportionment I*, was a facial review and concerned only facial challenges. See [Apportionment II](#), 89 So.3d at 881 (stating that the challengers had “failed to satisfy their burden of demonstrating any constitutional violation *in this facial review*” (emphasis added)). The plurality of this Court in *Apportionment II* concluded that certain challenges were precluded because they “*could have been addressed in the first proceeding.*” [Id.](#) at 885 (emphasis added). Because

fact-intensive challenges would not fall within this category, the rationale of *Apportionment II* does not apply.

Moreover, the interpretation propounded by the dissent would render the [article III, section 21](#), standards regarding “intent to favor or disfavor a political party or an incumbent” without adequate review. In *Apportionment I*, the dissent argued that this Court's review was “extremely limited” and concerned only “the facial validity of the plan.” [Apportionment I](#), 83 So.3d at 696 (Canady, C.J., concurring in part and dissenting in part). Similarly, the Attorney General asserted that this Court “should not undertake a meaningful review of compliance with the new constitutional *211 standards,” but should instead await challenges to the plan brought in circuit courts over a period of time because the new standards were “too fact-intensive to be resolved in the instant original proceeding, which is limited to a narrow thirty-day window.” [Id.](#) at 609, 626 (majority opinion). Now, the dissent goes one step further, contending that any and all challenges to the plan are precluded by this Court's “extremely limited” [article III, section 16](#), facial review. The dissent's interpretation, which has never before been suggested by this Court as the meaning of [article III, section 16](#), would allow the Legislature to circumvent the constitutional standards regarding “intent to favor or disfavor a political party or an incumbent” by concealing evidence of that intent from the public, knowing full well that discovery of any documents demonstrating this unconstitutional intent would never be reviewed by a court. While we do not suggest that this occurred during the 2012 redistricting process, these are the exact types of claims that must be subject to a fact-finder's scrutiny.

Accordingly, we conclude that the provision in [article III, section 16\(d\)](#), that this Court's declaratory judgment is “binding upon all the citizens of the state” does not provide a basis for the Court to exercise all writs jurisdiction in this case. Assuming the claims raised by the Coalition in its complaint are not the same as those resolved by this Court in 2012, the circuit court's ruling on the merits of those claims will not interfere with this Court's complete exercise of jurisdiction under [article III, section 16](#). The issue of whether the claims raised by the Coalition are, in fact, identical to those already rejected by this Court is the basis of the Legislature's second all writs argument, which we address next.

B. Whether the Coalition's Claims Are Identical to Those Already Rejected by This Court

[4] As its second argument seeking to invoke this Court's all writs jurisdiction, the Legislature contends that the claims presented in the Coalition's complaint are identical to those presented to this Court in *Apportionment II* and, therefore, it is impossible for the Coalition to prevail on any of these claims without the circuit court overturning this Court's factual and legal determinations in *Apportionment II*. The Legislature argues that this Court's decision in *Apportionment II* was intended to adjudicate all claims that the Senate map violated constitutional standards and further contends that this Court's review was not “facial” because the Court engaged in a comprehensive and detailed examination of evidence.

We conclude that the Legislature's argument is without merit. As we have already explained, we repeatedly stated that the nature of our review in both *Apportionment I* and in the plurality decision in *Apportionment II* was a facial one. *See, e.g., Apportionment I*, 83 So.3d at 614 (stating that this Court was undertaking its “constitutionally mandated review of the *facial* validity of the Senate and House plans” (emphasis added)); *id.* (“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.” (emphasis added)); *see also Apportionment II*, 89 So.3d at 881 (“Finally, we conclude that the opponents have failed to satisfy their burden of demonstrating any constitutional violation in this *facial* review.” (emphasis added)).

*212 Further, the mere fact that we engaged in a detailed examination of objective and undisputed evidence to give meaning to the new state constitutional standards in the 2012 apportionment decisions does not lead to the conclusion that the fundamental nature of our review—that is, a facial review based on the limited record before the Court—was altered by the 2010 amendment introducing express new redistricting standards into the Florida Constitution. Although the Legislature contends that our review pursuant to [article III, section 16](#), in effect, involved fact-finding, we repeatedly emphasized that our determinations in 2012 were based on the limited record before the Court and were constrained by the equally limited nature of the review

this Court was able to conduct in the thirty-day facial proceeding mandated by [article III, section 16](#). *See, e.g., Apportionment I*, 83 So.3d at 645 (“We conclude that *on this record*, any facial claim regarding vote dilution under Florida's constitution fails.” (emphasis added)); *id.* at 651 (“We conclude that there are *no objective indicia of intent* to disfavor an incumbent *on this record*.” (emphasis added)); *id.* at 654–55 (“While this failure is relevant to other defects in the plan, 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.” (emphasis added)). Indeed, we even specifically noted that the type of information available during our [article III, section 16](#), review proceeding was “objective data,” and we refused to consider an expert affidavit because we conducted our own “independent analysis using objective data.” *Apportionment I*, 83 So.3d at 612 & n. 13.

In essence, this Court in the 2012 apportionment decisions conducted our facial review of the validity of the apportionment plan in a “meaningful way.” *Id.* at 609. As Justice Labarga cogently explained in his concurring opinion in *Apportionment I*: “While it would have been preferable to have the luxury of more time, we were able, given advances in technology, to carefully examine both plans and make a *facial determination based on this undisputed data within the time allotted by the constitution*.” *Id.* at 692 (Labarga, J., concurring) (emphasis added). “It would be a complete and unjustified derogation of our constitutional obligation,” Justice Labarga stated, “if we ignore our constitutional mandate to examine the plans to determine whether they meet constitutional muster by simply saying we do not have the time.” *Id.* (Labarga, J., concurring); *see also Apportionment II*, 89 So.3d at 884 (describing *Apportionment I* as conducting a “meaningful facial review”); *id.* at 898 (Pariente, J., concurring) (“*Restricted to only a facial review of the Legislature's intent*, there will be times when this Court may seriously question the drawing of certain lines or the partisan balance of the plan but nevertheless uphold it because *impermissible intent has not been proven based on the limited nature of the record before us*.” (emphasis added)). Likewise, Justice Lewis aptly articulated in his concurring opinion that, in 2012, “[a]s was the case in 2002, we [could] only conduct a *facial review* of [the] legislative plans and consider facts properly developed and *presented in*

our record.”  *Apportionment I*, 83 So.3d at 689 (Lewis, J., concurring) (emphasis added).

The Legislature's argument for all writs relief on this basis is grounded in the assumption that the claims raised in the Coalition's complaint are identical to those claims that were raised and resolved in this Court's [article III, section 16](#), proceedings. However, the complaint does not set forth the evidence or exact arguments that the Coalition intends to rely upon in support of its claims. The answer to the *213 question of whether the claims are, in fact, identical to those already decided by this Court will, in part, depend on the evidence discovered and introduced through the adversarial proceeding in the circuit court. The resolution of such factual issues indisputably could never have been the subject of this Court's automatic thirty-day review.

As the circuit court cogently concluded with respect to whether the claims are the same, it is not possible to “make that determination from the pleadings themselves.” Importantly, however, the circuit court recognized that relitigation of the same claims would not be appropriate:

To the extent that the plaintiffs [(the Coalition)] seek only a rehash of facial arguments made before the Florida Supreme Court, they will be disappointed. But to the extent their claims are as-applied challenges to the plans, they are entitled to develop and to present relevant evidence to support their claims. The [Legislature] likewise [is] entitled to prepare and present contrary evidence in defense.

Whether the Coalition's claims when litigated would amount to “a rehash of facial arguments made before” this Court remains to be seen. In any event, at this stage of the litigation, the Legislature's assertion that the complaint presents identical claims does not provide a basis for this Court to grant relief through an extraordinary writ. We conclude that the Legislature has not shown—especially in light of the circuit court's order—that allowing the circuit court case to proceed on these claims at this time would interfere with this Court's exercise of jurisdiction under [article III, section 16](#).

CONCLUSION

Based on the foregoing, we conclude that the Legislature has not met its burden of demonstrating that it is entitled to either a writ of prohibition or all writs relief because the circuit court has subject matter jurisdiction to adjudicate subsequent fact-based challenges to the legislative apportionment plan and because the circuit court's exercise of this jurisdiction will not interfere with the binding judgment rendered by this Court in *Apportionment II*. Accordingly, we deny the Legislature's petition for extraordinary relief.

It is so ordered.

[LEWIS, QUINCE](#), and [LABARGA, JJ.](#), concur.

[PERRY, J.](#), specially concurs with an opinion.

[CANADY, J.](#), dissents with an opinion, in which [POLSTON, C.J.](#), concurs.

[PERRY, J.](#), specially concurring.

I agree with the majority that, because the circuit court has subject matter jurisdiction to adjudicate as-applied challenges to the validity of the 2012 legislative apportionment plan, the Legislature has failed to demonstrate its entitlement to either a writ of prohibition or all writs relief. I write separately, however, to make explicit what the majority leaves implicit—that as-applied challenges in the circuit courts are not only permissible, but in many ways necessary.

The Legislature's contrary position that judicial review of its compliance with [article III, section 21](#), is restricted to the time-sensitive, facial challenges in this Court is untenable. Such a position not only misreads [article III, section 16](#), as the majority explains, but also would do violence to the right to access courts guaranteed by [article I, section 21, of the Florida Constitution](#).

First, as the majority explains, our apportionment precedents have recognized the limits on this Court's ability to review *214 apportionment challenges as applied to particular cases. We are not a fact-finding body, and the limited, thirty-day period that [article III, section 16](#), mandates scarcely allows meaningful fact-based review. Our duty under [article III, section 16](#), is to determine the facial validity of the

Legislature's apportionment scheme; nothing more, nothing less. The circuit courts, however, have a very different, yet important role. As trial courts, they assist in developing the contested facts of particular cases, thereby advancing the truth-seeking function of a trial. [Article III, section 16](#), does nothing to divest the circuit courts of these important functions. In addition, and perhaps more problematic, the Legislature's position, if adopted, would infringe on the right to access courts guaranteed by [article I, section 21](#), of the [Florida Constitution](#).

In 2002, this Court explicitly “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.’ ” [Florida Senate v. Forman](#), 826 So.2d 279, 280 (Fla.2002) (quoting   *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 832 (Fla.2002)). And, as the majority notes, neither party disputes that as-applied challenges arising under federal law are available in the circuit courts. The Legislature would draw the line, however, at claims alleging a violation of [article III, section 21](#), of the [Florida Constitution](#), because such a line, the Legislature argues, is necessary for finality and stability in the apportionment process. The problem with that argument, however, is that it overlooks an important right guaranteed by our own constitution—the right to access courts. *See* [Art. I, § 21](#), Fla. Const.

[Article I, section 21](#), of the [Florida Constitution](#) provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” As a general matter, the law undertakes to protect access to courts because the right to sue and defend is preservative of all other rights, and lies at the foundation of orderly government. *See*  *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). That the Florida Constitution specifically enumerates this right, moreover, makes it particularly deserving of protection. *See*  *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001) (applying strict scrutiny).

With these observations, I join in the majority's opinion.

CANADY, J., dissenting.

Because the Florida Constitution in [article III, section 16\(d\)](#), unambiguously precludes challenges under Florida law to

a legislative redistricting plan that has been declared valid by this Court in a proceeding under [article III, section 16](#), I would grant the Legislature's request for relief under this Court's authority-granted by [article V, section 3\(b\)\(7\)](#) of the Florida Constitution—to issue all writs necessary to the complete exercise of its jurisdiction. I strongly disagree with the majority's decision, which consigns [section 16\(d\)](#) to the status of a dead letter. Accordingly, I dissent.

[Article III, section 16\(d\)](#), provides that “[a] judgment of the supreme court of the state determining [a legislative redistricting plan] to be valid *shall be binding upon all the citizens of the state.*” (Emphasis added.) The majority totally fails to reckon with the text of this constitutional provision. Rather than addressing this unambiguous text, the majority relies on dicta from prior opinions that also failed to reckon *215 with the constitutional text. In the reasoning set forth by the majority, what this Court has said in dicta without any consideration of the pertinent constitutional text effectively trumps what the people themselves have said in the Constitution they have adopted. The constitutional order is thus inverted.

Until the majority's decision here, this Court has never held—as distinct from stating in dicta—that the Constitution permits a challenge under Florida law to the validity of a redistricting plan after the plan has been declared valid in a proceeding under [article III, section 16](#). What the Court has said in dicta on that subject is fundamentally flawed because it does not address the rule of preclusion in the text of [article III, section 16\(d\)](#). Beginning with the Court's first decision under the framework established by [article III, section 16](#), the Court has never once discussed the significance of [section 16\(d\)](#). The provision has been consistently—if not studiously—ignored by this Court.

The constitutional pronouncement in [section 16\(d\)](#) concerning the binding effect of the declaratory judgment of validity issued in a proceeding under [article III, section 16](#), is unconditional and unequivocal. It is plainly designed to conclusively determine and settle once for all the validity of a redistricting plan under state law. The plain import of the provision that a judgment of validity “shall be binding upon all the citizens of the state” is that no citizen is permitted to thereafter challenge the validity of the redistricting plan that has been held valid. If the citizens of the state are bound by a judgment of validity, they are necessarily precluded from challenging the validity of the redistricting plan in subsequent litigation. Those who are bound by a judgment

will not be heard to challenge that judgment. Nothing in the constitutional text or structure suggests that the rule of preclusion in [section 16\(d\)](#) is limited to claims that are actually litigated in a [section 16](#) validation proceeding. If [section 16\(d\)](#) had been designed to have such limited preclusive effect, the Constitution would contain some sign of that limitation. Although the Court has repeatedly suggested in dicta that post-validation challenges to redistricting plans are permissible, it has never found occasion to explain why [section 16\(d\)](#) does not mean what it says.⁴

The references in the redistricting context to the facial/as-applied challenge dichotomy—on which the majority here relies—find their source in the 1972 decision [In re Apportionment Law Appearing as Senate Joint Resolution No. 1305, 1972 Regular Session \(In re Apportionment Law—1972\)](#), 263 So.2d 797, 808 (Fla.1972), where the Court in dicta observed that “the apportionment plan as framed may be constitutional on its face, but upon its application in a particular case the joint resolution may violate organic law,” relying on prior “holdings that a statute may be valid as applied to one state of facts, though invalid as applied to another state of facts.” In discussing fact-intensive claims that could properly be adjudicated under the federal Voting Rights Act of 1965, [42 U.S.C. §§ 1971, 1973](#) to [1973bb-4](#) (1970), the Court went on to state that the “Florida Constitution contemplates that our judgment in these proceedings be limited to a declaration that the apportionment plan on its face is either valid or invalid *216 under the Constitution of the United States and the Constitution of the State of Florida” and that its judgment of validity was “without prejudice to the right of protesters to question the validity of the plan in appropriate proceedings raising factual questions asserted in their briefs.” [Id.](#) The litigation of federal claims, of course, cannot be limited by Florida law. But there is nothing in the text of the Florida Constitution suggesting that as-applied challenges arising under Florida law somehow escape the rule in [section 16\(d\)](#) that all the citizens of the state are bound by a judgment declaring a redistricting plan valid. And in stating its view concerning as-applied challenges, the Court maintained a stony silence regarding [section 16\(d\)](#).

The Court's deliverances on the subject of post-validation challenges to redistricting plans are also rooted in a misconception of the law regarding declaratory judgments. In its 1972 “Order Clarifying Opinion and Denying Rehearing,”

in what could only be described as a supplemental advisory opinion, the Court expressed the view that a post-validation challenge could be brought “by supplemental relief” as authorized by the declaratory judgment law in [section 86.061, Florida Statutes](#) (1971). [In re Apportionment Law—1972](#), 263 So.2d at 822 (Order Clarifying Opinion and Denying Rehearing). The Court reasoned that “[b]y classifying the [[article III, section 16](#)] proceeding as one for ‘declaratory judgment,’ the Florida Constitution contemplates that we retain *exclusive state jurisdiction* and consider any and all future proceeding relating to the validity of the apportionment plan.” [Id.](#) The majority here, of course, does not follow the dicta regarding the retention of exclusive jurisdiction but does otherwise rely on the 1972 Court's view concerning post-validation challenges.

The 1972 Court's muddled reasoning regarding the law of declaratory judgments demonstrates the fallacious foundation on which the majority's position ultimately rests. The Court's misconception of the law regarding declaratory judgments is twofold. First, there is no basis for concluding that the provisions of chapter 86, Florida Statutes, are applicable under [article III, section 16](#). Second, even if chapter 86 did have some application in this context, the supplemental relief authorized by [section 86.061](#) does not encompass the setting aside of a prior declaratory judgment.

The proceeding established by [article III, section 16](#), is a unique constitutional proceeding. There is no suggestion in the Florida Constitution that this proceeding, which takes place in the Supreme Court, is somehow subject to the provisions of chapter 86. As [section 86.011, Florida Statutes](#) (1971), makes clear, the declaratory judgment proceedings dealt with by chapter 86 are proceedings over which “[t]he circuit courts have jurisdiction.” [Article III, section 16](#), proceedings do not fit within that framework.

But even putting aside this problem, the suggestion that the provision for supplemental relief in [section 86.061](#) authorizes litigation to set aside a prior declaratory judgment is entirely fallacious. The crucial provision of [section 86.061](#) is this: “Further relief *based on a declaratory judgment* may be granted when necessary or proper.” (Emphasis added.) An application for relief that seeks to set aside the prior declaratory judgment is not an application for relief *based on* a declaratory judgment. Further relief is based on the prior declaratory judgment only if it seeks to give effect to that judgment—not if it seeks to wholly or partially

invalidate that judgment. When “further relief” is sought, the existing declaratory judgment can serve “as a predicate to further relief.” *217  *Powell v. McCormack*, 395 U.S. 486, 499, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). A declaratory judgment is not properly the “predicate” for its own undoing. *See also Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C.Cir.1988) (“The ‘further relief’ provisions of both state and federal declaratory judgment statutes clearly anticipate ancillary or subsequent coercion to make an original declaratory judgment effective.”); *McCann v. Kerner*, 436 F.2d 1342, 1344 (7th Cir.1971) (stating that further relief provision of federal declaratory judgment act “contemplates that subsequent to the issuance of a declaratory judgment, a court may upon notice and hearing grant injunctive relief to protect and enforce its judgment”); *Koscot Interplanetary, Inc. v. State*, 230 So.2d 24, 25 (Fla. 4th DCA 1970) (stating that supplemental relief on a declaratory decree is “that which is necessary to make effective the judgment”).

The majority's reasoning in rejecting the Legislature's argument that [section 16\(d\)](#) precludes the challenge brought by the respondents is summed up in the assertion that the Legislature's argument should be rejected because “this Court's apportionment decisions have always contemplated the potential of subsequent challenges to the validity of the legislative apportionment plan” and the further assertion that when [article III, section 21 of the Florida Constitution](#) “was proposed and passed, the framers and voters were entitled to rely on this Court's precedent and our consistent interpretation of the declaratory judgment required by [article III, section 16](#), as a determination of only the facial validity of the plan.” Majority op. at 209, 210. It is true that the Court has never interpreted or applied [section 16\(d\)](#) in the manner suggested by the Legislature. That is because the Court has never considered [section 16\(d\)](#) at all. And for that very reason, it is necessarily false that the Court's precedent contains any holding that [section 16\(d\)](#) permits so-called as-applied post-validation challenges to redistricting plans. The majority's reference to “this Court's interpretations dating back to 1972 as to the meaning of [article III, section 16\(c\)-\(d\)](#),” is fictitious. Majority op. at 210. The Court has uttered not one word about the “meaning” of [section 16\(d\)](#). Since the jurisprudence of this Court contains no discussion of [section 16\(d\)](#), the majority here has necessarily failed to cite any such discussion in our case law.

The majority thus effectively contends that when [article III, section 21](#), was proposed and passed, the framers and the voters were entitled to rely on the dicta contained in our

prior opinions. This is an extraordinary position. No one is entitled to rely on dicta. Dicta has only whatever force the persuasiveness of its reasoning can subsequently command. It is indeed a startling proposition that anyone can for any purpose rely on a court's unreasoned dicta that flies in the face of an unambiguous constitutional provision. The majority's line of reasoning amounts to this: because the Court has ignored [section 16\(d\)](#) and the people in adopting [section 21](#) were entitled—indeed, bound—to understand that we would continue to ignore [section 16\(d\)](#), the Court therefore will continue to ignore [section 16\(d\)](#). Such reasoning is not sound. A provision of the Florida Constitution is not repealed simply because this Court has—either through inattention or willfulness—ignored the provision. Nor does an argument made last year by the Senate based on dicta in prior decisions—an argument unequivocally rejected by the Court—act to repeal a provision of the Florida Constitution. The words of the text of [section 16\(d\)](#) were adopted by the people of Florida. The people are entitled to rely on what they have said in their Constitution, just as this *218 Court is bound by what the people have said in the Constitution. And the people have neither expressly nor implicitly repealed the rule contained in [section 16\(d\)](#). It should not be treated as a dead letter.

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. The rule of preclusion in [section 16\(d\)](#) could not be stated more clearly. It is a crucial element of the process established by [section 16](#). Whatever the limitations and restrictions of that process may be, [section 16](#) sets forth the process established by the people of Florida to adjudicate the validity under Florida law of legislative redistricting plans. The voters who adopted [section 21](#) did nothing to in any way restrict the reach of the rule of preclusion in [section 16\(d\)](#). The majority's analysis in this case begins and ends with the assumption that there must be a way to adjudicate every fact-based claim that might be asserted against the validity of a legislative redistricting plan. That is an assumption that simply cannot be reconciled with the rule of preclusion in [section 16\(d\)](#).

Last year, the majority cast aside the limitation on this Court's power imposed by our well-established precedent that legislative redistricting plans adopted by the Legislature enjoy a presumption of validity. Now the majority casts aside the limitation on judicial power imposed by [section 16\(d\)](#). With this decision, we confront the prospect of unending litigation concerning legislative redistricting—a prospect that [section 16\(d\)](#), by its plain terms, undeniably was designed to preclude. This unjustified decision further lays the groundwork for the unrestrained judicial “intrusion into a process that is the very foundation of democratic decisionmaking.”  *Vieth v. Jubelirer*, 541 U.S. 267, 291, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion).

In accordance with the provision of [section 16\(d\)](#) that a declaratory judgment of this Court declaring a redistricting plan valid “shall be binding upon all the citizens of the state,” the Legislature is entitled to the issuance of a writ precluding litigation challenging the redistricting plan that this Court last year determined to be valid. I strongly dissent from the majority's failure to grant this relief to which the Legislature is entitled.

POLSTON, C.J., concurs.

All Citations

118 So.3d 198, 38 Fla. L. Weekly S565

Footnotes

- 1 Although both the Florida Senate and the Florida House of Representatives, as well as the Speaker of the House and President of the Senate, in their official capacities, have filed this petition—and the apportionment plan is a joint resolution approved by both legislative chambers—the lawsuit raises challenges only with respect to the Senate map and does not challenge the plan apportioning districts for the Florida House.
- 2 On June 26, 2013, the National Council of La Raza filed a Notice of Voluntary Withdrawal, notifying this Court that it has withdrawn as a plaintiff in the circuit court case below and therefore is no longer a Respondent in this proceeding. We treated the Notice of Voluntary Withdrawal as a motion to withdraw as a party and granted the motion.
- 3 We do not cite the position taken by the Attorney General and the Senate in *Apportionment I* as authority for the interpretation adopted by the Court, but only to demonstrate that no party participating in the [article III, section 16](#), proceeding in 2012 construed [article III, section 16\(d\)](#), as mandating a preclusive effect as to all subsequent challenges.
- 4 Why the Court has never felt the need to explain its view regarding the interpretation of [section 16\(d\)](#) cannot be known. Perhaps the Court's statements that fly in the face of [section 16\(d\)](#) have been based on an intuition that [section 16\(d\)](#) could not possibly mean what it says. And perhaps the Court's silence regarding the text of [section 16\(d\)](#) has sprung from a bafflement about how to explain that intuition.



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [League of Women Voters of Pennsylvania v. Commonwealth](#), Pa.Cmwlth., November 22, 2017

132 So.3d 135

Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS
OF FLORIDA, et al., Petitioners,

v.

The FLORIDA HOUSE OF
REPRESENTATIVES, et al., Respondents.[Rene Romo](#), et al., Petitioners,

v.

The Florida House of
Representatives, et al., Respondents.

Nos. SC13-949, SC13-951.

|

Dec. 13, 2013.

Synopsis

Background: Challengers to congressional apportionment plan brought action against state legislature for declaratory and injunctive relief, asserting unconstitutional partisan or discriminatory intent. The Circuit Court granted in part and denied in part the legislature's motion for a protective order with regard to challengers' discovery requests. On certiorari review, the First District Court of Appeal,  [113 So.3d 117](#), [Wetherell, J.](#), quashed the order. The Supreme Court granted review.

Holdings: Addressing novel issues of law, the Supreme Court, [Pariente, J.](#), held that:

[1] state legislators and legislative staff members possess a legislative privilege under the state constitution's separation of powers provision;

[2] legislative privilege is not absolute and may yield to a compelling, competing interest;

[3] legislative privilege had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibition against partisan political gerrymandering; and

[4] legislators and staff members could assert or waive legislative privilege at discovery stage as to their subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process.

Decision of District Court of Appeal quashed.

[Labarga, J.](#), concurred with an opinion in which [Lewis, J.](#), concurred.[Perry, J.](#), concurred with an opinion in which [Quince, J.](#), concurred.[Canady, J.](#), dissented with an opinion in which [Polston, C.J.](#), concurred.

West Headnotes (6)

[1] Appeal and Error  De novo review

Existence of a legislative privilege, and the parameters of such a privilege, are questions of law subject to de novo review.

[3 Cases that cite this headnote](#)**[2] Constitutional Law**  Nature and scope in general**States**  Privileges and exemptionsState legislators and legislative staff members possess a legislative privilege under Florida law, based on the principle under state constitution's separation of powers provision that no branch may encroach upon the powers of another and on inherent principles of comity that exist between the coequal branches of government; in other words, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. [West's F.S.A. Const. Art. 2, § 3.](#)[5 Cases that cite this headnote](#)**[3] States**  Privileges and exemptions

Legislative privilege that exists under separation of powers principles codified in state constitution is not absolute and may yield to a compelling, competing interest. [West's F.S.A. Const. Art. 2, § 3](#).

[2 Cases that cite this headnote](#)

[4] **States**  Privileges and exemptions

When the legislative privilege is asserted, courts must engage in two-step inquiry to determine, first, whether the information sought falls within the scope of the privilege, and, second, whether the purposes underlying the privilege, namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation, are outweighed by a compelling, competing interest. [West's F.S.A. Const. Art. 2, § 3](#).

[5] **States**  Privileges and exemptions

Legislative privilege based on separation of powers provision in state constitution had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibition against partisan political gerrymandering, in action against state legislature in which challengers sought declaratory and injunctive relief in connection with congressional reapportionment plan, asserting improper legislative intent. [West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20\(a\)](#).

[3 Cases that cite this headnote](#)

[6] **States**  Privileges and exemptions

Legislators and their staff members could assert or waive a claim of legislative privilege at discovery stage of declaratory judgment action against state legislature in connection with congressional reapportionment plan that purportedly violated state constitutional prohibition against partisan political gerrymandering, to the extent that challengers sought testimony or documents

revealing legislators' or staff members' subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process. [West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20\(a\)](#).

[4 Cases that cite this headnote](#)

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Opinion

[PARIENTE, J.](#)

Does enforcement of the explicit prohibition in the Florida Constitution against partisan political gerrymandering and improper discriminatory intent in redistricting outweigh a claim of an absolute legislative privilege? Specifically, the issue presented to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant

to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory “intent.” See art. III, § 20(a), Fla. Const.

This Court is charged with the solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent in redistricting is effectively enforced. While *138 the Legislature asserts that the challengers should be precluded from accessing relevant discovery information because it is absolutely privileged, we conclude that there is no unbending right for legislators and legislative staff members to hide behind a broad assertion of legislative privilege to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition against unconstitutional partisan political gerrymandering and improper discriminatory intent.

This Court has held, in interpreting the constitutional redistricting “intent” standard, that “the focus of the analysis must be on both direct and circumstantial evidence of intent.”

 *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I)*, 83 So.3d 597, 617 (Fla.2012). Further, this Court has stated that “there is no acceptable level of improper intent.” *Id.* As Chief Judge Benton aptly observed in his dissenting opinion to the First District Court of Appeal’s decision below, “[t]he enactment of [article III, section 20 of the Florida Constitution](#) makes plain that how and why the Legislature redistricts is a matter of paramount public concern.”  *Fla. House of Reps. v. Romo*, 113 So.3d 117, 131 (Fla. 1st DCA 2013) (Benton, C.J., dissenting).

In this opinion, we decide for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers, thus rejecting the challengers’ assertion that there is no legislative privilege in Florida. We also hold, however, that this privilege is not absolute where, as in this case, the purposes underlying the privilege are outweighed by the compelling, competing interest of effectuating the *explicit* constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting. We therefore reject the Legislature’s argument that requiring the testimony of individual legislators and legislative staff members will have a “chilling effect” among legislators in discussion and participation in the reapportionment process, as this type of “chilling effect” was the precise purpose of the constitutional

amendment outlawing partisan political gerrymandering and improper discriminatory intent.

We also unequivocally reject the dissent’s hyperbolic assertion that our decision “grievously violates the constitutional separation of powers,” dissenting op. at 156, by recognizing a legislative privilege but concluding that it is not absolute as to enforcing this explicit constitutional mandate. To the contrary, we strike the appropriate balance between respecting the separation of powers and fulfilling this Court’s obligation to uphold the citizens’ explicit constitutional protection against partisan political gerrymandering and improper discriminatory intent in redistricting.

Accordingly, we quash the First District’s decision in  *Florida House of Representatives v. Romo*, 113 So.3d 117 (Fla. 1st DCA 2013), which erroneously afforded legislators and legislative staff members the absolute protection of a legislative privilege. We approve 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. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach set forth in this opinion.

*139 FACTS AND BACKGROUND

In February 2012, the Florida Legislature approved the decennial plan apportioning Florida’s twenty-seven congressional districts, based on population data derived from the 2010 United States Census. Soon after its adoption, two separate groups of plaintiffs filed civil complaints in circuit court, which were later consolidated, challenging the constitutionality of the plan under new state constitutional redistricting standards approved by the Florida voters in 2010 and now enumerated in [article III, section 20, of the Florida Constitution](#). Those standards, governing the congressional reapportionment process, appeared on the 2010 general election ballot as “Amendment 6” and, together with their identical counterparts that apply to legislative reapportionment (“Amendment 5”), were generally referred to as the “Fair Districts” amendments.¹ All together, these “express new standards imposed by the voters clearly act as

a restraint on legislative discretion in drawing apportionment plans.” [Apportionment I](#), 83 So.3d at 599.

The Florida Constitution's Redistricting Standards

Article III, section 20, of the Florida Constitution prohibits the Legislature from drawing an apportionment plan or individual district “with the intent to favor or disfavor a political party or an incumbent” and “with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.” Art. III, § 20(a), Fla. Const. Specifically, this constitutional provision provides in its entirety as follows:

In establishing congressional district boundaries:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 20, Fla. Const.

In interpreting the identical standards in article III, section 21,² during its initial *140 2012 review of the legislative apportionment plan, this Court explained that the requirement that “[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent” is “a top priority to which the Legislature must conform during the redistricting process.” [Apportionment I](#), 83 So.3d at 615. This Court stated that “by its express terms,

Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually.” [Id.](#) at 617.

Because “redistricting will inherently have political consequences,” this Court explained that “the focus of the analysis must be on both direct and circumstantial evidence of intent.” [Id.](#) In reviewing the objective evidence before it, this Court held that “the effects of the plan, the shape of district lines, and the demographics of an area are all factors that serve as objective indicators of intent.” [Id.](#) Moreover, as to the intent to favor or disfavor an incumbent, this Court stated that “the inquiry focuses on whether the plan or district was drawn with this purpose in mind,” and as to objective indicators of intent to favor or disfavor a political party, these “can be discerned from the Legislature's level of compliance with our own constitution's tier-two requirements, which set forth traditional redistricting principles.” [Id.](#) at 618.

In reviewing these factors to assist this Court in discerning circumstantial evidence of intent, however, this Court was mindful that it was unable to engage in fact-finding. [See id.](#) at 612 & n. 13 (noting that the sole type of information available was “objective data” and refusing to consider an expert affidavit); [see also In re Senate Joint Resolution of Legislative Apportionment 2–B \(Apportionment II\)](#), 89 So.3d 872, 893 (Fla.2012) (Pariente, J., concurring) (“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.”). Indeed, in [Florida House of Representatives v. League of Women Voters of Florida \(Apportionment III\)](#), 118 So.3d 198, 207 (Fla.2013), this Court subsequently explained that its decisions in [Apportionment I](#) and [Apportionment II](#) were “based solely on objective evidence and undisputed facts in the limited record before the Court.” This Court also highlighted the need for judicial review of fact-intensive claims in order to effectuate the intent of the voters, who “clearly desired more judicial scrutiny” of apportionment plans, “not less.” [Id.](#) at 205.

The Current Dispute

In the consolidated circuit court lawsuit challenging the validity of the 2012 congressional apportionment plan under the Florida Constitution's redistricting *141 standards, the

challengers³ allege that the congressional apportionment plan and numerous individual districts violate the [article III, section 20](#), standards by impermissibly favoring Republicans and incumbents, by intentionally diminishing the ability of racial and language minorities to elect representatives of their choice, and by failing to adhere to the requirement that districts be compact and follow existing political and geographical boundaries where feasible. The challengers seek both a declaratory judgment invalidating the entire plan, or at least the specific districts challenged, as well as a permanent injunction against conducting any future elections using the congressional district boundaries established by the 2012 apportionment plan.

As part of ongoing 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. From third-party discovery, the challengers uncovered communications between the Legislature and partisan political organizations and political consultants, which they allege reveal a secret effort by state legislators involved in the reapportionment process to favor Republicans and incumbents in direct violation of [article III, section 20\(a\)](#). The challengers have also taken deposition testimony from numerous third-party witnesses as to their involvement in the redistricting process and their communications with state legislators and legislative staff members, and have been provided with e-mail communications between legislators and legislative staff, as well as other public records from the Legislature.

In order to further develop and discover evidence concerning their claim of unconstitutional legislative intent in violation of [article III, section 20\(a\)](#), the challengers served a notice of taking depositions of the then-state Senate Majority Leader, an administrative assistant to the Senate Reapportionment Committee, and the staff director of the House Redistricting Committee. Thereafter, the Legislature filed a “Motion for Protective Order Based on Legislative Privilege,” in which it requested the circuit court to enter an order “declaring that (i) no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable.” The Legislature’s motion for a protective order was filed in direct response to the challengers’ notice of taking depositions; however, the Legislature sought to more generally prevent the depositions of *any* legislators and

legislative staff, as well as the “discovery of legislatively drawn draft redistricting plans that were never filed as bills.”

The circuit court granted in part and denied in part the Legislature’s motion for a protective order. The circuit court determined that, although a legislative privilege exists in Florida, the privilege is not absolute and “must be balanced against other compelling government interests.” Finding it “*difficult to imagine a more compelling, competing government interest* than that represented by the [challengers’] claim,” the circuit court drew a distinction between “subjective” thoughts or impressions of legislators and the thoughts or impressions shared with legislators by staff or other legislators, and “objective” information or communication that “does not encroach” into those thoughts or impressions. *142 (Emphasis added.) In drawing this distinction, the circuit court observed that “there are some categories of information and communications that are most in need of the protection offered by the privilege and some that are less in need of such protection.”

Accordingly, because “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,” and because the information sought by the challengers “is certainly relevant and probative of intent,” the circuit court held that all “objective” information or communications “should not be protected by the privilege.” However, the circuit court cautioned that any individual legislators or legislative staff members who assert a claim of legislative privilege “shall not be deposed regarding their ‘subjective’ thoughts or impressions or regarding the thoughts or impressions shared with them by staff or other legislators.” The circuit court also determined that the same dichotomy applied to the production of documents. It therefore ordered the Legislature to produce all requested documents that do not contain “subjective” information and to schedule an *in camera* review as to any disputed documents.

On a petition for a writ of certiorari to review the circuit court’s non-final order, the First District, relying on its prior decision in [Florida House of Representatives v. Expedia, Inc.](#), 85 So.3d 517 (Fla. 1st DCA 2012), which was the first published Florida case to explicitly recognize the existence of a legislative privilege in Florida, concluded that the circuit court’s order departed from the essential requirements of law when it allowed the challengers to depose legislators and legislative staff members “on any matter pertaining to

their activities in the reapportionment process.” [Romo](#), 113 So.3d at 123. The First District reasoned that the legislative privilege “equally protects ‘subjective’ information, such as the legislator’s rationale or motivation for proposing or voting on a piece of legislation, and ‘objective’ information, such as the data or materials relied on by legislators and their staff in the legislative process.” *Id.* Thus, the First District quashed the circuit court’s order “insofar as it permits [the challengers] to depose legislators and legislative staff members concerning the reapportionment process and insofar as it requires production of draft maps and supporting documents for an in camera review under the erroneous, unworkable objective/subjective dichotomy.” [Id.](#) at 128.

Chief Judge Benton dissented, observing in part that “[p]artisan political shenanigans are not ‘state secrets,’ ” and that, at this stage of the litigation, “it is impossible to say that any question [the challengers] would actually have asked would be objectionable.” [Id.](#) at 130–31 (Benton, C.J., dissenting). Subsequently, after both groups of challengers in the consolidated litigation below sought review, we exercised our discretion to accept jurisdiction to review the First District’s decision because that decision expressly affects a class of constitutional officers—namely, legislators—and because this Court has never considered whether a legislative privilege exists, which is clearly an important issue to resolve. *See art. V, § 3(b)(3), Fla. Const.*

ANALYSIS

[1] The questions we confront require this Court to interpret the Florida Constitution to determine whether a legislative privilege exists and to define the parameters of that privilege as applied in this case. These are pure questions of law that are subject to de novo review.

*143 We hold, first, that a legislative privilege exists in Florida, based on the principle of separation of powers codified in [article II, section 3, of the Florida Constitution](#). However, we conclude that this privilege is not absolute and may yield to a compelling, competing interest. We then proceed to review whether a compelling, competing interest exists in this case. Finally, we explain why we embrace the circuit court’s balancing approach at this stage of the litigation, which determined that the compelling, competing constitutional interest present here outweighs the purposes underlying the privilege, therefore allowing discovery but

retaining the right of an individual legislator or legislative staff member to assert the privilege as to his or her thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.

I. Florida’s Legislative Privilege

The challengers contend that this Court should not recognize a legislative privilege because the Florida Constitution lacks a Speech or Debate Clause, which is the constitutional provision upon which the legislative privilege is traditionally premised. This clause, which generally states that legislators shall in all cases except treason, felony, or breach of the peace, not be questioned in any other place for any speech or debate in either legislative chamber,⁴ is the general justification that the federal courts and other states with a state-specific clause have utilized in recognizing the legislative privilege. *See City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So.2d 455, 457 (Fla. 4th DCA 2006) (“The federal courts which have acknowledged and applied the privilege have done so based largely on the Speech and Debate Clause in Article I, section 6, of the United States Constitution, which protects federal legislators from suits.”); *Kerttula v. Abood*, 686 P.2d 1197, 1205 (Alaska 1984) (applying Alaska’s state constitutional version of the Speech or Debate Clause to preclude the deposition of a state legislator).

In contrast to the vast majority of states, the Florida Constitution does not include a Speech or Debate Clause and has not included one since the clause was omitted during the 1868 constitutional revision.⁵ In fact, Florida is one of only two states in the country that lacks either a state constitutional Speech or Debate Clause or a provision protecting legislators from arrest during legislative session.⁶

Coupled with the absence of a Speech or Debate Clause in the Florida Constitution is the presence of Florida’s broad constitutional right of access to public records, set forth in [article I, section 24](#), and right to transparency in the legislative process, codified in [article III, section 4](#). Specifically regarding the Legislature, the Florida Constitution mandates as follows:

[A]ll prearranged gatherings, between more than two members of the legislature, or between the governor,

the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent *144 time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.

 [Art. III, § 4\(e\), Fla. Const.](#) Further, article I, section 24(a), which “specifically includes the legislative” branch, provides that “[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body” of the state.  [Art. I, § 24\(a\), Fla. Const.](#)

Thus, the absence of a Speech or Debate Clause and the strong public policy, as codified in our state constitution, favoring transparency and public access to the legislative process, are factors weighing against recognizing a legislative privilege in Florida. Florida statutes also do not provide for a legislative privilege.⁷ Further, any common law legislative privilege has been abolished by a provision in the Florida Evidence Code providing that Florida law recognizes only privileges set forth by statute or in the state or federal constitutions.⁸

These factors, however, are not conclusive because there is another important factor that weighs in favor of recognizing the privilege—the doctrine of separation of powers. It is through this separate and important constitutional principle, which is codified in [article II, section 3, of the Florida Constitution](#), that we recognize a legislative privilege under Florida law.

Forty states, including Florida, have a specific state constitutional provision recognizing the separation of powers between the three branches of government.⁹ [Article II, section 3, of the Florida Constitution](#), which is Florida's separation of powers provision, provides as follows:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any

powers appertaining to either of the other branches unless expressly provided herein.

[Art. II, § 3, Fla. Const.](#)

In *Expedia*, which was the first published case to analyze and recognize the existence of a legislative privilege in Florida, the First District concluded that the state constitutional separation of powers provision provides an independent basis to recognize a legislative privilege under Florida law.  [85 So.3d at 524](#). The issue in *Expedia* *145 was whether a legislator and a member of the legislator's staff could be deposed in tax-related litigation so that a party in the lawsuit could “refute a claim that it had waived the attorney-client privilege” as to several documents the legislator had obtained.

 [Id. at 525](#). The First District held that the legislator and his aide were entitled to assert a legislative privilege against the compelled testimony and that there was no compelling interest in seeking the depositions because the party seeking them was “attempting to refute a fact that has not yet been proven, and, as it appears from this record, may never be proven.”  [Id.](#)

Although *Expedia* was the first published Florida case to explicitly conclude that state legislators may assert a legislative privilege, various Florida circuit courts have, in unpublished orders over the years, quashed subpoenas requesting the testimony of state legislators or legislative staff members for various reasons. For example, in 2003, a circuit court quashed a subpoena seeking to elicit the intent, purpose, or motive behind a particular state senator's introduction of certain amendments to a 2002 piece of legislation. *See Order Granting Motion to Quash, Billie v. State*, No. 02–499–CA (Fla. 17th Cir.Ct. Feb. 7, 2003). None of these orders specifically analyzed the legislative privilege, however, and most have been premised on the tenet that an individual legislator's testimony as to individual intent is usually irrelevant in a typical lawsuit challenging a statute. These orders nevertheless support the premise that the judicial branch has respected the separation of powers between the three branches of government, particularly where no compelling interest in seeking the testimony has been demonstrated.

Such respect between the three branches is inherent in our democratic system of government. This Court has previously described the constitutional tenet of separation of powers as “[t]he cornerstone of American democracy,”  [Bush v. Schiavo](#), 885 So.2d 321, 329 (Fla.2004), and has explained that [article II, section 3](#), which is the state

constitutional separation of powers provision, “encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.” [Chiles v. Children A, B, C, D, E, & F](#), 589 So.2d 260, 264 (Fla.1991). Indeed, as pointed out by several former presiding officers of the Legislature in their amicus curiae brief filed in this case, “the legislative privilege is critical to a proper separation of powers, upon which our system of government is built.”¹⁰

[2] Accordingly, because of the role that the principle of separation of powers plays in the structure of Florida's state government, as embodied in [article II, section 3](#), of our state constitution, we reject the challengers' contention that there is no legislative privilege in Florida and hold that state legislators and legislative staff members do possess a legislative privilege under Florida law. This privilege is based on the principle that “no branch may encroach upon the powers of another,” [Chiles](#), 589 So.2d at 264, and on inherent principles of comity that exist between the coequal branches of government. In other words, “the privilege can be said to derive from the supremacy of each branch within [*146](#) its own assigned area of constitutional duties.” [United States v. Nixon](#), 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

Several reasons support recognition of a legislative privilege. The most obvious is the practical concern of protecting the integrity of the legislative process by not unnecessarily interfering with the Legislature's business. As the circuit court cogently articulated, “[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.” In addition, other reasons for recognizing a privilege include the “historical policy ... of protecting disfavored legislators from intimidation by a hostile executive” and protecting legislators “from the burdens of forced participation in private litigation.” [Kerttula](#), 686 P.2d at 1202. These other policies undergirding the legislative privilege aim to ensure 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.

[3] Although separation of powers principles require deference to the Legislature in refusing to provide compelled testimony in a judicial action, we emphasize that the

legislative privilege is not absolute. As the United States Supreme Court has noted in determining that the President of the United States does not enjoy an absolute privilege of immunity from judicial process in all circumstances, “when the privilege depends solely on the broad, undifferentiated claim of public interest ... a confrontation with other values arises.” [Nixon](#), 418 U.S. at 706, 94 S.Ct. 3090. This public interest component is especially true in Florida, where one of our state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process, which is enshrined in the Florida Constitution.

Indeed, the proposition that a legislative privilege is not absolute, particularly where another compelling, competing interest is at stake, is not a novel one. For example, in [United States v. Gillock](#), 445 U.S. 360, 369, 372, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court acknowledged the need to avoid unnecessary intrusion by the executive or judicial branches into the “affairs of a coequal branch,” as well as the Court's “sensitivity to interference with the functioning of state legislators.” However, the Court concluded nevertheless that “although principles of comity command careful consideration, ... where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields.” [Id.](#) at 373, 100 S.Ct. 1185. The Court stated as follows:

We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in [United States v. Nixon](#), 418 U.S. 683 [94 S.Ct. 3090, 41 L.Ed.2d 1039] (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. *See also* [United States](#)

v. Burr, 25 F.Cas. 187 (No. 14,694) (C.C.Va.1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes *147 with only speculative benefit to the state legislative process.

Id. While the interest implicated in this case is not the enforcement of the criminal laws, 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.

[4] As the First District itself has recognized, there may be a compelling, competing interest in a particular case that outweighs the purposes underlying the privilege. *See Expedia*, 85 So.3d at 525. When the legislative privilege is asserted, therefore, 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.¹¹ This inquiry is a two-step process.

The first step is to determine whether the information sought falls within the scope of the privilege. This is an important determination because, for example, information concerning evidence of a crime would not be covered by the legislative privilege. For purposes of our analysis in this case, however, we assume that all of the information being sought by the challengers, which relates to functions undertaken by legislators and legislative staff during the course of their legitimate legislative duties, would fall within the scope of the privilege. We therefore proceed to the next step.

Once a court determines that the information being sought is within the scope of the legislative privilege, the court then must determine whether the purposes underlying the privilege—namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation—are outweighed by a compelling, competing interest. With this in mind, we next address the compelling, competing interest asserted in this case. Then, we analyze whether

this compelling, competing interest outweighs the purposes underlying the privilege.

II. The Compelling, Competing Interest

[5] The compelling, competing interest in this case is ensuring compliance with [article III, section 20\(a\)](#), which specifically outlaws improper legislative “intent” in the congressional reapportionment process. The language of [article III, section 20\(a\)](#), explicitly places legislative “intent” at the center of the litigation. Indeed, as the circuit court succinctly stated, it is “difficult to imagine a more compelling, competing government interest” than the interest represented by the challengers' [article III, section 20\(a\)](#), claims. The circuit court explained this finding as follows:

[The challengers' claim] is based upon a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans. It seeks to protect *148 the essential right of our citizens to have a fair opportunity to select those who will represent them. In this particular case, the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan. The information sought is certainly relevant and probative of intent. Frankly, 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.

The first-tier requirements in [article III, section 20](#), provide that “[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” [Art. III, § 20\(a\), Fla. Const.](#) We recently explained that, in enacting these constraints on the Legislature's reapportionment of congressional and state

legislative districts, “the framers and voters clearly desired more judicial scrutiny” of the apportionment plans, “not less.” *Apportionment III*, 118 So.3d at 205. Indeed, as this Court has previously noted, “[t]he new requirements dramatically alter the landscape with respect to redistricting by prohibiting practices that have been acceptable in the past.... By virtue of these additional constitutional requirements, the parameters of the Legislature’s responsibilities under the Florida Constitution” and therefore the scope of judicial review of the validity of an apportionment plan “have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.” *Apportionment I*, 83 So.3d at 607.

Although the dissent relies heavily on the historical roots of the legislative privilege and the United States Supreme Court’s decision in *Tenney*, 341 U.S. 367, 71 S.Ct. 783, *Tenney* was “a civil action brought by a private plaintiff to vindicate private rights.” *Gillock*, 445 U.S. at 372, 100 S.Ct. 1185. Specifically, the issue in *Tenney* was whether an individual plaintiff could maintain a cause of action for monetary damages against members of the California state legislature’s “Fact-Finding Committee on Un-American Activities” after the committee held a hearing that the plaintiff alleged was designed “to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature.” *Tenney*, 341 U.S. at 369, 371, 71 S.Ct. 783.

The compelling, competing interest in this case is a far cry from the interests implicated in *Tenney*. Unlike the plaintiff in *Tenney*, the challengers seek not to vindicate private rights, but to determine whether the Florida Legislature violated an explicit constitutional provision outlawing improper partisan and discriminatory intent in the redistricting process. The challengers do not seek monetary damages, but instead challenge whether the congressional districts in which citizens exercise their fundamental democratic right to elect representatives of their choice were drawn in compliance with the Florida Constitution.

In order to fully effectuate the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering, it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent. The challengers assert that documents they have

so far uncovered, primarily through third-party discovery, reveal direct, secret communications between legislators, legislative staff members, partisan organizations, and political consultants. In addition, because of Florida’s broad public records laws, the challengers have received 16,000 e-mails, including e-mails between *149 legislators and legislative staff, as part of the discovery process.¹² Contrary to the Legislature’s argument, the fact that the challengers have already discovered communications between legislators and legislative staff, as well as between legislators, legislative staff members, and outside political consultants, related to the congressional apportionment plan, at least in part because Florida’s strong public records constitutional provision requires it, does not make the depositions sought any less important to the critical issue of intent that is the focus of the challengers’ *article III, section 20(a)*, claims.

If the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters’ enactment of the *article III, section 20(a)*, standards will be undermined. As we recently stated in connection with our decision to allow a fact-based challenge to the legislative apportionment plan to proceed in circuit court, the failure to permit factual inquiry and the development of a factual record in circuit court proceedings would allow

the Legislature to circumvent the constitutional standards regarding “intent to favor or disfavor a political party or an incumbent” by concealing evidence of that intent from the public, knowing full well that discovery of any documents demonstrating this unconstitutional intent would never be reviewed by a court. While we do not suggest that this occurred during the 2012 redistricting process, these are the exact types of claims that must be subject to a fact-finder’s scrutiny.

Apportionment III, 118 So.3d at 211.

In *Apportionment I*, we acknowledged the Legislature for engaging in extensive public hearings as indicative of an unprecedented transparent reapportionment process.

See *Apportionment I*, 83 So.3d at 664 (“We commend the Legislature for holding multiple public hearings and obtaining public input.”); see also *id.* at 637 n. 35 (noting that the Legislature held twenty-six hearings at different locations around the state, during which the public had the opportunity to provide recommendations for the legislative and congressional apportionment plans). However,

if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

We reject the approach of the dissenting opinion, which contends that a broad claim of an absolute legislative privilege should prevent this discovery, and emphasize that this Court's first obligation is to give meaning to the explicit prohibition in the Florida Constitution against improper partisan or discriminatory intent in redistricting. The existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits. This constitutional mandate prohibiting improper partisan or discriminatory intent in redistricting therefore requires that discovery be permitted to determine whether the Legislature engaged in actions designed to circumvent the constitutional mandate.

Additionally, the compelling, competing constitutional interest in this case is completely ***150** unlike any competing interests implicated in a traditional lawsuit challenging a statutory enactment, where a court looks to determine legislative intent through statutory construction. Specifically, the Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. See, e.g., [Heart of Adoptions, Inc. v. J.A.](#), 963 So.2d 189, 198 (Fla.2007) (stating the general principle of statutory construction that “legislative intent is determined primarily from the statute's text”). In this context, however, the “intent” standard in the specific constitutional mandate of [article III, section 20\(a\)](#), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.

This Court has explained that the “intent” standard “applies to both the apportionment plan as a whole and to each district individually,” and that “there is no acceptable level of improper intent.” [Apportionment I](#), 83 So.3d at 617. Thus, the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole

or any specific districts were drawn with unconstitutional intent.

As another court has explained in evaluating a similar claim, “[t]his is not ... ‘the usual “deliberative process” case in which a private party challenges governmental action ... and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public [domain].’ ” [Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections](#), No. 11–C–5065, 2011 WL 4837508, at *8 (N.D.Ill.2011) (quoting [United States v. Bd. of Ed. of City of Chicago](#), 610 F.Supp. 695, 700 (N.D.Ill.1985)). Instead, “the decisionmaking process ... [itself] is the case.” *Id.* The same court also noted that cases concerning voting rights, “although brought by private parties, seek to vindicate public rights” and are, in this respect, “akin to criminal prosecutions.” *Id.* at *6.

Therefore, this case is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case. This case is also readily distinguishable from the First District's decision in [Expedia](#), where the party seeking to depose a member of the Legislature and a legislative aide was “attempting to refute a fact that ha[d] not yet been proven and ... may never be proven” by seeking to ask a question to which the parties had already acknowledged the answer. [Expedia](#), 85 So.3d at 525. Unlike [Expedia](#) and other disputes not directly involving the Legislature, the lawsuit brought by the challengers seeks to vindicate the public interest in ensuring that unconstitutional partisan political gerrymandering by the Legislature itself did not occur.

Having concluded that this case presents a compelling, competing interest against application of an absolute legislative privilege, we now address the critical issue of whether this interest outweighs the purposes underlying the privilege.

III. The Balancing Approach

In this case, the circuit court determined that the legislative privilege does not shield most information or communications regarding the congressional apportionment process, but does protect the thoughts or *151 impressions of individual legislators and legislative staff members at this stage of the litigation. We embrace the circuit court's balancing approach. We conclude 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 to the extent that the circuit court protected the thoughts or impressions of individual legislators or legislative staff at this stage of the litigation. This is not a bright line, however, and involves a balancing of interests as specific questions are posed and additional discovery information is received in this case. The circuit court therefore is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach.

Although the Legislature, as well as the former legislative presiding officers in their amicus curiae brief, assert that a “chilling effect” will result if legislators are compelled to testify in this case, we reject this argument. In doing so, we emphasize that this case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction and there are few, if any, compelling, competing interests weighing against application of the privilege.

Further, we observe that the major “chilling effect” asserted by the former presiding officers would be the alleged reluctance of legislators to meet with constituents to discuss private or intimate matters in fear of those private conversations becoming public.¹³ This example is obviously a far cry from this case, which involves nothing less than the public's interest in ensuring compliance with a constitutional mandate in a process this Court has described as “the very bedrock of our democracy.”  *Apportionment I*, 83 So.3d at 600.

To the extent the Legislature and the former presiding officers assert that there will be a “chilling effect” among legislators in discussion and participation as to future apportionment plans, this type of “chilling effect” was the explicit purpose of the constitutional amendment imposing the [article III, section 20\(a\)](#), redistricting standards—to prevent partisan political

gerrymandering and improper discriminatory intent. Indeed, if in fact there was a separate, secret process undertaken by the Legislature to create the 2012 congressional apportionment plan in violation of the [article III, section 20\(a\)](#), standards, the voters clearly intended for the Legislature to be held accountable for violating the Florida Constitution and to curb unconstitutional legislative intent in this and future reapportionment processes.

We also reject the Legislature's argument that this Court should apply an absolute privilege and preclude the discovery sought because all courts that have considered this issue have precluded similar discovery. First, we note that this Court has never had the occasion to specifically consider whether a legislative privilege exists in Florida and to delineate its boundaries, and, as we have explained, Florida stands *152 apart from many other states in lacking a constitutional Speech or Debate Clause.

Second, although the Legislature has made a point of arguing that no court anywhere has ever allowed a legislator to be deposed regarding the legislative process outside of the criminal context, the Legislature also has candidly admitted that no court in a state with a constitutional provision similar to Florida's, which explicitly prohibits improper intent or purpose in redistricting,¹⁴ has ever addressed this particular issue. Thus, despite the Legislature's claim that no court in any of these states has ever permitted the compelled testimony of a state legislator, no court in any of these states has ever expressly prohibited it either. In other words, there is no precedent on this issue in the narrow context of a constitutional provision that explicitly prohibits improper legislative intent in redistricting.

To say, as the dissent does, that our decision stands alone “in the recorded history of our Republic” in compelling legislators to be interrogated “in a civil case concerning their legislative activities,” dissenting op. at 156, fails to take into account that this case is unlike any other “civil” case involving the legislative privilege. In contrast to traditional civil cases, this case concerns an issue of first impression involving an explicit state constitutional prohibition against partisan political gerrymandering and improper discriminatory intent.

We likewise reject the dissent's reliance on a single case decided by a federal district court judge, who determined the scope of the federal legislative privilege in the context of preclearance review under the Federal Voting Rights Act. See *Florida v. United States*, 886 F.Supp.2d 1301,

1302 (N.D.Fla.2012). Although legislative purpose may be a relevant factor in a discriminatory intent challenge brought pursuant to the Federal Voting Rights Act, challenges under the federal statute primarily involve “effect” rather than “intent,” which is an easier standard to establish since it does not involve probing the motives behind the plan. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In addition, federal courts have long recognized the existence of a federal legislative privilege based on the explicit text of the Speech or Debate Clause of the United States Constitution and through federal common law—neither of which applies to an action in state court based on a specific prohibition in the state constitution.

Finally, in embracing the circuit court's approach, we reject the argument propounded by the First District that the dichotomy between discoverable and non-discoverable information recognized by the circuit court is an unworkable test. *See Romo*, 113 So.3d at 121. To the contrary, we have confidence that the circuit court will be able to capably make these determinations on a situation-by-situation basis as the specific issues arise, as circuit courts are often called upon to do, and that the parties will conduct discovery in a good faith manner.

As to the procedure to determine whether the draft apportionment plans and supporting documents should be produced, we reject the First District's reasoning and approve the circuit court's approach. As the circuit court stated:

Florida has a long and rich tradition of open government and the case law in this area suggests that questions about *153 the interpretation of the Public Records Act should be resolved in favor of access by the public. Any specific exemptions are therefore to be strictly construed. Noting the legislative history of the exemption under which the [Legislature] seek[s] protection, I conclude that their very broad interpretation of the exemption is not supported by the language of the statute nor the case law in this area. The [challengers'] interpretation might be a little too narrow, as they suggest that once any plan has been passed, any documents that might have been exempted from the act, are no longer so.

It is difficult for me to know where to draw the line between the plan that was actually proposed and adopted by the legislature and any other draft of a plan. The [challengers'] argument is that the entire process is designed to create a plan, not several plans. Without having precise knowledge

of how plans are proposed, discussed, and developed, it is difficult for me to evaluate that assertion. The only way I know how to do so is to have any disputed documents presented to me in camera, with explanatory testimony as to their nature and how they compare or contrast with the plan ultimately adopted.

We agree that the first issue to be decided is whether the draft plans fall within the scope of the public records exemption in section 11.0431(2)(e), Florida Statutes (2012), and that this exemption should be strictly construed in favor of disclosure. *See Rameses, Inc. v. Demings*, 29 So.3d 418, 421 (Fla. 5th DCA 2010) (“In light of the policy favoring disclosure, the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose.”). However, even if the circuit court concludes, after undertaking an in camera review of any disputed documents, that the draft plans are exempt from public records disclosure, the circuit court should still require the Legislature to produce the draft apportionment maps and supporting documents under appropriate litigation discovery rules, to the extent these documents do not contain information regarding individual legislators' or legislative staff members' thoughts or impressions. *See Dep't of High. Saf. & Motor Veh. v. Krejci Co.*, 570 So.2d 1322, 1325 (Fla. 2d DCA 1990) (determining that a statutory exemption from public records disclosure is not a per se bar to insulate records from discovery in a civil action); *see also Fla. R. Civ. P. 1.280(b) (1)* (“Parties may obtain discovery regarding *any matter, not privileged*, that is relevant to the subject matter of the pending action....” (emphasis added)).

We emphasize that this case presents novel issues of law and the first circuit court litigation under the new article III, section 20(a), redistricting standards. Indeed, the specific claims raised by the challengers in this case are first of their kind claims under the Florida Constitution that require considerable factual development. *See Apportionment III*, 118 So.3d at 210. Given that the record at this time does not indicate that the challengers “have so much as framed the questions to be asked on deposition,” *Romo*, 113 So.3d at 130 (Benton, C.J., dissenting), the challengers should not be prevented from developing evidence to support their constitutional claims.

Although the dissent criticizes our approval of the dichotomy between discoverable and non-discoverable information as

having no principled basis, we approve the distinction drawn in the well-reasoned order of the circuit court, recognizing that this order was entered in anticipation of the depositions being set and the types of questions that could be posed. As Chief *154 Judge Benton pointed out, “[a]ctually knowing what questions the litigants intended to ask could well shed an invaluable light on these important issues.” *Id.* at 133. Without the depositions having taken place and specific objections raised, this Court can rule only on issues that are before us.

While the Florida Constitution authorizes the Legislature to adopt redistricting plans, it places significant limitations on how the redistricting plans are drawn and therefore the power is vested in the courts to determine the constitutionality of those plans. Accordingly, for all these reasons, we conclude that the circuit court recognized the proper balance in determining what information is protected by the legislative privilege at this stage of the litigation and what information the challengers should be permitted to discover. Because we conclude that the circuit court committed no error of law in its order, we also necessarily conclude that the First District erred in granting certiorari review of that non-final order because the circuit court's order did not depart from the essential requirements of law, a necessary prerequisite for granting certiorari relief. See *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So.3d 344, 351 (Fla.2012).

[6] In sum, we hold that individual legislators may waive their privilege, or legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach embraced herein.

CONCLUSION

Based on the foregoing, we conclude that Florida law should recognize a legislative privilege, but that this privilege is not absolute in this case, where the violations alleged are of

an explicit state constitutional provision prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting. We further conclude that the circuit court determined the proper balance of interests by protecting the thoughts or impressions of individual legislators and legislative staff members at this stage of the litigation, but recognizing the compelling, competing interest in ensuring that the Legislature complies with the constitutional mandate regarding redistricting by permitting discovery of all other information and communications pertaining to the constitutional validity of the challenged apportionment plan. Accordingly, we quash the First District's decision under review, approve the circuit court's order, and remand for further proceedings in accordance with this opinion.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

LABARGA, J., concurs with an opinion in which LEWIS, J., concurs.

PERRY, J., concurs with an opinion in which QUINCE, J., concurs.

CANADY, J., dissents with an opinion in which POLSTON, C.J., concurs.

LABARGA, J., concurring.

I concur and write to emphasize the important duty of this Court to honor *155 and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan at issue in this case. While examination of objective data can disclose a discriminatory result, only the discovery authorized by the majority can disclose unconstitutional intent, if there be any, in the apportionment process. Moreover, the majority recognizes a constitutionally-founded legislative privilege, although not an absolute one. It is the Florida Constitution, not the judiciary, that creates the necessity for the Legislature to disclose any evidence of improper intent. Thus, there is no violation of the principle of separation of powers. Without the limited discovery authorized in this case, there is no other meaningful or practicable way for the intent of the voters in enacting the constitutional amendment to be realized.

As has been true throughout Florida's constitutional history, the Legislature must act within the constitutional limitations

imposed upon it by the people of Florida. *See e.g.*,  *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So.2d 797, 805 (Fla.1972) (“It is well settled that the state Constitution is not a grant of power but a limitation upon power.”). Nowhere is the will of the people expressed more strongly than in the Florida Constitution. In the matter before the Court, the people have spoken through their amendment limiting the ability of their elected representatives to carry out legislative redistricting with any partisan or discriminatory intent. The decision reached today allows realization of this limitation on legislative power. Thus, I fully concur in the majority decision in this case.

LEWIS, J., concurs.

PERRY, J., concurring.

I fully concur with the majority's decision in this case. And, I write separately to emphasize my agreement with Justice Pariente's previously expressed observations in  *In re Senate Joint Resolution of Legislative Apportionment 2–B (Apportionment II)*, 89 So.3d 872 (Fla.2012) (Pariente, J., concurring). It bears repeating that our constitution requires that politics be removed from the reapportionment process.

Art. III, §§ 20(a), 21(a), Fla. Const.; *see also*  *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 598 (Fla.2012). However, the reality is that there can never be an apolitical result from an inherently political process. As Justice Pariente so aptly stated in *Apportionment II*:

The voters have spoken that neutrality, and not partisan politics, must be the polestar of legislative apportionment.

....

... In other words, the Fair Districts Amendment changed the standards governing the manner in which the Legislature accomplishes that task, adding an express prohibition against partisan and incumbent favoritism to eliminate the partisan nature of the apportionment process.

....

... [C]hanges must be made to the process to ensure that the purpose of the amendment—to take politics out of the apportionment equation—can be fully realized.... [I]t would be wise at this juncture to seriously examine the adoption of an independent apportionment commission to oversee this inherently political task....

The creation of an independent commission as a means to reform the process is not a novel concept. Other states have established independent redistricting *156 commissions to redraw legislative districts. *See, e.g.*,  *Ariz. Const. art. IV, pt. 2, § 1(3)* (added by initiative measure in 2000); *Cal. Const. art. XXI, § 2* (added by initiative measure in 2008); *Idaho Const. art. III, § 2(2)* (created in 1994); *Wash. Const. art. II, § 43* (added by constitutional amendment in 1982). In fact, even in Florida, numerous proposals have been advanced, but never adopted, for the creation of such a commission over the years.

....

... the time has come for this state to reevaluate the value of an independent apportionment commission.

 *Id.* at 892–95.¹⁵

Indeed, the time has come for this idea to be given due consideration. I believe that the citizens of Florida would be well-served by an independent redistricting commission established for purposes of redrawing legislative districts. Such a commission would help ensure that the constitutional requirement of an apolitical reapportionment process is realized. Furthermore, an independent commission would limit the number of cases in which parties litigate reapportionment decisions that are perceived to be motivated by self-serving partisanship.

QUINCE, J., concurs.

CANADY, J., dissenting.

In this case, for the first time in the recorded history of our Republic, a court has ruled that state legislators are required to submit to interrogation in a civil case concerning their legislative activities. I dissent from this unprecedented decision—a decision which effectively abrogates the well-established common law legislative privilege and grievously violates the constitutional separation of powers. I would approve the First District Court of Appeal's cogent decision.

I.

The legislative privilege—which the majority reduces to a matter of judicial discretion—is firmly rooted in the English common law and inherent in the constitutional separation of powers. In [Tenney v. Brandhove](#), 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the United States Supreme Court explained the historical origins of the privilege.

The privilege of legislators to be free from ... civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.... In 1689, the Bill of Rights declared in unequivocal language: “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”

[Id.](#) at 372, 71 S.Ct. 783 (quoting 1 Wm. & Mary, Sess. 2, c.II). Central elements of the Bill of Rights of 1689 were a provision abolishing the royal suspending power—that is, the monarch’s asserted power to suspend the operation of laws without the consent of Parliament—and the provision recognizing the legislative privilege. “Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a *157 system of separate powers.” Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L.Rev. 1113, 1135 (1973). Along with the other provisions of the English Bill of Rights, Magna Charta, and the writ of habeas corpus, the legislative privilege stands as a component in “a towering common law lighthouse of liberty.”

[Boumediene v. Bush](#), 553 U.S. 723, 845, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting) (quoting Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996)). The legislative privilege undeniably is one of “the presuppositions of our political history.” [Tenney](#), 341 U.S. at 372, 71 S.Ct. 783.

As *Tenney* recognizes, “[t]he claim of an unworthy purpose does not destroy the privilege.” [341 U.S. at 377, 71 S.Ct. 783](#). The privilege exists so that legislators will be “immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.” *Id.* “The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s [or judge’s] speculation as to motives.”

[Id.](#) Any impairment of the legislative privilege threatens both to undermine the ability of legislators to carry out their constitutional duties and to weaken the constitutional separation of powers.

The autonomy of the core internal operations of the legislative branch is a bulwark of the separation of powers. That autonomy is violated by the intrusion of the judicial branch into the internal operations of the legislative process. When the constitutional autonomy of one branch is breached by another branch, the separation of powers is violated. Florida law has recognized that the judicial branch should not intrude into the internal operations of the legislative branch. “Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of [the Legislature].” *Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So.2d 404, 409 (Fla.2001); see also [Moffitt v. Willis](#), 459 So.2d 1018, 1022 (Fla.1984) (rejecting judicial inquiry into “the propriety and constitutionality of certain internal activities of members of the legislature”).

Due respect for the separation of powers precludes the judicial branch from requiring that legislators and legislative employees submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process. As the Supreme Court stated in *Tenney*, the view that it is “not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.” [341 U.S. at 377, 71 S.Ct. 783](#) (citing [Fletcher v. Peck](#), 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162 (1810)). Courts are highly sensitive to the fact that “judicial inquiries into legislative ... motivation represent a substantial intrusion into the workings of [an]other branch[] of government.” [Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.](#), 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). That is why the majority has been unable to cite any decision in which a legislator has been required to provide testimony in a civil case regarding the legislative process. The best that the petitioners offer is an unreported federal trial court order compelling a legislative staff member to submit to a deposition. See [Baldus v. Members of Wis. Gov’t Accountability Bd.](#), 2011 WL 6122542 (E.D.Wis.2011).

Contrary to the majority’s suggestion, *Tenney’s* recognition of the important purpose of the legislative privilege is by

no means undermined by [United States v. Gillock](#), 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), where the Supreme Court held that the legislative privilege was not applicable in a federal criminal prosecution of a state legislator. In *Gillock*, the Supreme Court reasoned that “the separation of powers doctrine [] gives no support to the grant of a privilege to state legislators in federal criminal prosecutions” because “federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch.” [445 U.S. at 370](#), 100 S.Ct. 1185.

Given “the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions,” the Supreme Court concluded that no basis existed “for a *judicially created limitation* that handicaps proof of the relevant facts.” [Id. at 374](#), 100 S.Ct. 1185 (emphasis added). *Gillock* thus does not address the role that the legislative privilege plays in the separation of powers between the legislative and judicial branches. Instead, *Gillock* is a case about the scope of federal legislative power vis-à-vis state legislators. In *Gillock*, the recognition of the legislative privilege would have required “a judicially created limitation” impinging on the prosecution of federal offenses created by Congress. Here, however, it is the majority's failure to honor the legislative privilege that has required “a judicially created limitation” on the legislative privilege—a privilege that is rooted in the English common law and inherent in the constitutional separation of powers.

The absence of persuasive authority justifying the compelled deposition of state legislators was recently recognized by Judge Robert L. Hinkle in *Florida v. United States*, 886 F.Supp.2d 1301 (N.D.Fla.2012), a case arising under section 5 of the Voting Rights Act of 1965, [42 U.S.C. §§ 1973\(a\)–1973\(q\)](#) (2006). Although Judge Hinkle recognized that in Voting Rights Act cases, as in equal protection cases, “the critical question often is whether the legislature acted with a discriminatory purpose,” he held that legislators and legislative staff could not be compelled to testify. He observed:

The considerations that support the result include the burden that being compelled to testify would impose

on state legislators, the chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due a coordinate branch of government. Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes. Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege.

Florida, 886 F.Supp.2d at 1303.

II.

The majority recognizes “that a legislative privilege exists in Florida, based on the principle of separation of powers codified in [article II, section 3, of the Florida Constitution](#)” but concludes “that this privilege is not absolute and may yield to a compelling, competing interest.” Majority op. at 143. The majority holds that a compelling, competing interest is operative here because with the passage of [article III, section 20](#), Florida Constitution, “the framers and the voters clearly desired more judicial scrutiny’ of the [redistricting] plans, ‘not less.’ ” Majority op. at 148 (quoting [*159 Fla. House of Representatives v. League of Women Voters of Fla.](#), 118 So.3d 198, 205 (Fla.2013)). The majority adopts a “balancing approach”—applicable to both depositions and document production—under which “most information or communications regarding the congressional [redistricting] process” are discoverable, but the “thoughts or impressions of individual legislators and legislative staff members” are not subject to discovery “at this stage of the litigation.” Majority op. at 151. The majority also holds that “any common law legislative privilege has been abolished by” the Florida Evidence Code. Majority op. at 144.

The majority's conclusion that the common law legislative privilege has been abolished is unwarranted. [Section 90.501, Florida Statutes](#) (2013), which the majority relies on to

support this conclusion, simply provides that no evidentiary privilege exists other than those “provided by [chapter 90], any other statute, or the Constitution of the United States or of the State of Florida.” The English common law legislative privilege, however, is given the force of law in Florida by the terms of another statute. [Section 2.01, Florida Statutes \(2013\)](#), provides that the general “common and statute laws of England ... down to the 4th day of July, 1776, are declared to be in force in this state” to the extent they are “not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.” [Section 90.501](#) does nothing to abolish any privilege established in Florida law by [section 2.01](#). By the plain terms of [section 2.01](#), the legislative privilege contained in the Bill of Rights of 1689 is in force under Florida law.

The majority is correct in acknowledging that the legislative privilege is inherent in the separation of powers under Florida's Constitution. But the majority errs in reducing the constitutional legislative privilege to a matter of unfettered judicial discretion. Like the presumption of constitutionality historically applied to redistricting plans passed by the Florida Legislature but effectively abrogated by this Court last year, what now remains of the legislative privilege in this context promises to be swiftly vanishing. There is an unmistakable signal in the majority's statements that the “thoughts or impressions of individual legislators and legislative staff members” are not discoverable “*at this stage of the litigation*” and that the circuit court “is *not constrained* by [the majority's] opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach” adopted by the majority. Majority op. at 151 (emphasis added). To the extent that the improper motivations of individual legislators are a legal basis for determining that a constitutional violation by the Legislature has occurred—a point the majority assumes but does not establish—it is unclear what rationale exists for holding that the “thoughts and impressions” of individual legislators are protected from discovery. It would seem to be axiomatic that an individual's improper motivation will be reflected in that individual's “thoughts and impressions.” Although the majority adopts the thoughts-and-impressions limitation “at this stage of the litigation,” the majority certainly has not articulated a specific rationale for the limitation. Majority op. at 151. The tenuousness of the limitation is manifest; there is no reason to believe that the limitation will long survive.

The majority's balancing approach boils down to the exercise of unfettered judicial discretion: the legislative privilege inherent in the separation of powers will give way to the extent that an entirely subjective judicial determination requires that the privilege must give way. This is not the way that one branch of government *160 should approach the acknowledged constitutional privilege of an equal and coordinate branch of government. When the judicial branch is called on to consider the scope of a privilege granted by the Constitution to another branch of government, it is incumbent upon the judicial branch to articulate clearly grounded, objective rules that can be applied without the suggestion that the coordinate branch's privilege is subject to diminishment or abrogation through the unfettered discretion of judges. At no time would it be more appropriate to pay heed to the maxim that “he is the best judge who leaves the least to his own discretion.”¹⁶ In a context such as this—where the internal functioning of a coordinate branch of government is at issue—due respect for the separation of powers requires that judicial restraint be at its zenith. Unfortunately, the balancing approach adopted by the majority represents the nadir of judicial restraint.

Nothing in [article III, section 20](#), justifies this evisceration of the constitutional legislative privilege. The majority's assertion that the constitutional legislative privilege is restricted by the desire of the voters for “more judicial scrutiny” is based purely on supposition. Majority op. at 148. The text of [article III, section 20](#), provides directives to the Legislature regarding the redistricting process but says nothing about judicial scrutiny or the legislative privilege. Therefore, any impact of the adoption of this constitutional provision on the constitutional legislative privilege could arise only by implication. But the annulment or the fundamental alteration of an essential component of the constitutional separation of powers does not properly arise by implication. *See Jackson v. Consol. Gov't of City of Jacksonville*, 225 So.2d 497, 500–501 (Fla.1969) (“[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.”)

The view adopted by the majority works a radical change in the relationship between the judicial branch and the legislative branch by thrusting judicial officers into the

internal workings of the legislative process. Such a radical alteration in the operation of the separation of powers should not be accomplished absent the clear assent of the people of Florida. No such assent was manifested by the adoption of [article III, section 20](#). Nothing in the text of the proposed amendment—much less the ballot summary—informed the voters that this alteration would be a consequence of the adoption of the amendment by the people. When the validity of the ballot summary was under consideration in this Court, the sponsor of the proposed amendment argued that the proposal “*changes no judicial functions whatsoever*” and has “*no effects on judicial functions.*” Amended Answer Brief of Sponsor at 7, 15 n. 2, *Advisory Op. to Atty. Gen. re Standards for Establishing Legislative District Boundaries (Legislative District Boundaries)*, 2 So.3d 175 (Fla.2009) (emphasis added). The Court's plurality opinion approving the ballot summary concluded that the proposed amendment “*do[es] not alter the functions of the judiciary.*” *Legislative District Boundaries*, 2 So.3d at 183 (emphasis added). But now the Court has effectively accepted *161 the petitioners' argument in this case that “[a]rticle III, [section 20](#), revised the balance of powers in the redistricting context” and created a “*new arrangement*” requiring an aggressive judicial role. Petitioners' Initial Brief on the Merits at 19, *League of*

Women Voters of Fla. v. Fla. House of Representatives, No. SC13–949, review granted, 122 So.3d 868 (Fla.2013) (table) (emphasis added). A revision of the “balance of powers” between the judicial and legislative branches should not be brought about by stealth.

III.

In its treatment of the legislative privilege, the majority damages one of the “presuppositions of our political history.”

 *Tenney*, 341 U.S. at 372, 71 S.Ct. 783. I dissent from this further unwarranted judicial encroachment on the Legislature's exercise of its constitutional authority to adopt redistricting plans. The decision of the First District should be approved.

POLSTON, C.J., concurs.

All Citations

132 So.3d 135, 38 Fla. L. Weekly S895

Footnotes

- 1 Amendment 5 is now codified in [article III, section 21](#), of the Florida Constitution. The standards in [article III, section 20](#)—governing congressional reapportionment—and those in [article III, section 21](#)—governing legislative reapportionment—are identical.
- 2 [Article III, section 21](#), provides as follows:
In establishing legislative district boundaries:
 - (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
 - (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
 - (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

[Art. III, § 21, Fla. Const.](#) The only difference between [article III, section 21](#), and [article III, section 20](#), is that [article III, section 21](#), applies to legislative reapportionment, whereas [article III, section 20](#), applies to congressional reapportionment. The substantive standards governing the Legislature's discretion in redistricting are identical in the two provisions. See  *Apportionment I*, 83 So.3d at 598 n. 1 (“Amendment 6 adopted identical standards for congressional redistricting.”).

- 3 The challengers collectively include the League of Women Voters of Florida, Common Cause Florida, named
plaintiff Rene Romo, and ten other individually named plaintiffs.
- 4 See art. IV, § 11, Fla. Const. (1865)art. IV, § 11, Fla. Const. (1865); see also U.S. Const. art. I, § 6, cl. 1.
- 5 See  *Girardeau v. State*, 403 So.2d 513, 515 n. 3 (Fla. 1st DCA 1981) (“Florida’s 1865 Constitution
contained a speech and debate clause in language substantially similar to that found in the United
States Constitution; however, the clause was omitted from the 1868, 1885, and the current (1968) Florida
Constitutions.”).
- 6 North Carolina is the other state. Forty-three states have a state constitutional Speech or Debate Clause
and five other state constitutions contain an arrest exemption without explicitly conferring a speech or debate
privilege. Many states have both provisions.
- 7 See *Swerdlow Lightspeed Mgmt. Co.*, 942 So.2d at 457 (“No Florida legislative testimonial privilege has been
recognized in the Evidence Code, statutes, or Florida constitution.”).
- 8 See  *Marshall v. Anderson*, 459 So.2d 384, 387 (Fla. 3d DCA 1984) (stating that the adoption of section
90.501, Florida Statutes (1981), “abolishe[d] all common-law privileges existing in Florida,” making “the
creation of privileges dependent upon legislative action or pursuant to the Supreme Court’s rule-making
power” (quoting Law Revision Council Note)).
- 9 See art. II, § 3, Fla. Const.; Ala. Const. art. III, § 43; Ariz. Const. art. III; Ark. Const. art. IV, § 2; Colo. Const.
art. III; Conn. Const. art. II; Ga. Const. art. I, § 2, ¶ III; Idaho Const. art. II, § 1; Ill. Const. art. II, § 1; Ind. Const.
art. III, § 1; Iowa Const. art. III, § 1; Ky. Const. §§ 27, 28; La. Const. art. II, § 2; Me. Const. art. III, § 2; Md.
Const. Decl. of Rts. art. 8; Mass. Const. pt. 1, art. XXX; Mich. Const. art. III, § 2; Minn. Const. art. III, § 1;
Miss. Const. art. I, § 2; Mo. Const. art. II, § 1; Mont. Const. art. III, § 1; Neb. Const. art. II, § 1; Nev. Const.
art. III, § 1; N.H. Const. pt. 1, art. 37N.H. Const. pt. 1, art. 37; N.J. Const. art. III, ¶ 1; N.M. Const. art. III, § 1;
N.C. Const. art. I, § 6; N.D. Const. art. XI, § 26; Okla. Const. art. IV, § 1; Or. Const. art. III, § 1; R.I. Const.
art. V; S.C. Const. art. I, § 8; S.D. Const. art. II; Tenn. Const. art. II, § 2; Tex. Const. art. II, § 1; Utah Const.
art. V, § 1; Vt. Const. ch. II, § 5; Va. Const. art. III, § 1;  W. Va. Const. art. V, § 1; Wyo. Const. art. II, § 1.
- 10 The amicus curiae brief from which this quotation is derived was filed by three former presiding officers of
the Florida Legislature—former Senate Presidents Ken Pruitt and John M. McKay and former Speaker of the
House James Harold Thompson—in support of the Legislature.
- 11 This case does not involve legislative immunity, nor does it involve the liability of any individual legislator.
We note that the legislative privilege (that is, an evidentiary privilege against compelled judicial process) is
different than legislative immunity from suit, even though federal courts have held that the legislative privilege
is derived from the principles underlying legislative immunity. See  *Gravel v. United States*, 408 U.S. 606,
615, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). These principles are based on the United States Constitution’s
Speech or Debate Clause, see U.S. Const. art. I, § 6, cl. 1, and arise out of “the Parliamentary struggles of
the Sixteenth and Seventeenth Centuries.”  *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95
L.Ed. 1019 (1951).
- 12 The number of e-mails—16,000—was provided during oral argument by the attorney representing the
Legislature.
- 13 As an example, the former presiding officers assert in their amicus curiae brief that constituents will be less
likely to bring difficult, emotional issues, such as issues relating to someone who has been the victim of a
crime or a “glitch in Florida law” causing a businessperson to be unable to make ends meet, to the attention
of their legislator without the protection of a dependable legislative privilege.
- 14 See  *Apportionment I*, 83 So.3d at 615 n. 19 (noting that California and Washington share a similar
constitutional provision and Idaho, Iowa, Montana, and Oregon codify similar provisions by statute).
- 15 In addition to Arizona, California, and Idaho, Alaska, Arkansas, Colorado, Hawaii, Missouri, New Jersey,
Ohio, Pennsylvania, and Washington give an independent body primary responsibility for drawing legislative
districts. See Alaska Const. Art. VI, § 3 (amended 1988); Ark. Const. Art. VIII, §§ 1–6; Colo. Const. Art. V,

§ 48;  Haw. Const. Art. IV § 2; Mo. Const. Art. III, § 2; N.J. Const. Art. II § 2; Ohio Const. Art. XI, § 11.01; Pa. Const. Art. II, § 17; Wash. Const. Art. II, § 43.

16 From the Latin maxim *Optimus judex qui minimum sibi*. *Black's Law Dictionary* 1858 (9th ed. 2009).

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140 So.3d 510
Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS
OF FLORIDA, et al., Petitioners,
v.
DATA TARGETING, INC., et al., Respondents.

No. SC14–987.
|
May 27, 2014.

Synopsis

Background: Voters brought action against state legislature, alleging that plan for congressional redistricting violated the Fair Districts Amendments to the state constitution. Voters moved to compel production of documents in the possession of non-party political consulting group. The Circuit Court, Second Judicial Circuit, Leon County, 2014 WL 1264711, Terry P. Lewis, J., granted motion to compel and subsequently determined that the documents were not privileged but were to remain confidential during their use at trial, even “if offered as an exhibit in witness examination or entered into evidence.” Consulting group appealed. The First District Court of Appeal issued a short ruling reversing “to the extent [that] the [Circuit Court’s] orders permit any degree of disclosure or use” of the documents and promising a forthcoming opinion explaining its reasoning. Voters filed emergency petition for issuance of a constitutional writ, seeking to stay enforcement of the Court of Appeal’s ruling.

Holding: The Supreme Court held that it would issue a constitutional writ to stay enforcement of Court of Appeal’s ruling reversing Circuit Court’s orders.

Petition granted.

Lewis, J., concurred with opinion.

Polston, C.J., dissented with opinion in which Canady, J., concurred.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] Courts ➔ Issuance of Prerogative or Remedial Writs

Supreme Court would grant voters’ emergency petition for issuance of a constitutional writ to stay enforcement of Court of Appeal’s ruling reversing Circuit Court’s orders, which orders determined that documents produced under protest by non-party political consulting group were not privileged and allowed confidential use of the documents at trial “if offered as an exhibit in witness examination or entered into evidence,” pending conclusion of trial in action by voters against state legislature alleging that plan for congressional redistricting violated Fair Districts Amendments to state constitution; writ would maintain the status quo during ongoing trial, preserve Supreme Court’s ability to completely exercise its likely eventual jurisdiction to review Court of Appeal’s forthcoming opinion explaining its reasoning for ruling, and prevent any irreparable harm that might occur if voters were prevented from using the documents at trial. *West’s F.S.A. Const. Art. 3, § 20(a), Art. 5, § 3(b)(4, 7).*

6 Cases that cite this headnote

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D. Kent Safriet, Thomas Roy Philpot, and Mohammad Omar Jazil of Hopping Green & Sams, P.A., Tallahassee, FL, for Respondents.

Opinion

PER CURIAM.

This case is before the Court on an emergency petition for the issuance of a constitutional writ, filed by the League of Women Voters of Florida, Common Cause, and eleven individually named parties, who are all plaintiffs in an ongoing lawsuit challenging the constitutional validity of the 2012 plan apportioning Florida's congressional districts under the “Fair Districts Amendments” approved by Florida voters in 2010 to prohibit improper partisan and discriminatory intent in redistricting. *See* art. III, § 20(a), Fla. Const. The Respondents—political consulting organization Data Targeting, Inc., its president, and two company employees—are non-parties to the litigation that possess documents that the Petitioners contend demonstrate “the surreptitious participation of partisan operatives in the apportionment process,” in alleged violation of the Fair Districts Amendments to the Florida Constitution.

In consideration of the parties' arguments, this Court's case law, and the importance and statewide significance of this case, and for the reasons that follow, we grant the petition. Pursuant to our constitutional authority to issue “all writs necessary to the complete exercise of [our] jurisdiction,” art. V, § 3(b)(7), Fla. Const., we stay the enforcement of the First District Court of Appeal's order that reversed the circuit court and prevented the disclosure or use of the documents at trial.

Based on the narrow and specific relief requested in the emergency petition, we determine that the circuit court is not precluded from admitting the documents into evidence, subject to a proper showing of relevancy, but that any disclosure or use of the documents must take place under seal in a courtroom closed to the public. We conclude that this is the only adequate, available remedy to maintain the status quo during the trial that is currently *512 ongoing, and that there is a strong likelihood of irreparable harm to the Petitioners if the trial is conducted without the ability to offer this evidence—and no harm to the Respondents if the documents, which have already been produced, are admitted in this manner. In fact, this is similar to the remedy the Respondents themselves originally proposed in the circuit court after producing the documents. *See* Non-Parties' Motion to Determine Confidentiality of Court Records at 8, *Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla.2d Jud.Cir.Ct. May 12, 2014). However, in granting the petition, we emphasize that this opinion is not a determination

that these documents will be permanently under seal or that they are in fact protected by the associational privilege and should be shielded from the public.

BACKGROUND

The issue presented by this emergency petition for extraordinary writ relief concerns certain documents in the possession of non-parties to the redistricting litigation, which are allegedly relevant to the constitutional claims currently being argued in the trial that is taking place in a Leon County circuit court. After the circuit court determined that the challenged documents were not privileged, the Respondents subsequently produced the documents to the trial judge and to counsel and experts for the Petitioners, although the circuit court directed that the documents would remain confidential. *See Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490, Order at 2-3 (Fla.2d Jud.Cir.Ct. May 2, 2014).

The circuit court stated that it would provide further guidance at a later time as to how the documents could be used at trial, *see id.* at 3, which the court then did in a second order entered two weeks later, in anticipation of the start of the trial the following week. *See Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla.2d Jud.Cir.Ct. May 15, 2014). In this order, the circuit court determined that the documents themselves were to remain confidential, even “if offered as an exhibit in witness examination or entered into evidence in the trial of this case,” but that the proceedings “shall remain open” during use of the documents by any party at trial. *Id.* at 3.

Thereafter, in a short ruling that promised a forthcoming opinion explaining its reasoning in greater detail, the First District reversed the circuit court, stating in full as follows:

The orders of the lower tribunal entered May 2, 2014, and May 15, 2014, are REVERSED to the extent the orders permit any degree of disclosure or use at trial of the constitutionally-protected contents of the privileged and confidential documents that are the subject of those orders. *See*  *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir.2010). An opinion of

this court explaining its reasoning will follow.

Non-Parties, Pat Bainter, Matt Mitchell v. League of Women Voters of Fla., No. 1D14–2163 (Fla. 1st DCA order filed May 22, 2014) (reversing circuit court).

The case cited by the First District in its order arises from the United States Court of Appeals for the Ninth Circuit and pertains to the First Amendment associational privilege. *See id.* (citing [Perry](#), 591 F.3d 1147). The First District also denied the Petitioners' emergency motion to stay its decision during the pendency of the trial. *See Non-Parties, Pat Bainter, Matt Mitchell v. League of Women Voters of Fla.*, No. 1D14–2163 (Fla. 1st DCA order filed May 22, 2014) (denying emergency request for stay).

***513** The following day, the Petitioners filed the emergency petition now before this Court, seeking to stay the enforcement of the First District's order precluding the admission of the documents “so that the trial can be completed with this evidence, which has already been disclosed to the parties' counsel and the trial court, in time for the trial court to fashion meaningful relief before the upcoming 2014 midterm elections.” The petition asserts that these documents are relevant to the Petitioners' claims as to the unconstitutionality of the 2012 congressional apportionment plan because they allegedly indicate that the non-parties worked with other partisan operatives to submit, through “public front persons,” draft redistricting maps for the Legislature's consideration. In other words, the Petitioners contend that these documents are important evidence for establishing their claim that there was “a parallel redistricting process” to the open and transparent one, which was “conducted in the shadows” in an effort to “subvert[] the public process” and produce a partisan map favoring Republicans and incumbents in violation of the Florida Constitution.

DISCUSSION

Since the passage of the Fair Districts Amendments, this Court has considered their impact and the “more stringent requirements as to apportionment” that they provide in a series of important decisions. [In re Senate Joint Resolution of Legislative Apportionment 1176 \(Apportionment I\)](#), 83 So.3d 597, 598 (Fla.2012); *see also* [In re Senate Joint](#)

Resolution of Legislative Apportionment 2–B (Apportionment II), 89 So.3d 872 (Fla.2012); *Fla. House of Representatives v. League of Women Voters of Fla. (Apportionment III)*, 118 So.3d 198 (Fla.2013); [League of Women Voters of Fla. v. Fla. House of Representatives \(Apportionment IV\)](#), 132 So.3d 135 (Fla.2013). Indeed, in December of last year, this Court addressed a claim of privilege concerning the very types of information implicated by this petition, in a case related to the same ongoing circuit court litigation. [See Apportionment IV](#), 132 So.3d at 140–41.

Specifically, in that case, this Court held that even the significance of a legislative privilege founded on the fundamental principle of separation of powers must yield to the compelling, competing interest in effectuating the constitutional Fair Districts reapportionment standards and “ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering.” [Id.](#) at 148. Our decision in *Apportionment IV*, as well as our other recent redistricting cases, makes clear that this litigation is unique because it impacts the statewide operation of government and the validity of Florida's current system of government through the alleged unconstitutionality of the 2012 apportionment plan.

Article V, section 3(b)(7), of the Florida Constitution provides that this Court may issue “all writs necessary to *the complete exercise of its jurisdiction.*” (Emphasis added.) In [Roberts v. Brown](#), 43 So.3d 673 (Fla.2010), we explained that although the doctrine of all writs is not an independent basis for jurisdiction, this Court may utilize the constitutional all writs provision as a means of “preserving jurisdiction that has already been invoked or *protecting jurisdiction that likely will be invoked in the future.*” [Id.](#) at 677 (emphasis added); *see also* *Petit v. Adams*, 211 So.2d 565, 566 (Fla.1968) (providing that this Court may use its all writs authority if necessary to preserve the status quo and protect this Court's ability to completely exercise jurisdiction at a future time).

We have fully considered the First District's order, the underlying orders of the ***514** circuit court, and the parties' arguments concerning our jurisdiction. After careful review, we have determined that the First District's forthcoming decision on this issue is highly likely to construe both the First Amendment of the United States Constitution and the Fair Districts Amendments of the Florida Constitution. Indeed, in reversing the circuit court, the First District relied

on a case holding that courts are required to consider the importance of the litigation in evaluating whether information is protected by the associational privilege. See [Perry](#), 591 F.3d at 1161. In this case, this determination is highly likely to require the construction of not only the First Amendment, but also the Fair Districts Amendments and this Court's decision in *Apportionment IV*, which repeatedly emphasized the important “public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering.” [Apportionment IV](#), 132 So.3d at 148. While we are unable at this time to determine the likelihood that the First District's forthcoming decision will expressly affect a class of constitutional officers, as argued by the emergency petition, we observe that we previously accepted jurisdiction on this basis regarding a related issue in *Apportionment IV*. See [id.](#) at 142. In addition, given the statewide importance of this litigation and the lack of Florida precedent regarding the associational privilege, we note that the First District may certify a question to this Court in issuing its forthcoming decision, which would undeniably vest us with jurisdiction under [article V, section 3\(b\)\(4\), of the Florida Constitution](#).

In order to maintain the status quo during the ongoing trial, preserve this Court's ability to completely exercise the eventual jurisdiction it is likely to have to review the First District's decision, and prevent any irreparable harm that might occur if the Petitioners are prevented from using the challenged documents, we conclude that we must grant the petition and stay the enforcement of the First District's reversal of the circuit court, pending the completion of the trial. See *Amends. to Fla. Rules of Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla.2003) (exercising all writs authority to hold a statute in abeyance while this Court considered its jurisdiction and other matters in order to avoid rendering proceedings moot and precluding this Court, should it determine it had jurisdiction, from the “complete exercise” thereof); cf. *Monroe Educ. Ass'n v. Clerk, Dist. Ct. of Appeal, Third Dist.*, 299 So.2d 1, 3 (Fla.1974) (noting the importance of the Court's all writs authority with respect to “certain cases [that] present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved that require expedition”).

Accordingly, we hereby exercise our discretion under [article V, section 3\(b\)\(7\), of the Florida Constitution](#) to issue all writs necessary to the complete exercise of our jurisdiction, and

stay the enforcement of the First District's May 22, 2014, order reversing the circuit court's May 2, 2014, and May 15, 2014, orders, pending the conclusion of the ongoing trial. As specifically requested in the emergency petition, the circuit court is not precluded from admitting the documents into evidence, subject to a proper showing of relevancy, but shall maintain the confidentiality of the documents by permitting any disclosure or use only under seal of the court and in a courtroom closed to the public.

No motion for rehearing will be entertained by the Court. It is so ordered.

[PARIENTE, QUINCE, LABARGA, and PERRY, JJ.](#), concur.

*515 [LEWIS, J.](#), concurs with an opinion.

[POLSTON, C.J.](#), dissents with an opinion in which [CANADY, J.](#), concurs.

[LEWIS, J.](#), concurring.

I concur with the decision to grant the petition, but write separately to explain why the exercise of all writs jurisdiction is appropriate here. If the order of the First District Court of Appeal, which precludes the disclosure or use during trial of documents that were determined by the circuit court to be discoverable with regard to the 2012 redistricting, remains in effect, the trial will proceed without their admission. Such an outcome will frustrate the fact-finding ability of the circuit court to determine whether the 2012 redistricting was conducted in a fair, impartial, and nonpartisan fashion, as required by the Florida Constitution. The First District has, by preventing consideration of these documents during trial, jeopardized the stability and integrity of our governmental structure and authorized those who interact with the Florida Legislature on a critical matter such as redistricting to operate under a veil of secrecy. This outcome should be most disconcerting to any supporter of our democratic form of government.

The First District stated that it will issue an opinion to provide the rationale for the reversal of the circuit court orders. As previously discussed in the opinion granting the petition, precedent establishes that we possess the authority under the doctrine of all writs to intervene *now* and protect the status quo while we determine whether jurisdiction ultimately exists to review the issue presented.¹ The issue is one that impacts the statewide operation of Florida government and

is, therefore, one of paramount importance. In *Petit v. Adams*, 211 So.2d 565 (Fla.1968), when presented with an electoral challenge that impacted Dade County, the Court utilized its all writs authority to maintain the status quo where action by a county canvassing board would have otherwise rendered the proceedings moot:

[I]t is apparent from the disclosures of the petition that it is the intention of the respondents constituting the Dade County Canvassing Board to erase the counters on all of said machines beginning at 5 o'clock p m., Friday, June 7th, unless this Court directs otherwise. The erasure of such counters would render these proceedings moot and would in effect prevent this Court, in the event it determines it has jurisdiction, from the complete exercise thereof.

Upon consideration of the matter and pursuant to Article V, Section 4(2) which provides “the Supreme Court may issue all writs necessary or proper to the complete exercise of its jurisdiction,” the respondents in this cause are hereby directed to refrain from in any way erasing the results of said second primary election on any voting machine used therefor in Dade County, Florida until the further order of this Court.

Id. at 566. More recently, this Court utilized the all writs power to preserve physical evidence for DNA testing so that two pending emergency petitions related to the issue could be considered. See *Amends. to Fla. Rule of Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla.2003). The Court explained:

To allow this Court an opportunity to fully consider the petitions, the deadline of October 1, 2003, set forth in rule 3.853(d)(1)(A), is hereby suspended until further order of this Court. Further, as petitioners point out, operation of the same deadline in section 925.11(1)(b)1., *516 Florida Statutes (2002), may result in the non-preservation of physical evidence for DNA testing under section 925.11(4)(b). Because such a result would render these proceedings moot and in effect preclude this Court, should it determine it has jurisdiction, from the “complete exercise” thereof, the deadline in section 925.11(1)(b)1. is hereby held in abeyance while this Court considers its jurisdiction and other matters before it. See art. V, § 3(b)(7), Fla. Const. By our actions herein, we express no opinion on the merits of the underlying petitions. Accordingly, by operation of the terms of the statute, the evidence described in section 925.11(4)(a)

“shall be maintained for at least the period of time” controlled by the abeyance. No other provision of the rule or statute is affected by this order.

Id. at 190.

While the use of all writs in this manner occurs in only the most urgent of situations, I cannot think of a situation more urgent than precluding the disclosure and use of documents during trial to potentially demonstrate that our entire legislative structure is a façade and was not redistricted in compliance with the Florida Constitution. Moreover, if the trial proceeds in accordance with the order of the First District, this issue will become moot due to the time sensitive nature of the proceedings, and there will be no adequate remedy to correct a possible manifest injustice. Therefore, utilization of the doctrine of all writs to preserve the status quo is unquestionably within the parameters of our authority. See *id.* at 190; *Petit*, 211 So.2d at 566. This is the only way the validity and operation of our democratic system of government in Florida—and public faith in that system—can be protected.

Accordingly, I wholeheartedly concur with the decision of the majority to grant the petition.

POLSTON, C.J., dissenting.

Because Florida's constitution does not grant this Court the jurisdiction to generally weigh in on evidentiary rulings and discovery disputes in ongoing civil trials, I respectfully dissent. In fact, with today's decision, this Court effectively and unconstitutionally usurps the role of the First District Court of Appeal as the appellate court vested with jurisdiction over this interlocutory appeal of a civil evidentiary ruling.

The petitioners seek to invoke this Court's all writs jurisdiction, but before exercising all writs jurisdiction, this Court must first have an independent basis for jurisdiction. This is because “[t]he all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court's all writs power cannot be used as an independent basis of jurisdiction.” *St. Paul Title Ins. Corp. v. Davis*, 392 So.2d 1304, 1305 (Fla.1980). In *Williams v. State*, 913 So.2d 541, 543 (Fla.2005), this Court emphasized that the all writs provision of the Florida Constitution “does not constitute a separate source of original or appellate jurisdiction. Rather, it operates as an aid to the Court in exercising its ‘ultimate jurisdiction,’ conferred elsewhere in the constitution.”

Here, the petitioners concede that this Court does not currently have jurisdiction over this case. The proceedings below involve a dispute over allegedly privileged and confidential documents and a district court order (and an expected, eventual opinion) in the interlocutory appeal of a trial court's ruling regarding that dispute. The petitioners and the majority hypothesize about what the First District might eventually discuss in its opinion reversing the trial court, but such guesses do not constitute an independent basis for jurisdiction. If the First District, as the majority *517 hypothesizes, issues an opinion construing the First Amendment to the United States Constitution or an amendment to the Florida Constitution, then this Court could eventually choose to exercise its discretionary jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. However, granting an all writs petition at this point is improper because an independent basis for jurisdiction does not currently exist.

The majority quotes [Roberts v. Brown](#), 43 So.3d 673, 677 (Fla.2010), and claims it is granting this all writs petition to “protect[] jurisdiction that likely will be invoked in the future.” But, unlike this case, there was an independent and nonspeculative basis for this Court's jurisdiction in *Roberts*, namely this Court's exclusive jurisdiction over pre-election challenges to constitutional amendments proposed through the citizen initiative process. [Id.](#) at 678 (“The applicability of the writ of prohibition in this case hinges upon the identical issue that is determinative of whether the doctrine of all writs applies; that is, the exclusiveness of this Court's jurisdiction to consider pre-election challenges to proposed citizen-initiative constitutional amendments.”); see also *United Servs. Auto. Ass'n v. Goodman*, 826 So.2d 914, 915 (Fla.2002) (exercising all writs jurisdiction to vacate circuit court orders that encroached on this Court's exclusive jurisdiction to adopt rules pursuant to article V, section 2(a) of the Florida Constitution); *Fla. Senate v. Graham*, 412 So.2d 360, 361 (Fla.1982) (“Because jurisdiction of the issue of apportionment will vest in this Court with certainty in this year we have the jurisdiction conferred by [article V, section](#)

[3\(b\)\(7\)](#), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction imposed by article III, section 16(b), (c) and (f).”). Additionally, the First District's current order is most akin to an unelaborated per curiam opinion or order merely citing another decision, and this Court has ruled that it does not have extraordinary writ jurisdiction over such opinions and orders. See *Persaud v. State*, 838 So.2d 529 (Fla.2003) (stating that this Court lacks discretionary review jurisdiction to review per curiam decisions of the district courts that simply affirm with citations to cases not pending review in this Court, and that extraordinary writs also cannot be used to seek review of such decisions); see also *Dodi Publ'g Co. v. Editorial Am., S.A.*, 385 So.2d 1369 (Fla.1980), and [Jollie v. State](#), 405 So.2d 418 (Fla.1981) (together standing for proposition that this Court lacks jurisdiction to review per curiam opinions citing a case not pending review in this Court).

The majority's action in this case is truly unprecedented. The majority is simply guessing at what the First District's opinion will state as the basis for its ruling in order to engage in the active trial management of evidentiary rulings that are subject to the jurisdiction of Florida's district courts of appeal. Moreover, by requiring admission of the evidence at issue, rather than a proffer pending review by this Court of the yet-issued First District opinion, the majority has adjudicated the opinion not yet written to be in error. In short, this Court has predetermined appellate error and awarded the petitioners full relief in the trial court by requiring admission of evidence. Such action does not act to protect this Court's jurisdiction; it expands it outside the bounds of the constitution.

Accordingly, I respectfully dissent.

CANADY, J., concurs.

All Citations

140 So.3d 510, 39 Fla. L. Weekly S355

Footnotes

- 1 Indeed, the opinion granting the petition demonstrates it is highly likely that this Court will have jurisdiction to review the forthcoming opinion by the district court. See majority op. at 513–14.

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Not Followed as Dicta [United States Sugar Corp., v. Estate of Mullins](#), Fla.App. 4 Dist., January 25, 2017

150 So.3d 1115
Supreme Court of Florida.

Pat BAINTER, et al., as Non-Parties, Appellants,

v.

[LEAGUE OF WOMEN VOTERS
OF FLORIDA](#), et al., Appellees.

No. SC14-1200.

|
Nov. 13, 2014.

Synopsis

Background: Voters organization brought action challenging redistricting plan. The Circuit Court, Leon County, [Terry Powell Lewis, J.](#), ordered political consulting firm and its president, which were not parties, to produce 538 pages of documents. Firm and president sought review.

Holdings: On certification, the Supreme Court, [Pariente, J.](#), held that:

[1] firm and president waived on appeal argument that the documents were privileged under the First Amendment;

[2] claims by consultant and its president of procedural error with regard to claim that the documents were privileged as trade secrets were not preserved for appeal; and

[3] trial court's finding that disputed documents did not constitute trade secrets was supported by competent, substantial evidence in the record.

Affirmed.

[Polston, J.](#), concurred in the result and filed opinion in which [Canady, J.](#), joined.

West Headnotes (7)

[1] **Pretrial Procedure** Nature and Purpose

Full and fair discovery is essential to the truth-finding function of the justice system; parties and non-parties alike must comply, not only with the technical provisions of the discovery rules, but also with the purpose and spirit of those rules in both the criminal and civil context.

[2] **Criminal Law** Public Trial

Records Presumptions, inferences, and burden of proof

Trial Publicity of proceedings

Supreme Court is committed to the principle that all trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records.

[3] **Appeal and Error** Necessity of presentation in general

Appeal and Error Defects, objections, and amendments

Basic principles of due process, to say nothing of professionalism and a long appellate tradition, suggest that courts should not consider issues raised for the first time at oral argument and ought not consider arguments outside the scope of the briefing process. [U.S.C.A. Const.Amend. 14](#); [West's F.S.A. R.App.P.Rule 9.210\(d\)](#).

8 Cases that cite this headnote

[4] **Appeal and Error** Proceedings preliminary to trial or hearing

Appeal and Error Sufficiency and scope of motion

Under the totality of the circumstances, political consultant and its president, which were non-parties to action by voters' organization challenging redistricting plan, waived on appeal argument that 538 pages of documents were privileged under the First Amendment, where

president did not seek a protective order from the initial subpoena duces tecum or raise any other legal objection to producing the subpoenaed documents, and instead, attended a deposition and affirmatively represented that he had conducted a thorough search for documents, failed in motion to quash subpoenas or at hearing on the motion to raise any claim of privilege, did not raise the claim in any hearing or in any written filing until being held in contempt of court six months after the second round of subpoenas were issued, and failed to exhaust their appellate remedies before actually producing the documents.

quash was denied, where the non-parties never requested an evidentiary hearing on the trade secrets claim, and the trial court's order requiring production of the documents specifically stated that it had considered the non-parties' assertion of trade secret protection during its in-camera review of all the disputed documents, and during months of hearings and filings in the course of proceedings in the trial court, they never articulated with any particularity, even when prompted by specific questioning, why the documents should be considered trade secrets.

2 Cases that cite this headnote

- [5] **Privileged Communications and Confidentiality** 🔑 Objections; claim of privilege

Privileged Communications and Confidentiality 🔑 Privilege logs

Rationale of rule requiring a party withholding information that is otherwise discoverable by claiming that it is privileged to make the claim expressly and describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection applies with equal force to non-parties. *West's F.S.A. RCP Rule 1.280(b)(6)*.

1 Cases that cite this headnote

- [6] **Appeal and Error** 🔑 Proceedings preliminary to trial or hearing

Under the totality of the circumstances, claims by political consultant and its president, which were non-parties to action by voters organization challenging redistricting plan, of procedural error with regard to claim that 538 pages of documents were privileged as trade secrets were not preserved for appeal, although the non-parties made a cursory assertion of trade secrets protection at a hearing on their motion to quash the subpoenas and then preserved this objection at a subsequent hearing where the motion to

- [7] **Privileged Communications and Confidentiality** 🔑 Trade secrets; commercial information

Trial court's finding that disputed documents did not constitute trade secrets was supported by competent, substantial evidence in the record in action by voters organization challenging redistricting plan in which political consulting firm and its president were ordered to produce 538 pages of documents, where the trial court reviewed the documents and concluded that they did not qualify as trade secrets, and Supreme Court's review of the documents gave it no reason to question this finding. *West's F.S.A. § 688.002(4)*.

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Opinion

[PARIENTE, J.](#)

The narrow issue we address is whether the trial court erred by ordering the production of 538 pages of documents subpoenaed in a challenge to the constitutional validity of the Florida Legislature's 2012 congressional redistricting plan.¹ We affirm the trial court's ruling. We hold that any objection to the production of these documents based on a qualified First Amendment privilege has been waived. We reach this conclusion after a detailed examination of the record regarding the litigation of this discovery issue, which clearly and conclusively demonstrates the inexcusable delay of non-parties Pat Bainter and his political consulting firm, Data Targeting, Inc., in asserting this qualified privilege.

Our holding of waiver is based on the totality of the circumstances in this case and not on any one particular factor. Those circumstances began when Bainter did not file a motion for a protective order or raise any legal objection to producing the documents when served with a subpoena duces tecum including these disputed documents within its scope. Instead, Bainter attended a deposition, during which he affirmatively testified under oath that he had conducted “a thorough search” for documents in response to the subpoena and had produced what he found.

Then, after being served with additional subpoenas duces tecum including these disputed documents within their scope, the non-parties did not raise any claim of a First Amendment privilege during six more months of hearings and filings regarding document production. Not until the day after the trial court held the non-parties in contempt of court and ordered them to pay attorney's fees for failing to produce the documents did the words “First Amendment” appear for the first time in a filing or a hearing transcript in the trial court.

*1118 The non-parties' belated claim of a qualified First Amendment privilege also was asserted only after they had

previously sought a writ of certiorari from the First District Court of Appeal to prevent the discovery of the disputed documents, not once raising in that certiorari petition that the documents contained privileged communications or, as they now claim, that they needed more time to review the documents for privileges. Instead, until they were held in contempt of court, the non-parties' objections to production of these documents were based solely on the claimed irrelevancy and burdensome nature of the discovery requests.

However, the trial court consistently ruled that these documents were relevant as important circumstantial evidence of the claim that Bainter and other political consultants engaged in “a parallel redistricting process” to the open and transparent process championed by the Legislature, which was “conducted in the shadows” in an effort to “subvert[] the public process” and produce an unconstitutional “partisan map favoring Republicans and incumbents.” *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So.3d 510, 513 (Fla.2014). For his part, Bainter denied that this had occurred, stating in his sworn deposition in November 2012 that his involvement in the 2012 legislative redistricting was merely based on “intrigue” or an “after-the-fact interest” in the outcome and something he was involved with purely for the sake of his own “[k]nowledge.”

In other words, Bainter did not assert, as he does now, that the documents implicated his right to associate with others to submit redistricting maps through the public process. Instead, he denied submitting any maps through the public process, described himself as simply an “observer” in the 2012 legislative redistricting, and testified during his deposition about his firm's drafting and analysis of redistricting maps without ever once stating that he might possess any privileged communications.

[1] We simply do not countenance and will not tolerate actions during litigation that are not forthright and that are designed to delay and obfuscate the discovery process. As this Court has long stated, full and fair discovery is essential to the truth-finding function of our justice system, and parties and non-parties alike must comply not only with the “technical provisions of the discovery rules,” but also with “the purpose and spirit of those rules in both the criminal and civil context.”  *Scipio v. State*, 928 So.2d 1138, 1144 (Fla.2006) (citing  *Binger v. King Pest Control*, 401 So.2d 1310, 1314 (Fla.1981)).

[2] Accordingly, concluding that the non-parties' claim of a trade secrets privilege against production is also without merit, we affirm the trial court's ruling requiring the production of the 538 pages of disputed documents.² Because we reject the non-parties' appellate claims of error, and in accordance with the overriding *1119 public interest favoring openness to judicial proceedings and records, we direct that the 538 pages of documents currently under seal should be made part of the public record and that the sealed portions of the trial transcript, ordered sealed by this Court to preserve the status quo during the pendency of the trial and this appeal, should be and hereby are ordered unsealed. Not only is there no legally valid reason at this time for allowing these documents or the testimony admitted at trial under seal to be hidden from public view, but this Court is committed to the principle that “all trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records.” *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla.1988).³

I. THE HISTORY OF THE DISCOVERY DISPUTE

The issue before the Court is whether the trial court erred by ordering the production of 538 pages of documents in the possession of non-parties to the redistricting litigation. We use the term “non-parties” to refer to all of the appellants in this proceeding, which consist of Pat Bainter, the president of Data Targeting, Inc., a political consulting company; two Data Targeting employees—Bainter's assistant and a computer programmer; and the company itself. The Legislature, which was the primary defendant in the trial court during the underlying redistricting litigation, is not a party to this proceeding. Neither is the Florida State Conference of the National Association for the Advancement of Colored People (NAACP), which was an intervenor-defendant in the underlying litigation, or the Florida Secretary of State or Attorney General, who were also named defendants in the trial court.

Data Targeting is a political consulting company that provides strategy, polling, and a host of related campaign services to legislators and candidates for public office who are affiliated with the Republican Party. These disputed documents, which the non-parties belatedly asserted are privileged under the First Amendment and as trade secrets, were subpoenaed in support of the central claim in the underlying redistricting litigation that Bainter and other political consultants acted

in concert with the Legislature to produce individual districts and an overall redistricting map favorable to the Republican Party and incumbents, in violation of the Florida Constitution's redistricting standards.

We comprehensively set forth the history of the two-year protracted litigation over the documents in question to highlight the way in which the non-parties thwarted the discovery process. The litigation surrounding these documents began on September 13, 2012, when the individuals and groups challenging the constitutional validity of the 2012 congressional redistricting plan (“the challengers”)⁴ issued *1120 a subpoena duces tecum for deposition to Bainter. This subpoena provided that Bainter was “to bring to the deposition any document in [his] possession or control that relates to or discusses” any of the following:

1. Congressional redistricting in Florida in 2012;
2. Congressional redistricting maps (whole or partial, completed or draft) that were:
 - a. submitted to or discussed with any legislator, legislative staff member, or any legislative committee; or
 - b. submitted to or discussed with any person with the intent that the person would convey it to any legislator, legislative staff member, or any legislative committee submitted to, considered by or passed by the Florida Legislature;
3. Any communication with any person about the subjects described in 1 and 2 above;
4. Any knowledge you have about:
 - a. the method or process by which the 2012 Florida redistricting maps were drawn;
 - b. any person who was involved in any way in drafting any map or district that was submitted to any legislator, legislative staff member, or to any legislative committee.

This subpoena clearly included within its scope the 538 pages of disputed documents at issue in this case. The subpoena issued to Bainter in September 2012 was never

amended during the course of the litigation over the documents in question.

Bainter did not file a motion to quash the subpoena. He did not seek a protective order. Nor did Bainter otherwise raise any legal objection. Instead, fully two months after the issuance of the subpoena, on November 14, 2012, Bainter participated in a deposition, with an attorney present, and produced a set of 733 pages of documents that he asserted were responsive to the subpoena—but that, as the trial court later determined, did not include many documents in his possession that were within the scope of the subpoena.

Under deposition questioning, Bainter stated that he had “searched all of the areas that I have available to me” and was “confident” he “did a thorough search and did the best I could to produce” what was requested in the subpoena, including searching for communications with individuals he knew he had spoken to about redistricting. In further answers to deposition questioning about his role in the 2012 legislative redistricting, Bainter denied submitting any maps to the Legislature and described his involvement in the redistricting process as mere “intrigue” and an “after-the-fact interest.”

Significantly, Bainter discussed his analysis of draft redistricting maps, which he described as something done out of “intrigue” or “interest,” without ever asserting that he possessed or might possess any privileged communications. Bainter’s sworn deposition did not assert, as he does now, that he wanted to submit redistricting maps as a private citizen for the Legislature’s consideration as part of the public process—even anonymously. Rather, he stated that any actions he and his company had engaged in related to the legislative redistricting were simply for their own *1121 personal and professional interest in the process.

Specifically, Bainter stated under oath at his deposition that his involvement in the 2012 redistricting process was an “after-the-fact interest” similar to “watching a Sunday morning talk show” or “watch[ing] the first three-quarters of a football game” because, even though “all you want to know is the outcome,” you still watch the whole game. When pressed as to the purpose being served by his company and other political consultants creating, analyzing, and sharing redistricting maps, Bainter at one point said, “Knowledge,” and at another time said, “Intrigue.”

The following excerpt from Bainter’s deposition is illustrative of his sworn assertions at that time regarding the nature of his involvement in the 2012 redistricting process:

Q: Do you recall Rich Johnson (sic) [another political consultant] drafting maps?

A: Yeah.

Q: How many?

A: I don’t know. A few.

Q: What did he do with them?

A: Traded them back and forth with me.

Q: And what else? What was the purpose of this map drawing process?

A: Interest. Mostly interest on our part.

When the challengers further inquired as to why he and his company were “engaged at this level of making specific changes to specific maps that ... according to [his] testimony, were not being submitted to the legislature,” Bainter stated that he “wasn’t making any specific changes to any maps” and that he did not “know towards what purpose” his employees were working on maps. After being asked repeatedly to answer what “professional purpose” was being served by working together with other political consultants on a map “that was never intended to be submitted to the legislature,” Bainter stated that the purpose was, “Knowledge,” and, when asked if there was “[a]ny other purpose,” he responded, “I’ve done my best.”

Simply put, Bainter did not assert during his sworn deposition, as he now does, that he and Data Targeting were drafting and analyzing redistricting maps in order to petition the government on the issue of redistricting, even anonymously, and that the challengers should not be able to discover documents revealing those communications. He likewise did not assert, as he now does, that his communications with other political consultants regarding the issue of redistricting implicated his First Amendment freedom of association. Nor did he assert, as he now does, that his communications regarding redistricting—communications for which he had conducted “a thorough search”—revealed proprietary, trade secret information or information about “grassroots” networks.

In fact, Bainter’s position regarding the nature of his involvement in the 2012 redistricting process has changed dramatically from the time of his deposition to the present

point in the litigation. While his attorney during oral argument in this Court stated that Bainter was participating in the redistricting process “just like any other citizen” and “submitting maps through the public portal” under a First Amendment right to petition his government, Bainter himself, under oath at his deposition, actually *denied* ever submitting a map through the public process. Instead, he repeatedly responded that “intrigue,” “interest,” or “[k]nowledge”—not a desire to submit maps anonymously—was the purpose of his and his firm’s creation and analysis of draft redistricting maps. In other words, despite what he now claims, Bainter’s sworn assertions at *1122 the time of his deposition were that he was simply an “observer” in the redistricting process, someone who was just watching what transpired as in the first three quarters of a football game, analyzing the maps that were submitted through the public process for his own “after-the-fact” professional and personal interest, and that the purpose of his and Data Targeting’s map drawing was nothing more than “intrigue,” done for his and the company’s own “[k]nowledge.”

After Bainter’s deposition, the challengers issued subpoenas *duces tecum* on November 16, 2012, to two Data Targeting employees that Bainter testified were involved in communications about redistricting and to the records custodian for the company, seeking the identical types of documents described in the September subpoena issued to Bainter. Again, these subpoenas sought “any document in your possession or control that relates to or discusses ... Congressional redistricting in Florida in 2012.”

Following this second round of subpoenas, Bainter, the two employees, and the company filed a motion to quash “all subpoenas *duces tecum* for depositions and production of documents served” on them, asserting that the subpoenas were “premature,” “unreasonable,” “unduly burdensome,” “oppressive,” and tantamount to a “fishing expedition” for information that was “not relevant” to the case and the central issue of legislative intent in the enacted redistricting plan. Significantly for our purposes of finding waiver, the motion to quash did not include any claim of either a First Amendment or trade secrets privilege.

The trial court held a hearing on the motion to quash on December 19, 2012, during which the non-parties principally focused their arguments on the claimed irrelevancy of any documents in their possession to the issues in the case and the claimed burdensome and broad nature of the discovery requests. They asked the trial court to, at the very least,

limit the subpoenas “to only communications with legislative members and/or staff.”

During the hearing, although not previously in their written motion, the non-parties briefly asserted that “a lot of the stuff that [Bainter] does in this business obviously is trade secret, confidential, privileged business information that the [challengers] have no interest in or no entitlement to.” Once again, however, there was no mention of any asserted First Amendment privilege—much less a particularized claim, as they now make, that the subpoenas would require the disclosure of the names, contact information, and internal deliberations of Data Targeting employees, clients, and other like-minded individuals regarding the redistricting process, thus infringing on the non-parties’ right to freely associate with like-minded individuals in pursuit of a common goal to petition the Legislature regarding redistricting.

At the December 2012 hearing on the motion to quash, and in an effort to expedite and simplify the discovery process, the trial court asked the challengers to identify with more particularity the communications they were seeking, and held another hearing on January 28, 2013, at which the trial court attempted to foster agreement between the parties as to the types of communications that could be produced.⁵ During this hearing, the non-parties continued to object to the discovery requests primarily on the basis of relevancy and the *1123 alleged burdensome and costly nature of the requests, but, after the trial court continually ruled against their relevancy objections, the non-parties stated that they would “make a good faith attempt to obtain the documents and research the documents, saving our objection on costs and trade secrets,” though no specific trade secrets claim was made. Still, no First Amendment privilege was ever raised or asserted in any way.

On January 30, 2013, the trial court entered an order denying the motion to quash but limiting the scope of the subpoenas *duces tecum* to documents dated, generated, or created between January 1, 2010, and the present, and requiring the challengers to provide an initial list of search terms consisting of “relevant specific persons” for whom the non-parties could “conduct a specific search for documents” involving these individuals, without prejudice to the challengers to later seek additional documents—all of which were within the scope of the September and November 2012 subpoenas. The trial court subsequently held several status hearings regarding document production, in February 2013, during which the trial court continued to rule against the non-parties’ efforts to object to

the alleged irrelevancy of the subpoenaed communications and continued to rule that the documents were relevant and must be produced. At no point in any of these hearings or in any filing did the non-parties assert a First Amendment privilege or make any specific claim regarding trade secrets.

Eventually, the non-parties produced 112 pages of documents, which were in addition to the 733 pages of documents Bainter had produced in response to the initial September 2012 subpoena but prior to filing the motion to quash. These 112 pages of documents produced at that time consisted of communications between the non-parties and either legislators or legislative staff, but did not include any communications between the non-parties and other individuals, such as communications with other political consultants or other third parties interested in the redistricting process—even though those communications were within the scope of the subpoenas and the trial court had continually ruled those documents to be relevant and discoverable.

Based on the trial court's denial of the motion to quash and continued rulings that the non-parties must produce all responsive communications within the scope of the subpoenas, including those with other individuals outside the Legislature concerning redistricting, the non-parties filed a petition for a writ of certiorari in the First District, asserting that the trial court had “authorized discovery beyond the scope of matters reasonably calculated to lead to admissible evidence.” Significantly, while the non-parties stated that disclosure would risk revealing “strategic ideas and action plans for responding to campaign issues triggered by redistricting changes,” as well as “proprietary data analysis regarding redistricting intended for business purposes,” no claims of a First Amendment or trade secrets privilege were raised.

Instead, the non-parties argued in their certiorari petition that the discovery requests sought documents that were irrelevant and that disclosure would cause irreparable harm to Bainter and his company. This petition for a writ of certiorari was denied, without elaboration, by the First District on July 17, 2013. *Data Targeting, Inc. v. League of Women Voters of Fla.*, 116 So.3d 1266 (Fla. 1st DCA 2013).

On April 22, 2013, the date production was due under the trial court's rulings, and after the trial court and the First District had both denied the non-parties' motions to stay, the non-parties filed a “notice of *1124 status of production of documents” and motion for an order requiring confidentiality

of production and the deposit for costs of production into a court registry. In this filing, the non-parties asserted that they had “reviewed the numerous documents returned from the electronic searches [they had conducted] for responsiveness, *privilege*, and other matters of confidentiality” and were “in a position to produce documents” satisfying the challengers' now seven-month-old discovery requests. (Emphasis added.) However, the non-parties stated that, “[o]utstanding from this available production,” was “a small set of documents” that were “being recorded on a privilege log” for the challengers' review “as soon as practical.”

The non-parties' filing asserted that the documents available for production at that time “constitute[d] private business communications between Non-parties and other private, non-legislative entities,” and asked the trial court to keep all documents regarding “communication with non-legislative persons or entities” confidential, pending their then-outstanding petition for a writ of certiorari in the First District. No First Amendment privilege was asserted—the words “First Amendment” did not even appear in the filing, despite the assertion that the non-parties had reviewed all documents for privileges—and no documents were actually produced.

In response to this notice, the challengers filed a motion for contempt and sanctions, contending that the non-parties had “purposefully, knowingly and willfully” failed to comply with the trial court's order requiring production of the documents by April 22, 2013. At a hearing on this motion on May 28, 2013, the challengers asked the trial court to, among other things, issue “an order that there has been a waiver of any and all objections, confidentiality, privilege and otherwise.”

The trial court asked the non-parties to assert what “cat out of the bag” privilege they were claiming and also inquired as to what was “confidential” about the documents. Even though the non-parties' notice stated that all the documents had been reviewed for privileges by that time, their response to the trial court was that the documents were “irrelevant to the entire case,” and, when pressed by the trial court as to the privileged nature of the documents, the non-parties stated that “the privileged nature is proprietary business information. Some of it's trade secrets.”

Once again, we reiterate that at no time was the claim raised that the communications were protected under the First Amendment. The trial court did observe, in reference to the cursory trade secrets assertion, that it “probably ... could

rule that [the non-parties] waived their claim for any kind of privilege” since they had failed for over eight months to assert any privilege in response to the initial discovery requests, but stated that the court was “going to wait and see.”

At this May 28 hearing, the trial court held the non-parties in contempt of its prior order requiring production of the documents by April 22 and gave them until the day after the hearing to produce any non-privileged and non-confidential documents to the challengers and to also produce a privilege log, along with the withheld documents to the court for an in-camera review. In addition, the trial court awarded the challengers their attorney's fees for “not just this motion” because they “shouldn't have had to have been here for a lot of stuff.”

The trial court's subsequent written order memorializing the hearing, entered on May 31, 2013, granted in part the challengers' motion for contempt and sanctions, holding the non-parties in contempt of the order requiring production of the documents *1125 by April 22 and awarding the challengers “their reasonable expenses, including attorneys' fees, incurred in obtaining the document discovery” from the non-parties. The trial court explicitly reserved ruling on “the confidentiality or privilege of any documents pending the completion of its in-camera review.”

The day after the hearing at which the non-parties were orally held in contempt and ordered to pay attorney's fees, on May 29, 2013, the non-parties filed a notice of producing documents in response to the subpoenas duces tecum of September and November 2012. In that notice, the non-parties maintained, despite the trial court's consistent rulings on relevancy, that the subject documents were “wholly irrelevant” to the case and were being produced “only to avoid sanctions.” The non-parties produced at that time an additional 166 pages of documents and, contrary to their prior assertion that only “a small set” of documents was being withheld, submitted a cursory privilege log indicating that they were withholding another 1,833 pages of documents—for the first time asserting that these documents were being withheld on the bases of “right of privacy” under [article I, section 23, of the Florida Constitution](#);⁶ “freedom of association” under the First Amendment to the United States Constitution; and as “trade secret[s].”

In other words, while the non-parties claimed in their May 29 motion for a protective order that the “First Amendment's associational privilege” applied to the disputed documents,

this was the first mention of that privilege during the protracted litigation over these same documents. This motion was filed almost six months after the filing of their motion to quash the subpoenas and after Bainter asserted during his deposition that he had conducted “a thorough search” for responsive communications. It was filed more than eight months after the initial discovery requests. And it was filed only after the non-parties were held in contempt of court and ordered to pay attorney's fees. In moving for a protective order and an in-camera review of the documents, the non-parties stated for the first time that requiring disclosure of any of the 1,833 pages of withheld documents “would have a chilling effect on [their] ability to participate in the legislative process.”

Many more months of hearings were subsequently held on the disputed documents, including referral at one point to a special master and the trial court's own in-camera review. At a hearing on April 29, 2014, in anticipation of the upcoming trial in the underlying case, the trial court orally stated that it was “prepared to rule on some documents that [the court] took to review in camera,” including the 1,833 pages of disputed Data Targeting documents. The trial court stated that it was “doing the balancing” required under the qualified First Amendment associational privilege test “of the need for the information, how relevant, how important is it, and also to what extent does it invade upon the exercise of that First Amendment.” The trial court then proceeded to orally list the 538 page numbers of the disputed documents that were, in the trial court's estimation, discoverable—conditioning the release of these 538 pages of documents within the following week “to the plaintiffs' attorney and their staff and experts, but not to share with your clients or any third person unless and until it's utilized some way in these proceedings. So, confidential.”

*1126 When asked by the non-parties whether the in-camera review also encompassed an analysis for trade secrets protection, the trial court responded affirmatively that this claim was also considered and rejected. The trial court's subsequent May 2, 2014, order memorializing its oral ruling at the hearing likewise explained that the trial court had “performed the balancing test required” in evaluating the qualified First Amendment associational privilege claim and had “also considered” the assertion of trade secrets protection, and that based on the trial court's “review, balancing and analysis,” the qualified First Amendment associational privilege should yield as to 538 pages of the disputed documents.

In response to the trial court's May 2 order, which permitted the documents to remain confidential and ordered the documents not to be publicly disclosed at that time, the non-parties produced these 538 pages of documents to the challengers. However, after the trial court, on May 15, 2014, subsequently denied the non-parties' motion to close the courtroom to the public during any use of the documents at trial, the non-parties appealed the trial court's discovery rulings to the First District, which eventually passed through the appeal to this Court. *See Non-Parties v. League of Women Voters of Fla.*, 150 So.3d 221, 231, 39 Fla. L. Weekly D1300, 2014 WL 2770013, at *1 (Fla. 1st DCA June 19, 2014). Therefore, we now consider this case as one of direct appellate review of the trial court's May 2014 discovery orders under our jurisdiction provided in article V, section 3(b)(5), of the Florida Constitution.⁷

II. WAIVER

[3] At the outset of our analysis, we reject the non-parties' attempts to raise new issues at oral argument and in a subsequent notice of supplemental authority, primarily on the question of waiver, that were not raised or discussed in the briefs.⁸ The non-parties filed two briefs in the First District, which we accepted, and two supplemental briefs directly in this Court—the last three of which were all filed after the challengers fully set forth their argument for waiver in their answer brief. “Basic principles of due process”—to say nothing of professionalism and a long appellate tradition—“suggest that courts should not consider issues raised for the first time at oral argument” and “ought not consider arguments outside the scope of the briefing process.”

 *Powell v. State*, 120 So.3d 577, 591 (Fla. 1st DCA 2013); cf. Fla. R.App. P. 9.210(d) (“The reply brief shall contain argument in response and rebuttal to argument presented in the answer brief.”). We will not do so here.⁹

*1127 [4] Turning to the issues actually raised in the briefs and properly before us, the non-parties argue that the trial court erred in requiring production of the subject documents because those documents are privileged under the First Amendment and as trade secrets, and are thus exempt from compelled disclosure as part of the underlying redistricting litigation. We do not reach the merits of the asserted qualified First Amendment privilege, however, because we conclude based on the totality of the circumstances in this case that the

non-parties' objections to production on this basis have been waived.

As our extensive recitation of the background of the discovery dispute reveals,¹⁰ Bainter—who had control of all the challenged documents as president of Data Targeting—did not seek a protective order from the initial subpoena duces tecum served on him in September 2012 or raise any other legal objection to producing the subpoenaed documents. Instead, Bainter attended a deposition and affirmatively represented that he had conducted “a thorough search” for documents, including for communications between many of the individuals involved in the now-disputed documents, and stated that he had produced all documents at that time that he considered to be responsive.

For instance, when asked at his deposition whether he had produced all final or draft redistricting maps in his possession, Bainter stated, “I am testifying that I produced the maps that I found in [my] search,” and that he was “confident” and “did a thorough search and did the best [he] could to produce for [the challengers].” He also testified that he “individually went through emails relative to people that I know that I may have discussed redistricting with,” including some of the political consultants involved in the now-disputed documents, never once asserting that he found communications that were or might be privileged. Rather, Bainter stated that he had produced all the communications he found—even though it is clear from the documents under review that, as the trial court determined, Bainter did not, in fact, produce all maps or relevant communications in his possession.

The non-parties contend that, after additional discovery requests were made following Bainter's deposition—the subpoenas duces tecum served in November 2012 on the records custodian for Data Targeting, as well as the two Data Targeting employees—“[m]onths passed in attempting to narrow the relevant search, including numerous hearings before the [trial court] where [the non-parties] acknowledged concerns regarding the burdens of the request and the likelihood of inherent privilege matters once potentially responsive documents were identified.” Even assuming that the additional subpoenas in November 2012 triggered another responsive time period—despite the fact that those subpoenas were identical in scope to the September subpoena issued to Bainter—the non-parties still failed in their motion to quash the subpoenas or at the hearing on this motion to raise any claim of privilege.

In fact, not once during any hearing or in any written filing until being held in contempt of court six months after the second round of subpoenas were issued did the non-parties ever raise the claim that some of the communications might contain information that was protected by the First Amendment. In other words, while *1128 the non-parties' attorney stated during oral argument in this Court that the non-parties objected to the discovery as soon as they "became aware that these inquiries were going far beyond what [they] deem[ed] to be tolerable," the legal objections made even at that point were not based on privilege, but on relevancy and the claimed burdensome and costly nature of the requests.

The trial court denied the non-parties' motion to quash the subpoenas at the end of January 2013 and continually, over the course of many months of additional hearings, ruled against their relevancy objections. After the motion to quash was denied, the non-parties agreed to "work in good faith to obtain these e-mails," saving only their "objection on costs and trade secrets."

The non-parties did not assert that any documents were privileged under the First Amendment until a motion for a protective order filed almost six months after filing their motion to quash the subpoenas and eight months from the initial discovery requests. Significantly, this was after they had already been held in contempt of court for failing to comply with the trial court's prior orders requiring production and after Bainter himself testified during his deposition that he had thoroughly searched for communications involving people he talked to about redistricting and had produced what he found. Nonetheless, when asked by the trial court at the May 2013 hearing on the challengers' motion for contempt to assert what privilege they were claiming, the non-parties again fell back on their arguments that the documents were "irrelevant to the entire case" and that "the privileged nature is proprietary business information," stating that "[s]ome of it's trade secrets" without mentioning, much less raising, a First Amendment privilege.

The non-parties did not assert that the communications might implicate the First Amendment or, as they now claim, that they needed to review the documents in greater detail to determine what privileges might apply. To the contrary, the non-parties asserted at the hearing that they had "all the documents" available for production but their objection was based on "the personal nature of it, it's their business information, it's their business communications" and continued, in the face of the trial court's repeated rulings, to

object primarily on the basis of relevancy. The fact that they stated, "trade secrets," when pressed by the trial court to assert what privilege they were claiming is further indication that the First Amendment privilege claim was not timely raised.

The non-parties' statements that they were withholding only "a small set" of documents and were recording these on a privilege log were also ultimately belied by their subsequent withholding of 1,833 pages of documents and their submission of an extremely cursory privilege log that the trial court noted was "not very helpful" because it did not "identify the documents" or explain why a particular document was considered to be privileged for a particular reason. This is the very type of gamesmanship this Court simply will not tolerate during discovery.

[5] Under [Florida Rule of Civil Procedure 1.280](#), a party withholding information that is otherwise discoverable by claiming that it is privileged must "make the claim expressly" and "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." [Fla. R. Civ. P. 1.280\(b\)\(6\)](#). Regardless of whether the non-parties are considered "a party" under *1129 this rule, its rationale applies with equal force to this case—particularly once the trial court, repeatedly, determined that the disputed documents in the non-parties' possession were relevant and ordered the submission of a privilege log—and the non-parties did not expressly make their claim of privilege or produce a privilege log until many months after they withheld the documents. *Cf. Century Bus. Credit Corp. v. Fitness Innovations & Techs., Inc.*, 906 So.2d 1156, 1156–57 (Fla. 4th DCA 2005) (denying a petition for a writ of certiorari "directed to an order finding a waiver of privilege in regard to the production of documents because of the failure of the petitioner to file a privilege log," where "the log was not only months late, but found by the [trial] court to be 'completely inadequate' "); *Kaye Scholer LLP v. Zalis*, 878 So.2d 447, 449 (Fla. 3d DCA 2004) (explaining that failing to comply with the procedural requirements of [rule 1.280\(b\)](#), including refusing to produce a privilege log and delaying the production of documents, may result in the waiver of an asserted privilege).

As the challengers have aptly pointed out, the non-parties' argument that they timely asserted the privilege because they raised the claim once they "were finally able to review" the responsive documents for privileges, after narrowing the

“broad scope of the subpoenas,” is contradicted by the nature of the asserted privilege itself. The “blanket associational privilege” asserted “does not distinguish between the characteristics of any particular document,” and thus, “there can be no reasonable claim that [the non-parties] had to collect and review the responsive documents to determine whether the privilege might apply.” In fact, Bainter, who was involved in almost all of the communications revealed in these documents, never indicated at his deposition or in the motion to quash filed after his deposition—by which point the nature of the communications sought by the challengers was crystal clear—that he might possess privileged information.

Instead, as the challengers correctly assert, Bainter freely discussed the subject matter of the documents during his deposition without claiming any privilege whatsoever. Bainter’s sworn testimony during his deposition that he and Data Targeting were drawing maps out of “intrigue” and “interest,” and that this “keen[] interest[] in the process” was the only involvement he had in the 2012 legislative redistricting, is unsupported by a review of the disputed documents. In fact, the documents support the challengers’ claim that Bainter was not just drawing maps out of casual “after-the-fact interest,” but was actively engaged in an extensive process to draw maps favorable to a particular political party or incumbent and facilitate the submission of those maps to the Legislature through “shell people” without any indication that the maps were drawn by the political consultants.

We point this out not to comment on the merits of the challengers’ ultimate assertion that Bainter and other political consultants were actually engaged in a shadow process of creating maps with the intent to favor a political party or incumbent and facilitating the submission of those maps to the Legislature through other individuals, but rather to show that Bainter’s deposition answers in November 2012 directly contradicted the documents that were eventually ordered produced and the arguments he now makes on appeal. Indeed, as the challengers’ attorney stated during oral argument in this Court, if Bainter had acknowledged during his deposition or at any time in the months of litigation over these documents that he and Data Targeting were creating maps and anonymously submitting them to the Legislature, and had simply asserted at that time that the *1130 discovery requests were improperly aimed at ascertaining the strategy or process by which they went about doing so, there likely would have been much less need to “get into the details” or go through the documents. But Bainter denied that this occurred, denied that he had ever

submitted a map, and denied that he had any involvement in the redistricting process other than as an outside “observer.”

By responding to the deposition questions and acknowledging discussions with other political consultants without ever revealing the true nature of those communications or asserting a First Amendment privilege, in conjunction with the failure to timely assert this qualified privilege after the deposition testimony and months of additional hearings, we conclude that Bainter waived his ability to later claim that the documents revealing these communications were privileged on that basis. *Cf. Hoyas v. State*, 456 So.2d 1225, 1229 (Fla. 3d DCA 1984) (stating that “the privilege was intended as a shield, not a sword” and that “a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving” (quoting *Int’l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185 (M.D.Fla.1973))).

The district court of appeal cases cited by the non-parties from the 1980s regarding the timeliness of asserting a claim of privilege simply do not apply to the circumstances of this case, primarily because the courts in those cases were reluctant to require production of potentially privileged material when the litigant reasonably did not discover the privilege until some later time. *See, e.g., Gross v. Sec. Trust Co.*, 462 So.2d 580, 581 (Fla. 4th DCA 1985) (observing that, while counsel “should have asserted privilege at the earliest time,” the failure to do so when “no one had reviewed the tapes” ordered produced by the trial court, would not “prevent the trial court’s in camera examination of the tape to determine if privilege exists”). Our facts are wholly distinguishable, in that the non-parties’ current claim that they did not know any of the documents were privileged until the discovery requests were narrowed is entirely unsupported by the record, including Bainter’s deposition answers; the non-parties’ own response to the trial court when asked what privilege was being asserted after the non-parties stated that all documents had been reviewed; and the blanket nature of the asserted privilege itself.

The challengers also assert that waiver is warranted because the non-parties failed to exhaust their appellate remedies before producing the documents. As to this contention, the non-parties counter that they “faced a Hobson’s Choice when confronted with [the trial court’s May 2, 2014, production order under review]: either turn over the documents subject to the temporary confidentiality provision in the [order] and then appeal, or withhold the documents and face contempt of court

before appealing and perhaps bringing the two-week trial to a halt.” Yet, the non-parties *did* produce the documents prior to seeking appellate review of the trial court's May 2, 2014, order requiring production, and only sought appellate review after the trial court subsequently denied their request to close the trial proceedings to the public during the discussion or use of any documents at trial.

Indeed, the non-parties' motion for confidentiality filed in the trial court after the documents were produced stated that “*if no determination of confidentiality is made and these records are not sealed by this Court, [they] have no other remedy than to appeal the Court's [order requiring production] in order to protect the significant First Amendment interests and trade* *1131 *secrets implicated by the compelled disclosure of the Produced Data Targeting Documents.*” (Emphasis added.) In other words, it was the trial court's subsequent May 15, 2014, order, denying their request to close the trial proceedings, and not the May 2, 2014, order requiring production, with which they had already complied, that led the non-parties to initiate this appeal.

Although the trial court declined to find waiver based on a patient, “wait and see” approach at the time, we conclude after our review of the record that the non-parties failed to raise their qualified First Amendment associational privilege claim in a timely fashion and then failed to exhaust their appellate remedies before actually producing the documents. Our review of the record also indicates that the asserted First Amendment privilege claim could have been raised to the First District—but was not—when the non-parties filed their initial petition for a writ of certiorari challenging the trial court's denial of their motion to quash the subpoenas, which the First District denied in July 2013. See *Data Targeting*, 116 So.3d at 1266.

While an unelaborated denial of a certiorari petition does not, standing alone, constitute an adjudication on the merits or establish law of the case, the failure to assert the privilege in that filing at the very least casts some doubt on the genuineness of the non-parties' current claim that disclosure will have a “chilling effect” on their First Amendment rights. It is for this very reason that courts have long disfavored piecemeal appeals of related claims involving the same parties and same transactions, see generally  *Mendez v. West Flagler Family Ass'n*, 303 So.2d 1, 5 (Fla. 1974), and the non-parties' failure to raise the privilege in their prior petition for certiorari relief undermines the purposes of providing for interlocutory review of certain discovery issues, such as

minimizing delay, decreasing costs, and conserving judicial resources. Indeed, the failure to raise any claim of privilege in the non-parties' initial petition for a writ of certiorari to the First District challenging the trial court's denial of their motion to quash the subpoenas unduly delayed the litigation of this claim. See *Liberty Mut. Ins. Co. v. Lease Am., Inc.*, 735 So.2d 560, 562 (Fla. 4th DCA 1999) (“[W]e do not countenance dilatory tactics in belatedly asserting a privilege claim.”).

By failing to assert this qualified privilege sooner, the non-parties obfuscated the discovery process. They now seek additional appellate review of additional reasons not previously presented to the First District in the petition for a writ of certiorari or timely asserted in the trial court that they object to producing the same documents—all of which date back to the subpoenas that were legally served in September and November of 2012 encompassing these disputed documents. Cf. *Bensonhurst Drywall, Inc. v. Ledesma*, 583 So.2d 1094, 1094 (Fla. 4th DCA 1991) (after a party did not appeal the denial of a motion for a protective order from certain discovery but then refused to permit the discovery at a deposition and filed a second motion for a protective order, the district court held that any petition for a writ of certiorari should have been filed after the first order denying the motion for a protective order). This is not the way either the discovery or the appellate process should work.

Accordingly, the totality of the circumstances clearly and conclusively establish that the non-parties have waived their defense to production on First Amendment grounds. Standing alone, this constitutes an adequate and independent basis under Florida law to reject the non-parties' First Amendment challenge to the trial court's rulings requiring production of the documents.

*1132 III. TRADE SECRETS

In addition to claiming a qualified First Amendment privilege, the non-parties also allege that the vast majority of the documents constitute trade secrets and that the trial court committed a number of errors, both procedurally and on the merits, in requiring the disclosure of their proprietary business information. While the totality of the circumstances would support a finding of waiver of any trade secrets privilege—as the trial court observed at the May 2013 hearing where it held the non-parties in contempt—we address the trade secrets claim on the merits because, unlike the asserted

First Amendment privilege, the non-parties made a cursory assertion of trade secrets protection at a hearing on their motion to quash the subpoenas and then preserved this objection at a subsequent hearing where the motion to quash was denied.

[6] However, although we address the trade secrets claim, we conclude for a number of reasons that it is without merit. First, the non-parties' claims of procedural error were not preserved. Contrary to their arguments on appeal, the non-parties never requested an evidentiary hearing on the trade secrets claim, and the trial court's order requiring production of the documents specifically stated that it had "considered" the non-parties' "assertion of trade secret protection" during its in-camera review of all 1,833 pages of disputed documents. Thus, even if preserved, the primary case law cited by the non-parties in support of their claim regarding the inadequacy of the trial court's procedures is completely distinguishable because in those cases, unlike here, there was no in-camera review. *See, e.g.,* [Am. Express Travel Related Servs., Inc. v. Cruz](#), 761 So.2d 1206, 1210 (Fla. 4th DCA 2000) (remanding for an in-camera inspection of the material sought and a determination of whether it constituted a trade secret); [Salick Health Care, Inc. v. Spunberg](#), 722 So.2d 944, 947 (Fla. 4th DCA 1998) (remanding for an in-camera hearing and inspection of the materials sought to determine whether they constituted trade secrets).

Moreover, during months of hearings and filings in the course of proceedings in the trial court, the non-parties never articulated with any particularity, even when prompted by specific questioning, why the documents should be considered trade secrets. The type of cursory and general assertion made by the non-parties regarding trade secrets was insufficient to satisfy their burden of establishing the privilege. *See* [Am. Express Travel Related Servs.](#), 761 So.2d at 1209 ("The burden is on the party resisting discovery to show 'good cause' for protecting or limiting discovery by demonstrating that the information sought is a trade secret or confidential business information and that disclosure may be harmful.").¹¹

[7] Section 688.002(4), Florida Statutes (2014), defines a "trade secret" as a "formula, pattern, compilation, program, device, method, technique, or process" that derives actual or potential independent economic value "from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic

value from its disclosure or use" when it is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." In this case, the trial court reviewed the documents and concluded that they did not *1133 qualify as trade secrets. Our own review of the documents gives us no reason to question this finding. *See generally* [Health Care Mgmt. Consulting, Inc. v. McCombes](#), 661 So.2d 1223, 1226 (Fla. 1st DCA 1995) (concluding that competent, substantial evidence in the record supported a trial court's finding that a "self-professed confidential methodology of presenting and interpreting Medicare regulations to clients in the home health care industry does not constitute a trade secret"). Accordingly, because the trial court's finding that the disputed documents do not constitute trade secrets is supported by competent, substantial evidence in the record, the non-parties' assertion of a trade secrets privilege does not prevent the production of the disputed documents.

IV. CONCLUSION

This Court has, for years, held that a "search for truth and justice," as our court system and our constitution demand, "can be accomplished only when all relevant facts are before the judicial tribunal." [Binger](#), 401 So.2d at 1313 (quoting [Dodson v. Persell](#), 390 So.2d 704, 707 (Fla.1980)). "Those relevant facts," this Court has explained, "should be the determining factor rather than gamesmanship, surprise, or superior trial tactics." *Id.*

In this case, the trial court repeatedly determined that the non-parties possessed relevant documents that were within the scope of the lawful discovery requests issued by the challengers, as authorized by the Florida Rules of Civil Procedure. Yet, the non-parties defied the trial court's repeated rulings on relevancy and now seek to prevent the discovery on a basis not raised in the trial court until the day after the trial court held them in contempt of court for their failure to produce the documents. The non-parties' belated assertions of a qualified First Amendment privilege have, based on the totality of the circumstances, therefore been waived. In addition, their trade secrets claim is wholly devoid of merit.

Accordingly, we affirm the trial court's ruling requiring production of the 538 pages of disputed documents. For all these reasons, and in accordance with the overriding public interest in openness to judicial proceedings and records, we direct that the sealed portions of the trial transcript, as well as

the sealed documents themselves, should be and hereby are ordered unsealed.

It is so ordered.

LABARGA, C.J., and LEWIS, QUINCE, and PERRY, JJ., concur.

POLSTON, J., concurs in result with an opinion, in which CANADY, J., concurs.

POLSTON, J., concurring in result.

Although I do not concur fully with the portrayal of the background or with the entirety of the majority's analysis, I agree with the majority's holding that, under Florida law, the non-parties waived any First Amendment privilege by failing to raise it in a timely manner. *See Kaye Scholer LLP v. Zalis*, 878 So.2d 447, 449 (Fla. 3d DCA 2004) (explaining that the failure to comply with Florida Rule of Civil Procedure 1.280(b) may result in the waiver of a privilege). I also agree with the majority that the non-parties' general assertion of a trade secrets privilege does not prevent production of the documents. *See* Charles W. Ehrhardt, *Ehrhardt's Florida Evidence*, § 506.1 (2014 ed.) (“The party invoking the privilege bears the burden of showing ‘good cause’ for protecting or limiting discovery by demonstrating that the information sought is a trade secret or confidential business information and that disclosure may be harmful.”); *see also*  *Am. Express Travel Related Servs., Inc. v. Cruz*, 761 So.2d 1206, 1209 (Fla. 4th DCA 2000). I write separately to address federal law.

*1134 During oral argument, the non-parties asserted that federal law, not Florida law, governs the question of whether they waived their First Amendment rights. The adequacy of a waiver under state law to the assertion of a federal right is a matter of federal law.  *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002);  *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). But, under federal law, the question is whether state “practice gives litigants ‘a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined’

by the state court.” *Parker v. Illinois*, 333 U.S. 571, 574, 68 S.Ct. 708, 92 L.Ed. 886 (1948) (holding, in a discovery dispute, that waiver of First Amendment claim, under state law, was adequate under federal law) (quoting *Cent. Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194–95, 46 S.Ct. 90, 70 L.Ed. 229 (1925)); 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4028 (3d ed. 2014) (“The best interpretation of the cases, together, is that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights.”).

In this case, the non-parties had a reasonable opportunity to have any claim of a First Amendment privilege heard and decided by Florida's courts. As the majority opinion explains in detail, the non-parties could have asserted, but failed to assert, their First Amendment claim before or during the deposition in November 2012, in their subsequent motion to quash the subpoenas duces tecum, during multiple discovery hearings in late 2012 and early 2013, and in their certiorari petition to the First District Court of Appeal. When the non-parties decided to challenge production on the basis of relevancy, cost, and burdensomeness instead, the non-parties made a choice that involved waiving the First Amendment issue that they asserted much later in the proceedings. *See Parker*, 333 U.S. at 575, 68 S.Ct. 708 (“[P]etitioner plainly had a reasonable opportunity to have his federal questions passed upon by the state court. When petitioner acting through counsel decided to seek review in the [improper state] Appellate Court he made a choice which involved abandonment of the constitutional issues which he had raised in the proceedings.”). Therefore, because Florida law provided the litigants with a reasonable opportunity to assert their federal rights but they failed to do so, the non-parties' waiver of their First Amendment claim under state law satisfies federal law.

Accordingly, I concur in result.

CANADY, J., concurs.

All Citations

150 So.3d 1115, 39 Fla. L. Weekly S689

Footnotes

- 1 We accepted jurisdiction of this appeal of the trial court's discovery orders involving these documents, under [article V, section 3\(b\)\(5\), of the Florida Constitution](#), after the First District Court of Appeal passed through the appeal to this Court. See *Non-Parties v. League of Women Voters of Fla.*, 150 So.3d 221, 224, 39 Fla. L. Weekly D1300, 2014 WL 2770013, at *1 (Fla. 1st DCA June 19, 2014).
- 2 The trial court subsequently entered a final judgment in the underlying litigation, finding constitutional violations of [article III, section 20, of the Florida Constitution](#), which prohibits redistricting with the intent to favor or disfavor a political party or an incumbent. In response to the final judgment, the Legislature adopted, and the trial court thereafter approved, a remedial redistricting plan. The final judgment and the remedy ordered and approved by the trial court are the subject of a separate appeal and cross-appeal. The First District certified, pursuant to [article V, section 3\(b\)\(5\), of the Florida Constitution](#), that the trial court's final judgment is of great public importance and requires immediate resolution by this Court. See *League of Women Voters of Fla. v. Detzner*, — So.3d —, —, No. 1D14–3953, 2014 WL 4851707, at *2 (Fla. 1st DCA Oct. 1, 2014). We accepted jurisdiction. See *League of Women Voters of Fla. v. Detzner*, No. SC14–1905, 2014 WL 5502409, at *1 (Fla. Sup.Ct. order filed Oct. 23, 2014). We express no opinion at this time as to any of the issues that are the subject of that separate appeal and cross-appeal.
- 3 Numerous media organizations that regularly covered the underlying litigation and the broader redistricting controversy, as well as a nonprofit freedom of information advocacy group and a professional association for news editors, filed an amici curiae brief in this Court in support of unsealing the documents. Those organizations included: (1) the Associated Press; (2) the Bradenton Herald, Inc.; (3) the First Amendment Foundation; (4) the Florida Society of News Editors; (5) Gannett Broadcasting, Inc.; (6) Gannett Co., Inc.; (7) Halifax Media Group, LLC; (8) Media General Operations, Inc.; (9) Miami Herald Media Co.; (10) Morris Communications Corp.; (11) Orlando Sentinel Communications, LLC; (12) Scripps Media, Inc.; and (13) Sun-Sentinel Co., LLC.
- 4 The history of the underlying litigation and a detailed overview of the nature of the challengers' constitutional claims is contained in this Court's decision in  [League of Women Voters of Florida v. Florida House of Representatives](#), 132 So.3d 135 (Fla.2013), in which this Court recognized a legislative privilege but held that this qualified privilege must yield to permit the discovery of relevant information and communications, including the testimony of legislators and legislative staff members, pertaining to the constitutional validity of the challenged redistricting plan.
- 5 We commend the trial judge for the proactive and professional manner in which he conducted the proceedings regarding this discovery dispute, including his efforts to encourage the parties to reach an agreement about the scope of the subpoenas and to facilitate timely discovery.
- 6 The trial court immediately rejected the asserted “right of privacy” as a basis to preclude disclosure of the documents, and the non-parties did not challenge this finding or make any arguments on appeal concerning this claim.
- 7 We reject the challengers' claim that our review of the issues presented in this case is moot, either in light of the production of the subject documents; the admission of some of the documents into evidence at trial, on the basis of this Court's decision in [League of Women Voters](#), 140 So.3d at 512; or based on the trial court's final judgment in the underlying redistricting litigation. The non-parties' production of the documents to the challengers is an issue of waiver, not mootness, and the documents were permitted to be used at trial only because of this Court's intervening all writs opinion, which was specifically based on the understanding that this appellate review of the privilege claims would subsequently occur. See *id.* at 514.
- 8 By separate order, we denied the non-parties' motion for leave to file supplemental briefs as an improper attempt to insert new issues after oral argument into the appeal.
- 9 We note, however, that we have reviewed the cases cited by the non-parties in their notice of supplemental authority and, even if we were to consider them, we find them to be completely inapposite.

- 10 The entire record regarding this discovery issue was in place at the time the non-parties filed their notice of appeal in the First District. Therefore, it is unnecessary to reach the legal issue of whether the trial court's final judgment or any other events occurring after the notice was filed should be considered as a part of this appeal.
- 11 Even when asked in an order issued by this Court to specifically identify which pages of disputed documents they continue to assert are protected trade secrets, the non-parties offered only vague and general claims and identified nearly every page of the disputed documents as allegedly containing trade secrets.

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Declined to Extend by [Shamrock-Shamrock, Inc. v. Remark](#), Fla.App. 5 Dist., April 26, 2019

172 So.3d 363
Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS OF
FLORIDA, etc., et al., Appellants/Cross-Appellees,

v.

Ken DETZNER, et al., Appellees/Cross-Appellants.

No. SC14-1905.

|
July 9, 2015.

Synopsis

Background: Challengers to congressional redistricting plan brought action against state Legislature and others for declaratory and injunctive relief, asserting unconstitutional partisan or discriminatory intent. The Circuit Court, Leon County, [Terry P. Lewis, J.](#),  [2014 WL 3797315](#), found the plan unconstitutional as to two districts and ordered it withdrawn, along with any other districts affected thereby. Following passage by the Legislature during special session of remedial redistricting plan, and a 12-day bench trial, the Circuit Court,  [2014 WL 4261829](#), ordered that the 2014 elections be held under the map as enacted in 2012. Challengers appealed, and suggested certification of the judgment for direct review by the Supreme Court. Defendants cross-appealed and opposed certification. The District Court of Appeal, [Padovano, J.](#), [2014 WL 4851707](#), certified judgment.

Holdings: The Supreme Court, [Pariente, J.](#), held that:

[1] the issue is whether the Legislature had an improper intent prohibited by the mandate of the Fair Districts Amendment;

[2] actions and statements of legislators and staff was relevant;

[3] trial court was justified in drawing an adverse inference against the Legislature in adjudicating challengers' claim;

[4] evidence supported trial court's conclusion that the Legislature had unconstitutional partisan intent prohibited by Amendment;

[5] trial court was required to analyze redistricting plan as a whole, rather than with regard to individual districts;

[6] once the trial court finds that the Legislature intended to favor a political party or an incumbent, burden shifts to Legislature; and

[7] Legislature was required to redraw redistricting map for Districts 5, 13, 14, 21, 22, 25, 26, and 27.

Affirmed in part and reversed in part.

[Lewis, J.](#), concurred in the result.

[Canady, J.](#), dissented and filed opinion in which [Polston, J.](#), joined.

Procedural Posture(s): On Appeal.

West Headnotes (41)

[1] **Election Law**  Reapportionment in general
Partisan gerrymanders are incompatible with democratic principles.

[2] **United States**  Apportionment of Representatives; Reapportionment and Redistricting

Neither the Elections Clause of the United States Constitution, nor federal law prohibits the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn; banning lawmaking by initiative to direct a State's method of apportioning congressional districts would stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. U.S.C.A. Const. Art. 1, § 4, cl. 1;  2 U.S.C.A. § 2a(c).

[3] **United States** ➔ Equality of representation and discrimination; Voting Rights Act

Under Fair Districts Amendment, there is no acceptable level of improper intent by the legislature in congressional redistricting. *West's F.S.A. Const. Art. 3, § 20(a)*.

[4] **Election Law** ➔ Reapportionment in general

The prohibition in the Fair Districts Amendment on improper partisan intent in redistricting applies, by its express terms, to both the apportionment plan as a whole and to each district individually, and does not require a showing of malevolent or evil purpose. *West's F.S.A. Const. Art. 3, § 20(a)*.

[5] **Election Law** ➔ Reapportionment in general

A finding of partisan intent renders the Legislature's redistricting plan constitutionally invalid under the Fair Districts Amendment, as it expressly outlaws partisan political gerrymandering. *West's F.S.A. Const. Art. 3, § 20(a)*.

[6] **Election Law** ➔ Reapportionment in general

In contrast to the federal equal protection standard applied to political gerrymandering, the Fair Districts Amendment to the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. *U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 3, § 20(a)*.

2 Cases that cite this headnote

[7] **Election Law** ➔ Reapportionment in general

The Fair Districts Amendment does not reference the word “invidious” as the term has been used by the United States Supreme Court in equal protection discrimination cases, and Fair Districts Amendment should not be read to require a showing of malevolent or evil purpose.

U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 3, § 20(a).

[8] **Election Law** ➔ Reapportionment in general

Fair Districts Amendment prohibits intent, not effect, meaning that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent; thus, the focus of the analysis must be on both direct and circumstantial evidence of intent. *West's F.S.A. Const. Art. 3, § 20(a)*.

[9] **Election Law** ➔ Reapportionment in general

One piece of evidence in isolation may not indicate intent to favor or disfavor a political party or incumbent in violation of the Fair Districts Amendment; but, a review of all of the evidence together may lead a reviewing court to the conclusion that the plan was drawn for a prohibited purpose. *West's F.S.A. Const. Art. 3, § 20(a)*.

[10] **Election Law** ➔ Reapportionment in general

The relevant inquiry under the Fair Districts Amendment for discerning improper partisan intent to favor or disfavor a political party or incumbent focuses on whether the plan or district was drawn with this purpose in mind. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[11] **Conspiracy** ➔ Direct or Circumstantial Evidence

Circumstantial evidence is often essential in proving a conspiracy, and may be the only type of evidence available.

[12] **United States** ➔ Equality of representation and discrimination; Voting Rights Act

The issue on review of drawing congressional districts is whether the legislature had an

improper intent that was prohibited by the mandate of the Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[13] Election Law 🔑 Reapportionment in general

In a traditional lawsuit involving a challenge to a statutory enactment, courts determine legislative intent through statutory construction, looking to the actual language used and any other tools, such as the history of legislative changes and any appropriate interpretive canons, to assist in discerning the Legislature's intent in enacting the law; however, determining whether the Legislature acted with the type of improper intent that is prohibited by the mandate of the Fair Districts Amendment is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction. *West's F.S.A. Const. Art. 3, § 20(a)*.

[14] Election Law 🔑 Reapportionment in general

Actions and statements of legislators and staff, especially those directly involved in the map drawing process, was relevant on the issue of whether the Legislature acted with the type of improper intent that was prohibited by the mandate of the Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

[15] United States 🔑 Equality of representation and discrimination; Voting Rights Act

Intent of individual legislators and legislative staff members involved in the drawing of congressional redistricting plan is relevant in evaluating legislative intent to determine if the intent was prohibited by the mandate of the Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

[16] United States 🔑 Judicial review and enforcement

Trial court was justified in drawing an adverse inference against the Legislature in adjudicating

the claim by challengers of congressional redistricting plan on the basis of unconstitutional partisan intent prohibited by the mandate of the Fair Districts Amendment, where Legislature systematically deleted almost all of their e-mails and other documentation relating to redistricting despite knowledge that litigation over the constitutionality of the plan was inevitable and that no privilege would apply to any of its communications with outside political consultants. *West's F.S.A. Const. Art. 3, § 20(a)*.

[17] Evidence 🔑 Suppression or spoliation of evidence

Even in the absence of a legal duty, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence.

3 Cases that cite this headnote

[18] Evidence 🔑 Suppression or spoliation of evidence

Pretrial Procedure 🔑 Failure to Comply; Sanctions

Courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability.

3 Cases that cite this headnote

[19] Evidence 🔑 Suppression or spoliation of evidence

If evidence was negligently destroyed, a rebuttable presumption of liability may arise.

[20] Evidence 🔑 Suppression or spoliation of evidence

An adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.

2 Cases that cite this headnote

[21] United States 🔑 Judicial review and enforcement

Competent, substantial evidence supported trial court's conclusion that the Legislature had unconstitutional partisan intent prohibited by the mandate of the Fair Districts Amendment when it passed congressional redistricting plan, where the trial court was convinced by circumstantial evidence that political operatives obtained the necessary cooperation and collaboration from the Legislature to ensure that the redistricting process and the resulting map were tainted with improper partisan intent, and found that operatives were successful in their efforts to influence the redistricting process and the congressional plan under review. *West's F.S.A. Const. Art. 3, § 20(a)*.

[22] United States 🔑 Judicial review and enforcement

Trial court's finding of unconstitutional partisan intent prohibited by the mandate of the Fair Districts Amendment pertained to the process of redistricting and the enacted map as a whole, rather than solely to the two specifically invalidated congressional districts, where Legislature destroyed almost all e-mails and other documentation relating to redistricting, there were early meetings between legislative leaders and staff with political consultants regarding the redistricting process and their continued involvement in the redistricting process, and none of this evidence was district-specific. *West's F.S.A. Const. Art. 3, § 20(a)*.

[23] United States 🔑 Equality of representation and discrimination; Voting Rights Act

Trial court was required to analyze congressional redistricting plan as a whole, rather than with regard to individual districts, to determine whether it violated partisan intent prohibition of the Fair Districts Amendment, where evidence of constitutionally improper partisan intent

included evidence pertaining both to the plan as a whole and to specific districts, and trial court found that partisan political consultants made a mockery of the redistricting process and managed to taint the process and the resulting map with improper partisan intent, as there was a parallel redistricting process undertaken contrary to the Legislature's public transparent redistricting effort in an attempt to favor a political party or an incumbent. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[24] Election Law 🔑 Reapportionment in general

The existence of a parallel redistricting process undertaken contrary to the Legislature's public transparent redistricting effort in an attempt to favor a political party or an incumbent is important evidence in support of the claim that the Legislature violated the mandate of Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

[25] United States 🔑 Judicial review and enforcement

Although the legislative redistricting plan comes before a reviewing court with an initial presumption of validity, once the trial court finds that the Legislature intended to favor a political party or an incumbent in violation of Fair Districts Amendment, there is no longer any basis to apply a deferential standard of review, and instead, the burden shifts to the Legislature to justify its decisions in drawing the congressional district lines, and no deference is afforded to the Legislature's decisions regarding the drawing of the districts. *West's F.S.A. Const. Art. 3, § 20(a)*.

[26] Election Law 🔑 Reapportionment in general

It is a reviewing court's duty, given to it by the citizens of Florida through the Fair Districts Amendment, to enforce adherence to the constitutional requirements for redistricting and to declare a redistricting plan that does

not comply with those standards constitutionally invalid. *West's F.S.A. Const. Art. 3, § 20(a)*.

[27] **Election Law** 🔑 Reapportionment in general
Unlike a legislative act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the instructions of the citizens as expressed in specific requirements of the Florida Constitution governing this process, including the Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

[28] **Election Law** 🔑 Reapportionment in general
While the Legislature is generally entitled to deference as a result of its role in the redistricting process, that deference applies only so long as its redistricting decisions do not violate the constitutional requirements, including the Fair Districts Amendment. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[29] **Election Law** 🔑 Reapportionment in general
Once a tier-one violation of the constitutional intent standard in Fair Districts Amendment is found, there is no basis to continue to afford deference to the Legislature; to do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. *West's F.S.A. Const. Art. 3, § 20(a)*.

[30] **United States** 🔑 Judicial review and enforcement
Alternative maps can provide relevant proof that the Legislature's apportionment plans consist of congressional district configurations that are not explained other than by the Legislature considering impermissible factors under the Fair Districts Amendment, such as intentionally favoring a political party or an incumbent. *West's F.S.A. Const. Art. 3, § 20(a)*.

[31] **United States** 🔑 Equality of representation and discrimination; Voting Rights Act

Legislature failed to meet its burden to demonstrate that District 5, even as revised, passed constitutional muster under Fair Districts Amendment, and District had to be redrawn in an East–West manner, where District was a key component of the Legislature's unconstitutional intent in drawing congressional redistricting plan, Legislature could not prove that North–South configuration was necessary to avoid diminishing the ability of black voters to elect a candidate of their choice, trial court clearly found that the Legislature's intent in drawing redistricting plan generally and District specifically, was to benefit the Republican Party, configuration also had the effect of benefiting the long-time incumbent of the district, and East–West version of District was visually less unusual and bizarre than the meandering North–South version. *West's F.S.A. Const. Art. 3, § 20(a)*.

3 Cases that cite this headnote

[32] **Election Law** 🔑 Reapportionment in general

The object of the compactness criterion for analyzing whether legislative intent in redistricting violates mandate of Fair Districts Amendment is that a district should not yield bizarre designs. *West's F.S.A. Const. Art. 3, § 20(a)*.

[33] **United States** 🔑 Equality of representation and discrimination; Voting Rights Act

Legislature failed to meet its burden to demonstrate that Districts 13 and 14 passed constitutional muster under Fair Districts Amendment, and the congressional districts had to be redrawn to avoid crossing Tampa Bay, where enacted configuration of these two districts added more Democratic voters to an already safely Democratic District 14, while ensuring that District 13 was more favorable to the Republican Party. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[34] United States  Equality of representation and discrimination; Voting Rights Act

Legislature failed to meet its burden to demonstrate that decision to split Homestead between congressional Districts 25 and 26 was not done to benefit the Republican Party in violation of Fair Districts Amendment, and, thus, Districts 26 and 27 had to be redrawn to avoid splitting Homestead. *West's F.S.A. Const. Art. 3, § 20(a)*.

[35] United States  Equality of representation and discrimination; Voting Rights Act

Legislature failed to meet its burden to demonstrate that congressional District 25 passed muster under Fair Districts Amendment, and the District had to be redrawn to avoid dividing Hendry County, where decision to adopt the District's configuration was made in a non-public meeting at the end of the redistricting process, there was no record from the time this decision was made to explain why the Legislature chose the Senate's configuration of this district over the House's, even though the Senate's configuration rendered the District less numerically compact while splitting a county boundary and without improving the compactness of the adjacent district, District 20. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[36] United States  Equality of representation and discrimination; Voting Rights Act

Legislature failed to meet its burden to demonstrate that Districts 21 and 22 passed muster under Fair Districts Amendment, where congressional districts could have been drawn in a more constitutionally compliant manner by stacking them on top of each other, in a horizontal configuration, rather than configuring the districts to run vertically, parallel to each other along the Atlantic coast, which would have been more compact and would have broken

fewer political boundaries, and it could have been accomplished without violating any tier-one minority voting protection requirements. *West's F.S.A. Const. Art. 3, § 20(a)*.

[37] United States  Judicial review and enforcement

State courts are empowered to enact constitutional redistricting plans for the United States Congress when the legislature fails to do so. *U.S.C.A. Const. Art. 1, § 4, cl. 1*.

[38] United States  Judicial review and enforcement

State courts have the authority to evaluate the constitutionality of redistricting laws and to enact their own congressional redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones. *U.S.C.A. Const. Art. 1, § 4, cl. 1*.

[39] United States  Judicial review and enforcement

When a state legislature fails to replace unconstitutional districts with valid ones, a court cannot be characterized as usurping the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action. *U.S.C.A. Const. Art. 1, § 4, cl. 1*.

[40] United States  Equality of representation and discrimination; Voting Rights Act

Legislature was required by violations of Fair Districts Amendment to redraw congressional redistricting map for Districts 5, 13, 14, 21, 22, 25, 26, and 27 pursuant to Supreme Court's precise guidelines and instructions, but was not required to redraw the entire map, where requiring the entire map to be redrawn was not the remedy commensurate with the constitutional violations, including partisan political consultants making a mockery

of the redistricting process and managing to taint the process and the resulting map with improper partisan intent, and there was a parallel redistricting process undertaken contrary to the Legislature's public transparent redistricting effort in an attempt to favor a political party or an incumbent. *West's F.S.A. Const. Art. 3, § 20(a)*.

1 Cases that cite this headnote

[41] **Constitutional Law** 🔑 Encroachment on Legislature

While the judiciary is generally without authority to review the internal workings of the Legislature, Florida has a strong public policy, as codified in the state Constitution, favoring transparency and public access to the legislative process. *West's F.S.A. Const. Art. 3, § 20(a)*.

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Opinion

[PARIENTE, J.](#)

In this appeal involving legal issues of first impression, we review a trial court's finding that the 2012 “redistricting process” and the “resulting map” apportioning Florida's twenty-seven congressional districts were “taint [ed]” by unconstitutional intent to favor the Republican Party and incumbent lawmakers.¹ Cognizant that this Court's role is not to select a redistricting map that performs better for one political party or another, but is instead to uphold the purposes of the constitutional provision approved by Florida voters to outlaw partisan intent in redistricting, the crux of what we must decide is whether the trial court gave the appropriate legal effect to its finding that the Florida Legislature drew the state's congressional districts in violation of the Florida Constitution.

Added to the Florida Constitution in 2010, the Fair Districts Amendment sought to eliminate the age-old practice of partisan political gerrymandering—where the political party and representatives in power manipulate the district boundaries to their advantage—by forbidding the Florida Legislature from drawing a redistricting plan or an individual district with the “intent to favor or disfavor a political party or an incumbent.” *Art. III, § 20(a), Fla. Const.* “The desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or

Democratic tenet, but applies equally to both parties.”  *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I)*, 83 So.3d 597, 615 (Fla.2012). As observed when a three-judge panel of a federal district court examined Florida's last decennial congressional redistricting plan in 2002, the “raw exercise of majority legislative *370 power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country.”   *Martinez v. Bush*, 234 F.Supp.2d 1275, 1297 (S.D.Fla.2002).

With the voters' approval of the Fair Districts Amendment, that unfortunate fact of political life was banned in Florida. Our citizens declared that the Legislature must “redistrict in a manner that prohibits favoritism or discrimination.”

 *Apportionment I*, 83 So.3d at 632. And the Eleventh Circuit Court of Appeals similarly declared that “[f]ar from dictat[ing] electoral outcomes, the provision seeks to maximize electoral possibilities by leveling the playing field.”

 *Brown v. Sec’y of State of Fla.*, 668 F.3d 1271, 1285 (11th Cir.2012) (internal quotation marks omitted).

[1] [2] Like the voters of Arizona, who adopted an independent redistricting commission recently upheld by the United States Supreme Court as consistent with the “fundamental premise that all political power flows from the people,” the Florida voters endeavored “to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.”  *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, No. 13–1314, — U.S. —, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704, 2015 WL 2473452, at *4, 21 (U.S. June 29, 2015). As the United States Supreme Court has recognized, “partisan gerrymanders ... [are incompatible] with democratic principles.” *Id.* at *4, —,  135 S.Ct. 2652, 2658 (alteration in original) (quoting  *Vieth v. Jubelirer*, 541 U.S. 267, 292, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion)). In short, the Fair Districts Amendment was designed “to restore ‘the core principle of republican government,’ namely, ‘that the voters should choose their representatives, not the other way around.’ ”  *Id.* at *21, —,  135 S.Ct. 2652, 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 *Texas L.Rev.* 781, 781 (2005)).²

Presented in this case with a first-of-its-kind challenge under the Fair Districts Amendment, the trial court found that the Legislature's 2012 congressional redistricting plan was drawn in violation of the Florida Constitution's prohibition on partisan intent. We affirm that finding. We conclude, however, that the trial court failed to give proper legal effect to its determination that the Fair Districts Amendment was violated.

In reaching this conclusion, we recognize that the trial court had scant precedent to guide it in approaching the legal issues presented. And, we commend the trial court for the tremendous effort that was expended in deciding this novel challenge under the Fair Districts Amendment.

Nevertheless, we conclude that two legal errors significantly affected the trial court's determination of the appropriate legal effect of its finding of unconstitutional intent. First, the trial court erred in determining that there was no distinction between a challenge to the “plan as a whole”—a challenge, in effect, to the map produced from the unconstitutional “process”—and a challenge to individual districts. Second, the trial court erred in the standard of review it applied, which was improperly deferential to the Legislature's decisions after finding a violation of the Fair Districts Amendment's prohibition on partisan intent. Although it found the existence of unconstitutional intent, the trial court relied solely on objective “tier-two” constitutional indicators, such as compactness and the use of political or geographical boundaries, rather than on the direct and circumstantial evidence of “tier-one” unconstitutional intent presented at trial.

In other words, the trial court analyzed the Legislature's map as if it had not found the existence of unconstitutional intent, affording deference to the Legislature where no deference was due. Once a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.

Relying on the finding of unconstitutional intent, the challengers have urged that the entire plan should be redrawn. Certain factors support this approach, which would require the Legislature to begin the redistricting process anew on a blank slate. For example, we are aware that the starting point for drawing the 2012 congressional redistricting map was the 2002 map, which was drawn prior to the Fair Districts Amendment with, at that time, legally permissible partisan intent. In fact, the Legislature itself had, in defending against a racial gerrymandering claim directed at the 2002 map, “stipulated” that its intent “was to draw the congressional districts in a way that advantages Republican incumbents and potential candidates.”   *Martinez*, 234 F.Supp.2d at 1340. We also acknowledge that a three-judge federal district court panel concluded that the Florida Legislature's “overriding goal with respect to congressional reapportionment” in 2002 was to “maximize the number of districts likely to perform for Republicans.”   *Id.* at 1300–01. These are considerations now explicitly outlawed by the Florida Constitution's prohibition on partisan political gerrymandering.

Based on the findings and evidence in this case, however, we ultimately reject the challengers' request that the entire plan must be redrawn or that this Court should, at this time, perform the task of redrawing the districts. Although we conclude that the trial court's finding of unconstitutional intent required the burden to shift to the Legislature to justify its decisions regarding where to draw the lines, we also conclude that the challengers still must identify some problem with the Legislature's chosen configuration. They did so in this case with respect to Districts 5, 13, 14, 26, and 27—showing a nexus between the unconstitutional intent and the district—as well as for Districts 21, 22, and 25, which they contended were problematic either for “tier-two” reasons or because the Legislature unjustifiably rejected a less favorable configuration.

Accordingly, while we affirm the trial court's finding that the Legislature's enacted map was “taint[ed]” by unconstitutional intent, we reverse the trial court's order upholding the Legislature's remedial redistricting plan. We relinquish this case to the trial court for a period of 100 days from the date of this opinion, with directions that it require the Legislature to redraw, on an expedited basis, Congressional *372 Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by the redrawing, pursuant to the guidelines set forth in this opinion. We emphasize the time-sensitive nature of these proceedings, with candidate qualifying for the 2016 congressional elections now less than a year away, and make clear that we take seriously our obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts. Upon the completion of the redrawing of the map, the trial court shall hold a hearing where both sides shall have an opportunity to present their arguments and any evidence for or against the redrawn map, and the trial court shall then enter an order either recommending approval or disapproval of the redrawn map.

We commend both parties for their professionalism in presenting the case to this Court and now proceed to discuss in detail the legal issues that have been raised on appeal, the background of this case, the evidence presented, and our legal reasoning.

I. CHALLENGE TO TRIAL COURT'S FINDINGS

On appeal in this Court, the challengers seek affirmance of the trial court's finding of unconstitutional partisan intent in drawing the state's congressional districts—a finding that

was based on both direct and circumstantial evidence. Their primary contention of error, however, is that the trial court applied an unduly deferential standard of review, thereby precluding it from imposing a more meaningful remedy for its finding of unconstitutional intent to favor the Republican Party and incumbents.³

The Legislature, while seeking affirmance of the trial court's approval of the remedial redistricting plan, nevertheless takes issue with the trial court's finding of unconstitutional intent.⁴ In particular, the *373 Legislature contests, first, the trial court's finding of a connection between the evidence and the Legislature itself, including the trial court's decision to ascribe the intent of a few individuals to the Legislature as a collective body. Second, the Legislature asserts that, even assuming the existence of unconstitutional intent, the trial court's finding pertains solely to the two invalidated districts and not to the broader process or map as a whole. Accordingly, the Legislature argues that any remedy that may have been necessary has already been provided through the enactment of the remedial redistricting plan.

We address these issues in the following way. After setting forth a comprehensive overview of the factual and legal background of the case, including a review of the evidence relied on by the trial court in finding unconstitutional intent, our analysis begins by considering the “intent” standard and the trial court's application of that standard in this case. Upon determining that the trial court appropriately framed the “intent” inquiry, we turn to the legal sufficiency of the trial court's finding of unconstitutional intent. We conclude that competent, substantial evidence supports the trial court's finding and that this finding pertains to the plan as a whole and not solely to the two invalidated districts. We then proceed to consider the proper legal effect of this finding as we review each challenged district. Finally, we address the remedy.⁵

II. THE FLORIDA CONSTITUTION'S PROHIBITION ON PARTISAN POLITICAL GERRYMANDERING

In February 2012, “the Florida Legislature approved the decennial plan apportioning Florida's twenty-seven congressional districts, based on population data derived from the 2010 United States Census.”  *League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV)*, 132 So.3d 135, 139 (Fla.2013). After the adoption of the Legislature's 2012 congressional redistricting plan,

two separate groups of plaintiffs (“the challengers”)⁶ filed civil complaints in the Second Judicial Circuit Court in and for Leon County, challenging the validity of the plan under new state constitutional redistricting standards approved by the Florida voters in 2010 and now enumerated in [article III, section 20, of the Florida Constitution](#). “Those standards, governing the congressional reapportionment process, appeared on the 2010 general election ballot as *374 ‘Amendment 6’ and, together with their identical counterparts that apply to legislative reapportionment (‘Amendment 5’), were generally referred to as the ‘Fair Districts’ amendments.” *Id.*⁷ As this Court has previously noted, “[t]here is no question that the goal of minimizing opportunities for political favoritism was the driving force behind the passage of the Fair Districts Amendment.” [Apportionment I](#), 83 So.3d at 639.

In *Apportionment I*, during this Court’s first review involving the new constitutional standards, we commended the Legislature for what it claimed at that time to be an unprecedented transparent redistricting process, in which the Legislature engaged in twenty-six public hearings around the state and obtained public input as it went about its task of redistricting. [See](#) 83 So.3d at 637 n. 35, 664. In truth, public input in redistricting was not unique to the 2012 process. The Legislature held thirty-three public hearings during the 1992 redistricting and twenty-four public hearings prior to the enactment of the 2002 map. *See* [Martinez](#), 234 F.Supp.2d at 1288.

Based on the new constitutional standards that applied for the first time to the 2012 process, transparency became legally significant under the Florida Constitution. This Court explained that “if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.” [Apportionment IV](#), 132 So.3d at 149. Indeed, the challengers’ principal claim in this litigation challenging the constitutional validity of the Legislature’s 2012 congressional redistricting plan involved evidence of the type of “entirely different, separate process” this Court warned would be “important evidence” of a constitutional violation.

Specifically, the challengers argued that the Legislature cooperated and collaborated with partisan political operatives aligned with the Republican Party to produce a redistricting plan that was drawn in contravention of [article III, section 20](#), with the intent to favor incumbents and the Republican Party, which was the controlling political party in the Legislature at the time of the 2012 redistricting. Before the approval of the Fair Districts Amendment, this Court had previously acknowledged, in 1992, that there was “little doubt that politics played a large part” in the adoption of prior redistricting plans in this state, explaining that the protection of incumbents and favoritism of one party over another was inevitable—and certainly “not illegal.” *In re Senate Joint Resolution 2G*, [Special Apportionment Session 1992 \(In re Apportionment Law–1992\)](#), 597 So.2d 276, 285 (Fla.1992). But at that time, such partisan intent was not legally prohibited.

The acceptability of partisan political gerrymandering in this state dramatically changed in 2010. With “fairness” as its “focus,” the Fair Districts Amendment now “expressly prohibits” redistricting “practices that have been acceptable in the past, such as crafting a plan or district with the intent to favor a political party or an incumbent.” [Apportionment I](#), 83 So.3d at 605, 607, 616. These “express new standards” thus afford Florida citizens *375 “explicit constitutional protection” under [article III, section 20, of the Florida Constitution](#), “against partisan political gerrymandering.” [Apportionment IV](#), 132 So.3d at 138–39.

Specifically, [article III, section 20, of the Florida Constitution](#), provides in its entirety as follows:

In establishing congressional district boundaries:

- (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
- (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall,

where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 20, Fla. Const.

[3] [4] [5] [6] [7] Under [article III, section 20](#), “the is no acceptable level of improper intent.” [Apportionment I, 83 So.3d at 617](#). The prohibition on improper partisan intent in redistricting applies, “by its express terms,” to “both the apportionment plan as a whole and to each district individually” and does not “require a showing of malevolent or evil purpose.” *Id.* A finding of partisan intent therefore renders the Legislature’s redistricting plan constitutionally invalid, as the Florida Constitution expressly “outlaw[s] partisan political gerrymandering.” [Apportionment IV, 132 So.3d at 137](#). As we explained in *Apportionment I*:

The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process.

Florida’s express constitutional standard, however, differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions. Political gerrymandering claims under the Equal Protection Clause of the United States Constitution focus on determining when partisan districting as a permissible exercise “has gone too far,” so as to “degrade a voter’s or a group of voters’ influence on the political process as a whole.”

In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. It does not reference the word “invidious” as the term has been used by the United States Supreme Court in equal protection discrimination cases, and Florida’s provision should not be read to require a showing of malevolent or evil purpose.

[83 So.3d at 616–17](#) (citations omitted).

[8] [9] [10] “Florida’s constitutional provision prohibits intent, not effect,” which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent. [Id. at 617](#). “Thus, the focus of the analysis must be on both direct and circumstantial evidence of *376 intent.” *Id.* “One piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead this Court to the conclusion that the plan was drawn for a prohibited purpose.”

[Id. at 618](#). The relevant inquiry for discerning improper partisan intent “focuses on whether the plan or district was drawn with this purpose in mind.” *Id.*

A. TRIAL COURT’S FINDING OF UNCONSTITUTIONAL INTENT

The challengers’ claim of unconstitutional intent in the enacted congressional redistricting plan was that the Legislature communicated and collaborated with partisan political operatives, in the shadow of the Legislature’s purportedly open and transparent redistricting process, to produce a map favoring Republicans and incumbents. After hearing all the evidence presented during a twelve-day bench trial held from late May to early June 2014, and evaluating the credibility of all the witnesses, the trial court found that the challengers had proven their case and concluded that the Florida Legislature’s enacted 2012 congressional redistricting plan was drawn in violation of [article III, section 20](#).

The introductory paragraph of the trial court’s judgment stated that “districts 5 and 10 were drawn in contravention of the constitutional mandates of [Article III, Section 20](#),” but, in its discussion throughout the course of its forty-one-page order, the trial court more generally referred to and found that a group of partisan political operatives “conspire[d] to manipulate and influence *the redistricting process*” and succeeded in “infiltrat[ing] and influenc[ing] the Legislature, to obtain the necessary cooperation and collaboration” to “taint *the redistricting process and the resulting map* with improper partisan intent.” (Emphasis supplied.)

Specifically, the trial court stated, in pertinent part, as follows:

[The challengers’] theory of the case regarding improper intent is that Republican leadership in the House and the Senate, their key staff members, and a small group of Republican political consultants conspired to avoid the

effective application of the Fair District Amendments to the redistricting process and thereby successfully fashioned a congressional map that favors the Republican Party and its incumbents. The strategy they came up with, according to the [challengers], was to present to the public a redistricting process that was transparent and open to the public, and free from partisan influences, but to hide from the public another secretive process. In this secretive process, the political consultants would make suggestions and submit their own partisan maps to the Legislature through that public process, but conceal their actions by using proxies, third persons who would be viewed as “concerned citizens,” to speak at public forums from scripts written by the consultants and to submit proposed maps in their names to the Legislature, which were drawn by the consultants.

What is clear to me from the evidence, as described in more detail below, is that this group of Republican political consultants or operatives did in fact conspire to manipulate and influence the redistricting process. They accomplished this by writing scripts for and organizing groups of people to attend the public hearings to advocate for adoption of certain components or characteristics in the maps, and by submitting maps and partial maps through the public process, *all with the intention of obtaining enacted maps for the State *377 House and Senate and for Congress that would favor the Republican Party.*

They made a mockery of the Legislature's proclaimed transparent and open process of redistricting by doing all of this in the shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it. They were successful in their efforts to influence the redistricting process and the congressional plan under review here. And they might have successfully concealed their scheme and their actions from the public had it not been for the [challengers'] determined efforts to uncover it in this case.

The closer question is whether the Legislature in general, or the leadership and staff principally involved in drawing the maps, knowingly joined in this plan, or were duped by the operatives in the same way as the general public. The Defendants argue that if such a conspiracy existed, there is no proof that anyone in the Legislature was a part of it. If portions of the operatives' maps found their way into the enacted maps, they say, it was not because leadership or staff were told or knew they came from this group, but

rather because the staff, unaware of their origins, saw the proposals as improving the draft maps they were working on.

The most compelling evidence in support of this contention of the Defendants is the testimony of the staff members who did the bulk of the actual map drawing for the Legislature. I had the ability to judge the demeanor of Alex Kelly, John Guthrie and Jason Poreda at trial and found each to be frank, straightforward and credible. I conclude that they were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate them from direct partisan influence. I accept that their motivation in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair District Amendments, as their superiors had directed them.

That being said, the circumstantial evidence introduced at trial convinces me that the political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part. They managed to taint the redistricting process and the resulting map with improper partisan intent. There is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise.

(Emphasis supplied.)

[11] Having reviewed the trial court's factual findings and the record, and viewing the evidence in the light most favorable to the trial court's finding of unconstitutional intent, we set forth the following relevant factual background of the case. See [Berges v. Infinity Ins. Co.](#), 896 So.2d 665, 676 (Fla.2004) (explaining that it “is not the function of this Court to substitute its judgment for that of the trier of fact”); [Markham v. Fogg](#), 458 So.2d 1122, 1126 (Fla.1984) (stating that an appellate court “should not substitute its judgment for that of the trier of fact” as long as there is competent, substantial evidence to support the findings, and concluding upon review of conflicting evidence that there was “ample credible evidence adduced at the trial to sustain the trial judge's findings”); see also [Hausdorff v. Hausdorff](#), 913 So.2d 1267, 1268 (Fla. 4th DCA 2005) (viewing the evidence in the light most favorable to *378 the challenged judgment in evaluating whether competent, substantial evidence supported the trial court's rulings); [Mesick v. Loeser](#), 311 So.2d 132, 136 (Fla. 2d DCA 1975) (findings by the lower court as a trier of fact come to

the appellate court “clothed with a heavy presumption of correctness and where there is substantial competent evidence to sustain the actions of the trial court,” the appellate court cannot substitute its own opinion on the evidence but “must indulge every fact and inference in support of that judgment,” which is the equivalent of a jury verdict). We note, given the nature of the challengers' claim, that circumstantial evidence is often essential in proving a conspiracy—and indeed may be the only type of evidence available. See *Anheuser–Busch, Inc. v. Campbell*, 306 So.2d 198, 199 (Fla. 1st DCA 1975) (“It is a well settled rule that circumstantial evidence is admissible in civil conspiracy cases.”); see also *Resnick v. State*, 287 So.2d 24, 26 (Fla. 1973) (holding that a criminal conspiracy need not be proved by only direct evidence).

As we recount the facts, we emphasize that not every meeting held or every communication made was improper, illegal, or even violative of the letter of the Fair Districts Amendment. We set forth the pertinent facts in the record because, collectively, the evidence that the challengers were able to uncover after a protracted discovery process demonstrates a different scenario than the entirely open and transparent process touted by the Legislature when this Court considered the original apportionment challenges to the state Senate and House maps in *Apportionment I*. This is, indeed, what the trial court—which heard and considered all this evidence—found.

We also emphasize that since many of the e-mails were deleted or destroyed, we still may have only a partial picture of the behind-the-scenes political tactics. As the trial court found, “the Legislators and the political operatives systematically deleted almost all of their e-mails and other documentation relating to redistricting.” The Legislature did so even though it had acknowledged that litigation over the redistricting plan was “a moral certainty.” Indeed, if not for the production of some documents from the political consultants, including Marc Reichelderfer and Pat Bainter, there would be no record of the separate process undertaken by the consultants and no way to establish whether or not this process involved the collusion of the Legislature and ultimately affected the enacted map, as the trial court concluded.

We further understand that “taking the politics out of politics” is itself a difficult challenge, considering that partisan political gerrymandering was the norm for both political parties during prior redistricting processes in this state. Nevertheless, the facts that we recount provide the backdrop as to why we reject the Legislature's defense—which

focuses on the political consultants' efforts to “influence the redistricting process” and “make themselves relevant” despite their “exclusion from the decision-making process”—that depicts the political consultants and a few errant staffers as independent, self-motivated culprits, individuals who did not have the ability to and did not, in fact, influence the Legislature's decisions regarding where to draw the lines. And, finally, we emphasize that a finding of unconstitutional intent to favor a political party or incumbent does not necessarily mean that those who made the decisions acted with “malevolent or evil purpose,” which is not required for a finding of unconstitutional intent under the Fair Districts Amendment.  *Apportionment I*, 83 So.3d at 617.

B. EVIDENCE OF UNCONSTITUTIONAL INTENT

A month after the Florida voters approved the Fair Districts Amendment during *379 the November 2010 general election, then-Speaker of the House Dean Cannon authorized a meeting in December 2010 at the headquarters of the Republican Party of Florida, involving Republican political consultants and legislative staffers, to discuss the upcoming redistricting process. This gathering was described by one of the consultants at trial as a meeting of “people that, prior to passage of the [new constitutional standards], would have generally been involved in the redistricting process.”

The four key political consultants in attendance, who became major figures in the redistricting trial, were (1) Rich Heffley, (2) Frank Terraferma, (3) Marc Reichelderfer, and (4) Pat Bainter. Heffley is a consultant who has worked with many Republican legislators and candidates for public office, including Senator Don Gaetz, the Chairman of the 2012 Senate Committee on Reapportionment. Heffley had been involved in prior redistricting processes in Florida in 1992 and 2002 and, by the summer of 2011, was being paid \$10,000 per month by the Republican Party of Florida for unspecified redistricting services. Terraferma is also a consultant who has worked for a number of Republican legislators and candidates, including Representative Will Weatherford, the Chairman of the 2012 House Redistricting Committee. Terraferma had previously been hired by Heffley to work for the Republican Party of Florida and went back to work for the party as Director of House campaigns in 2011. He was described by employees of a national Republican organization, in an invitation for a meeting held in Washington, D.C., in June 2011 with key individuals involved in the redistricting process, as a “genius map

drawer.” Reichelderfer is another consultant who has worked with several Republican legislators and candidates, including former Speaker Dean Cannon. Reichelderfer is also one of Cannon's longtime personal friends, dating back over twenty years to their days together as Young Republicans. He was, at the time of the 2012 redistricting, considered part of Cannon's “inner circle,” and he had a good working relationship with Heffley. Bainter is the owner of a Gainesville, Florida, based political consulting firm known as Data Targeting, Inc., which has as one of its largest clients the Republican Party of Florida. Between January of 2011 and November of 2012, the Republican Party of Florida paid Data Targeting, Inc., almost \$3 million for consulting, polling, and direct mail services.

These four consultants, along with employees of the Republican Party of Florida, met in the initial December 2010 meeting with Alex Kelly, the staff director for the House Redistricting Committee; Chris Clark, the chief legislative aide for Senator Gaetz; and attorneys for the Legislature. At a second meeting the following month, in January 2011, the consultants met with Senator Gaetz, Representative Weatherford, Alex Kelly, and Kelly's Senate counterpart, John Guthrie.

These meetings were not open to the public and there is no record of what was discussed. As the trial court stated, “[n]o one who testified at trial about [the meetings] seemed to be able to remember much about what was discussed, though all seemed to agree that the political consultants were told that they would not have a ‘seat at the table’ in the redistricting process,” as they had during redistricting in years past. According to the trial court, “[n]o one clearly articulated what that meant exactly, but there was testimony that they were told that they could still participate in redistricting through the public process ‘just like any other citizen.’”

Reichelderfer, the consultant who has worked with then-Speaker Cannon, testified *380 that one topic of discussion at the meetings, as the trial court noted, was “whether a privilege could be identified to prevent disclosure of redistricting-related communications among political consultants, legislators, and legislative staff members.” The conclusion reached at the meetings, according to the trial court, was “that no privilege would apply.” After the first meeting, in December 2010, Reichelderfer prepared a memorandum that included the following question: “Communication with outside non-lawyers—how can we make that work?”

Another question included in the Reichelderfer memorandum was, “Evolution of maps—Should they start less compliant and evolve through the process—or—should the first map be as near as compliant as possible and change very little?” Reichelderfer acknowledged at trial that it was “possible” he discussed with Speaker Cannon the issues identified in this initial memo he prepared. The trial court would later reference Reichelderfer's memo in rejecting part of the Legislature's argument that there could be “no improper partisan intent in the drafting of the maps” because, the Legislature asserted, “as things progressed, each succeeding map that was drawn was an improvement over the one before it in terms of compactness, leaving cities and counties intact and following geographical boundaries.” “Coincidentally,” the trial court stated, “that corresponds with a strategy suggested from Reichelderfer's notes, i.e., start with less compliant maps and work toward a more compliant map.”

The trial court found that there was “no reason to convene two meetings just to tell active political partisans of the Republican Party that they would not ‘have a seat at the table.’” The trial court also noted “a few curious things about these meetings and their connection to subsequent events that are troubling.”

Specifically, even though the consultants supposedly had no “seat at the table,” the trial court found that they continued to be involved in the process. In June 2011, an e-mail was sent from Senator Gaetz's e-mail address to legislators to provide information about upcoming public hearings regarding redistricting. A “blind copy” of this e-mail was sent to Heffley, the consultant under contract with the Republican Party of Florida, and to Terraferma, the “genius map drawer.” The trial court found that this was evidence that either Senator Gaetz or “someone in his office” was “keeping these operatives in the loop.”

Another e-mail, sent in October 2011 from Terraferma to Representative Weatherford, reported that Kirk Pepper, the Deputy Chief of Staff for then-Speaker Cannon, was “huddled on a computer” at the Republican Party of Florida's headquarters, working with consultant Heffley on “[c]ongressional redistricting if I had to guess?” Pepper acknowledged at trial that he must have been speaking with Heffley at the Republican Party of Florida's headquarters at the time, but stated that he “never met with Rich Heffley about redistricting.” He had no explanation as to why Terraferma, whom Pepper had previously worked with at the Republican Party of Florida, would have thought otherwise.

The trial court found that it was “possible that Terraferma was mistaken or simply speculating without any basis,” but this communication caused the trial court to “wonder why [Terraferma] would make this assumption if Pepper really had nothing to do with the redistricting process.”

As it turned out, Pepper acted as a conduit between the consultants and the Legislature. According to testimony relied on by the trial court, Cannon staffer *381 Pepper “regularly” provided advance, non-public copies of draft redistricting maps to consultant Reichelderfer. The evidence, which came from document production by Reichelderfer since, as the trial court noted, neither Pepper nor Speaker Cannon preserved any records, demonstrated that between November 2011 and January 2012, Pepper transmitted to Reichelderfer—through his personal e-mail account, a “Dropbox” account he later deleted, and a thumb drive—at least twenty-four draft congressional redistricting maps prepared by the Legislature, mostly before they were released to the public. In some instances, Pepper sent Reichelderfer maps the Legislature prepared but *never* released to the public.

Although Pepper testified at trial that he acted “without Speaker Cannon’s approval” and, in retrospect, considered his decision to provide Reichelderfer with maps to have been “a mistake,” Pepper was later hired by Cannon’s private firm after Cannon left office. Cannon described Pepper as “a loyal employee,” but testified that he did not know about Pepper’s transmission of maps to Reichelderfer until it was reported in the media during the litigation in this case.

While they denied doing so, the trial court found that Pepper and Reichelderfer “communicate[d] about the political performance of the maps.” In one instance, after Reichelderfer expressed concerns that the draft of a Central Florida district occupied by incumbent Republican Representative Daniel Webster was “a bit messed up,” Pepper asked Reichelderfer, “[p]erformance or geography?” Reichelderfer acknowledged during testimony at trial that “performance” in that context would “[g]enerally” refer to the political performance of the district, although there is no record of his response to Pepper. Reichelderfer testified that he could not recall whether or how he answered that question. He spoke on the phone “regularly” with Pepper but denied having “specific conversations about political performance.”

Despite asking, “[p]erformance or geography?” Pepper testified at trial that he did not want to know from Reichelderfer if there was a problem with the political

performance of that particular district. Instead, he provided a lengthy explanation that his question was a “sarcastic” response to remind Reichelderfer “to be quiet,” because they were not supposed to talk about redistricting or the political implications of certain maps. Pepper stated of his question, “[i]t’s like if you were talking to someone that you knew very well and had known for a long period of time, you could say something in writing that other people might take differently than you meant it.” The trial court discredited Pepper’s explanation as “very unusual and illogical.”

After receiving maps from Cannon staffer Pepper, Reichelderfer modified the maps to increase the Republican performance of the districts, and he and the other consultants traded numerous maps back and forth with each other. Of significance, the trial court found that some of Reichelderfer’s modifications corresponded to the actual decisions the Legislature ultimately made.

In one graphic example, cited by the trial court, Reichelderfer’s revisions changed the performance of Districts 5, 7, 9, and 10 from four Democratic performing or leaning seats to two Democratic and two Republican performing seats, as eventually reflected in the actual map enacted by the Legislature. Another map, which was known to have been drawn by Terraferma, shared eleven identical districts with a map submitted through the public process by an individual named Alex Posada, *382 who denied ever creating or submitting the map and stated that he had not authorized anyone to submit a map using his name.

For his part, Reichelderfer described his interest in the Legislature’s maps as important to him “professionally” to “know the lay of the land,” similar to Bainter’s explanation that his interest was an “after-the-fact” one merely for the sake of his own “[k]nowledge”—even though the evidence presented at trial demonstrated that the consultants spent considerable time, including weekends, early mornings, and late nights, making revisions to draft maps, and even though communications between these consultants regarding the maps referred to having “a job to do,” wanting to “spread” the maps “around,” and “[h]ead[ing] up” to Tallahassee to “[t]ell[] folks to look at” certain maps.

The trial court found that the consultants “did their best to evade answering direct questions” at trial, “often using semantic distinctions to avoid admitting what they had done.” As this Court previously noted with respect to documents produced by Bainter that included communications among

the consultants regarding maps, “the documents support[ed] the challengers’ claim that Bainter was not just drawing maps out of casual ‘after-the-fact interest,’ but was actively engaged in an extensive process to draw maps favorable to a particular political party or incumbent and facilitate the submission of those maps to the Legislature through ‘shell people’ without any indication that the maps were drawn by the political consultants.” [Apportionment VI, 150 So.3d at 1129](#). For instance, one email produced by Bainter stated that a Republican activist in Gainesville was “getting” him “10 more people at least,” while another e-mail indicated that if one of the consultants could “think of a more secure and failsafe way to engage our people, please do it.”

The trial court found that the Bainter documents “evidenced a conspiracy to influence and manipulate the Legislature into a violation of its constitutional duty” to redistrict in a neutral, non-partisan fashion, and explained that those documents were “very helpful” in demonstrating not only that the consultants “were submitting maps to the legislature” through third parties, but “how extensive and organized that effort was, and what lengths they went to in order to conceal what they were doing.” The trial court also found it “hard to imagine” that the legislative leaders and staffers who allegedly told these consultants that they could not be involved, other than through the public process, “would not have expected active participation in the public redistricting process by those political consultants at the meetings” and would not have questioned both why the consultants were not in attendance at the public hearings and why none of the maps coming from the public had any of the consultants’ names on them. “I would think,” the trial court opined, “that the staff and legislative leaders would find [this lack of public participation by the consultants] extremely strange, that they might even ask why not. But they didn’t.”

According to the trial court, however, the consultants had no need to publicly participate in order to influence the Legislature’s redistricting plan. Throughout the process, Reichelderfer was in direct contact with Speaker Cannon. In one late November 2011 e-mail from Cannon to Reichelderfer, which copied Pepper, Cannon commented that “we are in fine shape” as long as “the Senate accommodates the concerns that you [Reichelderfer] and Rich [Heffley] identified in the map that they put out tomorrow.”

Cannon testified at trial that these “concerns” he was referring to were that the ***383** House and Senate “not roll out maps that were either completely inconsistent with one another

or designed to show some inadequacy in terms of either minority representation or defect in [the House’s] maps,” so that reconciliation between the two chambers would be difficult. The trial court found Cannon’s explanation to be “a stretch given the language used.”

The evidence also revealed that Cannon asked Reichelderfer and Heffley, who was described as being “close” to Senator Gaetz, to serve, as the trial court put it, “as go betweens for leadership of the two chambers regarding the redistricting process.” According to testimony relied on by the trial court, the asserted reason for Reichelderfer’s and Heffley’s involvement was “purportedly because of a lack of a good working relationship between the Speaker of the House and the President of the Senate.”

The trial court was skeptical of that explanation, however, stating that “by all accounts, the actual staff members of each chamber who were working on the maps got along well with each other, as did the chairmen of the redistricting committees.” The trial court actually found the staff members who testified at trial to be “straightforward and credible” and “not a part of the conspiracy.” In any event, the trial court specifically found that “in their insider roles, Heffley and Reichelderfer did not have to speak directly to staff map drawers, or even leadership, to infect and manipulate the map drawing and adoption process.”

At trial, Reichelderfer admitted to discussing “global” redistricting concerns with Speaker Cannon, but denied talking to Cannon “specifically about individual maps.” Reichelderfer lived near Cannon, their families spent time together, Reichelderfer saw Cannon on the weekends, and Reichelderfer met with Cannon to discuss issues he was dealing with as Speaker.

Reichelderfer also correctly informed other consultants about which of the Legislature’s draft maps was most “relevant,” meaning which was most likely to advance in the process. Among the seven congressional maps released to the public by the House on December 6, 2011, the map identified by Reichelderfer as the map most likely to advance was the map that was revised to become the House’s final proposed congressional map. At trial, Reichelderfer could not “recall specifically” how he knew that map to be the most likely to advance in the process, simply stating that if he “had that information for sure,” he wouldn’t have used the qualifier “I think” in his response. He testified that he “could have” just

thought it “was the easiest to pair up with the Senate version of the map.”

Communications among the consultants revealed particular emphasis on certain areas of the map. For instance, in one e-mail referencing a configuration in a draft map that kept District 14 contained entirely within Hillsborough County—a configuration less favorable to Republicans than the configuration ultimately enacted, which crossed Tampa Bay to pick up voters from Pinellas County in District 14—Terraferma noted to Heffley that “Tampa is far from perfect.” The enacted configuration of Districts 13 and 14—where District 14 includes a portion of Pinellas County, rather than being strictly within Hillsborough—produced one safe Democratic seat and one seat that either party could win, rather than two naturally-occurring seats favorable to Democrats. This was the configuration preferred by the consultants.

In another e-mail between Terraferma, Heffley, and Reichelderfer sent on the same day the Senate released a public map that did not divide the City of Homestead *384—a division considered by the consultants to be important to favor Republicans—Terraferma noted that District 26 was “pretty weak.” Heffley responded, “The [H]ouse needs to fix a few of these,” and Terraferma, copying Reichelderfer, responded, “yes.” The enacted configuration did, indeed, split the City of Homestead between Districts 26 and 27, which turned one Republican district and one Democratic district into two Republican-leaning districts.

The decision to split Homestead was one of several key decisions made in a non-public meeting between Senator Gaetz, Representative Weatherford, and the two staff directors of the respective redistricting committees. While the meeting of two legislators in private does not result in a violation of  article III, section 4(e), of the Florida Constitution—which requires all meetings between “more than two members” of the Legislature to be open to the public—the lengths to which the legislators went to avoid triggering the requirements for a public meeting in the final stages of negotiating and making changes to the districts raises questions as to the motivation of the Republican leadership. It also stands in stark contrast to statements from that leadership proclaiming that the 2012 redistricting process would be the most open and transparent in Florida's history. And, it can be readily distinguished from other legislative decisions where private negotiations are undertaken, since redistricting involves “a constitutional

restraint on the Legislature's actions.”  *Apportionment IV*, 132 So.3d at 147.

Indeed, many final revisions that affected numerous districts in some way—such as the decision to push the Black Voting Age Population (BVAP) of District 5 over 50%, add an appendage to District 10, split Homestead, and increase the Hispanic Voting Age Population (HVAP) of Districts 9 and 14—were made in this non-public meeting that occurred after the House and Senate had each passed their versions of the congressional map. The decisions regarding District 5 and District 10 specifically contributed to the trial court's decision to invalidate those two districts.

There was, in general, either conflicting or vague testimony as to why certain decisions were made in this meeting, including that the decisions were necessary to comply with the federal Voting Rights Act or some other policy concern. Because the meeting was not public, however, there is no official record of the reason for these decisions, which ultimately benefitted the Republican Party.

One example of a key decision made during this non-public meeting was the decision to push the BVAP of District 5 over 50%. Although he could not recall specifics, Representative Weatherford testified that making District 5 a majority-minority district was “important to the Senate” and that the Senate made a “compelling case” for raising the BVAP of the district over 50%. The highest BVAP for District 5 in any of the House's draft maps was slightly over 48%. Senator Gaetz testified that the Senate believed it was important to increase the BVAP to over 50% to protect against a federal Voting Rights Act challenge, and that he also favored keeping the City of Sanford in the district, which the House's version of the map did not do.

Before Representative Weatherford met with Senator Gaetz, Speaker Cannon met separately with Representative Weatherford and staff in another non-public meeting. Speaker Cannon anticipated that the Senate would ask to make District 5 a majority-minority district and apparently instructed the House during this non-public meeting to agree to the Senate's request. Ensuring that the BVAP of District *385 5 ended up over 50% was of particular concern to Reichelderfer, the consultant who was part of Speaker Cannon's “inner circle.”

At trial, Reichelderfer testified, without specificity, that he believed pushing the BVAP of District 5 over 50% was important “to comply with the Federal Voters Rights Act,”

based on a general recollection of discussions with lawyers whose names he could not recall. He thought it would be “politically damaging” if the map was invalidated because of a successful Voting Rights Act challenge, even though the 2002 version of District 5 did not have a BVAP of over 50% and was not invalidated during Voting Rights Act litigation.

See  *Martinez*, 234 F.Supp.2d at 1307 (noting that the BVAP of the 2002 version of District 5 was “only” 46.9%, but that the district “will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice”). At the same time, increasing the BVAP of District 5—as occurred from early versions of the Legislature's draft maps to the enacted version—decreased the Democratic performance of surrounding districts.

The trial court found the Legislature's justification for making District 5 a majority-minority district to be “not compelling” and invalidated the enacted version of District 5. The Legislature's decision—made in a non-public meeting, after Cannon's instruction in a separate non-public meeting, consistent with a concern Reichelderfer had long expressed—is therefore circumstantial evidence of collusion between the Legislature and the consultants, particularly where the trial court found there to have been no showing that it was legally necessary to create a majority-minority district.

There is no record from the time many of these key decisions were made to explain the Legislature's reasoning. This is, of course, partly because the final decisions were made in a non-public meeting. But it is also because the Legislature, as the trial court found, deleted almost all e-mails and documentation related to redistricting.

Former Speaker Cannon testified that his e-mails were automatically deleted after six months unless specifically saved as having “significant archival or legal significance.” If that were the case, then exchanges between Speaker Cannon and consultant Reichelderfer that occurred in late November 2011—discovered from document production by Reichelderfer—would not have been deleted until May 2012 unless they were intentionally deleted before that time. But May 2012 was several months after the lawsuit was filed in this case, naming Cannon as a party and making a reality what the Legislature itself had previously acknowledged, as far back as December 2012, to have been “a moral certainty” from “start to finish” during the redistricting process—that records related to redistricting would be sought by the

challengers and relevant to adjudicating the constitutionality of the Legislature's redistricting plan.

Ultimately, based on the evidence the challengers uncovered and presented at trial, the trial court found that there was “just too much circumstantial evidence” and “too many coincidences” to reach any conclusion other than that the political operatives had “infiltrate[d] and influence[d] the Legislature” in order to “obtain the necessary cooperation and collaboration” to “taint the redistricting process and the resulting map with improper partisan intent.” While it is sometimes said that it is “hard to believe in coincidence,” the trial court determined in this case that, as the saying goes, it was “even harder to believe in anything else.” After reviewing all the *386 evidence, both direct and circumstantial, the trial court thus concluded that the plan was drawn with improper partisan intent.

C. STEPS AFTER FINDING UNCONSTITUTIONAL INTENT

Despite its finding of unconstitutional partisan intent, however, the trial court invalidated only Districts 5 and 10, rejecting challenges to seven other individual districts. The trial court determined that there was no “distinction” between a challenge to the plan as a whole and a challenge to specific districts, and therefore “focused on those portions of the map” that it found to be “in need of corrective action in order to bring the entire plan into compliance with the constitution.”

Its finding of unconstitutional intent notwithstanding, the trial court applied a deferential standard of review in analyzing each challenged district, “deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.” Believing that the “more reliable” indicators of whether the plan was drawn with the intent to favor a political party or incumbent were the tier-two constitutional measures, 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 where feasible, then consider[ed] any additional evidence that supports the inference that such districts are also in violation of tier-one requirements.”

Applying this analysis as to District 5, the trial court noted that the decision to increase the BVAP of District 5 over 50% was made at a non-public meeting at the end of the redistricting

process and ultimately found that there was no showing “that it was legally necessary to create a majority-minority district.” The trial court therefore concluded that the challengers had proved “that District 5 unnecessarily subjugates tier-two principles of compactness” and that “portions of District 5 were drawn to benefit the Republican Party, in violation of tier-one.”

As to District 10, the trial court noted an “odd-shaped appendage” and found that the challengers had “shown that the district could be drawn in a more compact fashion, avoiding this appendage.” The trial court therefore concluded, based in part on an inference it drew from the existence of the odd-shaped appendage that had no legal justification, that District 10 was drawn to benefit the Republican Party and the incumbent.

Accordingly, the trial court required Districts 5, 10, and “any other districts affected thereby” to be redrawn. But 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.

As a remedy, the challengers urged the trial court to adopt one of their remedial plans, draw its own remedial plan, or hire an independent expert to draw a remedial plan. After a hearing, the trial court declined the challengers' suggestions and determined that the Legislature should redraw the plan.

The Legislature held a special session in August 2014 to enact a remedial redistricting plan. During this session, the chairs of the respective redistricting committees again conducted non-public meetings with staff and counsel to negotiate the features of the revised plan. The Legislature made modest changes to correct the specific tier-two deficiencies identified in Districts 5 and 10,⁸ and, after the plan was signed into *387 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.

Concluding that the challengers' objections to the validity of the remedial plan were without merit, 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 2016 effective date for the remedial plan has not been challenged.

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. *See League of Women Voters of Fla. v. Detzner*, No. 1D14–3953, —So.3d —, —, 2014 WL 4851707, at *2 (Fla. 1st DCA Oct. 1, 2014). We accepted jurisdiction under article V, section 3(b) (5), of the Florida Constitution, and heard oral argument. *See League of Women Voters of Fla. v. Detzner*, No. SC14–1905, 2014 WL 5502409, at *1 (Fla.Sup.Ct. order filed Oct. 23, 2014).

III. ISSUES OF “INTENT”

Having set forth this comprehensive background, we now turn to the legal issues pertaining to the trial court's finding of unconstitutional intent. First, we consider the “intent” standard itself and whether the trial court correctly applied the standard in this case. Then, we review the legal sufficiency of the trial court's finding.

A. THE “INTENT” STANDARD

[12] Article III, section 20, of the Florida Constitution, prohibits an apportionment plan or individual district from being “drawn” with the “intent to favor or disfavor a political party or an incumbent.” Art. III, § 20(a), Fla. Const. All parties in the litigation, the trial court stated, “agreed that it is the Legislature's intent”—not the intent of, for instance, one rogue “staff member charged with actually drawing the map,” or of political consultants with no influence on the Legislature—“that is at issue.” But how to determine the Legislature's intent in this unique context, where the Florida Constitution contains an explicit prohibition on certain improper legislative intent in “draw[ing]” the redistricting plan, is a much more difficult proposition.

 In *Apportionment I*, 83 So.3d at 617, this Court explained that “the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent.” (Emphasis supplied.) There is, this Court held,

“no acceptable level of improper intent.” *Id.* The “intent” standard “applies to both the apportionment plan *as a whole* and to each district individually.” *Id.* (emphasis supplied). This Court’s precedent discussing the “intent” standard in the course of prior cases during this litigation has demonstrated this principle—that improper intent, particularly if “part of a broader process to develop portions of the map,” may “directly relate to whether the plan *as a* *388 *whole* or any specific districts were drawn with unconstitutional intent.”

 *Apportionment IV*, 132 So.3d at 150 (emphasis supplied).

[13] In a traditional lawsuit involving a challenge to a statutory enactment, courts determine legislative intent through statutory construction, looking to the actual language used and any other tools—such as the history of legislative changes and any appropriate interpretive canons—to assist in discerning the Legislature’s intent in enacting the law. *See, e.g.,*  *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 198–99 (Fla.2007) (setting forth the general principle of statutory interpretation that “legislative intent is determined primarily from the statute’s text” and applying rules of statutory construction “to determine the legislative intent behind the provision,” including reading related statutory provisions together to achieve a consistent whole and avoiding readings that would render part of a statute meaningless). As this Court has previously explained, however, determining whether the Legislature acted with the type of improper “intent” that is prohibited by the “specific constitutional mandate of [article III, section 20\(a\)](#), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.”  *Apportionment IV*, 132 So.3d at 150.

Specifically, this Court held in largely rejecting claims of legislative privilege in *Apportionment IV* that, because the decision-making process itself is the case, “the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.” *Id.* This Court further stated that the “existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits,” and that evidence of this separate process would “clearly” be “important” to help support a “claim that the Legislature thwarted the constitutional mandate.”  *Id.* at 149.

[14] Following this Court’s precedent, which “emphasize[s] that this case is wholly unlike the traditional lawsuit challenging a statutory enactment,”  *id.* at 151, the trial court framed the “intent” inquiry as determining “the motive in drawing” the districts. We agree that this was the correct approach. Under this framework, the trial court appropriately concluded that “the actions and statements of legislators and staff, especially those directly involved in the map drawing process[,] would be relevant on the issue of intent.”

[15] Case law supports the trial court’s conclusion, which is consistent with our decision in *Apportionment IV*, that the intent of individual legislators and legislative staff members involved in the drawing of the redistricting plan is relevant in evaluating legislative intent. The United States Supreme Court, for example, has recognized that the actions of individual legislators and staff members may be relevant in discerning legislative intent in the context of redistricting.

In  *Easley v. Cromartie*, 532 U.S. 234, 254, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), the Supreme Court reviewed “direct” evidence, relied on by a federal district court evaluating a claim of racial predominance in North Carolina’s congressional redistricting plan, involving an e-mail sent from “a legislative staff member responsible for drafting districting plans” to two state senators. The Supreme Court noted that the e-mail’s “reference to race” offered “some support” for the district court’s conclusion that the *389 North Carolina Legislature used race as the “predominant factor” in drawing the boundaries of a particular district. *Id.*; *see also*  *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (stating that the “specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes” and that “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role”).

Other redistricting cases have confirmed this principle.

In  *Texas v. United States*, 887 F.Supp.2d 133, 165 (D.D.C.2012),⁹ cited by the trial court, a three-judge federal district court panel stated that its “skepticism about the legislative process that created [a challenged district] [wa]s further fueled by an email sent between staff members on the eve of the Senate Redistricting Committee’s markup of the proposed map.” *See also*   *Smith v. Beasley*, 946 F.Supp. 1174, 1210 (D.S.C.1996) (stating that “the evidence [wa]s

clear that the Reapportionment Subcommittee delegated to its staff ... the responsibility of drawing the district lines,” and subsequently evaluating the actions of those staff members). In other words, the federal district court looked to the actions of legislative staff members directly involved in the redistricting process to assist in evaluating whether the Legislature was acting with improper intent. Whether the actions of individual legislators or staffers ultimately signify constitutionally improper intent—as the trial court concluded in this case, despite finding the professional staff to be credible—is a separate question from whether their intent is relevant, in the first place, to evaluating the intent of the Legislature in drawing the redistricting plan.

In support of its contrary argument that “[c]ourts across the country ... refuse to impute the personal motivations of individual legislators to the legislative body as a collective whole,” the Legislature offers a catalogue of citations to cases from other jurisdictions. But, as the challengers have pointed out, these cases and the arguments made by the Legislature in this case closely mirror the exact cases and arguments this Court distinguished and rejected for the same basic principle in *Apportionment IV*.

In that case, this Court specifically stated that “this case is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case.” [Apportionment IV](#), 132 So.3d at 150. Indeed, in *Apportionment IV*, we determined that the actions of the individual legislators and legislative staff members involved in the drawing of the redistricting plan *were* directly relevant to assessing whether the plan itself was drawn with improper intent. See [id.](#) at 137 (“[T]he issue presented to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory ‘intent.’”).

***390** Accordingly, we hold that the trial court correctly framed the “intent” inquiry and reject the Legislature’s assertion that the finding of unconstitutional intent could not be ascribed to the Legislature as a whole. Having reached the conclusion that the trial court did not err in evaluating the

actions of legislators and legislative staff members in finding unconstitutional “intent,” as prohibited by [article III, section 20](#), we turn next to the legal sufficiency of the trial court’s finding.

B. LEGAL SUFFICIENCY OF UNCONSTITUTIONAL INTENT

[16] Our review of the trial court’s finding of unconstitutional intent in the congressional redistricting plan takes place against the backdrop of the trial court’s specific finding that the Legislature “systematically deleted almost all of their e-mails and other documentation relating to redistricting.” The Legislature did so despite knowledge that litigation over the constitutionality of its redistricting plan was inevitable.

In fact, as far back as 2008, the Legislature argued to this Court that “litigation challenging reapportionment under the new standards” would increase as a result of the Fair Districts Amendment. See *Advisory Op. to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So.3d 161, 165 (Fla.2009). And, the Legislature informed the trial court in this case that litigation “was ‘imminent’ long before the days preceding the filing of” the challengers’ lawsuit. From “start to finish,” the Legislature asserted, the 2012 redistricting process, “more than any other, was conducted in an atmosphere charged with litigation.”

To be sure, the Legislature did preserve some records related to redistricting—documents showing, for instance, the time and location of public meetings or other generally benign details of the process. But the Legislature saved virtually no communications among legislators and staff and none of the communications—which, as a result of this case, we now know to have occurred—involving the outside political consultants.

The Legislature had no specific policy requiring it to preserve communications regarding redistricting, even though it knew litigation was certain to occur, and admits that its record-retention policies applied in the same manner to redistricting as they applied to all types of legislative business. The House’s policy, for example, specified that “records that are no longer needed for any purpose and that do not have sufficient administrative, legal, or fiscal significance to warrant their retention shall be disposed of systematically.” Fla. H.R. Rule 14.2(b) (2010–2012).

To the extent the Legislature argues that it had no reason to know it needed to preserve these records because it could not have anticipated this Court's decision in *Apportionment IV* rejecting its broad claim of legislative privilege over communications related to redistricting, the Legislature had, according to testimony at trial, determined as early as January 2011 that no privilege would apply to any of its communications with outside political consultants. In other words, the Legislature clearly knew that communications between, for instance, Speaker Cannon and consultant Reichelderfer would not be privileged, that they would be sought in litigation, and that litigation was certain to occur. Yet, Speaker Cannon did not preserve these records—and the only reason we now know these communications occurred is because records were produced during the litigation by Reichelderfer. The same is true of non-public draft redistricting maps sent to Reichelderfer by legislative *391 staffer Kirk Pepper, using a personal e-mail account and a since-deleted “Dropbox” account.

The trial court stated that there was “no legal duty on the part of the Legislature to preserve these records, but you have to wonder why they didn't,” given that litigation was certain to occur. Although the Legislature's failure to preserve records apparently did not violate a specific rule of legislative procedure regarding records retention—even though at least some of these records likely did have sufficient legal significance to have warranted their retention—Florida courts have, in any event, found a duty to preserve evidence in other circumstances when a party should reasonably foresee litigation. See *Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So.2d 547, 549 (Fla. 4th DCA 2005) (noting holdings that “a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim”). And this Court, in rejecting the Legislature's broad claim of legislative privilege in *Apportionment IV*, clearly held that the “purpose behind the voters' enactment of the article III, section 20(a), standards will be undermined” if “the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery.”

132 So.3d at 149.

[17] [18] [19] [20] Even in the absence of a legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. As this Court explained in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 346 (Fla.2005), Florida courts

may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. If the evidence was negligently destroyed, a rebuttable presumption of liability may arise. *Id.* at 347. In other words, as recognized by the Fourth District Court of Appeal, “an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.” *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006) (quoting *Martino v. Wal-Mart Stores, Inc.*, 835 So.2d 1251, 1257 (Fla. 4th DCA 2003), approved, 908 So.2d 342); see also *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA 2002) (stating that “[c]ases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations” that may be subject to sanctions).

The trial court was, therefore, justified in drawing an adverse inference against the Legislature in adjudicating the challengers' claim of unconstitutional partisan intent. And we too must consider the Legislature's “systematic[] delet[ion]” of redistricting records in evaluating whether the trial court's finding is supported by competent, substantial evidence.

[21] Turning to the merits of the trial court's finding, we have little trouble concluding that competent, substantial evidence of unconstitutional intent exists in the record. The Legislature asserts that the trial court did not find improper intent in the plan as a whole and, in particular, contends that there was no collaboration between partisan operatives and the Legislature in drawing the congressional redistricting plan. While acknowledging that partisan operatives “sought to influence the redistricting process,” the Legislature states that “at no time did the Legislature participate in their efforts.” If features from the operative-created maps made it into the enacted map, the Legislature says, it is simply because those features *392 were obvious or the similarities “superficial,” and not because the operatives' “frenetic efforts to make themselves relevant” were successful. In other words, the Legislature argues that it “did not conspire with the operatives, despite the operatives' efforts.”

We reject the Legislature's attempt to water down the trial court's findings and the inferences the trial court drew from the circumstantial evidence presented by pointing to an alleged lack of connection between the “parallel” process and the Legislature. The trial court found that it was “convince[d]” by the “circumstantial evidence introduced at

trial” that the political operatives “obtain[ed] the necessary cooperation and collaboration” from the Legislature to ensure that the “redistricting process and the resulting map” were “taint[ed]” with “improper partisan intent.” Indeed, the trial court specifically found that the operatives “were successful in their efforts to influence the redistricting process and the congressional plan under review.”

Nevertheless, the Legislature asserts that any conclusion that the whole plan was motivated by partisan intent “assumes the complicity of professional staff,” which is an “assumption” it claims the trial court rejected. While the trial court did find the professional staff to be “credible” and not to have been “part of the conspiracy,” the trial court immediately dismissed the Legislature’s argument about the effect of the staff having been insulated from the improper intent—which it called the “most compelling evidence in support” of the Legislature’s defense—by stating that the “political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration” to “taint the redistricting process and the resulting map with improper partisan intent.” And while the trial court made no explicit credibility determinations regarding any of the legislators who testified, the trial court did specifically reject the innocuous explanations provided by former Speaker Cannon and his staffer, Pepper, for their communications with the political consultants.

[22] There is also no doubt that the trial court’s finding of unconstitutional intent pertained to the “process” of redistricting and the “enacted map” as a whole—to use the trial court’s own words—rather than solely to the two specifically invalidated districts as the Legislature contends. In finding “too much circumstantial evidence” to reach any conclusion other than that the “redistricting process” and the “resulting map” were “taint[ed]” by “improper partisan intent,” the trial court pointed specifically to the following evidence: the Legislature’s destruction of “almost all” e-mails and “other documentation relating to redistricting”; early meetings between legislative leaders and staff with political consultants regarding the “redistricting process”; and the “continued involvement” of political consultants in the “redistricting process.” None of this evidence relied on by the trial court was district-specific. The dissent’s contrary interpretation of the trial court’s finding of unconstitutional intent renders meaningless the trial court’s extensive discussion of—and critical findings related to—this evidence.

We also reject the Legislature’s suggestion that the trial court’s determination, in its order approving the remedial redistricting plan, that the Legislature had corrected the identified deficiencies in the map is dispositive in evaluating the scope of its finding of unconstitutional intent. Instead, as detailed in the next sections, the trial court’s decision to approve the Legislature’s remedial redistricting plan flowed *393 from the legal errors made in its original judgment.

Accordingly, for all these reasons, we affirm the trial court’s finding of unconstitutional intent. We turn next to the trial court’s two legal errors, which significantly affected its determination of the proper effect of its finding that the Legislature violated the Florida Constitution.

IV. TRIAL COURT’S FIRST LEGAL ERROR: FAILING TO PROPERLY ANALYZE THE CHALLENGE TO THE PLAN “AS A WHOLE”

[23] The first legal error committed by the trial court was its determination that there was no distinction between a challenge to the redistricting plan “as a whole” and a challenge to individual districts. This error 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.

Specifically, the evidence presented and considered by the trial court—evidence that actually led the trial court to find the existence of constitutionally improper partisan intent—included evidence pertaining both to the plan “as a whole” and to “specific districts.” Indeed, the trial court explicitly noted this, stating that “[o]ne of [the challengers’] claims is that *the entire redistricting process was infected by improper intent.*” (Emphasis supplied.)

Yet, despite its findings that partisan political consultants had “made a mockery” of the *process* and “managed to *taint the redistricting process and the resulting map* with improper partisan intent,” the trial court rejected the challengers’ distinction between their challenge to improper intent in the redistricting plan “as a whole”—a challenge, in effect, to the map that was produced from *the process*—and their challenge to “individual districts,” stating as follows:

[The challengers] distinguish between their challenge to the redistricting plan as a whole, as being drawn with the intent generally to favor the Republican Party, and

their challenge to several individual districts, as being specifically drawn with such intent. I find this to be a false dichotomy, a distinction without difference. The redistricting plan is the result of a single act of legislation. If one or more districts do not meet constitutional muster, 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.* [FN 5]

[FN 5] This is consistent with the approach taken by [this] Court in *Apportionment I*. The Court invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action. *Id.* at 684–686.

That does not mean, however, that portions of the map not affected by those individual districts found to be improperly drawn would need to be changed in a redrawn map, even if a general intent to favor or disfavor a political party or incumbents was proven. What would be the point if the other districts are otherwise in compliance? Such a remedy would go far beyond correcting the effect of such noncompliance, but rather would require a useless act that would encourage continued litigation. Therefore, I have focused on those portions of the map that I find are in need of corrective action in order to bring the entire plan into compliance with the constitution.

(Emphasis supplied.)

The dissent asserts that “[a]t no point does the trial court indicate that it would *394 permit some level of unconstitutional intent in the drawing of any district.” Dissenting op. at 419. But the trial court specifically concluded that districts could be “in compliance” with the constitutional standards “even if a general intent to favor or disfavor a political party or incumbents was proven.” This statement clearly indicates that the trial court considered a general improper intent to lack any independent legal significance unless it was accompanied by another constitutional violation, which is an interpretation that simply does not square with the Florida Constitution or this Court’s precedent.

This Court has held that “the Florida Constitution prohibits drawing a plan” with improper intent.  *Apportionment I*, 83 So.3d at 617. This Court has also held that “there is no acceptable level of improper intent.” *Id.* And, this Court has held that the “intent” standard “applies to ... the

apportionment plan as a whole.” *Id.* Accordingly, under these holdings, the trial court’s “general” finding of improper intent in the “process” must have some independent legal significance.

[24] The trial court, however, failed to give effect to that finding of improper intent, in part because it never separately considered the challenge to the plan as a whole and, critically, never gave any weight to the general improper intent in analyzing the individual district challenges. The challengers correctly note that the trial court’s finding of improper intent was based extensively on the existence of a “different, separate process that was undertaken contrary to the [Legislature’s public] transparent [redistricting] effort in an attempt to favor a political party or an incumbent.”

 *Apportionment IV*, 132 So.3d at 149. And, as this Court stated in *Apportionment IV*, the existence of such a “parallel” process is “important evidence in support of the claim that the Legislature thwarted the constitutional mandate.” *Id.*

In error, the trial court gave no legal weight to the existence of this separate process. The trial court’s decision to invalidate District 5 was supported by numerous factors distinct from the “parallel” process, including that the district as enacted was “not compact,” was “bizarrely shaped,” and did not “follow traditional political boundaries as it winds from Jacksonville to Orlando,” narrowing at one point to the width of a highway. The trial court found improper intent to benefit the Republican Party as to District 5 based on “the decision to increase the district to majority BVAP, which was accomplished in large part by creating [a] finger-like appendage jutting into District 7.” Then, the trial court simply “buttressed” this “inference” of improper intent, based on the existence of the “oddly shaped appendage [],” through “the evidence of improper intent in the redistricting process generally, and as specifically related to the drawing of District 5,” but did not independently rely on the “general” improper intent in any legally significant way.

In other words, aside from referencing the increase in the BVAP of District 5 over 50% during a non-public meeting at the end of the redistricting process, the trial court’s decision to invalidate District 5 was based solely on blatant tier-two violations. While this Court had to resort to evaluating tier-two violations as a means to infer improper intent when considering the challenges to the Senate and House maps in *Apportionment I*, as we emphasized at that time, we were constrained because we had no factual record and no direct

evidence of improper intent. Exactly the opposite was true in this case.

The trial court's decision to invalidate District 10 is analogous. Noting an “odd-shaped appendage which wraps under and *395 around District 5, running between District 5 and 9,” the trial court stated that the challengers had “shown that the district could be drawn in a more compact fashion, avoiding this appendage.” The trial court's conclusion that District 10 “was drawn to benefit the Republican Party and the incumbent” was “based in part on the inference that the Florida Supreme Court suggested [in *Apportionment I*] could be drawn from oddly shaped appendages that had no legal justification”—an “inference” that, as with District 5, was simply “buttressed by the general evidence of improper intent” in the process and by objective indicators relied on by this Court in *Apportionment I*.

In rejecting challenges to seven other individual districts, the trial court never referred to the “general evidence of improper intent” that it found to exist in the “process.” Rejecting the challenge to Districts 13 and 14, in the Tampa Bay area, the trial court stated that, “[u]nlike Districts 5 and 10, there are no flagrant tier-two deviations” from which the trial court could “infer” improper intent. “[U]nlike changes made to District 5 by the [legislative] leaders during conference committee”—the “evidence of partisan intent specifically related to District 5,” where the House agreed with the Senate's request to push the BVAP over 50%—the trial court determined that it could not conclude, “on partisan effect alone,” that certain decisions were made in drawing Districts 13 and 14 “with the intent to benefit the Republican Party or the incumbent member of Congress.”

Likewise rejecting the challenge to Districts 21 and 22, the trial court concluded that the challengers had “not met their burden of showing unnecessary deviation from tier-two requirements,” nor had they “shown that improper intent led to the adoption of Districts 21 and 22.” Similarly, with respect to Districts 25, 26, and 27, the trial court determined that the challengers had “not proved invalidity” because the “totality of the evidence” did not establish that the “configuration” of these districts “was based on unlawful partisan intent.” At no point in addressing the validity of any of these districts—in which the trial court rejected the challengers' contention that the districts were drawn with improper partisan intent—did the trial court address any effect of its findings regarding how the “process” had been “taint [ed]” with “improper partisan intent.”

In determining that there was no distinction between a challenge to the “whole map” and a challenge to individual districts, the trial court relied on this Court's prior decision to invalidate the entire state Senate plan in *Apportionment I*. Citing this Court's decision as support, the trial court stated that this Court “invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action.”

The trial court was correct that this Court invalidated the whole Senate plan, to the extent that it determined the plan did “not pass constitutional muster” for the purposes of this Court's article III, section 16, declaratory judgment review.  *Apportionment I*, 83 So.3d at 683. But, unlike here, this Court in *Apportionment I* did not find a general improper intent in the state Senate plan, aside from the district numbering system that was manipulated to favor incumbents. Nor could we have, based on the nature of the limited record before us.

In *Apportionment I*, we expressed our conclusion regarding the Senate plan as follows:

We have held that Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid. The Legislature should *396 remedy the constitutional problems with respect to these districts, redrawing these districts and any affected districts in accordance with the standards as defined by this Court, and should conduct the appropriate functional analysis to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries. As to the City of Lakeland, the Legislature should determine whether it is feasible to utilize the municipal boundaries of Lakeland after applying the standards as defined by this Court. In redrawing the apportionment plan, the Legislature is by no means required to adopt

the Coalition's alternative Senate plan. Finally, we have held that the numbering scheme of the Senate plan is invalid. Accordingly, the Legislature should renumber the districts in an incumbent-neutral manner.

Id. at 686.

In other words, this Court identified very specific deficiencies in the Senate plan—eight individual districts that were invalid, the failure to conduct a functional analysis, and the district numbering scheme. This Court did not conclude that the whole plan was unconstitutional because of improper intent in the whole plan, and this Court did not analyze—and could not have analyzed—the plan in that manner. Therefore, in relying on *Apportionment I* in this way, the trial court failed to give any actual effect to its finding in this case that the “whole plan” challenge had been proven through the direct and circumstantial evidence of improper partisan intent presented at trial.

Accordingly, for all these reasons, we conclude that the trial court erred in failing to recognize any distinction between a challenge to the redistricting plan “as a whole” and a challenge to individual districts. This error significantly affected the trial court's determination of the proper scope and legal effect of its finding of unconstitutional intent, particularly with regard to its analysis of the challenges to individual districts, and 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.

V. TRIAL COURT'S SECOND LEGAL ERROR: APPLYING A DEFERENTIAL STANDARD OF REVIEW

[25] The trial court's error in failing to properly analyze the challenge to the plan “as a whole” was compounded by its error in the deferential standard of review it applied after finding the existence of unconstitutional intent. Certainly, we recognize the difficult task the trial court faced, considering numerous issues of first impression and attempting to be faithful to this Court's redistricting decisions. And we commend the trial court for the superb and professional manner in which it handled this difficult litigation.

But, we conclude nevertheless that the trial court failed to recognize the critical differences between this Court's “facial” review of the state legislative redistricting plans in *Apportionment I* and the nature of the fact-based claims presented in this case. This legal error in the standard of review, as with the legal error in not recognizing the independent significance of the challenge to the plan “as a whole,” 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. Once the trial court found unconstitutional intent, there was no longer any basis to apply a deferential standard of review; instead, the trial court should have shifted *397 the burden to the Legislature to justify its decisions in drawing the congressional district lines.

The trial court's error as to the standard of review can be traced to its analysis in evaluating the challengers' claims, which it set forth as follows:

It seems that the more reliable focus in such an inquiry would be on what was actually produced by the Legislature, the enacted map. Specifically, an analysis of the extent to which the plan does or does not comply with tier two requirements is a good place to start. Can one draw a map that meets tier-two requirements but nonetheless favors a political party or an incumbent? Sure, but it is more difficult.

Furthermore, a failure to comply with tier-two requirements not only supports an inference of improper intent, it is an independent ground for finding a map unconstitutional. See [Apportionment I](#), 83 So.3d [at] 640–641. Additional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent. *Therefore, I first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, then consider any additional evidence that supports the inference that such districts are also in violation of tier-one requirements.*

(Emphasis supplied.) In other words, the trial court began by asking whether there was any tier-two violation—whether the district was compact, and whether it followed existing political and geographical boundaries where feasible. Then, the trial court considered the direct and circumstantial evidence of tier-one improper intent only as “additional evidence” to “strengthen or weaken” an “inference of improper intent” that was identifiable from tier-two

deficiencies. The trial court did so despite finding that the direct and circumstantial evidence itself had established a violation of the tier-one constitutional standards.

Although the trial court relied on *Apportionment I* as support for the standard of review it applied, the standard from that case—a facial review based on purely objective, undisputed evidence in the limited record before the Court—does not directly translate to this one—a fact-intensive challenge based on direct and circumstantial evidence developed during an adversarial trial. Discerning which aspects of the standard set forth in *Apportionment I* apply and which do not is thus of critical importance.

In *Apportionment I*, this Court rejected the arguments of the Attorney General and the House of Representatives “that a challenger must prove facial invalidity beyond a reasonable doubt,” as is generally considered to be the standard applied to a typical lawsuit challenging the constitutionality of a legislative enactment outside the context of redistricting.

 83 So.3d at 607. This Court considered the “beyond a reasonable doubt” standard to be both “a departure from [its] precedent in legislative apportionment jurisprudence” and “ill-suited” to the nature of its review. *Id.* “Unlike a legislative act promulgated separate and apart from an express constitutional mandate,” this Court stated, “the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the ‘instructions’ of the citizens as expressed in specific requirements of the Florida Constitution governing this process.”  *Id.* at 607–08.

Although the legislative redistricting plan comes before this Court “with an initial presumption of validity,” this Court explained that “the operation of this Court’s process in apportionment cases is *398 far different than the Court’s review of ordinary legislative acts,” including “a commensurate difference in [its] obligations.”  *Id.* at 606. Noting that the “new requirements” of the Fair Districts Amendment “dramatically alter[ed] the landscape with respect to redistricting,” this Court held that its scope of review had “plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.”

 *Id.* at 607. As this Court would later reason, “the framers and voters” of the Fair Districts Amendment “clearly desired more judicial scrutiny” of the Legislature’s decisions in redistricting. *Fla. House of Representatives v. League of Women Voters of Fla. (Apportionment III)*, 118 So.3d 198, 205 (Fla.2013).

[26] “It is this Court’s duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid.”

 *Apportionment I*, 83 So.3d at 607. However, this Court acknowledged in the context of its review in *Apportionment I* that it would “defer to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.”  *Id.* at 608. This Court emphasized that its “responsibility [wa]s limited to ensuring compliance with constitutional requirements.” *Id.* “[E]ndeavoring to be respectful to the critically important role of the Legislature,” this Court stated that its duty was “not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.” *Id.* (quoting  *In re Apportionment Law—1992*, 597 So.2d at 285).

Echoing this Court’s language in *Apportionment I*, the trial court determined—based on “the nature of the legislation and the nature of what is reviewed”—that it should apply the same standard to the challenge presented in this case. Therefore, reciting the principles from *Apportionment I*, the trial court set forth the standard for its review as follows:

I will therefore, in this case, apply the standard of review articulated in *Apportionment I*, deferring to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements, with an understanding of my limited role in this process and the important role of the Legislature. My duty “is not to select the best plan” but to determine whether [the challengers] have proved the plan invalid.

 *Apportionment I*, 83 So.3d 597 at 608.

The trial court then cited this standard, and its deferential review, in rejecting challenges to certain individual districts.

[27] We conclude that the trial court was correct, initially, in rejecting the “beyond a reasonable doubt” standard, as this Court did in *Apportionment I*. As this Court stated, “[u]nlike a legislative act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the ‘instructions’ of the citizens as expressed in specific requirements of the Florida Constitution governing this process.”  *Apportionment I*, 83 So.3d at 607–08. Just as there is a difference in evaluating legislative intent

with respect to the specific constitutional mandate outlawing improper partisan intent in redistricting, so too is there “a difference between the Court’s role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court’s role in interpreting statutes.”  *Id.* at 607 n. 5. The “reason for the different standard,” the trial court correctly noted, is that “the inquiry is into the process, the *399 end result, and the motive behind the legislation”—not “a question of searching for a reasonable interpretation of a statute which would make it constitutional.”

In this respect, the trial court was right to rely on *Apportionment I* in concluding that the nature of the legislation and the specific constitutional mandate outlawing partisan political gerrymandering require a different standard of review than applied in traditional cases challenging legislative enactments. Where the trial court erred, however, was in discounting the differences between *Apportionment I* and this case to conclude that the *same* standard must apply, even though this case involved direct and circumstantial evidence of tier-one constitutional violations that this Court had no ability to review in *Apportionment I*.

As this Court has explained, its review in *Apportionment I* was quite different than the challenge presented in this case. Unlike the fact-intensive challenge here, in which the parties had an opportunity to present extensive evidence during an adversarial trial pertaining to whether the plan and individual districts were drawn with improper intent, this Court’s review in *Apportionment I* was “a facial review based on objective, undisputed evidence in the limited record before the Court.” *Apportionment III*, 118 So.3d at 200.

 In *Apportionment I*, 83 So.3d at 634, this Court looked to objective measures and tier-two requirements—such as the existence of “bizarre shape[s]” and “appendages”—in an effort to discern whether the map was drawn with improper intent. As this Court stated, “in the context of Florida’s constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms.”  *Id.* at 640.

The evidence of improper intent in this case, to the contrary, involved direct and circumstantial evidence of tier-one violations of the constitutional intent standard. Yet, despite the existence of testimony and fact-based claims regarding

improper intent from a voluminous record that extended far beyond the legislative record to which this Court was constrained in *Apportionment I*, the trial court still determined that tier-two requirements—compactness and the use of political and geographical boundaries where feasible—were the “more reliable” indicators of improper intent, explaining that “a failure to comply with tier-two requirements” would “support[] an inference of improper intent,” and that “[a]dditional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent.” Based on this assumption, the trial court proceeded to “first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, [and] then consider[ed] any additional evidence that supports the inference that such districts are also in violation of tier-one requirements.”

Not surprisingly under this framework of analysis, only where the trial court found a tier-two violation—the appendages in Districts 5 and 10—did the trial court conclude that a district had been drawn with improper intent to favor a political party or incumbent. The independent finding that the “redistricting process” and the “resulting map” were “taint[ed]” with “improper partisan intent” was relegated to “buttress[ing]” the “inference” of improper intent based on the tier-two violation.

We conclude that the trial court erred in focusing first on tier-two violations at the expense of the evidence of tier-one violations *400 —violations it specifically found based on the evidence presented. The trial court’s error was then exacerbated by its decision to apply an unduly deferential standard to its review of the map, even after finding the existence of unconstitutional partisan intent.

Certainly, this Court explained in *Apportionment I* that the judiciary’s role in reviewing an apportionment plan enacted by the Legislature is “not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.”  *Apportionment I*, 83 So.3d at 608 (quoting  *In re Apportionment Law—1992*, 597 So.2d at 285). At that time, this Court stated the general principle that it would “defer to the Legislature’s decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements.” *Id.*

But, in *Apportionment I*, this Court was conducting a “facial” review of the legislative apportionment plan, without fact-

finding, to determine *whether* any improper intent existed in the plan. Unlike that context, here, the trial court *found* the existence of improper intent, based on evidence presented during an adversarial trial, yet still applied a deferential standard of review. That was error.

[28] The trial court conducted its review as if it were premature to directly address the impact of the tier-one violations the trial court itself specifically found. In particular, the trial court found that the Legislature had “cooperat[ed]” and “collaborat[ed]” with partisan political operatives to draft an apportionment plan favoring the Republican Party and incumbents—in other words, a finding of a tier-one constitutional violation. While the Legislature is generally entitled to deference as a result of its role in the redistricting process, that deference applies only “so long as [its redistricting] decision[s] do[] not violate the constitutional requirements.” [Apportionment I](#), 83 So.3d at 608.

[29] Once a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the Legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose of the Fair Districts Amendment and to this Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering.

Accordingly, after reaching the conclusion that the “redistricting process” and the “resulting map” had been “taint[ed]” by unconstitutional intent, the burden should have shifted to the Legislature to justify its decisions, and no deference should have been afforded to the Legislature's decisions regarding the drawing of the districts. In other contexts, states have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has “raised sufficient issues” with respect to state constitutional requirements. [In re Legislative Districting of State](#), 370 Md. 312, 805 A.2d 292, 325 (2002).

Because there are many ways in which to draw a district that complies with, for example, the constitutional requirement of compactness, which party bears the burden of establishing why a decision was made to accept or reject a particular configuration can ultimately be determinative. This can be seen in reviewing the seven maps initially released to the public by the House.

All of these maps were considered by the Legislature to be maps that complied with the tier-two constitutional standards.

*401 But, in one of the maps, designated as H000C9001, there were as few as 14 Republican districts based on 2008 presidential election data and 15 Republican districts based on 2012 presidential data. In the map chosen by the House to move forward in the process, designated as H000C9011, there were 16 Republican districts under both the 2012 and 2008 presidential results. And, after additional revisions, the Legislature's enacted map performed with 17 Republican districts under the 2008 data and 16 using the 2012 data—actually more favorable to Republicans than the performance of the admittedly gerrymandered 2002 districts under the same data.¹⁰ This consistent improvement in the Republican performance of the map—even when comparing maps the Legislature itself produced and considered tier-two compliant—reveals that there are many ways to draw constitutionally compliant districts that may have different political implications.

[30] 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. This is particularly true where the challengers presented evidence that the Legislature's choices ultimately benefitted the Republican Party and also showed alternative maps that performed more fairly.¹¹ Unlike in *Apportionment I*, where this Court remained deferential to the Legislature's decisions in the absence of a finding of improper intent, there is no longer any basis for this Court to be deferential to the Legislature in fulfilling its own “solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering ... in redistricting is effectively enforced.” [Apportionment IV](#), 132 So.3d at 137.

VI. LEGAL EFFECT OF FINDING UNCONSTITUTIONAL INTENT

Having now concluded that the trial court erred in the standard of review it applied, we proceed to consider the legal effect of the trial court's finding of unconstitutional intent under the appropriate standard. In so doing, we reject the dissent's

view that we have “transgressed the boundaries of proper appellate review” and “abandon[ed]” the “restraints of the appellate *402 process.” Dissenting op. at 422–23, 423–24. The Legislature vigorously defended the challenged districts. Rather than foster additional delay and risk another election under unconstitutional districts, we have all the record evidence necessary to evaluate now whether the Legislature’s justifications can withstand legal scrutiny.

A. DISTRICT 5

We begin with District 5, which has been a focal point of the challenge to the Legislature’s redistricting plan. Initially, the trial court invalidated District 5 as “visually not compact, bizarrely shaped,” and in contravention of “traditional political boundaries as it winds from Jacksonville to Orlando,” narrowing at one point to the width of a highway. After the Legislature removed an appendage from Seminole County and widened the district, however, the trial court upheld the remedial version of District 5, concluding that while still “not a model of compactness,” the revised district is “much improved.” Deferring to the Legislature, the trial court summarily rejected the challengers’ proposed East–West configuration of the district, determining that although this configuration was “somewhat more compliant” with the constitutional standards, there were “legitimate non-partisan policy reasons for preferring a North–South configuration for this district over an East–West configuration.”

The trial court did not elaborate as to what any of these “non-partisan policy reasons” were. The only legal justification offered by the Legislature, with the support of the Florida State Conference of NAACP Branches, for preferring a North–South configuration to an East–West orientation is to comply with the minority voting protection requirements of the Florida Constitution and the federal Voting Rights Act—specifically, that a North–South configuration is necessary to avoid diminishing the ability of black voters to elect a candidate of their choice.

The challengers contend, though, that the North–South configuration of this district is a linchpin to the Legislature’s efforts to draw a map that favors the Republican Party. They allege that the North–South configuration overpacks Democratic-leaning black voters into the district—that is, places more black voters in the district than is necessary to ensure that they can elect a candidate of choice—thereby diluting the influence of Democratic minorities in

surrounding districts. The challengers rely in part on a trilogy of cases in federal court that trace the unique history of this district, culminating in a 2002 decision from a three-judge panel finding that the Legislature’s “overriding goal with respect to congressional reapportionment” was to adopt a plan that “would maximize the number of districts likely to perform for Republicans.”   *Martinez*, 234 F.Supp.2d at 1300–01; see also  *DeGrandy v. Wetherell*, 794 F.Supp. 1076, 1087–88, 1090 (N.D.Fla.1992) (adopting a redistricting plan drawn by an independent expert, which created the predecessor to District 5 as a black majority-minority district); *Johnson v. Mortham*, 926 F.Supp. 1460, 1466–67, 1472, 1495 (N.D.Fla.1996) (noting that the prior version of District 5 split every one of the fourteen counties that made up the district, and even split individual precincts, and declaring that the district was “racially gerrymandered” in violation of the Equal Protection Clause).

Even as redrawn by the Legislature and approved by the trial court, District 5 clearly does not strictly adhere to the Florida Constitution’s tier-two requirements of compactness and the utilization of political or geographical boundaries where feasible. It splits seven counties and has numerical compactness scores of .127 on the Reock measure and .417 on the Convex *403 Hull measure, where 1 is the best score. The critical determination, then, is whether the North–South configuration of this district, which extends from Jacksonville to Orlando, is necessary to comply with either the federal Voting Rights Act or the tier-one state constitutional requirement that no district shall be drawn in such a way as to diminish the ability of black voters to elect a representative of their choice—the justifications offered by the Legislature.

[31] Having reviewed the arguments of the parties in detail and studied the unique nature of this district, we conclude that the Legislature has failed to meet its burden to demonstrate that District 5, even as revised, passes constitutional muster. We further conclude that, because the trial court found that District 5 was a key component of the Legislature’s unconstitutional intent in the drawing of the congressional redistricting plan, the trial court erred in conducting only a cursory review of the remedial district and deferring to the Legislature’s North–South configuration on the basis of unstated “non-partisan policy reasons.”

Since the Legislature cannot prove that the North–South configuration is necessary to avoid diminishing the ability

of black voters to elect a candidate of their choice, we hold that District 5 must be redrawn in an East–West manner. While the dissent suggests that this holding displaces the Legislature's chosen configuration with a configuration drawn by operatives aligned with the Democratic Party, *see* dissenting op. at 422, the argument for an East–West orientation of this district is not exclusive to the Democratic Party. In fact, an East–West orientation is the only alternative option, and one that the Legislature's own map drawers—insulated, the dissent itself states, from partisan influence—considered during the redistricting process.

We reach our conclusion as to the continued unconstitutionality of District 5 for several reasons. First, the Legislature's configuration was entitled to no deference in light of the trial court's finding of unconstitutional intent. The trial court clearly found that the Legislature's intent in drawing the congressional redistricting plan generally, and District 5 specifically, was to benefit the Republican Party. The Legislature's configuration also had the effect of benefitting the long-time incumbent of the district, Congresswoman Corrine Brown, who previously joined with leading Republicans in actively opposing the Fair Districts Amendment and redistricting reform. *See*  [Brown](#), 668 F.3d 1271. Indeed, the remedial version of District 5 still retains approximately 80% of its 2002 benchmark—a redistricting map that was admittedly gerrymandered to favor the Republican Party and incumbents. *See*   [Martinez](#), 234 F.Supp.2d at 1340.

Retaining the same basic shape, while merely tweaking a few aspects of the district, does not erase its history or undo the improper intent that the trial court found. The trial court's decision to defer to the Legislature's configuration is contrary to the proper standard that should have applied—shifting the burden to the Legislature to justify its enacted configuration—particularly where the trial court itself continued to acknowledge that the district is “not a model of compactness.”

We conclude that the Legislature cannot justify its enacted configuration. Despite the Legislature's repeated contentions that a North–South orientation of the district is the only option and is essential to avoid diminishing the ability of black voters to elect a candidate of their choice, there is simply insufficient evidence to support that assertion. Indeed, legislative staffer Alex Kelly initially drew an East–West version of the district, with a BVAP of 44.96%, and *404 concluded that such a configuration would be constitutionally

compliant. The Legislature relies on the trial court's finding that Kelly was straightforward and credible elsewhere, but offers no persuasive explanation as to why this version of District 5 was rejected or why Kelly's assessment in this circumstance was incorrect.

During the trial, the Legislature argued that it had increased the BVAP of District 5 over 50%—a decision made during a non-public meeting at the end of the redistricting process—in order to prevent vote dilution and avoid retrogression. The trial court specifically found that argument to be “not supported by the evidence” and there to have been no showing that a majority-minority district was “legally necessary.”

After redrawing the district, the BVAP of remedial District 5 is 48.11%. The Legislature continues to argue that any additional diminishment in the BVAP would prevent black voters from electing a candidate of their choice. But neither the evidence, nor the case law, bears this out.

As of 1996, following the decision in *Johnson* that required the predecessor district to be redrawn, the predecessor to District 5 had a total black population of 47.0% and a total BVAP of 42.7%.   [Martinez](#), 234 F.Supp.2d at 1308. By 2000, the benchmark district had a total black population of 50.8% and a total BVAP of 46.7%. *Id.* The district performed for the black candidate of choice in every election from 1992 through 2000. *Id.*

In 2002, the total black population of the district was 51.4%.   *Id.* at 1307. The total BVAP was 46.9%. *Id.* The federal court in *Martinez* determined that the BVAP of 46.9% “will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice.” *Id.* The actual election results show this to be true—the district has continued to perform for the black candidate of choice in every election from 2000 through the present.

The challengers' proposed East–West configuration of the district has a BVAP of 45.12%—higher than the BVAP in the initial draft district drawn by Alex Kelly. This is well within the range of the 42.7%, 46.7%, and 46.9% BVAP percentages that were addressed by the federal court in *Martinez* and considered to be sufficient to “afford black voters a reasonable opportunity to elect candidates of choice” and to “in fact perform for black candidates of choice.”¹² *Id.* “This is so in part because,” the federal court in *Martinez* stated,

blacks constitute 61.3% of registered Democrats in [the predecessor to District 5], and Democrats constitute 63.8% of registered voters. Republicans constitute only 22.7% of registered voters. Actual voting also is strongly Democratic; in the 2000 presidential election, voters in [the predecessor to District 5] voted 63.7% for Mr. Gore and 34.2% for Mr. Bush. The black candidate of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election.

Id. at 1308.

The same logic applies to an East–West configuration of the district. Black voters *405 constitute 66.1% of registered Democrats under this configuration, and Democrats constitute 61.1% of registered voters. Republicans, by contrast, constitute only 23.0% of registered voters. This compares very favorably to the same respective numbers in the 2002 district upheld by the federal court in *Martinez*.

Thus, in an East–West orientation of the district, the black candidate of choice is still likely to win a contested Democratic primary, since black voters constitute 66.1% of registered Democrats. And the Democratic candidate is still likely to win the general election, since Democratic voters outnumber Republicans 61.1% to 23.0%. In other words, just as noted in *Martinez* as a basis for concluding that the prior version of District 5 afforded black voters a reasonable opportunity to elect a candidate of choice, “[t]he black candidate of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election.”¹³   *Martinez*, 234 F.Supp.2d at 1308.

The Legislature's contrary argument rests entirely on the premise that the BVAP of the district cannot be decreased from 48.11% to 45.12%. Of course, the trial court already rejected the Legislature's argument, based on the same asserted interest in protecting black voters, that the BVAP needed to be over 50%, and in urging this Court to uphold the revised district, the Legislature has now tacitly conceded that 48.11% is sufficient.

But, beyond that, the United States Supreme Court has recently articulated—in a case with a similar claim of overpacking black voters to maintain the continued political dominance of the Republican Party in surrounding districts—that the BVAP itself cannot be viewed in a vacuum. In  *Alabama Legislative Black Caucus v. Alabama*, — U.S. —, 135 S.Ct. 1257, 1272, 191 L.Ed.2d 314 (2015), the

Supreme Court emphasized that it is the “ability to elect a preferred candidate of choice,” not “a particular numerical minority percentage,” that is the pertinent point of reference.

The language of the Voting Rights Act that protects against adopting a redistricting plan that “has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice”—language incorporated into our tier-one state constitutional standards—“does not require maintaining the same population percentages.”  *Id.* at 1272–73. Instead, the Supreme Court has told us, this requirement “is satisfied if minority voters retain the ability to elect their preferred candidates.”  *Id.* at 1273. Providing an example, the Supreme Court stated that “it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate.” *Id.*

Accordingly, we reject the Legislature's argument that an East–West version of the district would diminish the ability of black voters to elect a candidate of their choice. We also reject the dissent's contention that an East–West district causes *406 the redistricting map to become significantly less compact. *See* dissenting op. at 420–22. There is no doubt, as noted by the dissent, that the East–West orientation is longer, with a correspondingly greater perimeter and area. But length is just one factor to consider in evaluating compactness.

[32] As this Court stated in *Apportionment I*, “the object of the compactness criterion is that a district should not yield ‘bizarre designs.’ ”  83 So.3d at 634. And as the Supreme Court of Washington has recognized, in a decision cited favorably by this Court in *Apportionment I*, “the phrase ‘as compact as possible’ does not mean ‘as small in size as possible,’ but rather ‘as regular in shape as possible.’ ” *Kilbury v. Franklin Cnty. ex rel. Bd. of Cnty. Comm'rs*, 151 Wash.2d 552, 90 P.3d 1071, 1077 (2004).

There is no doubt that an East–West version of District 5 is visually less “unusual” and “bizarre” than the meandering North–South version enacted by the Legislature.

 *Apportionment I*, 83 So.3d at 634. There is also no doubt that the numerical compactness scores actually favor the East–West orientation: the different configurations have essentially the same Reock score (.12 for a proposed East–West version of the district, and .13 for the Legislature's

North–South, where 1 is the most compact), while an East–West district fares significantly better on the Convex Hull measure (.71 for the East–West as compared to .42 for the North–South, where 1 is again the most compact). Further, an East–West orientation allows for fewer incorporated city and county splits than the Legislature's North–South district—another consideration in determining tier-two compliance.

The reality is that neither the North–South nor the East–West version of the district is a “model of compactness,” as the trial court stated. Other factors account for this phenomenon, “including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish

their ability to elect representatives of their choice.” *Id.* at 635. And while the dissent cherry-picks a favorable statistic to highlight the supposed decrease in the compactness of District 2 under an East–West version of District 5, *see* dissenting op. at 421–22, the challengers have demonstrated that the decrease in the compactness of District 2 is an outlier; in fact, as few as four and as many as seven other districts can be drawn in a more compact manner by drawing District 5 from East to West.

The bottom line is that none of the Legislature's justifications for its gerrymandered version of District 5, and none of its complaints about an alternative East–West configuration, can withstand legal scrutiny. Because the trial court erred in deferring to the Legislature's enacted North–South configuration, and because the Legislature cannot justify this configuration, District 5 must be redrawn in an East–West orientation.

B. DISTRICTS 13 & 14

[33] We turn next to Districts 13 and 14, in the Tampa Bay area, which the challengers contended were drawn in violation of the constitutional requirements. In addition to relying on the trial court's finding that the entire map was tainted by unconstitutional intent, the challengers asserted specifically that the Legislature's configuration of Districts 13 and 14 mirrored the configuration known to have been favored by political operatives, in which District 14 was drawn to cross Tampa Bay from Hillsborough County, splitting *407 Pinellas County and the City of St. Petersburg to move a portion of the black population from District 13 into District 14. In support, the challengers pointed to an

e-mail communication from consultant Frank Terraferma to consultant Rich Heffley and an employee of the Republican Party of Florida, which described this region as “far from perfect” in a draft map where District 14 did not cross Tampa Bay.

The enacted configuration of these two districts, which crossed Tampa Bay, added more Democratic voters to an already safely Democratic District 14, while ensuring that District 13 was more favorable to the Republican Party.¹⁴ The challengers thus contended that the Legislature's configuration of these districts was directly connected to the trial court's finding that the enacted map was unconstitutionally drawn to favor the Republican Party.

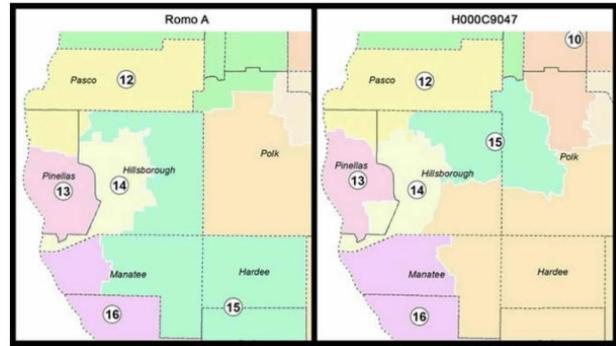
The trial court denied the challenge to these districts, reasoning that there were “no flagrant tier-two deviations from which” to “infer unlawful intent.” The trial court stated that it “simply” could not “conclude, on partisan effect alone, that the decision to incorporate portions of South St. Petersburg into District 14 was done with the intent to benefit the Republican Party or the incumbent member of Congress.”

We conclude that the trial court erred in rejecting the challenge to these districts. The trial court erroneously required a “flagrant tier-two deviation” in order to “infer unlawful intent,” rather than viewing the configuration of these districts through the lens of the direct and circumstantial evidence of improper intent presented at trial. Once the trial court found unconstitutional intent, the Legislature's enacted configuration was no longer entitled to deference, and it becomes the Legislature's burden to justify its decision to draw the districts in a certain way.

The Legislature's asserted justification for picking up voters from Pinellas County in District 14 was to increase minority voting strength in that district, which the Legislature considered to be preferable—though not required—from a state constitutional tier-one and federal Voting Rights Act perspective. The trial court did not, however, make any findings that it was necessary to add black voters from Pinellas County to District 14 in order to avoid diminishing the ability of black voters to elect a representative of their choice.¹⁵

During trial, the challengers showed that it is possible not to cross Tampa Bay and still maintain tier-two compliance. In fact, as the charts below indicate,¹⁶ following the county boundary significantly increases the numerical compactness

scores of District 13, although it does cause a decrease in the scores of surrounding districts.



Reock Score¹⁷

Convex Hull Score¹⁸

	Enacted Plan (H000C9047)	Romo Alternative (Romo A)	Enacted Plan (H000C9047)	Romo Alternative (Romo A)
CD12	0.40	0.38	0.81	0.79
CD13	0.46	0.57	0.82	0.91
CD14	0.36	0.28	0.69	0.60
CD15	0.44	0.33	0.75	0.67
CD16	0.42	0.32	0.81	0.80
CD17	0.64	0.39	0.83	0.68
AVG.	0.45	0.38	0.79	0.74

*408 In rejecting the challenge to these districts, the trial court emphasized the decrease in the overall compactness scores in the region, ultimately determining that the Legislature “was not required to make this tradeoff in compactness to avoid splitting Pinellas County.” However, as this Court has recognized, following county lines may result in a reduction in compactness scores. See *Apportionment I*, 83 So.3d at 635 (explaining that the compactness of the districts “cannot be considered in isolation” *409 because other factors influence a district’s compactness, including the “Legislature’s desire to follow political or geographical boundaries or to keep municipalities wholly intact”).

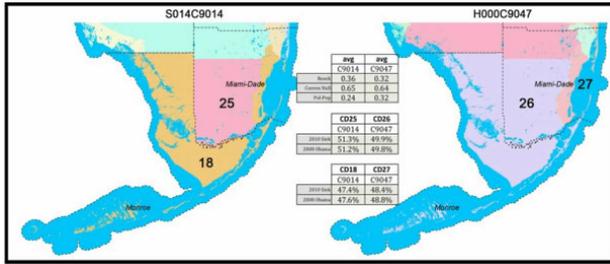
The trial court’s decision to defer to the Legislature’s configuration was contrary to the proper standard that should have applied once the trial court found that the Legislature’s intent in drawing the congressional redistricting plan was to benefit the Republican Party. Because the Legislature cannot justify its enacted configuration of these districts based on

race—the only justification that was offered—the trial court should have invalidated these districts. Accordingly, Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay.

C. DISTRICTS 26 & 27

[34] The challengers also mounted an individual attack against the validity of Districts 26 and 27, claiming that the enacted configuration of these two districts needlessly divided the City of Homestead to Republican gain—turning one Republican district and one Democratic district into two Republican-leaning districts.¹⁹ In support, the challengers relied on the general evidence of improper intent in the plan as a whole, as well as specifically on an e-mail chain between consultants Heffley, Terraferma, and Reichelderfer that took place after the Senate released a draft map that did not split Homestead. In this e-mail chain, the operatives stated that the configuration of these districts was “pretty weak” and that

the House “need[ed] to fix” it. The Senate’s draft version, not splitting Homestead, is shown on the left below, with the enacted map on the right.



The trial court denied the challenge to these two districts, stating that any tier-two differences between the enacted map and an alternative map introduced into evidence during trial by the challengers were de minimis since the enacted and alternative plans split about the same number of counties and cities in the region. The trial court stated that it would have been “selecting a plan that [it] found subjectively better rather than determining if [the challengers] have proved the enacted *410 plan invalid,” if it were to invalidate the enacted configuration of these districts “based on the objective tier-two evidence” presented. The trial court also summarily concluded that it did not find the enacted configuration to have been “based on unlawful partisan intent.”

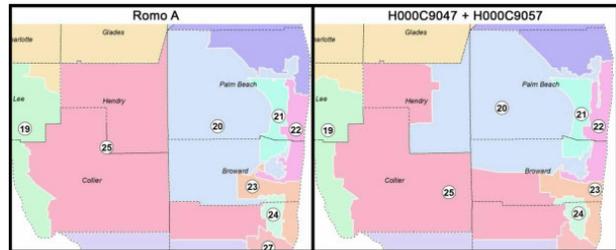
We conclude that the trial court erred in rejecting the challenge to these districts. Based on the trial court’s finding of unconstitutional intent to benefit the Republican Party, the burden should have shifted to the Legislature to justify its configuration of these districts. Thus, instead of deferring to the Legislature’s configuration and refraining from “selecting a plan [it] found subjectively better,” the trial court should have required the Legislature to demonstrate that the decision to split Homestead between Districts 25 and 26 was not done to benefit the Republican Party. Because the Legislature’s asserted justification for its configuration of these districts—to protect minority voting rights—simply cannot be justified, these districts must be redrawn to avoid splitting Homestead.

D. DISTRICT 25

[35] Along with the individual challenge to Districts 26 and 27 based on the split of Homestead, the challengers also argued that nearby District 25 needlessly divided Hendry County, in violation of the constitutional requirements. The trial court summarily rejected this challenge, considering it in conjunction with the challenge to Districts 26 and 27

and concluding simply that the challengers had not proved invalidity because they had not demonstrated more than “de minimis” tier-two deficiencies.

This was error. Having found improper intent in the adoption of the redistricting plan, the trial court should not have deferred to the Legislature’s configuration but should have, instead, shifted the burden to the Legislature to justify its decision to divide Hendry County.



The decision to adopt a configuration of District 25 that split Hendry County—as the Senate’s map had done but the House’s had not—was made in a non-public meeting at the end of the redistricting process. There is thus no record from the time this decision was made to explain why the Legislature chose the Senate’s configuration of this district over the House’s, even though the Senate’s configuration rendered the district less numerically compact while splitting a county boundary and without improving the compactness of the adjacent district, District 20.

The Legislature’s asserted justification at trial and on appeal in this Court for splitting Hendry County is chiefly based *411 on concerns related to preclearance requirements under Section 5 of the Voting Rights Act, since Hendry County was a “covered” jurisdiction to which Section 5 applied—that is, a county for which the state had to obtain federal permission prior to enacting any law related to voting in that county. The Legislature argues that, if it had placed Hendry County entirely within District 25, the Department of Justice would have denied preclearance.

We reject the Legislature’s justification for its decision to split Hendry County for at least two reasons. First, the House itself had drawn District 25 with Hendry County almost entirely included in the district, and the House considered its map to be constitutionally compliant. The Legislature’s concerns about preclearance thus appear to be post-hoc rationalizations for the enacted configuration.

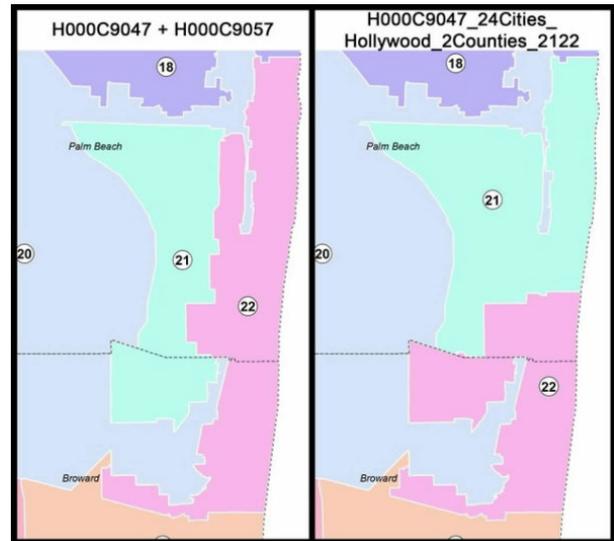
Second, to the extent preclearance is offered as a justification, preclearance concerns are no longer applicable after the

United States Supreme Court's decision in [Shelby County v. Holder](#), — U.S. —, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). In that case, the Supreme Court invalidated the “coverage formula” in Section 4 of the Voting Rights Act, thereby effectively invalidating the preclearance process established by Section 5 of the Act unless and until Congress creates another formula. [Id.](#) at 2631. Although the Legislature could not have anticipated the Supreme Court's decision at the time of the 2012 redistricting, Hendry County was not subject to preclearance at the time the Legislature enacted the remedial plan it now urges this Court to approve. In any event, we conclude that the Legislature has not demonstrated that keeping Hendry County whole would diminish the ability of black voters to elect a candidate of choice or cause any other tier-one minority voting protection concerns.

Accordingly, based on its error in the standard of review, the trial court should not have deferred to the Legislature's enacted configuration, and that chosen configuration cannot be justified. District 25 must be redrawn to avoid splitting Hendry County.

E. DISTRICTS 21 & 22

[36] Finally, the challengers individually attacked the validity of Districts 21 and 22, contending that these districts could have been drawn in a more constitutionally compliant manner by “stacking” them on top of each other, in a horizontal configuration, rather than configuring the districts to run vertically, parallel to each other along the Atlantic coast. Below, the enacted vertical configuration is shown on the left, whereas the “stacked” alternative configuration is shown on the right.



*412 Again applying a deferential standard of review, the trial court rejected this challenge, concluding that the challengers had not “met their burden of showing unnecessary deviation from tier-two requirements given the various tradeoffs required to draw compact districts in the region as a whole.” The trial court also stated that the challengers had not “shown that improper intent led to the adoption of Districts 21 and 22.”

However, as with the other individual district challenges, the trial court applied the incorrect standard. Based on its finding of unconstitutional intent, the trial court should not have deferred to the Legislature's enacted configuration of these districts, but should have instead shifted the burden to the Legislature to justify its decision to draw the districts in this manner.

We conclude that the Legislature has not done so. At trial, the House's chief map drawer, Alex Kelly, testified that the “stacked,” horizontal configuration represented “an opportunity to improve” the map. According to Kelly, this configuration would have been more compact and would have broken fewer political boundaries, and it could have been accomplished without violating any tier-one minority voting protection requirements. During a non-public meeting at the end of the redistricting process, Kelly presented this alternative configuration of the districts, but the Senate ultimately determined, without explanation, to reject this approach.

Because the Legislature has not justified its enacted configuration of these districts, we conclude that the districts must be redrawn. We do not, however, instruct that the Legislature must necessarily redraw the districts in a

“stacked,” horizontal configuration. Indeed, the challengers have conceded that a vertical configuration could perhaps pass constitutional muster, and their alternative maps introduced at trial did, in fact, configure these districts *413 in a vertical manner. Accordingly, we leave it for the Legislature to determine how to redraw these two districts, with the understanding that tier-two compliance could be improved and, given the shift in the burden, that the Legislature must be able to justify its redrawn configuration of these districts.

VII. REMEDY

We now turn to the remedy. The specifically challenged districts notwithstanding, the challengers suggest that a broader remedy is required and urge this Court to invalidate the whole map and either redraw it ourselves or order the trial court to redraw it, perhaps with the assistance of an appointed expert. The Legislature counters that this Court lacks the authority to do so, because a congressional redistricting plan may be enacted only by a state legislature pursuant to [article I, section 4, clause 1, of the United States Constitution](#), which vests exclusive authority to regulate the time, place, and manner of congressional elections in state legislatures, subject only to oversight by Congress. Although we reject the Legislature's argument that this Court has no authority to adopt a plan, if necessary, we decline the invitation to do so at this time.

[37] [38] [39] The Colorado Supreme Court has explained that state courts are empowered to enact constitutional redistricting plans for the United States Congress “when the legislature fails to do so.” [People ex rel. Salazar v. Davidson](#), 79 P.3d 1221, 1232 (Colo.2003). The Colorado high court has stated that state courts “have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones.” *Id.* “In such a case,” the Colorado Supreme Court has reasoned, “a court cannot be characterized as ‘usurping’ the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action.” *Id.*

[40] We agree, but we have determined that in this case the Legislature has not failed to conform to a ruling from this Court requiring it to adopt constitutionally compliant congressional districts, and, in fact, swiftly enacted a remedial

redistricting plan in response to the trial court's judgment. We thus conclude that the appropriate remedy at this juncture is to require the Legislature to redraw the map, based on the directions set forth by this Court.

The Legislature need not, in addition, redraw the entire map. Although we have struggled with this issue, particularly in light of the admittedly gerrymandered 2002 map that was used as a baseline for the current districts, we have ultimately determined that requiring the entire map to be redrawn is not the remedy commensurate with the constitutional violations found in this case. Further, we note that the challengers did not allege, as a separate claim, that the Legislature's reliance on the 2002 map was a basis for invalidating the whole map, nor did they identify a neutral map that showed how all of the districts could be redrawn in a manner more objectively compliant with the constitutional requirements.

We have, instead, instructed the Legislature on which districts must be redrawn—Districts 5, 13, 14, 21, 22, 25, 26, and 27—and provided precise guidelines as to the deficiencies in these districts. Although we decline to require the whole plan to be redrawn, it follows that all adjacent districts affected by the reconfiguration of the specific districts being redrawn must also be redrawn. We have, in addition, been asked by the challengers to *414 provide specific directives that the Legislature must follow in redrawing the districts.

[41] It is true, as the Legislature argues, that the judiciary is generally “without authority to review the internal workings” of the Legislature. [Fla. Senate v. Fla. Pub. Emps. Council 79](#), [AFSCME](#), 784 So.2d 404, 409 (Fla.2001). But it is also true, as this Court has recognized in another of its recent redistricting opinions, that Florida has a “strong public policy, as codified in our state constitution, favoring transparency and public access to the legislative process.” [Apportionment IV](#), 132 So.3d at 144. The Legislature's failure to preserve redistricting records and its decision to make important changes to the map during non-public meetings are factors that caused the trial court, and cause this Court, great concern as to whether the Legislature has complied with the constitutional provision to outlaw partisan political gerrymandering.

This is particularly so given that the Legislature itself proclaimed that it would conduct the most open and transparent redistricting process in the history of the state, and then made important decisions, affecting numerous districts in the enacted map, outside the purview of public scrutiny.

As this Court has previously stated, “[i]f the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters' enactment of the [article III, section 20\(a\)](#), standards will be undermined.”  *Id.* at 149.

While the congressional redistricting plan is somewhat unique in that it required compromise between the two legislative chambers—unlike the state House and Senate maps that were drawn solely within each respective chamber—a redistricting plan enacted by the Legislature is also unique as compared to other types of legislation, in that it involves a specific “constitutional restraint on the Legislature's actions.”

 *Id.* at 147. The dissent's claim that there is nothing “unique” about the challenge in this case, dissenting op. at 24–25, is unavailing—and belied by its own admonitions about how this Court's alleged errors are particularly grave in the context of redistricting.

In typical cases challenging the constitutionality of a legislative enactment, the relevant inquiry is whether the enacted legislation violates some individual right or contravenes some prohibition on the type of law the Legislature is empowered to enact. The traditional constitutional analysis of enacted legislation does not involve, as it does here, “a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans.”

 *Apportionment IV*, 132 So.3d at 147. Simply put, this case does not pit this Court versus the Legislature, but instead implicates this Court's responsibility to vindicate “the essential right of our citizens to have a fair opportunity to select those who will represent them.”  *Id.* at 148.

We therefore set forth the following guidelines and parameters, which we urge the Legislature to consider in adopting a redrawn map that is devoid of partisan intent. First, in order to avoid the problems apparent in this case as a result of many critical decisions on where to draw the lines having been made outside of public view, we encourage the Legislature to conduct all meetings in which it makes decisions on the new map in public and to record any non-public meetings for preservation. As we stated in *Apportionment IV*, “one of our state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process.”  *Id.* at 146. This transparency is critical in light of both the purpose

of the Fair Districts Amendment *415 to outlaw partisan manipulation in the redistricting process and the trial court's finding here that “an entirely different, separate process” to favor Republicans and incumbents was undertaken contrary to the Legislature's assertedly transparent redistricting effort.

 *Id.* at 149.

Second, the Legislature should provide a mechanism for the challengers and others to submit alternative maps and any testimony regarding those maps for consideration and should allow debate on the merits of the alternative maps. The Legislature should also offer an opportunity for citizens to review and offer feedback regarding any proposed legislative map before the map is finalized.

Third, the Legislature should preserve all e-mails and documents related to the redrawing of the map. In order to avoid additional, protracted discovery and litigation, the Legislature should also provide a copy of those documents to the challengers upon proper request.

Finally, we encourage the Legislature to publicly document the justifications for its chosen configurations. That will assist this Court in fulfilling its own solemn obligation to ensure compliance with the Florida Constitution in this unique context, where the trial court found the Legislature to have violated the constitutional standards during the 2012 redistricting process.

VIII. THE VOTERS SOUGHT FAIR DISTRICTS

Before we conclude, we observe that this is neither the first, nor likely the last, time this Court must confront a challenge to a redistricting plan enacted by the Legislature. In each case, we have endeavored to give meaning to the intent of the framers and voters who passed the Fair Districts Amendment to outlaw partisan political gerrymandering—no easy task given how entrenched this practice has been for years in the politics of crafting Florida's district boundaries.

A reader of Justice Canady's dissent in isolation could be forgiven for believing that this Court's decision here amounts to a creative maneuver designed to overstep its proper bounds, done in order to usurp the Legislature's role in the redistricting process. The dissent's attacks on this Court's analysis are extravagant, even when measured against prior dissenting opinions in our recent redistricting cases that have accused this Court of devising “a radical alteration in the operation

of the separation of powers.” [Apportionment IV](#), 132 So.3d at 160 (Canady, J., dissenting). The barrage of epithets employed by the dissent includes the following colorful array: “fallacious”; “fabricated”; “extreme distortion”; “revolutionary deformation”; “teeming with judicial overreaching”; “creatively cobbled”; “aggressive invasion”; “aberrant decision”; and “unprecedented incursions.”²⁰ Dissenting op. at 417, 417, 417–18, 420, 424–25.

Of course, we categorically reject the dissent's many derisive criticisms. And we point out that the dissent's overblown claims that this Court has violated the separation of powers, and has done away with the presumption of constitutionality applied to legislative acts in the redistricting context, are in fact nothing new. In *Apportionment I*, the dissent repeatedly chastised this Court for “cast[ing] aside the presumption of constitutionality.” [Apportionment I](#), 83 So.3d at 696 (Canady, J., concurring in part and dissenting in part). *416 In *Apportionment III*, the dissent charged that this Court had “la[id] the groundwork for the unrestrained judicial intrusion” into the redistricting process. [Apportionment III](#), 118 So.3d at 218 (Canady, J., dissenting) (internal quotation omitted). And in *Apportionment IV*, the dissent hyperbolically accused this Court of “grievously violat[ing] the constitutional separation of powers.” [Apportionment IV](#), 132 So.3d at 156 (Canady, J., dissenting).

The dissent's position has certainly been consistent. But so too has this Court's. We pointed out in *Apportionment I* that the Fair Districts Amendment “dramatically alter[ed] the landscape with respect to redistricting,” increasing the scope of judicial review and commensurately requiring “more expanded judicial analysis of legislative compliance.”

[Apportionment I](#), 83 So.3d at 607. We emphasized in *Apportionment III* that “the framers and voters clearly desired more judicial scrutiny” of the Legislature's decisions in drawing the state's congressional and legislative districts. [Apportionment III](#), 118 So.3d at 205. And we reiterated in *Apportionment IV* that there can hardly be a more compelling interest than the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering. [Apportionment IV](#), 132 So.3d at 147–48.

Far from upending the law, then, our legal analysis today adheres to our recent redistricting precedents. The dissent, to the contrary, continues its refusal to acknowledge

the import of the Fair Districts Amendment. As Chief Justice Labarga eloquently stated in his concurrence in *Apportionment IV*, this Court has an “important duty” to “honor and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan.” [132 So.3d at 154–55](#) (Labarga, J., concurring). This is a responsibility we undertake with the utmost of seriousness—not because we seek to dictate a particular result, but because the people of Florida have, through their constitution, entrusted that responsibility to the judiciary.

IX. CONCLUSION

In conclusion, we affirm the trial court's factual findings and ultimate determination that the redistricting process and resulting map were “taint[ed]” by unconstitutional intent to favor the Republican Party and incumbents. However, we reverse the trial court's order approving the remedial redistricting plan because we conclude that, as a result of legal errors, the trial court failed to give the proper effect to its finding of unconstitutional intent, which mandated a more meaningful remedy commensurate with the constitutional violations it found.

Through this opinion, we have provided clear guidance as to the specific deficiencies in the districts that the Legislature must redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected thereby—and we have urged the Legislature in light of the trial court's findings in this case to consider making all decisions on the redrawn map in public view. We have every confidence that the Legislature, given this guidance, will conduct itself in a manner that will fulfill the purpose of the Fair Districts Amendment, including the need for transparency and neutrality in drawing the state's congressional districts.

As to the remedy, we are aware that this litigation has now spanned more than three years and the qualifying period for the next congressional election of 2016 is not far away. We therefore urge that the redrawing of the map be expedited. We *417 have chosen to relinquish this case to the trial court for a limited period of 100 days from the date of this opinion, therefore retaining jurisdiction, and we anticipate that the trial court can perform an oversight role should any disputes arise.²¹ To avoid any further delays, we have also limited the

time for filing a motion for rehearing or clarification to five days from the date of this opinion and have limited the time for filing a response to such a motion to three days from the date the motion is filed.

It is so ordered.

LABARGA, C.J., and QUINCE and PERRY, JJ., concur.

LEWIS, J., concurs in result.

CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

CANADY, J., dissenting.

The circuit court properly ruled that the appellants failed to establish any basis for requiring the Legislature to further revise Florida's congressional district map. The majority's decision to reverse the circuit court and to invalidate numerous districts in the remedial congressional district plan adopted by the Legislature involves an extreme distortion of the appellate process deployed to effect a serious violation of the separation of powers. Accordingly, I dissent.

I.

The linchpin of the majority's decision is the assertion that in the final judgment the trial court “concluded that the [congressional redistricting] plan was drawn with improper partisan intent” and that the improper intent affected the entire plan. Majority op. at 386. According to the majority, “the trial court failed to give any actual effect to its finding in this case that the ‘whole plan’ challenge had been proven through the direct and circumstantial evidence of improper partisan intent presented at trial.” Majority op. at 396. In fact, however, the final judgment—a copy of which is appended—contains no finding whatsoever that the Legislature acted with improper intent regarding the entire congressional plan or that the “whole plan” challenge had been proven. The majority fails to identify any such finding in the final judgment. Instead, the majority puts forth a misconstruction of the trial court's ruling based on fragments from the final judgment taken out of context and creatively cobbled together. The trial court refused to draw an inference from the evidence that an improper partisan intent affected the redistricting plan in its entirety. But the majority effectively steps into the role of the trier of fact, independently reweighs the evidence, finds

that the evidence supports the inference that the whole plan was affected by an improper partisan intent, imputes that broad finding of unconstitutional intent to the trial court, and then faults the trial court for not acting in accord with that fabricated finding. The upshot is a virtually revolutionary deformation of the appellate process.

The materials from which the majority fashions its misconstruction of the trial court's ruling are found largely in the trial court's findings regarding a “conspiracy” by certain Republican political consultants “to influence and manipulate the Legislature into a violation of its constitutional duty.” Final Judgment at 10. But those materials are misshaped by the majority. When the trial court's ruling is considered in its full context, three essential points are clear in the trial court's findings regarding the consultants' conspiracy.

First, the consultants “managed to taint the redistricting process and the resulting map with improper partisan intent” by finding “ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, *at least in part*.” Final Judgment at 22 (emphasis added). The trial court unquestionably determined that efforts of the consultants to cause partisan action by the Legislature had some success.

Second, the consultants' conspiracy was not successful in affecting the entire map drawing process. The “taint” of “improper partisan intent” attributable to the activities of the Republican consultants was limited in scope and effect. This is evident from the trial court's crucial finding that “the staff members who did the bulk of the actual map drawing for the Legislature ... were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate them from direct partisan influence.” Final Judgment at 22. The trial court specifically found that the committee staff “were insulated from the political consultants,” Final Judgment at 37, and that the “motivation [of the staff] in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair Districts Amendments, as their superiors had directed them.” Final Judgment at 22. This finding is of critical importance because of the pivotal role the committee staff indisputably had in drawing the districts the trial court refused to invalidate.

Third, the trial court found that an improper partisan intent did affect certain districts in the redistricting plan—namely, Districts 5 and 10—where there was evidence that the

configuration of the districts was influenced through contact between the Republican consultants and legislative leadership or leadership staff. Thus, based on its consideration of the evidence, the trial court decided that “collaboration and cooperation” between the partisan consultants and decision makers in the Legislature regarding particular districts was the predicate for requiring the redrawing of a district based on a finding of unconstitutional intent.

The majority simply ignores the second of these points and fabricates a broad finding of unconstitutional intent. The majority goes on to fault the trial court for failing “to give any independent legal significance to its finding of unconstitutional intent when examining the challenges to individual districts,” majority op. at 393, and to assert that the trial court essentially concluded that some improper intent is acceptable. *See* majority op. at 393–94. Neither criticism of the trial court's order can withstand analysis. The trial court cannot be faulted for failing to give independent significance to a factual finding it did not make. The trial court expressly considered the question of unconstitutional intent in its analysis of the challenged individual districts. Indeed, the trial court was intently focused on the factual question of whether improper intent affected the drawing of particular districts by the Legislature. With respect to two districts, the trial court found that the districts were drawn with unconstitutional intent in the *419 map initially adopted. With respect to the other districts, the trial court found that the appellants had failed to establish that the districts were drawn with unconstitutional intent.

At no point does the trial court indicate that it would permit some level of unconstitutional intent in the drawing of any district. The assertion to the contrary is unwarranted. As the final judgment makes plain, the trial court thoughtfully considered the evidence in determining the extent to which the “secretive shadow process of map drawing by the political consultants” was in fact successful in causing the Legislature to act with unconstitutional intent in the drawing of particular districts. Final Judgment at 11–12. In rejecting the “whole plan” challenge, the trial court recognized the unremarkable proposition that districts that were not drawn with an unconstitutional intent and that did not otherwise violate the constitutional standards should not be invalidated. The trial court's ruling on this point is in accord with the basic principle “that the scope of the constitutional violation measures the scope of the remedy.”  *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979).

Although the trial court made no finding of a “general intent” by the Legislature to favor a political party or incumbents, the court reasoned that “even if” such a general intent could be proven it would be insufficient to invalidate a particular district unless it was shown that the improper intent affected the drawing of that district. Attempting to match the scope of the remedy to the scope of the violation, the trial court correctly focused on the “effect of ... noncompliance” with the Constitution in determining whether districts should be invalidated. Final Judgment at 9.

The majority asserts that “the trial court considered a general improper intent to lack any independent legal significance unless it was accompanied by another constitutional violation.” Majority op. at 394. But the trial court's analysis makes clear that it was focused on whether any general improper intent actually affected the drawing of particular districts—not on whether particular districts were affected by the violation of other standards.

The majority's reading of the text of the final judgment on this point imports incoherence into the final judgment. It puts the reference to “general intent” in conflict with the trial court's reiterated conclusion that the districts now invalidated by the majority were not drawn with improper intent. But the text of the final judgment—like any other text—should be read harmoniously. The rule that “the provisions of a text should be interpreted in a way that renders them compatible, not contradictory” is a compelling rule of construction predicated on the reality that “it is invariably true that intelligent drafters do not contradict themselves.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). There is no basis for concluding here that the trial court engaged in self-contradiction.

II.

The invalidation of Districts 5, 13, 14, 21, 22, 25, 26, and 27 cannot be reconciled with crucial factual determinations made by the trial court. Indeed, the invalidation of these districts can only be accomplished by setting aside the trial court's rulings regarding not only improper intent but also compactness, retrogression and other constitutional standards. The invalidation of these districts flies in the face of the pivotal role of the committee staff in drawing them and the trial court's express finding that the committee staff were insulated from partisan influence. The trial court's

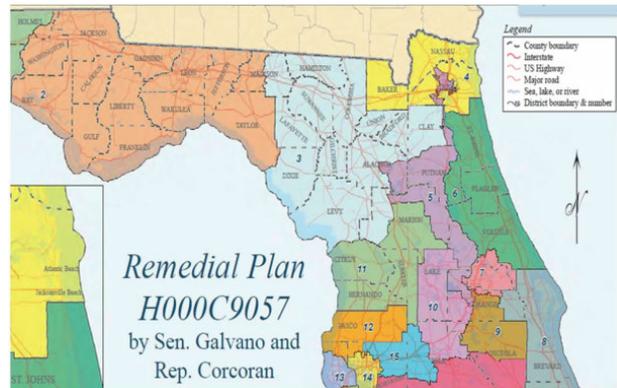
*420 rulings regarding improper intent and retrogression, in particular, indisputably turn on the question of fact that can only properly be determined by the trier of fact.

In an opinion teeming with judicial overreaching, the invalidation of Remedial District 5 has pride of place. The basis for the majority's decision to require that this district be reoriented from its north-south configuration to an east-west configuration ultimately boils down to this: the north-south configuration must be rejected because that is the configuration chosen by the Legislature and the Legislature's choice is presumed to be unconstitutional. If the Legislature made a choice, we must begin by assuming the choice violated the constitution. This is so even though the configuration chosen by the Legislature was based on a map drawn by committee staff, who were insulated from partisan influence in selecting that configuration. The majority also suggests that the north-south configuration is somehow tainted because "the long-time incumbent of the district, Congresswoman Corrine Brown ... previously joined the leading Republicans in actively opposing the Fair Districts Amendment and redistricting reform." Majority op. at 403.

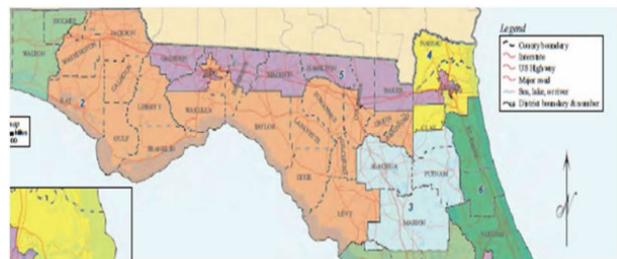
Based on this supposed taint and the presumption of unconstitutionality, the majority treats as irrelevant the trial court's ruling that "the Plaintiffs have not offered convincing evidence that an East–West configuration is necessary in order to comply with tier-one and tier-two requirements of Article III, section 20." Order Approving Remedial Redist. Plan at 3. Under the majority's application of the presumption of unconstitutionality, an alternative suggested by the challengers is virtually guaranteed to trump any choice made by the Legislature. This vividly illustrates just how far the majority has gone in repudiating the principle that a redistricting plan should not be declared unconstitutional "unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the [plan], it is in positive conflict with some identified or designated provision of constitutional law." *In re Apportionment Law*, 263 So.2d 797, 805–06 (Fla.1972) (quoting *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 772 (1914)).

The majority fails to consider critical aspects of the alternative suggested by the challengers for Remedial District 5. Most strikingly, the majority ignores the reality that the mandated east-west configuration will result in a district that is significantly less compact than Remedial District 5. In addition, no attention is given to the fact that the creation of the East–West District will cause adjoining District 2 to become significantly less compact.

Remedial Plan Map



***421 Romo Map A**



As the Legislature points out, the East–West District's length will be 43% greater than the length of Remedial District 5—206 miles rather than 144 miles. The perimeter of the East–West District is 22% larger than Remedial District 5's perimeter, and the area of the East–West District is 93% greater than the area of Remedial District 5. By any reasonable understanding of compactness, this is a dramatic movement toward a less compact district.

	RD 5	E– W D	Change
Length (miles)	144	206	+43%

Perimeter (miles)	583	711	+22%
Area (square miles)	2031	3,911	+93%

*422 The redrawing of District 2 necessitated by the majority's decision that Remedial District 5 must be replaced by an East–West District will also result in a dramatic movement toward a less compact district. The length of

District 2 will be increased by 39% from 167 miles to 232 miles. The district's perimeter will increase by 75% and its area by 30%.

	D2	New D2	Change
Length (miles)	167	232	+39%
Perimeter (miles)	550	961	+75%
Area (square miles)	10,107	13,107	+30%

The majority's imposition of the East–West District is also predicated on a disregard of the evidence of the potential for retrogression in the East–West District, and the failure to establish any objective standard for prohibited retrogression. On the issue of retrogression, the majority dismisses the expert testimony presented by the Legislature and acts on the basis of a very simple and totally subjective rule: we know retrogression when we see it. The majority's approach regarding the other challenged districts where retrogression was at issue parallels its approach regarding Remedial District 5.

With the invalidation of Remedial District 5 and other challenged districts, the ironic result is that districts drawn by professional committee staff, who were insulated from partisan influence in the drawing of the districts, are effectively displaced by districts drawn—as evidenced by deposition testimony—under the auspices of the National Democratic Redistricting Trust in cooperation with the Democratic Congressional Campaign Committee. There is something dreadfully wrong with this picture. As the Legislature argues: “To discard the work product of the Florida Legislature, which the trial court carefully considered and upheld, and substitute the partisan handiwork of the DCCC and the Democratic Trust, would be an indelible stain.” Legislative Parties' Answer Brief at 91.

III.

Despite casting its disagreement with the trial court in terms of legal errors, the majority's real disagreement with the trial court is not about questions of law. It is about questions of fact. The majority thus reverses the trial court because the trial court failed to invalidate particular districts for being drawn with an unconstitutional intent when the trial court made the factual determination that those districts were not drawn with an unconstitutional intent. The majority's real problem with the trial court's ruling is that the trial court was unwilling to draw broad factual inferences concerning intent that the majority concludes should have been drawn.

Intent unquestionably is a question of fact. As we explained in *Jersey Palm–Gross, Inc. v. Paper*, 658 So.2d 531 (Fla.1995), “the ultimate arbiter on the issue of intent is the trial court because ‘the question of intent is one of fact.’ ” *Id.* at 534 (quoting *Rebman v. Flagship First Nat'l Bank*, 472 So.2d 1360, 1364 (Fla. 2d DCA 1985)).

It is axiomatic that determining whether a district should be invalidated based on an unconstitutional intent claim turns on the factual question of whether that district was drawn with an unconstitutional intent—a question indisputably within the *423 province of the trier of fact. By imposing its own judgment about the factual inferences to be drawn from the evidence at trial, the majority has transgressed the boundaries

of proper appellate review and invaded the province of the trier of fact. Such overreaching by an appellate court would be a grave matter in any context, but it is doubly grave in the context of redistricting litigation, where a coordinate branch of government is a party and the constitutional authority of that branch is at issue. In a context such as this, the court has a special duty to scrupulously observe the limitations inherent in its function as an appellate court. Unfortunately, the majority has heedlessly cast those limitations aside.

The majority effectively holds that a finding of any unconstitutional intent in the drawing of congressional districts causes a presumption to arise that all the districts in the plan were drawn with an unconstitutional intent. Based on that presumption, the majority places the burden of proof on the Legislature to establish that particular districts were not drawn with an unconstitutional intent. The majority thus creates a general presumption of unconstitutionality based on a specific, narrow constitutional violation. This broad presumption of unconstitutionality untethers the remedy for violating the Constitution from proven specific violations requiring specific remedies. It transgresses the self-evident principle that “the scope of the constitutional violation measures the scope of the remedy.” [Penick](#), 443 U.S. at 455, 99 S.Ct. 2941. This, needless to say, shatters the shell of the presumption of constitutionality that was left by this court's recent redistricting decisions. But the majority reaches even further.

IV.

Having invaded the province of the trier of fact to find the factual basis for triggering the newly created presumption of unconstitutionality, the majority continues its march to dominate the redistricting process and finishes the job—at least for now—by making the factual determinations that the Legislature did not prove a lack of improper intent in the drawing of the specifically challenged districts. Marching forward, the majority eviscerates numerous factual determinations made by the trial court in its evaluation of the individual district challenges.

Under the well-established framework for appellate review, if an appellate court determines that the trier of fact has placed the burden of proof on the wrong party, the case should be remanded to the trier of fact to reevaluate the evidence in light of the correct legal rule regarding the burden of proof. The weighing of the evidence under the applicable burden of

proof is the function of the trier of fact. That function should not be usurped by an appellate court. The Supreme Court has recognized as “elementary” that “ ‘fact finding is the basic responsibility of [trial] courts, rather than appellate courts’ ” and “where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.” [Pullman–Standard v. Swint](#), 456 U.S. 273, 291–92, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (quoting [DeMarco v. United States](#), 415 U.S. 449, 450 n., 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974)). Proceedings by an appellate court contrary to these elementary principles are “incredible.” [Id.](#) at 293, 102 S.Ct. 1781.

The majority caps off its abandonment of the restraints of the appellate process by retaining jurisdiction after deciding this case, dictating the details of the proceedings in the trial court, and presuming to *424 require that all filings submitted in the trial court shall “simultaneously be submitted to this court.” This retention of jurisdiction and exercise of control of the proceedings in the trial court further vividly demonstrates the majority's aggressive determination to exercise full dominion over the redistricting process. Unlike our review of the legislative redistricting plan—over which we have original review jurisdiction under article III, section 16—our review of this case involving congressional redistricting is based on our jurisdiction to review trial court judgments that are certified by a district court under [article V, section 3\(b\)\(5\)](#). Once we have decided this case, there is no reason—other than the majority's determination to guarantee that it has the last word—that the case should not proceed like any other case that is reversed and remanded to a trial court after we have exercised our jurisdiction over a trial court judgment certified to us by a district court. If a party believes that an error occurs in the proceedings on remand, that party may file an appeal in the district court. The district court can then either decide the case or certify it to this court for decision. That is the way such cases proceed in the ordinary course. But here the ordinary course of judicial proceeding is once again cast aside by the majority without a shred of justification.

V.

The damage done by this decision to the structure of the appellate process is exceeded only by the damage done

to the constitutional separation of powers. Injury to the separation of powers in this case takes two forms. First, the majority effectively supplants the substantive constitutional power of the Legislature to draw congressional districts. As I have explained, the majority does this by reviewing the redistricting plan in a way that is inconsistent in multiple ways with the proper exercise of judicial power. Second, the majority invades the internal workings of the Legislature by effectively dictating how the Legislature must conduct its business in connection with the adoption of the revised congressional redistricting plan that the majority has mandated. The majority thus sets forth certain “guidelines and parameters” concerning the process for adopting a revised congressional district map. None of these “guidelines and parameters” have any basis in law. All of the subjects addressed by the “guidelines and parameters” are covered by existing law, but the majority imposes requirements that indisputably go beyond the clear requirements of the governing law.

The majority’s “guidelines and parameters” for the conduct of legislative business run headlong into our prior recognition of the danger “that the control or influence by one branch of another branch’s internal operating procedures could interfere with the independence of the second branch and possibly place the enforcing branch in a superior position.” *Locke v. Hawkes*, 595 So.2d 32, 36 (Fla.1992). Short shrift is given to the rule that “[i]t is a legislative prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative.”  *Moffitt v. Willis*, 459 So.2d 1018, 1022 (Fla.1984). In all the annals of constitutional government, this Court’s aggressive invasion of the internal workings of the legislative branch is without precedent. The only case authority that can be cited to support the depredations here visited on the independence of the legislative branch is this Court’s recent aberrant decision requiring members of the Legislature to submit to interrogations concerning their legislative activities. But the invasion of the legislative sphere made by the Court’s prior ruling is outstripped by today’s ruling.

*425 In attempting to justify these unprecedented incursions into the constitutional sphere of the Legislature, the majority offers the singularly unconvincing reason that “a redistricting plan enacted by the Legislature is ... unique as compared to other types of legislation, in that it involves a specific ‘constitutional restraint on the Legislature’s actions.’ ” Majority op. at 414. This is fallacious. In every single case

challenging the constitutionality of a law the question at issue is whether the law transgresses a constitutional restraint on the Legislature. There is nothing “unique” about the challenge brought in this case that justifies transgressing the separation of powers. It is “unique” only because the majority has chosen to treat it as “unique” to justify a “unique” exercise of judicial power.

All of the “parameters and guidelines” constitute unwarranted interference with the operation of the Legislature within its own constitutional sphere. The most egregious of the “safeguards” set forth by the majority is the admonition that “the Legislature should provide a mechanism for the challengers and others to submit alternative maps and any testimony regarding those maps for consideration and should allow debate on the merits of the alternative maps” and should “offer an opportunity for citizens to review and offer feedback regarding any proposed legislative map before the map is finalized.” Majority op. at 415. This tramples on the institutional independence and integrity of the Legislature by inserting the challengers and others outside the Legislature into the very heart of the legislative process.

The challengers and others interested in redistricting have the benefit, of course, of the constitutional right granted to the people of Florida “to petition for redress of grievances.” Art. I, § 5, Fla. Const. They thus have the right to communicate with members of the Legislature to make their views known and to criticize legislative proposals. But the majority opinion clearly contemplates a “mechanism” that goes far beyond permitting the exercise of this constitutional right. The Legislature debates and gives formal consideration only to proposals that are submitted—in the form of bills or resolutions and amendments thereto—by members of the Legislature. The filing of bills, resolutions and amendments in the Legislature is the exclusive constitutional prerogative of elected members of the Legislature. And no person who is not a member of the Legislature has standing in the Legislature to participate in legislative debate, submit proposals that must be debated or to formally “review” proposals under consideration by the Legislature before they are adopted. In ignoring these elemental features of the legislative process, the majority betrays either a lack of knowledge or a lack of regard for the integrity of the core function of a coordinate branch of government.

VI.

This decision causes serious damage to our constitutional structure. The proper functioning of the judicial process is deformed and the separation of powers is breached in an unprecedented manner. Since 2012, this Court's decisions concerning the redistricting process have been characterized by a repeated rewriting of the rules. The foundation for all that followed was the effective abrogation of our precedents that clothed a redistricting plan with a presumption of constitutionality. The Fair Districts Amendments—which said not a word about the alteration of the exercise of judicial power—could not bear the weight of that jettisoning of the presumption of constitutionality. And the Fair Districts Amendments certainly cannot bear the weight of today's decision, *426 which abandons the well-established boundary between the trier of fact and a reviewing appellate court and transgresses the independence of the core function of the legislative branch in conducting the legislative process. I dissent.

POLSTON, J., concurs.

Appendix

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT

IN AND FOR LEON COUNTY, FLORIDA

RENE ROMO, et al, Plaintiffs,

vs.

KEN DETZNER and PAM BONDI, Defendants.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al,
Plaintiffs,

vs.

KEN DETZNER, et al, Defendants.

CASE NO: 2012–CA–412

CASE NO: 2012–CA–490

FINAL JUDGMENT

This case is before me following a lengthy bench trial. Plaintiffs claim that the congressional redistricting plan adopted by the Legislature violates Article III, Section 20 of the Florida Constitution. For the reasons set forth below,

I agree, finding that districts 5 and 10 were drawn in contravention of the constitutional mandates of [Article III, Section 20](#), thus making the redistricting map unconstitutional as drawn.

INTRODUCTION

President George Washington, in his farewell address of 1796, warned the new nation of the dangers of political parties.

“However combinations or associations of the above description may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.... Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.”

His countrymen did not heed Washington's warning and quickly divided themselves into opposing political factions. Though the names have changed over the years, the two major political parties have been battling each other for control over our nation's government ever since. To many, it seems that Washington's fears have been realized. Certain in the rightness of their cause, of the superiority of their ideas and their members, they consider those in the opposing camp to be not only wrong, but a threat to the very foundations of our country. Any idea of the other party is to be opposed fervently. They must win elections and gain or remain in power because, to the partisans, their party's interest is synonymous with the country's interest. In short, winning is everything.

One of the ways in which political parties seek to gain or maintain an advantage over the other is through the redistricting process. Every ten years, based on new census data, congressional seats are reapportioned among the states based upon shifting population figures. To many citizens this process is of mild interest, but to the political parties it is a high stakes *427 proposition, a zero sum game in which one party wins and the other loses—for years to come. Subtle shifts in a district boundary line can make the difference between a district that is “safe” for a political party or one that is “competitive” between the two. It can make a big difference

in the ability to recruit candidates for particular districts, the amount of time, energy and resources necessary to give a party's candidate a real chance of success, and ultimately, whether the party can maintain a majority of seats in congress.

Historically, the political party in control of the state legislature has been able to draw the new districts in a manner that protects their party and its incumbents. Voter populations are shifted and clustered based upon how they are likely to vote. The result has often been maps with districts that have unusual boundaries and bizarre shapes, as if some abstract artist had been given free rein. This practice has come to be called political gerrymandering and has been criticized as allowing, in effect, the representatives to choose their voters instead of vice versa.

In 2010, the voters of Florida passed two amendments to the Florida Constitution, commonly referred to as the Fair Districts Amendments, aimed at eliminating such political gerrymandering. These amendments are now codified in the Constitution as [Article III Section 20](#), pertaining to congressional redistricting and [Article III Section 21](#), pertaining to state legislative redistricting. These amendments significantly decrease the Legislature's discretion in drawing district boundaries. Specifically forbidden is the drawing of a redistricting plan with the intent to favor or disfavor a political party or incumbent. [Section 20](#) reads as follows:

Standards for establishing congressional district boundaries.—In establishing congressional district boundaries:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to

establish any priority of one standard over the other within that subsection.

[Art. III, § 20](#), Fla. Const.

Subsection (a) contains tier-one requirements which must be followed. In addition to prohibiting intent to favor or disfavor a political party or incumbent, this subsection contains two distinct protections for racial and language minorities. The first, which prohibits districts which are drawn with “the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process,” is similar to Section II to of the Voting Rights Act. Commonly referred to as the “vote dilution” provision, this section requires majority minority districts where certain preconditions are met. The second minority protection prohibits a plan or district from “diminish[ing] their ability to elect representatives *428 of their choice.” Commonly referred to as “retrogression,” this clause tracks Section 5 of the Voting Rights Act and prohibits backsliding in the ability of minority groups to elected candidates of their choice.¹

Subsection (b) contains provisions requiring compactness and the following of political and geographic boundaries, where feasible.² These traditional redistricting principles, tier-two requirements, must be followed unless doing so would conflict with tier-one requirements.

More than one witness during trial explained their opposition to the passage of these amendments by opining that “you can’t take politics out of politics” or that the amendments would be “impossible to implement.” Perhaps, but they are now a part of our organic law and I am bound to interpret and apply them as best I can in order to give effect to will of the voters as so expressed. See [In Re: Senate Joint Resolution of Legislative Apportionment 1176](#), 83 So.3d 597, 597 (Fla.2012).³ Any act of legislation that is in conflict with the organic law of the constitution is not a valid law. This is a fundamental principle of our political and legal system.

This is a case of first impression interpreting [Article III Section 20](#), dealing with congressional re-districting. The Florida Supreme Court, however, has interpreted the analogue provision in [Article III Section 21](#), which applies to state legislative plans. See [Apportionment I](#), 83 So.3d 597. This lengthy and comprehensive opinion interprets key terms and explains how the various criteria are to be analyzed in

reviewing a redistricting plan for constitutionality. It therefore provides me with a detailed road map for reviewing the congressional plan challenged by Plaintiffs.

STANDARD OF REVIEW

A law passed by the legislature is entitled to a presumption of constitutionality. The burden to show otherwise is on those who challenge the law, and that burden is generally said to be beyond a reasonable doubt. This is, in fact, the standard I applied when considering motions for summary judgment earlier in this case. The Plaintiffs ask that I reconsider this decision in light of the Florida Supreme Court's holding to the contrary in *Apportionment I*, and its subsequent language in [League of Women Voters of Fla. v. Fla. House of Representatives](#), 132 So.3d 135 (Fla.2013).

In *Apportionment I*, the Florida Supreme Court specifically rejected the argument that those who challenge redistricting plans must prove facial invalidity beyond a reasonable doubt. It stated that the plans still come to the Court “with an initial presumption of validity” ... and that the review of the plans would be done “with deference to the role of the Legislature in apportionment ...” but stated that its constitutionally required independent review brought with it a lesser degree of deference than would be appropriate with other legislation. *Id.* at 606–607.

The question is whether this different standard of review is a consequence of the nature of the act reviewed (a redistricting plan), the nature of the new criteria required by the Fair District Amendments (the expanded scope of review), or the specific constitutional mandate that the *429 State House and Senate plans be reviewed by the Florida Supreme Court irrespective of a specific challenge (the procedural process of obtaining review). It was this latter factor, the constitutional requirement of an independent review, which I felt distinguished this case from *Apportionment I* and thus required the traditional standard of review. Upon reflection, however, I'm not convinced that the different procedural process requires a different standard of review.

It is true that the constitutional mandate for review by the Florida Supreme Court is unique. But should the procedural manner in which a plan is brought before the court for review make a difference in the standard applied in that review? The other two factors noted by the Supreme Court in *Apportionment I*, the nature of the legislation and the criteria

to be applied, are the same in this case. The rights protected are just the same and just as important when redistricting occurs for Congress as it is when it occurs for the State House and Senate. Should the voters be entitled to less constitutional protection when the redistricting is for the former rather than the latter? Should actions on the part of the legislature in the redistricting process be deemed in violation of the constitution in one instance but not the other?

I think not, and now conclude that it is the nature of the legislation and the nature of what is reviewed that requires a different standard of review. In *Apportionment I* the Florida Supreme Court observed:

We conclude that the beyond a reasonable doubt standard is ill-suited for an original proceeding before this Court in which we are constitutionally obligated to enter a declaratory judgment on the validity of the legislative plans. Unlike a legislative act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the “instructions” of the citizens as expressed in specific requirements of the Florida Constitution governing this process.

[Apportionment I](#), 83 So.3d 597 at 607–608;

There is a difference between the Court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court's role in interpreting statutes; this Court has stated its responsibility in construing statutes differently.

For example, in [Tyne v. Time Warner Entertainment](#), 901 So.2d 802, 810 (Fla.2005), in upholding a statute as constitutional, the Court stated that it had “an obligation to give a statute a constitutional construction where such a construction is possible.” This Court has stated that it is

“committed to the fundamental principle that it has the duty if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity

of a statute in favor of its constitutional validity and to construe a statute, if reasonabl[y] possible, in such a manner as to support its constitutionality—to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity.”

 *Apportionment I*, 83 So.3d at 607, n. 5 (quoting  *Corn v. State*, 332 So.2d 4, 8 (Fla.1976)).

As this language suggests, the reason for the different standard is because apportionment plans cannot be interpreted. The lines are where they are. It is not a question of searching for a reasonable interpretation of a statute which would make it constitutional. Rather, the inquiry is *430 into the process, the end result, and the motive behind the legislation.

I will therefore, in this case, apply the standard of review articulated in *Apportionment I*, deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements, with an understanding of my limited role in this process and the important role of the Legislature. My duty “is not to select the best plan” but to determine whether Plaintiffs have proved the plan invalid.  *Apportionment I*, 83 So.3d 597 at 608. ⁴

CHALLENGE TO PLAN AS A WHOLE VERSUS A CHALLENGE TO INDIVIDUAL DISTRICTS

Plaintiffs distinguish between their challenge to the redistricting plan as a whole, as being drawn with the intent generally to favor the Republican Party, and their challenge to several individual districts, as being specifically drawn with such intent. I find this to be a false dichotomy, a distinction without difference. The redistricting plan is the result of a single act of legislation. If one or more districts do not meet constitutional muster, 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. ⁵

That does not mean, however, that portions of the map not affected by those individual districts found to be improperly drawn would need to be changed in a redrawn map, even if a general intent to favor or disfavor a political party or incumbents was proven. What would be the point if the other districts are otherwise in compliance? Such a remedy would

go far beyond correcting the effect of such noncompliance, but rather would require a useless act that would encourage continued litigation. Therefore, I have focused on those portions of the map that I find are in need of corrective action in order to bring the entire plan into compliance with the constitution.

EVIDENCE RECEIVED UNDER SEAL OR IN CLOSED PROCEEDINGS

A portion of the trial was closed to the public and certain exhibits entered under seal, pursuant to an order of the Florida Supreme Court. Whether this evidence will ever be made public awaits determination by that court of the correctness of my ruling that the associational privilege of the non-parties from whom the evidence was obtained should yield to the interest in disclosure. ⁶ For purposes of such review, I will briefly explain how I weighed and balanced the appropriate factors and why I tipped the scales in favor of disclosure. Rather than file a partially redacted order, any reference to such evidence here will be *431 general in nature so as not to reveal the specific information contained in the exhibits and testimony.

As noted in my previous Orders, I found that the non-parties, the political consultants, had cognizable First Amendment Rights in the documents and testimony sought by the Plaintiffs in this case. ⁷ The privilege is not absolute, however, and I had to weigh and balance the competing interests to determine whether that privilege should yield in favor of disclosure. Specifically, I considered the factors set forth in  *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir.2010) and determined that the privilege should yield. In the interest of time, I did not elaborate in detail my reasons for that conclusion, announced in open court. I thought it important that the parties know what could and could not be used at trial and that the non-parties have time to obtain a stay if further review was deemed appropriate by the appellate court. The reasons I decided that the associational privilege should yield are as follows:

The case before me of is of the highest importance, going, as it does, to the very foundation of our representative democracy. “Indeed, as [this Court] succinctly stated, it is “difficult to imagine a more compelling, competing government interest” than the interest represented by the challengers' [article III](#),

section 20(a), claims.”  *League of Women Voters*, 132 So.3d 135, 147.

The required disclosure was narrowly tailored and limited. Out of approximately 1800 pages of documents, I required the disclosure of less than a third of those. The disclosure was only to the Plaintiffs' attorneys with instructions that they not disclose it to third parties other than staff or retained experts, including to their own clients. I felt that the Plaintiffs' attorneys were in the best position to determine which of these documents were most probative of their claims. As it turned out, they actually offered as evidence only a very small portion of those documents as exhibits.

The documents for which the political consultants claimed privilege evidenced a conspiracy to influence and manipulate the Legislature into a violation of its constitutional duty set forth in Article 3, Section 20 of the Florida Constitution. That was, at least, a reasonable conclusion to be drawn from this and other evidence made available to me in the case to that point. As such, I viewed any chilling effect the release of these documents might have on such behavior in the future to be not such a bad thing, and the danger to the legitimate exercise of First Amendment rights rather slight.

Some of the communications, and a good deal of the map work product of the non-party political consultants, were transmitted to persons outside of their group, and made very public by submission to the legislature. If this did not constitute an outright waiver of the privilege as to these items, it lessened the strength of a legitimate claim to its protection.

Unlike the politically hot button issue of homosexual marriage, present in *Perry*, the underlying subject matter here was redistricting. Although political partisans are no doubt deeply interested in the process, the redistricting process does not address controversial issues of social and moral values that divide the population. It does not arouse the type of intense passions that might justify a real fear of physical danger or mass public reprisals *432 against the members if the information was made public.

The evidence was highly relevant and not available from other sources. When I considered this factor, I tried my best to look at it from the perspective of the judge rather than the ultimate fact finder, the two roles I play in a non jury trial. One of the principal theories of the Plaintiffs in this case was that legislative staff and leaders collaborated with these political consultants to produce a redistricting map that

violated the constitution by favoring the Republican Party and its incumbents.

While it is true that the documents claimed as privileged contain no glaring “smoking gun” in terms of direct communications between the consultants and specific staff or legislators, that does not mean they are not highly relevant. Under their theory of the case, it was essential for the Plaintiffs to first prove that there was a secretive shadow process of map drawing by the political consultants which found its way into the enacted congressional map before they could prove the second prong—the connection of this process to the Legislature.

Nor was this evidence available from other sources. Yes, the Plaintiffs engaged in extensive discovery and obtained e-mails and other documentation which they argued was compelling evidence in support of their claim. But the Plaintiffs' advocacy on this point should not be confused with the reality of what they actually had—which were bits and pieces of information which they sought to weave into a narrative consistent with their theory. The legislature had, in fact, destroyed e-mails and other evidence of communication regarding the redistricting process and so had many of the non-party political consultants.

Throughout the discovery process, these political consultants maintained that they were told by legislative leaders that they could not “have a seat at the table” in the drawing of the redistricting maps, and that they abided by that admonition. They denied having any input in the Legislative map drawing efforts or otherwise trying to influence how the maps were drawn. They denied that they submitted maps in the public submission process for redistricting. Any map drawing on their part was described as a hobby, something for personal use only, an exercise done to see what could be done on a map and to anticipate what the Legislature might produce.

What this additional evidence gave the Plaintiffs was the ability to confront these denials, to lay bear not only the fact that some of these consultants were submitting maps to the legislature, but to show how extensive and organized that effort was, and what lengths they went to in order to conceal what they were doing. Notably, even in the face of this evidence, the non-party witnesses at trial did their best to evade answering direct questions on the subject, often using semantic distinctions to avoid admitting what they had done.

At the time I considered the issue, the Plaintiffs did have some evidence that suggested otherwise but, considering the high burden on them to prove their case, I couldn't say that it would have been enough, or that this additional evidence wouldn't be crucial to the case. After all, I had not heard all of the evidence nor had the opportunity to view it in context. Now that I have, I can say that the evidence filed under seal was very helpful to me in evaluating whether Plaintiffs had proved that first prong of their theory.

Moreover, as noted above, without sufficient proof of this secret, organized campaign to subvert the supposedly open and *433 transparent redistricting process, the question of whether the Plaintiffs could sufficiently tie the Legislature to that effort becomes moot. To conclude that this evidence was not highly relevant to this central issue of legislative intent would have been to prejudge the case and determine ahead of time that the Plaintiffs would not be able to prove that connection. This I was not prepared to do.

For all of these reasons, I tipped the scales in favor of the First Amendment privileges of the non-parties yielding to the need and interest of disclosure in this particular case.

DETERMINING LEGISLATIVE INTENT GENERALLY

One of Plaintiffs' claims is that the entire redistricting process was infected by improper intent. Specifically, they argue that, despite the Legislature's assertion that its redistricting process was open, transparent and non-partisan, a secret, highly partisan map drawing campaign was being conducted in the shadows that was intended to, and did, favor the Republican Party and its incumbents.

The first question in evaluating this claim is to ask, whose intent? The language in [Section 20](#) prohibits a map being “drawn” to favor or disfavor a political party or an incumbent, not “adopted” or “enacted.” Yet, the challenge is to an act passed by the Legislature, a collective body. When I asked the attorneys at the beginning of trial about this issue, I posed the hypothetical of a staff member charged with actually drawing the map, who did so with the intent to favor a political party, but hid this intent from other staff and members of the Legislature. Both sides agreed that it is the Legislature's intent that is at issue, not the staff member. Plaintiffs' attorneys conceded that, without more, this would be insufficient to

show improper intent as contemplated by [Article III, Section 20](#)—though they assert that the evidence indeed shows more.

There are some real problems in trying to make such a determination of legislative intent in this case. First, when we speak of legislative intent generally, we are concerned with trying to ascertain the meaning of language used in the enacted law. The goal is to interpret the language so as to give it the effect intended. In such a situation, we look to such things as the common meaning of the words used, legislative history, staff reports, statement of legislative intent in the enactment clause, transcripts of committee hearings, and statements made on the floor of the House and Senate. Some legal scholars suggest that one can never determine legislative intent from such sources, or indeed at all.⁸

This problem is exacerbated in a case like the one before me. Here, we are looking at something entirely different.

See, e.g., [League of Women Voters of Fla. v. Fla. House of Representatives](#)⁹, 132 So.3d 135, 150 (Fla.2013) (“In this context, however, the ‘intent’ standard in the specific constitutional mandate of [article III section 20\(a\)](#), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.”). It is not the meaning of the words used in the legislation that must be *434 interpreted. We can see clearly where the lines are drawn on the map. Rather, the question is what was the motive in drawing these lines.

In this inquiry, it is extremely unlikely that the bill's sponsor would stand up on the floor of the House or Senate and advise his or her colleagues that the intent of the legislation is to favor the Republican Party. Nor would you expect such comments at committee meetings, or anywhere else in public for that matter. Even if a legislator expressed such intent on the floor, can we assume that all of his or her colleagues were convinced and so motivated in their votes?

Do we look to evidence of improper intent of the leaders? If so, how many other legislators, if any, would need to be “in on it” in order to find it sufficient proof of the body's intent? What if legislative leaders and staff knew that partisan groups or individuals were drawing maps with intent to favor a political party and submitting them to the Legislature through third persons in order to conceal the identity of the map drawer, but they didn't inform legislative members of this? On the flip side, if leaders took reasonable precautions to insulate the staff map drawers from partisan influence, should

we conclude that the Legislature therefore had no improper partisan intent in adopting the map? How does that inform us as to what was motivating the members of the legislature?

Certainly, the actions and statements of legislators and staff, especially those directly involved in the map drawing process would be relevant on the issue of intent. As the Florida Supreme Court has explained,

the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.... [I]f evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent [redistricting] effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

 *Apportionment IV*, 132 So.3d at 149–150. See also, e.g.,  *Easley v. Cromartie*, 532 U.S. 234, 254, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (finding “some support” for district court’s conclusion that racial considerations predominated in drawing of district boundaries in email sent from legislative staff member to two senators);  *Texas v. United States*, 887 F.Supp.2d 133, 165 (D.D.C.2012) (noting that an “email sent between staff members on the eve of the Senate Redistricting Committee’s markup of the proposed plan” fueled the court’s “skepticism about the legislative process that created” a challenged district).

It is very difficult, however, to know when such evidence establishes not just individual intent or motive, but the intent or motive of the collective body. It seems that the more reliable focus in such an inquiry would be on what was actually produced by the Legislature, the enacted map. Specifically, an analysis of the extent to which the plan does

or does not comply with tier two requirements is a good place to start. Can one draw a map that meets tier-two requirements but nonetheless favors a political party or an incumbent? Sure, but it is more difficult.

Furthermore, a failure to comply with tier-two requirements not only supports an inference of improper intent, it is an independent ground for finding a map unconstitutional.

*435 See  *Apportionment I*, 83 So.3d 597 640–641. Additional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent. Therefore, I first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, then consider any additional evidence that supports the inference that such districts are also in violation of tier-one requirements.

SPECIFICALLY CHALLENGED DISTRICTS

The tier-two standards at issue in this case are compactness and the requirement that districts follow geographic and political boundaries where feasible. Because Florida and many of its counties are cities are not perfectly square or round, there is often tension between these two requirements.

An evaluation as to compactness “begins by looking at the shape of a district.”  *Apportionment I*, 83 So.3d 597, 634 (internal quotation marks and citation omitted). A district “should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement.” *Id.*; see also  *Id.* at 636 (emphasizing that “non-compact and ‘bizarrely shaped districts’ require close examination”). Districts “containing ... finger-like extensions, narrow and bizarrely shaped tentacles, and hook-like shapes ... are constitutionally suspect and often indicative of racial and partisan gerrymandering.”  *Id.* at 638 (internal quotation marks and alteration omitted). Thus, for example, the Florida Supreme Court struck down several Florida Senate districts in the Initial 2012 Senate Plan in part because those districts had “visually bizarre and unusual shapes.” *Id.*

The compactness review should also utilize “quantitative geometric measures of compactness” derived from “commonly used redistricting software.”  *Id.* at 635. For

example, the Florida Supreme Court has relied on the Reock method and the Area/Convex Hull method to assess compactness of voting districts. *See Id.* The Reock method “measures the ratio between the area of the district and the area of the smallest circle that can fit around the district.” *Id.* The Area/Convex Hull method “measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district.”  *Apportionment I*, 83 So.3d 597, 635.

Tier-two mandates also direct the Legislature to draw districts utilizing existing political and geographical boundaries where feasible. Political boundaries include “cities and counties,”  *Id.* at 637, while geographical boundaries include “rivers, railways, interstates and state roads,”  *Id.* at 638. This requirement is more flexible than the compactness requirement. But “the choice of boundaries” is not “left entirely to the discretion of the Legislature,”  *Id.* at 637, and it may not use any boundary (e.g., a “creek or minor road”) that suits its purposes,  *Id.* at 638. In addition, although no priority of importance is given to either, the requirement to use existing boundaries contains the modifier, “where feasible.”

A. Congressional District 5

Congressional District 5 does not adhere to the tier-two standards in [Article III Section 20](#). It is visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando. At one point, District 5 narrows to the width of Highway 17. The district has a Reock score of only 0.09. Enacted District 5 has majority black voting age population *436 (BVAP), but the benchmark districting was only a plurality BVAP district. The Defendants' argument that the vote dilution provision of Article III Section 20 and Section 2 of the Voting Rights Act required a majority BVAP district and that this configuration was necessary to achieve that end, is not supported by the evidence.

Plaintiffs have shown that a more tier-two compliant district could have been drawn that would not have been retrogressive. The plans proposed by the House of Representatives prior to conference committee plan 9047 being adopted were all more compact and split fewer counties. While not model tier-two compliant districts, these iterations did avoid the narrow appendage jutting from the

body of the district into Seminole County. Such appendages are particularly suspect of prohibited intent to benefit a political party or incumbent. Furthermore, the House's various iterations achieved a BVAP of between 47 and 48 percent. The House's chief map drawer, Alex Kelly, testified that he performed a functional analysis on these iterations, and that this level of minority population would not have been retrogressive. Indeed, this is higher than the BVAP of benchmark district when it was enacted.

The vote dilution provisions in [Article III, Section 20](#) and in the Voting Rights Act do not require the creation of a majority-minority district wherever possible, but only where certain conditions—conditions first announced in  *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)—are satisfied. First, three preconditions must be present: (i) the minority population is sufficiently large and geographically compact to be a majority of the voting-age population; (ii) the minority population is politically cohesive; and (iii) the majority population votes sufficiently as a bloc to enable it usually to defeat the candidates preferred by minorities.  *Apportionment I*, 83 So.3d at 622 (citing  *Gingles*, 478 U.S. at 50–51, 106 S.Ct. 2752).

The Legislature made no effort during the redistricting process to determine if the *Gingles* preconditions existed for this district, nor does the evidence introduced at trial demonstrate that they exist now. The minority population is not sufficiently large and geographically compact to constitute a majority of the voting age population. To achieve a BVAP over 50%, the district connects two far flung urban populations in a winding district which picks up rural black population centers along the way. The *Gingles* compactness inquiry certainly is focused on more than just district lines.

See  *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). But it also doesn't ignore such lines. *See Id.* District 5 is simply not compact for the purpose of the *Gingles* analysis.

Nor does the evidence prove the third precondition. There is no dispute that there is racially polarized voting in Northeast Florida. However, Defendants have not shown that this polarization is legally significant. Because “the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will

vary from district to district.”  *Thornburg v. Gingles*, 478 U.S. at 50, 106 S.Ct. 2752. The evidence is undisputed that the benchmark district, which was never majority-minority, elected an African–American to Congress during its entire existence. Additionally, analysis by Dr. Brunell, an expert retained by the House, suggested that there would be a 50/50 ability to elect a *437 minority candidate of choice with a BVAP as low as 43.6%. Thus, the evidence does not establish that the majority population votes sufficiently as a bloc to enable it usually to defeat the candidates preferred by minorities.

I also find that the decision to increase the district to majority BVAP, which was accomplished in large part by creating the finger-like appendage jutting into District 7 and Seminole County, was done with the intent of benefiting the Republican Party. I reach this conclusion based in part on the inference that the Florida Supreme Court suggested could be drawn from oddly shaped appendages that had no legal justification.

See  *Apportionment I*, 83 So.3d at 618 (“[W]here the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred”). This inference is also buttressed by the evidence of improper intent in the redistricting process generally, and as specifically related to the drawing of District 5, the most significant of which I will outline now.

1. In General

Plaintiffs' theory of the case regarding improper intent is that Republican leadership in the House and the Senate, their key staff members, and a small group of Republican political consultants conspired to avoid the effective application of the Fair District Amendments to the redistricting process and thereby successfully fashioned a congressional map that favors the Republican Party and its incumbents. The strategy they came up with, according to the Plaintiffs, was to present to the public a redistricting process that was transparent and open to the public, and free from partisan influences, but to hide from the public another secretive process. In this secretive process, the political consultants would make suggestions and submit their own partisan maps to the Legislature through that public process, but conceal their actions by using proxies, third persons who would be viewed as “concerned citizens,” to speak at public forums from scripts

written by the consultants and to submit proposed maps in their names to the Legislature, which were drawn by the consultants.

What is clear to me from the evidence, as described in more detail below, is that this group of Republican political consultants or operatives¹⁰ did in fact conspire to manipulate and influence the redistricting process. They accomplished this by writing scripts for and organizing groups of people to attend the public hearings to advocate for adoption of certain components or characteristics in the maps, and by submitting maps and partial maps through the public process, all with the intention of obtaining enacted maps for the State House and Senate and for Congress that would favor the Republican Party.

They made a mockery of the Legislature's proclaimed transparent and open process of redistricting by doing all of this in the shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it. They were successful in their efforts to influence the redistricting process and the congressional plan under review here. And they might have successfully concealed their scheme and their actions from the public had it not been for *438 the Plaintiffs' determined efforts to uncover it in this case.

The closer question is whether the Legislature in general, or the leadership and staff principally involved in drawing the maps, knowingly joined in this plan, or were duped by the operatives in the same way as the general public. The Defendants argue that if such a conspiracy existed, there is no proof that anyone in the Legislature was a part of it. If portions of the operatives' maps found their way into the enacted maps, they say, it was not because leadership or staff were told or knew they came from this group, but rather because the staff, unaware of their origins, saw the proposals as improving the draft maps they were working on.

The most compelling evidence in support of this contention of the Defendants is the testimony of the staff members who did the bulk of the actual map drawing for the Legislature. I had the ability to judge the demeanor of Alex Kelly, John Guthrie and Jason Poreda at trial and found each to be frank, straightforward and credible. I conclude that they were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate them from direct partisan influence. I accept that their

motivation in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair District Amendments, as their superiors had directed them.

That being said, the circumstantial evidence introduced at trial convinces me that the political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part. They managed to taint the redistricting process and the resulting map with improper partisan intent. There is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise.

a. Destruction of Records

The Legislative Defendants argue that despite the extensive discovery conducted by the Plaintiffs, there is a paucity of documentary evidence that ties the activities of the operatives with a single legislator so as to prove improper legislative intent. I note, however, that the Legislators and the political operatives systematically deleted almost all of their e-mails and other documentation relating to redistricting. There was no legal duty on the part of the Legislature to preserve these records, but you have to wonder why they didn't. Litigation over their plans was "a moral certainty," as their lawyers put it earlier in this case, and intent would be a key issue in any challenge.

b. Early Meetings of Legislative Leaders and Staff with Political Consultants

In December of 2010 and January of 2011, Legislative leaders, staff members and attorneys met with a group of Republican political consultants to discuss the upcoming 2012 redistricting process. The attendees for one or both included Senator Gaetz, Representative Weatherford, legislative staff members Alex Kelly, Chris Clark and John Guthrie, counsel for the House and Senate, Richard Heffley, Marc Reichelderfer, Patrick Bainter, Benjamin Ginsberg, Joel Springer, Andrew Palmer, and Frank Terraferma.

Clark was the chief legislative aide for Gaetz during the 2012 Redistricting Process and Guthrie was the Senate staff member in charge of map drawing. Heffley was a political consultant who has worked with a number

of Republican legislators and candidates, including Gaetz. *439 He was, at the time, under contract with The Republican Party of Florida (RPOF) to provide unspecified services relating to redistricting. Reichelderfer was a political consultant who had worked with a number of Republican legislators and candidates, including Speaker Dean Cannon. Bainter was a political consultant who had worked with a number of Republican legislators and candidates, including Representative Daniel Webster. Bainter was the owner of Data Targeting, Inc. ("Data Targeting"), a political consulting and polling firm located in Gainesville, Florida. Ginsberg was an attorney based in Washington, D.C., recognized in the area of redistricting and had represented the National Republican Party in redistricting matters. He also either was or came to be counsel for Heffley, Reichelderfer and Terraferma. Springer was employed by the RPOF as director of Senate campaigns. Palmer was employed by the RPOF as director of House campaigns. Terraferma was a political consultant who worked with a number of Republican legislators and candidates, including Weatherford.

The meetings were not open to the public, and there is no written record of what was discussed at either meeting. No one who testified at trial about them seemed to be able to remember much about what was discussed, though all seemed to agree that the political consultants were told that they would not have a "seat at the table" in the redistricting process. No one clearly articulated what that meant exactly, but there was testimony that they were told that they could still participate in redistricting through the public process "just like any other citizen." One witness testified that the participants discussed whether a privilege could be identified to prevent disclosure of redistricting-related communications among political consultants, legislators, and legislative staff members, and concluded that no privilege would apply.

Reichelderfer prepared a memorandum following the December, 2010 meeting that included the following notations: "What is our best operational theory of the language in [Amendments] 5 and 6 related to retrogression of minority districts?"; "Central FL Hispanic seats? Pros and Cons"; "Evolution of maps—Should they start less compliant and evolve through the process—or—should the first map be as near as compliant as possible and change very little? Or other recommendations?"; "Communications with outside non-lawyers—how can we make that work?"

There is nothing necessarily sinister about such meetings. Most of the attendees were friends or professional colleagues

and perhaps it could be considered a courtesy extended. But it doesn't look good if you are promoting openness, transparency and neutrality in the redistricting process. There was really no reason to convene two meetings just to tell active political partisans of the Republican Party that they would not "have a seat at the table." A letter or e-mail would suffice, or some general public announcement as to what the protocol would be going forward.

And there are a few curious things about these meetings and their connection to subsequent events that are troubling. First, this was a highly partisan group and all the political consultants were very interested in the redistricting process. It is inconceivable to me that, if as testified to, they were advised that they could participate in the public process "just like any other citizen," they would not have done so. How could these political consultants, who were intensely interested in the process, whose jobs or livelihoods were tied into protecting their clients' and their party's interests with respect to redistricting, not take the opportunity to submit proposed *440 maps through the public portal, to attend at least some of the public hearings and speak out?

The reality, and the irony, is that there would be absolutely nothing wrong about the attendees at those meetings submitting proposed maps or partial maps. The difference is, if done in the open, then those reviewing the submissions could take into account the source in evaluating whether it was neutral or whether it might tend to favor or disfavor a political party or an incumbent. One of the political consultants lamented that if he had submitted maps in his own name, he would probably have come under attack, accused of trying to favor his party or its incumbents. Well, of course his submission might be closely scrutinized, in the same way that a proposed map submitted by the Florida Democratic Party might be taken with a grain of salt. That's how it should be if one is concerned about improper partisan intent influencing the drawing of the map.

Regardless, given the circumstances, it's hard to imagine that the legislative leaders and staffers would not have expected active participation in the public redistricting process by those political consultants at the meetings. And when the process was under way and maps were being submitted by members of the public, and public hearings were being held, and these political consultants were not in attendance, and none of the maps coming from the public had any of their names on them, I would think that the staff and legislative leaders would find

it extremely strange, that they might even ask why not. But they didn't.

One of the things that the Defendants tout as showing that there was no improper partisan intent in the drafting of the maps is to point to the fact that as things progressed, each succeeding map that was drawn was an improvement over the one before it in terms of compactness, leaving cities and counties intact and following geographical boundaries. Coincidentally, though, that corresponds with a strategy suggested from Reichelderfer's notes, i.e., start with less compliant maps and work toward a more compliant map.

The Defendants also tout the opportunity for the public to have input by submitting proposed maps or partial maps, and by attending public hearings which were held throughout the state. And, the Defendants point out, all of this was open, transparent and on the record. Although that sounds like a good idea—who can argue that openness and transparency are not good things when it comes to government—it provided the means by which partisan maps, secretly drawn and submitted by political operatives, could be incorporated into the enacted map with no one in the general public the wiser. Staff members were encouraged to consider maps submitted by the public and if they contained concepts or configurations that made the draft map "better," to incorporate them.

Paid political operatives aside, when you think about it, anybody who would go to all the trouble of drawing a map and presenting it to the legislature for consideration is probably more likely to be motivated by personal or party politics than by an altruistic desire to draw the most constitutionally compliant map possible, free of any partisan intent. And if so, relying upon publicly submitted maps may not be the best way to protect against partisan influence.

If you choose, however, to accept and perhaps rely upon publicly submitted maps, it seems to me that you should have a way to address the possible, nay probable, partisan intent of the drafters of at least some of those maps. The Legislature's answer was apparently to ignore it. *441 Both the Senate and the House leadership instructed their staff not to consider the potential political performance of any district drawn (except in the House as to districts involving tier one minority issues), nor were they to concern themselves with the origins or the author of any publicly submitted map.

This seems on its face a neutral approach, and I appreciate the dilemma that arises: If I start evaluating a proposed map for

political performance because of suspicion that it is the result of improper partisan intent, and make “corrections,” haven’t I now altered the map with the intent to favor or disfavor a political party? While I appreciate this concern, I don’t know that it is a satisfactory answer to say that, as long as the improper intent behind a submitted map did not originate with me, and I am not expressly told about it, I don’t have to worry about it. Turning a blind eye to the probability of improper intent in these maps is not the same as neutrality.

Perhaps it would be best to have it out on the table for all to see and evaluate. Considering political performance is not the same as intending to favor or disfavor a political party or incumbent, and an open process would assist in evaluating which was in play in a particular situation. And in truth, every single legislator or senator could very easily determine on their own the potential political performance of any district on a proposed map and vote on it accordingly. Any interested citizen could access such information and advise their representative of his or her concerns or feelings about a particular district. You might insulate the staffers from political consultants and partisan influences but you can’t insulate the entire Legislature.

c. Continued Involvement of the Political Consultants in the Redistricting Process

On June 1, 2011, Senator Gaetz sent an email to legislators providing information about upcoming public hearings about the redistricting process. The metadata for the email reveals that a “blind copy” of it was sent to Heffley and Terraferma. At trial, Senator Gaetz had no explanation for why this was done, pointing out only that the information in the e-mail was public information and that he wasn’t sure someone else in his office had not sent it out under his name. Again, there would be absolutely nothing wrong with sending this information to Heffley and Terraferma, but why secretly send a blind copy? And if Senator Gaetz did not send it out, someone in his office was keeping these operatives in the loop.

Two of the consultants, Reichelderfer and Hefley, were directly involved in the redistricting process, acting as go betweens for leadership of the two chambers regarding the redistricting process. This was purportedly because of a lack of a good working relationship between the Speaker of the House and the President of the Senate. Yet, by all accounts, the actual staff members of each chamber who were working on the maps got along well with each other, as did the chairmen of

the redistricting committees. Regardless, in their insider roles, Hefley and Reichelderfer did not have to speak directly to staff map drawers, or even leadership, to infect and manipulate the map drawing and adoption process.

As noted above, the House and Senate destroyed most e-mails and other records of communications concerning the redistricting process, as did the political consultants. What was recovered, however, allowed the Plaintiffs to show that Kirk Pepper, Deputy Chief of Staff to then *442 Speaker Dean Cannon, was regularly sending to Reichelderfer copies of various draft maps of the Legislature well before they were disclosed to the public.

The Defendants acknowledge that this was improper, but say it is not evidence of improper intent on the part of the Legislature because: 1) It was done without permission from his boss; 2) It was not done for the purpose of influencing the actual drafting of the maps; 3) Pepper had no map drawing responsibilities and gave no directions on how the maps should be drawn; and 4) He was simply trying to give his friend, Reichelderfer, a heads up on what to expect so that he could get ahead of his competition and better advise his clients.

Pepper and Reichelderfer apparently did communicate about the political performance of the maps, however, as evidenced by a series of e-mails between the two. For example, on November 27, 2011, right after receiving an early unpublished copy of the Senate’s first draft congressional map from Pepper, Reichelderfer advised Pepper that the district of Representative Daniel Webster was “a bit messed up,” and Pepper responded by inquiring “performance or geography?” Mr. Pepper testified that, though it may seem that they were discussing political performance, his reply to his friend was actually a signal reminding him that they should not discuss such things. Perhaps, but that is a very unusual and illogical interpretation.

In an email exchange with Reichelderfer, Representative Cannon commented that “we are in fine shape” as long as “the Senate accommodates the concerns that you [Reichelderfer] and Rich [Heffley] identified in the map that they put out tomorrow.” The Defendants explained this exchange by saying that the concerns referred to was the general concern by the House that the Senate map would be so far different than the House map that it would make reconciliation of the two maps difficult. Again, perhaps, but this seems a stretch given the language used.

In October of 2011, Frank Terraferma e-mailed Chairman Weatherford reporting that Pepper was at the Republican Party of Florida huddled on a computer with Rich Hefley and working on “congressional redistricting if I had to guess.” Now, it's certainly possible that Terraferma was mistaken or simply speculating without any basis, as was suggested at trial, but one has to wonder why he would make this assumption if Pepper really had nothing to do with the redistricting process. Maybe not officially, but as noted above, he was heavily involved in helping his friend, Reichelderfer with inside information. From November 2011 until January 2012, Pepper transmitted at least 24 draft maps to Reichelderfer. In most cases, Pepper provided the draft maps to Reichelderfer before their release to the public. In many cases, Pepper provided Reichelderfer with draft maps that were never released to the public.

Reichelderfer made a number of modifications to these and other maps that he received from Pepper. Some of those revisions combine a District 5 with a Black VAP of over 50% and a Hispanic VAP of District 9 over 40%. (*Compare* CP Ex. 885 *with* CP Ex. 1050). As a result of such changes, the performance of Districts 5, 7, 9, and 10 went from being four Democratic performing or leaning seats in early maps such as H000C9001 to two Democratic and two Republican performing seats in the enacted map, H000C9047 based on the results of the 2008 presidential election.¹¹ Indeed, many of the maps *443 and partial maps the consultants focused on seemed to be in the Central Florida area, which coincidentally were the areas in the enacted map I have found to be problematic.

d. Prior Finding of Partisan Intent in State Senate Plan

The Florida Supreme Court found improper partisan intent present in the State Senate Map. The same process and the same people were involved in drafting the congressional map. It seems unlikely that the same taint would not affect that map as well. There is a difference in that the former was drawn without any input from the House and the latter the result of a collaborative effort. I note, however, that my concerns with Districts 5 and 10 involve changes to the House's map in deference to the Senate. The problems that I find in Districts 5 and 10 were not present, at least to the same degree, in the House version.

2. Evidence of Partisan Intent Specifically Related to District 5

The decision to change District 5 to make it a majority BVAP was made at a non-public meeting attended by Alex Kelly and John Guthrie, the chief map drawers for the House and Senate respectively, and Will Weatherford and Don Gaetz, chairmen of the redistricting committees in their respective chambers. They had been given direction before the meeting from their respective chamber leaders, Speaker of the House Dean Cannon and Senate President, Mike Haridopolis. Notably, Alex Kelly testified that Speaker Cannon told him that the Senate would likely request to push District 5 over 50% BVAP and that they should be prepared to accede to that request. Speaker Weatherford¹² testified that the House only went along with this request because the Senate made a “compelling” argument for it, but he could not remember the substance of the argument. The reason given at trial for this change was that the District was very close to 50% BVAP and that it seemed prudent to avoid a possible VRA suit by bumping it up enough to create a majority-minority district. That justification is not compelling, without some showing that it was legally necessary to create a majority-minority district.

The changes also increased the Republican performance of neighboring District 7.¹³ In the version of District 7 House Plan 9043, Alex Sink (D) would have received 48.5% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 50.5% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.7% of the two-party vote in the 2006 gubernatorial election. In the enacted version of District 7, Alex Sink (D) would have received 47.5% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 49.6% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.0% of the two-party vote in the 2006 gubernatorial election. The change resulted in a decrease in registered Democrats in District 7 from 36.0% to 35.0% based on 2010 general election data.

Based on the above, I find that Plaintiffs have proved that District 5 unnecessarily *444 subjugates tier-two principals of compactness. They have also proved portions of District 5 were drawn to benefit the Republican Party, in violation of tier-one. Accordingly, District 5 is invalid and must be

redrawn. Any surrounding districts affected by such a change must likewise be redrawn.

Congressional District 10

District 10 is overall fairly compact. It has a Reock Score of .39 and a Convex Hull Score of .73. However, there is an odd-shaped appendage which wraps under and around District 5, running between District 5 and 9. Such appendages render a district not compact pursuant to tier-two standards and should be avoided unless necessary to comply with tier-one requirements. See [Apportionment I, 83 So.3d at 634](#) (“Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement”). Plaintiffs have shown that the district could be drawn in a more compact fashion, avoiding this appendage. Plaintiffs adduced multiple iterations emanating from the House redistricting suite which did not contain this appendage and were otherwise more compact. Indeed these iterations were more compact in Central Florida generally, as the chart below will show.

Central Florida Regional Compactness Chart

	CONGRESSIONAL PLAN		HOUSE PLAN 9043	
	Reock	ConvexHull	Reock	ConvexHull
CD5	0.09	0.29	0.10	0.35
CD7	0.60	0.77	0.67	0.86
CD8	0.34	0.76	0.32	0.73
CD9	0.48	0.80	0.66	0.90
CD10	0.39	0.73	0.42	0.83
CD15	0.44	0.75	0.60	0.81
CD17	0.67	0.82	0.64	0.83
AVG.	0.43	0.70	0.49	0.76

The *Central Florida Regional Compactness Chart* lists compactness scores for all districts included in Orange, Osceola, and Polk Counties.

Defendants contend that this appendage, and the configuration of Central Florida generally, is necessary to achieve tier-one minority protection in both Districts 5 and 9. Because the appendage is highly populated and white majority, they argue that placing its population in either of those districts would have impermissibly lowered the minority VAP. I cannot agree.

While the creation of a Hispanic influence district in CD 9 may be a legitimate goal, there is no evidence before me to suggest that it was entitled to tier-one protection. There was no Hispanic opportunity district in Central Florida under the benchmark plan. There was no evidence that a district

without the appendage would lead to retrogression elsewhere. Indeed House plan 9043 had a non-retrogressive BVAP of 48.03% in CD 5 and a HVAP of 39.59% in CD 9.¹⁴ Nor is District *445 9 entitled to vote-dilution protection. There was no evidence to suggest that a Hispanic majority district could be created in Central Florida. Defendants cannot justify deviation from a tier-two *constitutional requirement* because of a desire to create a Hispanic influence district.

I also find that District 10 was drawn to benefit the Republican Party and the incumbent. I reach this conclusion based in part on the inference that the Florida Supreme Court suggested could be drawn from oddly shaped appendages that had no legal justification. See [Apportionment I, 83 So.3d at 618](#). This inference is also buttressed by the general evidence of improper intent outlined above in my analysis of District 5 and the following evidence related specifically to the drawing of District 10.

The appendage benefited the incumbent Representative Webster by returning to District 10 territory that was part of his benchmark District 8 and improved the Republican performance of District 10 in two out of the three elections relied upon by the Florida Supreme Court in *Apportionment I*. In the version of District 10 in H000C9043, Alex Sink (D) would have taken 44.9% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 48.0% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.0% of the two-party vote in the 2006 gubernatorial election. In the enacted version of District 10, Alex Sink (D) would have received 45.6% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 47.6% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 38.9% of the two-party vote in the 2006 gubernatorial election. In addition, the change lowered the number of registered Democrats in District 10 from 37.2% in H000C9043 to 36.8% in H000C9047 based on 2010 general election data.

Dr. Ansolabehere also testified that the changes between House plan 9043 and adopted plan 9047 altered the boundaries of that district primarily by moving 80,000 voting age people out of District 10 into District 9, while moving 71,000 voting age people out of District 9 to District 10. Dr. Ansolabehere testified that these changes were not necessary to make District 9 a minority-performing district, because without them District 9 was already a minority-performing district, and the populations that were shifted were majority

white populations. As a result of this appendage, the decrease in Democratic registration in District 10 and corresponding increase in Democratic registration in the already comfortably Democratic District 9 were of significant Republican benefit for a competitive district such as District 10.

Plaintiffs have proved that District 10 unnecessarily subjugates tier-two principles of compactness. They have also proved portions of District 10 were drawn to benefit the Republican Party, in violation of tier-one. Accordingly, District 10 is invalid and must be redrawn, as must the surrounding districts affected by such change.

Districts 13 & 14

Plaintiffs claim that Districts 13 and 14 are unconstitutional because they violate the tier-two standard, requiring that, where feasible, districts should utilize existing political and geographic boundaries. Plaintiffs point to District 14, which reaches across Tampa Bay to take in a portion of South St. Petersburg, splitting the city of St. Petersburg and Pinellas County. Plaintiffs suggest that this configuration is not justified by any tier-one consideration. They suggest that it is indicative of improper intent to benefit the Republican *446 Party and the incumbent, the late Republican Congressman Bill Young.

The benchmark predecessor to District 14 (District 11 in 2002) had a BVAP population of 26.78% and a HVAP of 25.84%. As adopted, Congressional District 14 has a BVAP of 25.63% and a HVAP of 25.61%. Romo Plaintiff's proposed maps A and B have a BVAP of 21.73% and a HVAP of 26.91%

Plaintiffs have not proved tier-two deviations. While the Romo Plaintiffs' proposed map does increase the compactness of District 13, it causes District 14 to become less compact under both Reock and Convex Hull measurements. On a regional level, the Romo proposed map causes every district which touched District 13 and 14 to become less compact than the adopted plan, 9047. As the chart below shows, the Romo maps would decrease the compactness in five of the six districts, while increasing the compactness in only one. The legislature was not required to make this tradeoff in compactness to avoid splitting Pinellas County.

Tampa Bay Regional Compactness Chart

	Reock Score		Convex Hull Score	
	Congressional Plan	Romo Maps	Congressional Plan	Romo Maps
CD12	0.40	0.38	0.81	0.79
CD13	0.46	0.57	0.82	0.91
CD14	0.36	0.28	0.69	0.60
CD15	0.44	0.33	0.75	0.67
CD16	0.42	0.32	0.81	0.80
CD17	0.67	0.39	0.82	0.68
AVG.	0.46	0.38	0.78	0.74

The Tampa Bay Regional Compactness Chart lists compactness scores for all which include portions of Hillsborough, Pasco, Pinellas, and Manatee Counties the adopted plan.

Nor have Plaintiffs proved that the decision to include portions of Pinellas County in District 14 was the result of partisan mal-intent to benefit the Republican Party. Unlike Districts 5 and 10, there are no flagrant tier-two deviations from which I can infer unlawful intent. The decision to have District 14 invade Pinellas County was made early in the process by the professional staff, as most if not all of the iterations emanating from both houses broke into Pinellas County. Thus, unlike changes made to District 5 by the leaders during conference committee, this decision was made by the Staff whom I have found were insulated from the political consultants. I simply cannot conclude, on partisan effect alone, that the decision to incorporate portions of South St. Petersburg into District 14 was done with the intent to benefit the Republican Party or the incumbent member of Congress.

Districts 21 & 22

Plaintiffs contend that Districts 21 and 22 are invalid. They point to testimony from Alex Kelly along with redistricting iterations emanating from the House redistricting suite. They suggest it was possible to draw Districts 21 and 22 stacked on top of each other north to south rather than in the adopted configuration with the districts running parallel to each other down the coast. This configuration could have avoided county and city splits. Plaintiffs contend that failure to adopt this configuration was an unnecessary deviation from tier-two requirements and evidenced *447 an intent to benefit the incumbents in that area.

Plaintiffs have not met their burden of proving unnecessary deviation from tier-two requirements. The iteration Plaintiffs point to might be more compliant with tier-two in a vacuum, but they have not shown that it could be achieved without violating tier-one requirements for minority protection in neighboring District 20.¹⁵ Alex Kelly did testify that this configuration could be accomplished without retrogression. However, the inquiry does not end there because the

benchmark district was a majority black district. CP 905, which was discussed extensively at trial, does not attain majority BVAP status in District 20. There was no testimony at trial about District 20 and whether it met the *Gingles* preconditions such that it was protected under the vote dilution provisions of Section 2 of the VRA. Because District 20 was a majority black district in the benchmark, I am reluctant to invalidate the Legislature's plan absent a showing that more tier-two compliant districts could be drawn while not violating either tier-one requirement regarding racial minority protection. See [Apportionment I](#), 83 So.3d 597, 641 (“If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression ... without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan”).

Plaintiffs did produce a couple of draft iterations that achieved majority black status for District 20.¹⁶ However, after visually examining these districts I don't find sufficient tier-two improvements to justify invalidating the Legislature's product.¹⁷ These districts have a more irregular boundary in Hendry County, compared to the enacted plan. Additionally, the stacked configuration of Districts 21 and 22 causes both districts to be deeply invaded by tentacles reaching from District 20. In enacted plan 9047, District 21 has no such appendage invading it and is quite visually compact. Furthermore, these iterations cause District 23 to become more visually non-compact, creating two distinct areas, joined by a narrower section.

Plaintiffs have not met their burden of showing unnecessary deviation from tier-two requirements given the various tradeoffs required to draw compact districts in the region as a whole. Nor have they shown that improper intent led to the adoption of Districts 21 and 22. My “duty ‘is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.’ ” See [Apportionment I](#), 83 So.3d at 608 (quoting [In re Apportionment Law—1992](#), 597 So.2d at 285).

Districts 25, 26, & 27

Plaintiffs contend that these districts are invalid because the Legislature unnecessarily split Hendry County between two districts and unnecessarily split the city of Homestead. They

also contend that the configuration was done to benefit the Republican Party.

Plaintiffs have not proved invalidity. A regional view of South Florida shows that any tier-two differences between the enacted map and Romo Plaintiffs' maps are *de minimis*. Indeed the enacted plan splits the same number of counties, while splitting one less city. Were I to invalidate the enacted plan based on the objective tier-two evidence before me, I would be selecting a plan I found subjectively better rather than determining if Plaintiffs have proved the enacted plan invalid. *Id.* Nor do I find based on the totality of the evidence that this configuration was based on unlawful partisan intent. Moreover, I ***448** credit the testimony of Professor Moreno that Romo A & B could have a retrogressive effect on the Hispanic majority districts in South Florida.

South Florida Regional Compactness Chart

	CONGRESSIONAL PLAN		ROMO A & B	
	Reock	Convex Hull	Reock	Convex Hull
CD18	0.50	0.82	0.42	0.77
CD20	0.48	0.74	0.49	0.75
CD21	0.28	0.60	0.28	0.62
CD22	0.18	0.61	0.22	0.53
CD23	0.27	0.57	0.28	0.56
CD24	0.38	0.73	0.37	0.76
CD25	0.40	0.73	0.42	0.65
CD26	0.18	0.46	0.17	0.49
CD27	0.46	0.81	0.59	0.84
AVG.	0.35	0.67	0.36	0.66

The *South Florida Regional Compactness Chart* contains compactness scores for all districts included in Palm Beach, Broward, Miami–Dade, and Monroe Counties.

South Florida Regional County and City Split Chart

	CONGRESSIONAL PLAN	ROMO A & B
Split Counties	5	5
Counties Splits	19	18
Split Cities	18	19
City Splits	45	42

This table uses the same 9 districts included in the South Florida Regional Compactness Table.¹⁸

***449 CONCLUSION**

As I find the Legislature's remaining affirmative defenses to be without merit, I find the Congressional Redistricting plan adopted by the Legislature to be constitutionally invalid. Specifically, Districts 5 and 10 were drawn in contravention of Article III Section 20 of the Florida Constitution. They

will need to be withdrawn, as will any other districts affected thereby. All additional challenges to the plan are rejected. Jurisdiction is reserved to consider any pending or post-judgment motions, and to enter such further orders as may be necessary to effectuate this judgment or to otherwise fashion an appropriate equitable remedy.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 10th day of July, 2014.

/s/ Terry P. Lewis

TERRY P. LEWIS

Circuit Judge

Copies to:

All Counsel of Record

All Citations

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Footnotes

- 1 This Court previously considered two issues arising out of the pre-trial discovery process—one concerning the legislative privilege and the other concerning the discovery of documents in the possession of non-party political consultants—and released three opinions while the litigation was pending. See [League of Women Voters of Fla. v. Fla. House of Representatives \(Apportionment IV\)](#), 132 So.3d 135, 138 (Fla.2013) (addressing and largely rejecting claims of legislative privilege); [League of Women Voters of Fla. v. Data Targeting, Inc. \(Apportionment V\)](#), 140 So.3d 510, 514 (Fla.2014) (permitting the use during trial of evidence obtained from non-party political consultants, pending further appellate review); [Bainter v. League of Women Voters of Fla. \(Apportionment VI\)](#), 150 So.3d 1115, 1117 (Fla.2014) (upholding trial court ruling ordering production of documents in the possession of non-party political consultants).
- 2 We reject the Legislature's federal constitutional challenge to the Fair Districts Amendment. The Supreme Court's recent opinion in the Arizona case confirms that neither the "Elections Clause" of the United States Constitution, [U.S. Const. art. I, § 4, cl. 1](#), nor federal law, [2 U.S.C. § 2a\(c\)](#), prohibits the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn. As the Supreme Court explained, "[b]anning lawmaking by initiative to direct a State's method of apportioning congressional districts" would "stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage." [Ariz. State Legislature](#), 135 S.Ct. at 2676, 2015 WL 2473452, at *20; see also [Brown](#), 668 F.3d at 1280 (rejecting a federal constitutional challenge to the Fair Districts Amendment based on reasoning wholly consistent with the Supreme Court's reasoning in *Arizona State Legislature*).
- 3 The issues raised on appeal by the challengers are: (1) the trial court erred in requiring only two districts to be redrawn after finding constitutionally improper intent in the enacted congressional redistricting plan; (2) Congressional Districts 5, 13, 14, 21, 22, 25, 26, and 27 are independently unconstitutional; (3) this Court should craft a meaningful remedy, either by adopting a constitutionally valid plan or assisting the Legislature so that it can adopt a plan that complies with the Florida Constitution; and (4) the trial court erred in rejecting the challengers' attempt to re-open the evidence to introduce additional allegations of improper partisan intent. We summarily reject the challengers' claim regarding the trial court's denial of their motion to re-open the evidence. Although the e-mail the challengers sought to introduce after the close of evidence did provide some additional circumstantial support for their claim of improper intent, the challengers themselves have conceded that it was cumulative to other evidence. Thus, while it may have been relevant evidence and properly introduced during the trial if the challengers had been able to obtain it sooner, the trial court did not

abuse its discretion in denying the motion to re-open the case, and the challengers were not, in any event, prejudiced since the trial court found the existence of unconstitutional intent.

4 The Legislature also raises the following three issues on cross-appeal: (1) the trial court's order improperly discourages public participation in the redistricting process; (2) under the Florida Constitution, the controlling intent is the intent of the Legislature as a collective body; and (3) [article III, section 20, of the Florida Constitution](#) is invalid because it violates the United States Constitution.

As to the claim regarding public participation, we clarify that we do not read the trial court's order as discouraging public input in redistricting. There is nothing inherently in violation of the law or the Florida Constitution for an individual to anonymously submit a map to the Legislature for consideration or to submit a map through a third party. We conclude that any comments by the trial court to the contrary were made in the specific context of the facts and circumstances of this case and do not amount to error.

5 We conclude—as agreed by both parties—that amici curiae LatinoJustice PRLDEF, Florida New Majority, and Mi Familia Vota lack standing to challenge the validity of Congressional District 9. Amici curiae did not appear in the trial court to raise this claim, and it is well-settled that amici are not permitted to raise new issues. See [Riechmann v. State](#), 966 So.2d 298, 304 n. 8 (Fla.2007).

6 We use the term “challengers,” which has been used by this Court in prior opinions during the course of this litigation, to refer collectively to the plaintiffs in the trial court, who are the Appellants/Cross-Appellees in this Court. These litigants that challenged the constitutionality of the congressional redistricting plan enacted in 2012 include two separate groups, which have described themselves as the “Coalition plaintiffs” and the “Romo plaintiffs.” The “Coalition plaintiffs” consist of the League of Women Voters of Florida, Common Cause, and four individually named parties. The National Council of La Raza was formerly a member of the “Coalition plaintiffs” but later voluntarily dismissed all claims and withdrew as a party in the case prior to the trial. The “Romo plaintiffs” consist of lead plaintiff Rene Romo and six other individually named parties. There has rarely been a need to distinguish between the two groups for purposes of the issues to come before this Court, and the circuit court consolidated the two lawsuits filed by these groups that challenged the Legislature's 2012 congressional redistricting plan.

7 “Amendment 5 is now codified in [article III, section 21, of the Florida Constitution](#). The standards in [article III, section 20](#)—governing congressional reapportionment—and those in [article III, section 21](#)—governing legislative reapportionment—are identical.” [Id.](#) at 139 n. 1.

8 In redrawing Districts 5 and 10, the Legislature's remedial redistricting plan also slightly altered the boundaries of five other congressional districts—Districts 6, 7, 9, 11, and 17. All of the remaining districts were unchanged from the configuration enacted in the Legislature's 2012 redistricting plan.

9 The federal district court's opinion in *Texas* was subsequently vacated on other grounds by the United States Supreme Court after that Court issued its recent decision in [Shelby County, Alabama v. Holder](#), — U.S. —, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), holding a portion of the Voting Rights Act unconstitutional. See *Texas v. United States*, — U.S. —, 133 S.Ct. 2885, 186 L.Ed.2d 930 (2013).

10 The 2002 benchmark plan performed with 15 Republican districts under the 2008 presidential data and 14 Republican districts under the 2012 data, though there were only twenty-five total districts in that map, as compared to twenty-seven total districts in the 2012 map after Florida gained two districts based on the results of the 2010 Census.

11 The Legislature has strongly disputed the relevance of these alternative maps, going so far as to assert that this Court should not consider the alternative maps at all because they were either drawn by partisan operatives aligned with the Democratic Party or of unknown origin. But alternative maps are not on trial themselves, as is the Legislature's map, and they can provide “relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent”—as the trial court found the Legislature to have done in this case. [Apportionment I](#), 83 So.3d at 611. Nevertheless, we have reviewed only the alternative maps actually introduced into evidence during the trial and remedial

proceedings, rather than any of the summary-judgment maps, and have relied on those maps only inasmuch as they show alternate ways—not necessarily the best or legally required way—to configure the districts.

12 Although the dissent states that our review of minority voting strength as to the East–West configuration of District 5 ultimately amounts to “we know retrogression when we see it,” dissenting op. at 422, we clearly rely on longstanding precedent applied by the three-judge federal district court panel in *Martinez*—the last time this exact district was challenged. Our conclusion that a BVAP of 45.12% does not diminish the ability of black voters to elect a candidate of choice—a BVAP percentage squarely within the range of prior BVAP percentages that precedent has established not to diminish the ability of black voters to elect a candidate of choice—is hardly subjective or arbitrary.

13 Contrary to the dissent’s accusation that we fail to apply any objective standard to our retrogression review of the minority voting strength of an East–West district, see dissenting op. at 421–22, our analysis is consistent with the standard set forth by this Court in *Apportionment I*: “To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice.” [83 So.3d at 625](#). This is precisely what we have done with respect to a proposed East–West orientation of District 5.

14 Indeed, although District 13 still leans Democratic under the elections data relied on by the parties, it actually elected Republican Representative David Jolly over Democrat Alex Sink in a close election in 2014.

15 District 14 was, prior to 2012, and still is, under the 2012 map, represented by Kathy Castor, a white Democratic congresswoman.

16 We use graphical depictions of maps that were included in the challengers’ brief because those maps show the particular areas of concern. The Legislature did not contest the accuracy of these graphics. In any event, we include them only as visual aids and have, in our analysis, relied solely on the data and maps introduced into evidence during the trial.

17 The Reock, or circle-dispersion, method of quantifying compactness “measures the ratio between the area of the district and the area of the smallest circle that can fit around the district.” [Apportionment I, 83 So.3d at 635](#). “This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.” *Id.*

18 The Area/Convex Hull method, which “measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district,” also ranges from 0 to 1, “with a score of 1 representing the highest level of compactness.” [Apportionment I, 83 So.3d at 635](#). “A circle, square, or any other shape with only convex angles has a score of 1” under this measure. *Id.*

19 The two districts are actually represented by members of the Republican Party. The performance data relied on by the parties shows that these two districts are Republican under the 2008 presidential and 2010 gubernatorial elections but Democratic under the 2012 presidential election.

20 Perhaps we should take solace in not being accused of “jiggery-pokery.” See [King v. Burwell, No. 14–114, — U.S. —, 135 S.Ct. 2480, 2499–50, 192 L.Ed.2d 483, 2015 WL 2473448, at *19 \(U.S. June 25, 2015\)](#) (Scalia, J., dissenting).

21 The specific parameters of the relinquishment and transmission of the record are set forth in a separate order issued by this Court simultaneously with this opinion. Although the dissent criticizes our requirement in that order of dual filings in the trial court and this Court during the relinquishment proceedings, see dissenting op. at 423–24, time is of the essence in bringing finality to the congressional redistricting plan. Requiring dual filings during a relinquishment or other proceeding over which this Court retains jurisdiction is not unusual, and the dual filings allow this Court to ensure it timely has the complete record so that it can act expeditiously.

1 The contiguity requirement is not at issue in this case.

2 The equal population requirement is not at issue in this case.

3 Hereafter *Apportionment I*.

4 As a practical matter, it may make little difference as most of the material facts are not in dispute. Rather, the parties differ as to what inferences and legal conclusions may be properly drawn from those facts. Nor

do I interpret *Apportionment I* as significantly reducing the burden on the Plaintiffs to demonstrate the lack of compliance with constitutional requirements. It remains a high burden.

5 This is consistent with the approach taken by the Court in *Apportionment I*. The Court invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action. *Id.* at 684–686.

6 The 1st DCA has withdrawn its order reversing my ruling and passed the matter to the Supreme Court. Members of the original panel have set forth in their dissents their reasons for the initial reversal order which I hope to address here.

7 I did not find that a trade secret privilege applied.

8 “Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.” [Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson](#), 559 U.S. 280, 302, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010) (Scalia, J., concurring).

9 *Apportionment IV*

10 Although one of this group took umbrage at the term operative, another self-described himself as such. I will use the terms interchangeably to refer to the same group.

11 Demographic, election, and compactness data are derived from Joint Exhibit 1, unless otherwise stated.

12 Then Chairman Weatherford

13 The increased Republican performance is admittedly marginal, particularly when comparing enacted CD 7 with the analogue district in Senate map 9014. However, close political races are almost always won or lost on the margins.

14 It is true that CD 9 in plan 9043 did not keep Osceola County whole. The goal of keeping cities and counties whole is laudable and required where “feasible.” Compactness on the other hand has no such modifier in its constitutional prescription, “suggesting that in balancing this criterion with compactness, more flexibility is permitted.” *Id.* at 636.

15 The Romo Plaintiffs' proposed map adopts the same general configuration as the Legislature's enacted map.

16 CP 909; CP913.

17 Plaintiffs did not provide compactness scores for these districts, so my analysis is limited to the ocular test.

18 The specific counties and cities split are as follows:

Congressional Plan Split Counties by District

Broward-20, 21, 22, 23, 24, 25

Collier-19, 25

Hendry-20, 25

Miami–Dade-23, 24, 25, 26, 27

Palm Beach-18, 20, 21, 22

Congressional Plan Split Cities by District

Boynton Beach-20, 22

Deerfield Beach-20, 21, 22

Fort Lauderdale-20, 22, 23

Hialeah-25, 27

Homestead-26, 27

Lake Worth-20, 22

Lantana-20, 22

Margate-20, 21

Miami-24, 27

Miramar-24, 25

Oakland Park-20, 22

Pembroke Pines-23, 24, 25

Plantation-20, 22, 23

Pompano Beach-20, 21, 22

Riviera Beach-18, 20, 22

Romo A & B Split Counties By District

Broward-20, 21, 22, 23, 24

Collier-19, 25

Miami–Dade-23, 24, 25, 26, 27

Palm Beach-18, 20, 21, 22

St. Lucie-8, 18

Romo A & B Split Cities by District

Coconut Creek-20, 21

Deerfield Beach-20, 21, 22

Fort Lauderdale-20, 22, 23

Hallandale Beach-23, 24

Hollywood-23, 24

Margate-20, 21

Miami-24, 27

Miramar-20, 24

North Miami-23, 24

Oakland Park-20, 22

Pembroke Pines-23, 24

Plantation-20, 22

Pompano Beach-20, 21, 22

Port St. Lucie-8, 18

Riviera Beach-18, 20

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Royal Palm Beach-18, 20, 21
Sunrise-20, 22, 23
West Palm Beach-18, 20, 22

North Miami Beach-23, 24
Sunrise-20, 22, 23
Tamarac-20, 21
West Palm Beach-18, 20

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179 So.3d 258
Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS OF
FLORIDA, etc., et al., Appellants/Cross-Appellees,

v.

Ken DETZNER, et al., Appellees/Cross-Appellants.

No. SC14-1905.

|

Dec. 2, 2015.

Synopsis

Background: Following remand, [172 So.3d 363](#), for configuration of congressional districts after enacted districts had been found unconstitutional, the Circuit Court, Leon County, [Terry Powell Lewis, J.](#), entered order recommending adoption of remedial map.

Holdings: The Supreme Court, [Pariente, J.](#), held that:

[1] configuration of uncontested districts met requirements of Fair Districts Amendment;

[2] Legislature did not meet its burden of justification for its proposed configuration of certain districts; and

[3] evidence supported trial court's adoption of House plan, rather than Senate plan or alternative plan, for certain districts.

Affirmed.

[Perry, J.](#), filed concurring opinion in which [Quince, J.](#), concurred.

[Canady, J.](#), concurred in part and dissented in part and filed opinion.

[Polston, J.](#), filed dissenting opinion.

West Headnotes (11)

[1] **United States**  **Judicial review and enforcement**

Supreme Court upholds the trial court's factual findings regarding whether congressional redistricting meets the requirements of the Fair Districts Amendment so long as those findings are supported by competent, substantial evidence. *West's F.S.A. Const. Art. 3, § 20.*

[2] **United States**  **Equality of representation and discrimination; Voting Rights Act**

Congressional district adopted by trial court following invalidation of enacted district met requirements of Fair Districts Amendment; district contained four whole counties and parts of four others, district was more visually and statistically compact than invalidated district, and ability of black voters to elect a candidate of their choice was not diminished. *West's F.S.A. Const. Art. 3, § 20.*

[3] **United States**  **Equality of representation and discrimination; Voting Rights Act**

Congressional districts adopted by trial court following invalidation of enacted districts met requirements of Fair Districts Amendment; districts were more compact and contained fewer city and county splits than previously- invalidated districts. *West's F.S.A. Const. Art. 3, § 20.*

[4] **United States**  **Judicial review and enforcement**

Fundamental fairness was not violated when advocates for certain configurations of congressional districts did not submit their proposals to Legislature during its special session to redraw maps that had been invalidated under Fair Districts Amendment and produced proposal only one week before trial court's hearing regarding configurations of districts;

House of Representatives requested that all parties be permitted to submit alternative plans after Legislature adjourned without passing remedial plan, and Legislature knew of alternative ways in which to draw districts but rejected them. *West's F.S.A. Const. Art. 3, § 20.*

[5] **United States** ➔ **Judicial review and enforcement**

Process of submitting proposed congressional districts to trial court following invalidation of earlier districts under Fair Districts Amendment was sufficiently transparent; trial court required specific identification of every person involved in drawing, reviewing, directing, or approving proposed remedial plan, drafters were called to testify and were subject to cross-examination, and burden was on Legislature, not on drafters of proposed alternatives, to justify its configuration based on finding that Legislature's prior proposed remedial congressional plan was tainted with partisan intent coming out of a shadow process in which political operatives infiltrated and influenced Legislature. *West's F.S.A. Const. Art. 3, § 20.*

1 Cases that cite this headnote

[6] **Election Law** ➔ **Reapportionment in general**

A redistricting process is not tainted merely by permitting citizens to speak out in a public forum and suggest a plan or portion of a plan.

[7] **United States** ➔ **Equality of representation and discrimination; Voting Rights Act**

A disregard for the constitutional requirements that congressional districts be as equal in population as is practicable, that they be compact, and that they utilize existing geographical and political boundaries where possible is indicative of improper intent in creating such districts. *West's F.S.A. Const. Art. 3, § 20.*

[8] **United States** ➔ **Equality of representation and discrimination; Voting Rights Act**

Legislature did not meet its burden of justification for its proposed configuration of congressional districts following invalidation of earlier configurations under Fair Districts Amendment; proposed configuration was even more favorable to one political party than prior enacted district, proposed configuration did not follow major roadways, and proposed districts were less compact and split more cities than alternative maps submitted at trial. *West's F.S.A. Const. Art. 3, § 20.*

[9] **United States** ➔ **Equality of representation and discrimination; Voting Rights Act**

Legislature did not meet its burden of justification for its proposed configuration of congressional district following invalidation of earlier configurations under Fair Districts Amendment; proposed configuration split a city, and alternative maps submitted at trial were more visually compact and were superior with respect to statistical compactness and city splits. *West's F.S.A. Const. Art. 3, § 20.*

[10] **United States** ➔ **Equality of representation and discrimination; Voting Rights Act**

Legislature did not meet its burden of justification for its proposed configuration of congressional districts following invalidation of earlier configurations under Fair Districts Amendment; alternative maps were more visually compact, and alternative maps kept cities wholly within district. *West's F.S.A. Const. Art. 3, § 20.*

[11] **United States** ➔ **Judicial review and enforcement**

After state House of Representatives and Senate failed to agree on new congressional districts following invalidation of enacted districts for violation of Fair Districts Amendment, evidence supported trial court's adoption of House plan,

rather than Senate plan or alternative plan; trial court found that compactness in House plan was slightly better than in other plans. [West's F.S.A. Const. Art. 3, § 20](#).

[1 Cases that cite this headnote](#)

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Opinion

[PARIENTE, J.](#)

This case is before the Court for approval of a final congressional redistricting plan in accordance with the Fair Districts Amendment and in accordance with our previous opinion in [League of Women Voters of Florida v. Detzner \(Apportionment VII\)](#), 172 So.3d 363 (Fla.2015). We approve in full the trial court's "Order Recommending Adoption of

Remedial Map." Our opinion today—the eighth concerning legislative or congressional apportionment during this decade since the adoption of the landmark Fair Districts Amendment—should bring much needed finality to litigation concerning this state's congressional redistricting that has now spanned nearly four years in state courts. Accordingly, the plan approved here shall be used in the 2016 congressional elections and thereafter until the next decennial redistricting.

In *Apportionment VII*, we affirmed the trial court's finding that the 2012 "redistricting process" and the "resulting map" apportioning Florida's twenty-seven congressional districts were " 'taint[ed]' by unconstitutional intent to favor the Republican Party and incumbent lawmakers." [Id.](#) at 369. Although we affirmed the trial court's finding of unconstitutional intent, we reversed the trial court's final judgment because it had not given proper legal effect to its finding of unconstitutional intent. As the trial court noted upon relinquishment, it "had not gone far enough in [its] requirements of the Legislature to correct the constitutional deficiencies." *Romo v. Detzner* (Trial Court Order), Nos. 2012-CA-00412 & 2012-CA-00490, Order Recommending Adoption of Remedial Map at 2 (Fla.2d Jud.Cir.Ct. Oct. 9, 2015).

In *Apportionment VII*, we rejected the Challengers'¹ request that the entire map be redrawn because "the remedy [should be] commensurate with the constitutional violations" and because the Challengers ***261** did not "identify a neutral map that showed how all of the districts could be redrawn in a manner more objectively compliant with the constitutional requirements." [Id.](#) at 413. We did acknowledge that the "admittedly gerrymandered 2002 map ... was used as a baseline" for the enacted plan, but the Challengers did not allege that fact as a "basis for invalidating the entire map." *Id.*

We also rejected the Challengers' request that this Court redraw the map, although we concluded that this Court had that authority once constitutional violations had been demonstrated. *Id.* Instead, we provided the Legislature with the opportunity to pass a constitutionally compliant plan. Accordingly, we relinquished jurisdiction to the trial court for a period of 100 days and directed the Legislature to redraw "Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by the redrawing." [Id.](#) at 371-72.

We did not anticipate, however, that the Legislature would be unable to agree on a final remedial redistricting plan.

Although each legislative chamber passed a plan, the Legislature deadlocked, failing to enact a remedial plan in a special session held for that purpose. Accordingly, this Court provided additional directions to the trial court based on a motion “for further relinquishment of jurisdiction” filed by the Florida House of Representatives.

In its detailed Trial Court Order, the trial court approved the House's proposed configuration of Districts 1 through 19—recommending the House's proposed plan over the Senate's where there was disagreement between the two chambers—but concluded that the Legislature had not met its burden of defending its proposed configurations for Districts 20 through 27. The trial court further recommended that the district configurations set forth in an alternative plan submitted by the Coalition Plaintiffs were more compliant with the tier-two constitutional requirements that “districts shall be compact” and “where feasible, utilize existing political and geographic boundaries.” *Art. III, § 20, Fla. Const.* Consequently, the trial court concluded that the Legislature had not justified its decision to adopt a less tier-two compliant plan with respect to the eight challenged South Florida districts.²

Having considered the trial court's order and the parties' supplemental briefs, having considered the entire record of both the three-day evidentiary hearing and the special session, having considered the remedial plans submitted by the parties, and having heard oral argument, we approve in full the trial court's recommendations regarding the remedial congressional redistricting plan.

In so doing, we reject the Legislature's contention, echoed by Justice Canady, that our decision today moves the “goalposts” on the Legislature in its redrawing of the districts. Concurring in part and dissenting in part *op. of Canady, J.*, at 302–03. The goal has not changed and has always been compliance with the Fair Districts Amendment. At this stage, after a finding that the 2012 congressional redistricting plan had been drawn with improper intent, the Legislature bears the burden of justifying its redrawn configurations. The Legislature did not escape this burden when it was unable to agree on a plan to enact and subsequently asked all parties to submit alternative plans to the trial court. The trial court's order, agreed to by the parties, required that each party submitting an alternative plan “identify every person involved in drawing, reviewing, directing or approving the proposed remedial *262 plan.” All parties, then, had a full opportunity to review and comment upon the various proposed plans submitted to the trial court, thereby providing a full and fair public airing

of the contending arguments relating to the constitutionality of each plan.

We additionally dismiss the contention that the trial court and this Court have adopted a plan drawn by “Democratic operatives.” *Dissenting op. of Polston, J.*, at 305. As this opinion makes clear, the only subject of current dispute between the Legislature and the Challengers are eight South Florida districts, including two redrawn districts in which Democratic incumbents were actually paired against each other in the same district. From the outset, we have encouraged the public to submit proposed plans that can be evaluated by the objective criteria of the Fair Districts Amendment. What we were faced with in the factual record in *Apportionment VII* was not that Republican political operatives publicly submitted plans but that Republican political operatives successfully infiltrated the redistricting process with the coordination and cooperation of the Legislature, resulting in a redistricting plan that was tainted with improper partisan intent.

After our determination in *Apportionment VII* that the Legislature's plan had been drawn with improper intent, we “shifted the burden to the Legislature to justify its decisions in drawing the congressional district lines.” [Apportionment VII, 172 So.3d at 396–97](#). In examining the Challengers' plan, we review for compliance with the objective constitutional standards we have promulgated throughout our redistricting decisions. Therefore, we reject the assertion in Justice Polston's dissent that this Court is violating separation of powers by affirming the trial court and approving the plan that most faithfully follows the objective criteria set forth in the Fair Districts Amendment. *See dissenting op. of Polston, J.*, at 305–06. All plans were evaluated by the same objective criteria. As the trial court found, the map submitted by the Coalition Plaintiffs—not the Democratic Party, or the Senate, or the House—was “hands down the best tier two performing map of the group” and was “more compact and splits fewer cities than any of the others.” Trial Court Order at 12.

In approving the trial court's recommendation, we are acutely aware that this case represents the first time that congressional districts have been challenged under the Fair Districts Amendment. As we have stated before, “the trial court had scant precedent to guide it,” [Apportionment VII, 172 So.3d at 370](#); neither did the Legislature nor the Challengers. We again commend the trial court for its diligence and all parties for their professionalism.

We emphasize that although the Challengers and the Legislature disagree as to some of the redrawn districts, the disagreement is limited to only eight districts in South Florida (Districts 20 through 27). All parties agree as to three districts that were not redrawn in any proposed plan (Districts 1, 8, and 19), as well as to ten redrawn districts (Districts 5, 13, and 14, which were invalidated in *Apportionment VII*, and additionally Districts 2, 3, 4, 6, 7, 12, and 18 that were affected by the redrawing of the districts). The configuration of the remaining six districts—9, 10, 11, 15, 16, and 17—is the subject of the dispute between the House and the Senate, when the chambers could not agree to the passage of a final plan.

This Court has an “obligation to provide certainty to candidates and voters regarding the legality of the state’s congressional districts.” [172 So.3d at 372](#). And as Chief Justice Labarga recently made clear, an “orderly and foreseeable constitutional end *263 point must be reached in this process. Anything less makes a mockery of the will of the voters who passed the Fair Districts Amendment.”

[League of Women Voters of Fla. v. Detzner](#), No. SC14–1905, Order at 6 (Fla. Sup.Ct. order filed Sept. 4, 2015) (Labarga, C.J., concurring) (the “Second Relinquishment Order”). We reiterate that “this case does not pit this Court versus the Legislature, but instead implicates this Court’s responsibility to vindicate ‘the essential right of our citizens to have a fair opportunity to select those who will represent them.’ ” [Id.](#) at 414 (citing [League of Women Voters of Fla. v. Fla. House of Representatives \(Apportionment IV\)](#), 132 So.3d 135, 148 (Fla.2013)).

Accordingly, we affirm the Trial Court Order recommending a remedial plan, and the congressional redistricting plan approved by this Court shall be utilized in the 2016 Florida congressional elections and in Florida congressional elections thereafter until the next decennial redistricting. The trial court shall enter a final judgment incorporating the approved plan.

**PRIOR PROCEDURAL
POSTURE: APPORTIONMENT VII**

This Court’s decision approving the Trial Court Order in all respects does not come to us in a vacuum. Far from it. The Fair Districts Amendment set forth what we have referred to as tier-one and tier-two standards. The tier-one standards mandate three requirements: (1) no apportionment

plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. [Art. III, § 20\(a\)](#). We previously explained the tier-one standards:

The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. By its express terms, Florida’s constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. The minority voting protection provision imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group’s ability to elect a candidate of its choice. Finally, districts must be contiguous.

[In re Senate Joint Resolution of Legislative Apportionment 1176 \(Apportionment I\)](#), 83 So.3d 597, 684–85 (Fla.2012).

The tier-two standards circumscribe how districts can be drawn so as to guard against gerrymandering and thus require: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts shall utilize existing political and geographical boundaries where feasible. [Article III, § 20\(a\)](#). We have described the tier-two requirements as follows:

The Legislature is required to make districts as nearly of equal population as is practicable, but deviations from equal population may be based on compliance with other constitutional standards. Compactness refers to the shape of the district; the goal is to ensure that districts are logically drawn and that bizarrely shaped districts are

avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements. As to utilizing political and geographical boundaries, *264 we accept the House's view of geographical boundaries as those that are easily ascertainable and commonly understood, such as “rivers, railways, interstates, and state roads.” Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards. Importantly, the extent to which the Legislature complies with the requirements contained in tier two serves as an objective indicator of impermissible legislative purpose proscribed under tier one (e.g., intent to favor or disfavor a political party or an incumbent).

 *Apportionment I*, 83 So.3d at 685.

In *Apportionment VII*, which dealt specifically with the 2012 congressional plan under [Article III, section 20\(a\)](#), and the litigation arising from the legislatively adopted plan, we affirmed the trial court's finding that the Legislature's enacted map was “taint[ed] by unconstitutional intent.”  [172 So.3d at 371](#). The facts and history of the underlying litigation are fully set forth in that opinion, upholding the trial court's ruling that the congressional redistricting plan enacted by the Florida Legislature in 2012 was constitutionally invalid, in violation of the “Fair Districts” standards set forth in [article III, section 20, of the Florida Constitution](#).  *Id.* at 393. But we held, nevertheless, that the trial court committed “two legal errors, which significantly affected its determination of the proper effect of its finding that the Legislature violated the Florida Constitution.” *Id.* The first legal error was that the trial court did not give effect to its finding of improper intent in analyzing the challenges to the individual districts.  *Id.* at 393–96. The second legal error was that once the trial court found the Legislature intended to favor a political party or incumbent in the drawing of the plan, the trial court should have shifted the burden to the Legislature to justify its redistricting plan.  *Id.* at 396–97.

In other words, as the trial court recently noted about our decision:

On July 9, 2015, the Florida Supreme Court issued its opinion in [*Apportionment VII*], affirming my finding of constitutional violation

but determining that I had not gone far enough in my requirements of the Legislature to correct the constitutional deficiencies. The Court directed the Legislature to draw a third map and gave specific instructions as to how to address problems it noted with certain districts (5, 13, 14, 21, 22, 25, 26 and 27.)

Trial Court Order at 2.

During the relinquishment proceedings, this Court considered the issue of the Legislature's burden to be important. After the trial court concluded that there was unconstitutional intent and a “violation of the Florida Constitution's prohibition on partisan intent ... the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.”  *Apportionment VII*, [172 So.3d at 370–71](#). As we stated:

Once a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the Legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose of the Fair Districts Amendment and to this Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering.

Accordingly, after reaching the conclusion that the “redistricting process” and the “resulting map” had been “taint[ed]” by unconstitutional intent, *265 the burden should have shifted to the Legislature to justify its decisions, and no deference should have been afforded to the Legislature's decisions regarding the drawing of the districts. In other contexts, states have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has “raised sufficient issues” with respect to state constitutional requirements.

 *In re Legislative Districting of State*, 370 Md. 312, 805 A.2d 292, 325 (2002).

Because there are many ways in which to draw a district that complies with, for example, the constitutional requirement of compactness, which party bears the burden

of establishing why a decision was made to accept or reject a particular configuration can ultimately be determinative.

 *Id.* at 400 (emphasis supplied).

Applying the correct standard of review that placed the burden on the Legislature to justify its decisions based on the trial court's finding of unconstitutional intent, we analyzed the constitutional deficiencies of eight specifically challenged districts. We ultimately relinquished jurisdiction to the trial court and mandated that the Legislature redraw “Congressional Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by the redrawing.” *Id.* at 371–72. In so doing, we provided “clear guidance as to the specific deficiencies in the districts that the Legislature must redraw,” and we gave the Legislature 100 days from the date of our July 9, 2015, opinion to enact a remedial congressional redistricting plan and to submit that plan to the trial court for approval. *Id.* at 416–17.

We further stressed that “transparency is critical in light of both the purpose of the Fair Districts Amendment to outlaw partisan manipulation in the redistricting process and the trial court's finding here that ‘an entirely different, separate process’ to favor Republicans and incumbents was undertaken contrary to the Legislature's assertedly transparent redistricting effort.” *Id.* at 414–15. Thus, we set forth four specific guidelines that we urged the Legislature to follow: (1) “conduct all meetings in which it [made] decisions on the new map in public and to record any non-public meetings”; (2) “provide a mechanism for challengers and others to submit alternative maps” and to permit debate on the merits of the proposed alternative maps; (3) “preserve all e-mails and documents related to the redrawing of the map”; and (4) “to publicly document the justifications for its chosen configuration.” *Id.*

PROCEDURAL POSTURE: AFTER RELINQUISHMENT

After this Court issued its opinion, the President of the Florida Senate and the Speaker of the Florida House of Representatives issued a joint proclamation on July 20, 2015, convening a special session for the purpose of enacting a remedial congressional redistricting plan. That same day, the Senate President and the House Speaker issued a joint memorandum to members of the Legislature, explaining procedures for the special session.

The memorandum directed legislative staff to work with House and Senate legal counsel to develop a “Base Plan” that complied with this Court's opinion. The legislative leaders determined that the Base Plan would be “drafted solely by staff in collaboration with counsel, without [the leaders'] participation or the participation of any other member.” However, contrary to the Court's suggested guidelines that “all meetings in which it makes decisions on the new map” should be held “in public” or otherwise recorded for preservation, *266 none of the meetings during which staff developed the Base Plan in collaboration with counsel—as well as outside counsel—were recorded or transcribed. The memorandum did direct, in accordance with this Court's recommended guidelines in *Apportionment VII*, that legislators retain and compile all communications related to redistricting.

Pursuant to the instructions set forth by legislative leadership, legislative staff then developed a Base Plan, in consultation with counsel for the House and Senate. This Base Plan was released publicly on August 5, 2015. In addition to redrawing the eight districts specifically invalidated by this Court—Districts 5, 13, 14, 21, 22, 25, 26, and 27—legislative staff made changes to fourteen other districts that were affected thereby—Districts 2, 3, 4, 6, 7, 9, 10, 11, 12, 15, 16, 17, 20, and 23.

The Legislature met in special session from August 10, 2015, to August 21, 2015. The House and Senate considered amendments to the Base Plan, and each chamber ultimately passed its own amended plan. As to proposed Districts 26 and 27, the League of Women Voters of Florida and Common Cause sent a letter to the Speaker of the House and President of the Senate criticizing the configuration of those districts as not having been drawn in a constitutionally compliant manner. Senator Dwight Bullard proposed an amendment that configured those same two districts in a more tier-two compliant manner.

The plan last passed by the House (H110C9071, the “House Plan”) differs from the Base Plan in Districts 9, 11, 15, 17, 18, 20, 21, 22, and 23, as a result of the House's stated purpose of keeping additional cities whole. The plan last passed by the Senate (S026C9062, the “Senate Plan”) differs from the Base Plan in Districts 9, 10, 11, 15, 16, 17, 18, 20, 21, 22, and 23, as a result of the Senate's stated purpose of reducing the number of times Hillsborough County was split and keeping both Sarasota County and certain cities whole. The House

and Senate Plans themselves differ only in six central and southwest Florida districts (Districts 9, 10, 11, 15, 16, and 17). Because the Legislature was unable to agree on and enact a single plan during the special session, the “Florida Legislature adjourned its special redistricting session sine die on August 21, 2015, without having enacted a remedial congressional redistricting plan as required by the Court’s July 9, 2015, opinion.” Second Relinquishment Order at 1.

After the Legislature failed to enact a remedial congressional plan, the House filed a “Motion For Further Relinquishment of Jurisdiction,” specifically requesting that this 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. This Court granted the motion, in part, and directed the trial court to make a recommendation to this Court as to “which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [this] Court’s July 9, 2015, opinion and all constitutional requirements.” See Second Relinquishment Order at 2–3.

In the Second Relinquishment Order, we reemphasized that the “burden remains on the House and Senate to justify their chosen configurations.” *Id.* at 2. We also explicitly rejected the proposition advanced by the House that any plan recommended by the trial court and ultimately approved by this Court would be “interim” or “provisional.” *Id.* at 4. Doing so would make “a mockery of the will of the voters who passed the Fair Districts amendment.” *Id.* at 6 (Labarga, C.J., concurring).

*267 THE TRIAL COURT PROCEEDINGS

After this Court issued the Second Relinquishment Order, the parties submitted an agreed scheduling order to the trial court, which the trial court entered:

On or before Monday, September 14, 2015, each party that intends to present a proposed remedial plan at the evidentiary hearing shall serve the proposed remedial plan in .doj format. *The disclosing party shall identify every person involved in drawing, reviewing, directing, or approving the proposed remedial plan.* The

Court will not consider any proposed remedial plan that is not timely disclosed in compliance with all provisions of this Order.

(Emphasis supplied.)

Pursuant to that order, the parties submitted a total of seven proposed plans to the trial court. The House submitted the House Plan, the last plan passed by that chamber during the unsuccessful special session. The Senate submitted the Senate Plan, the last plan passed by that chamber during the special session, as well as a plan drawn after the special session by legislative staff at the direction of the Reapportionment Committee Chair, Senator William Galvano (the “Galvano Plan”). The Galvano Plan differs from the House Plan in four districts (Districts 9, 15, 16, and 17) and from the Senate plan in six districts (Districts 9, 10, 11, 15, 16, and 17).

The “Romo Plaintiffs” submitted one plan (the “Romo Plan”), which adopted the House’s configuration for twenty-two districts but proposed new configurations for Districts 21, 22, 25, 26, and 27. The Romo Plaintiffs’ proposed configuration for Districts 21 and 22 retained a vertical configuration, unlike the Coalition Plaintiffs’ plans and the Legislature’s plans, which included a stacked configuration that paired two Democratic incumbents against each other in District 21.

The Coalition Plaintiffs submitted three plans—“CP–1,” “CP–2,” and “CP–3.” CP–1 adopted the House’s configuration for nineteen districts and proposed new configurations for Districts 20 through 27 in South Florida. CP–2 and CP–3 both adopt the House’s configuration for twenty-five districts and each contains an alternative configuration for Districts 26 and 27. The differences between CP–2 and CP–3 are minor, as each variation moves all of Homestead into District 26 and equalizes population in ways that do not move predominately black communities out of District 26 by using different major roadways as district boundary lines.

During the trial court’s three-day evidentiary hearing, testimony was received from those persons involved in “drawing, reviewing, directing, or approving” the proposed remedial plans. John O’Neill, the Coalition Plaintiffs’ map drawer, testified about how he drew the Coalition Plaintiffs’ maps. Harvard University Professor Stephen Ansolabehere, the Romo Plaintiffs’ map drawer, also testified at the remedial

hearing about how he drew the Romo map. In lieu of live testimony, the trial court also admitted the report of the Coalition Plaintiffs' expert, Dr. Allan Lichtman, which considered how the Coalition Plaintiffs' plans performed for Hispanics.

Professors Dario Moreno and Baodong Liu, experts hired by the Legislature, testified about how the Legislature's and the Challengers' plans performed for Hispanics. The Legislature also called to testify the professional staff that drew its maps: Jay Ferrin, the Staff Director of the Senate Committee on Reapportionment, Jason Poreda, the Staff Director of the House Select Committee on Redistricting, and Jeffrey Takacs, a special advisor to that Committee. Senator William Galvano, the Chair of the Senate Committee on Reapportionment, *268 and Senator Tom Lee, a member of the Committee, also testified for the Senate. Both senators testified in support of the Senate Plan, and Senator Lee specifically dispelled any suggestion that he proposed his amendment—which was incorporated into the Senate Plan—with the intent to disfavor any incumbent or to favor himself.

THE TRIAL COURT ORDER

After receiving proposed orders from the parties, the trial court entered its own comprehensive order, recommending adoption of a remedial map. It first analyzed the seven proposed remedial maps submitted by the parties: the 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.

In doing so, the trial court first set forth what it understood to be the applicable legal standard and parameters of review and determined that, pursuant to this Court's directions, “the burden remains on the House and Senate to justify their chosen configurations, and that no deference is due to their choices regarding the drawing of the districts.” Trial Court Order at 5. In interpreting this Court's direction in the Second Relinquishment Order to “especially focus on the House and Senate maps, any amendments offered thereto, and the areas of agreement,” the trial court concluded that meant that the “maps passed by each chamber, especially where they are in agreement, are the closest [they] will come to an expression of the preferences of the elected representatives of the people as to a remedial map.” *Id.* The trial court then determined that it would:

[F]irst evaluate the maps proposed by the House and Senate to determine which map, or portions thereof, best meet the Court's criteria. Then I should evaluate that configuration in light of any challenges thereto by the Plaintiffs to determine if the Legislative defendants can meet their burden as noted above, or if some other configuration best fulfills the Court's directions and all constitutional requirements.

Id.

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.” *Id.* at 7–8. The trial court further concluded that it was “not at liberty to draw something different than what is contained within the maps proposed by the parties.” *Id.* at 8.

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 Challengers and that they were “on the whole, more compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps.” *Id.* The trial court noted that of these districts, Districts 5, 13, and 14 were three that were required to be redrawn. *Id.*

The trial court then considered the Challengers' general complaint that the “actual drawing of the base map was not open to the public, nor recorded.” *Id.* at 8–9. It determined that although “[r]ecording the sessions would probably have been a good idea,” there was no way to “prevent a map drawer from manipulating lines with a partisan intent.” *Id.* at 9. Ultimately, the trial court stated that it remained convinced that:

[T]he best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for those shortcomings. If there is a way to make a map more *269

compliant without sacrificing tier-one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, it will go far in minimizing the risk, or the perception, that it was drawn with a partisan intent.

Id.

The trial court also dismissed the Legislature's argument that the Coalition Plaintiffs' plans were drawn with improper intent:

Moreover, I find no evidence to suggest that CP-1 was drawn with improper partisan intent. Mr. O'Neill, Coalition Plaintiffs' map drawer, testified that he strove to draw the most tier-two compliant configuration of South Florida, did not consider political or incumbent data in drawing the maps, and was not given any other direction but to focus on and comply with the requirements of [Article III, section 20](#) and *Apportionment VII* and to improve compactness and adherence to major roadways where possible.

Id. at 14.

The trial court found the Coalition Plaintiffs' map drawer, O'Neill, "to be straightforward in his testimony, logical in his approach to drawing the districts, and persuasive in his conclusions." *Id.* The trial court further found "no evidence to suggest that CP-1 was drawn with improper partisan intent." *Id.*

The trial court determined that CP-1 was the best plan as to Districts 20 through 27, and specifically noted that with respect to the tier-two constitutional standards—that is, how compact the districts are and how well they utilize existing political and geographical boundaries—CP-1 is "more compact and splits fewer cities than any of the others." *Id.* at 12. The trial court also found CP-1 more visually

compact and "follow[ed] major roadways far more closely than the legislative proposals." *Id.* at 4.

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 the South Florida 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." *Id.* at 4, 11. Yet, the Legislature did not:

The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits. I would think the Legislature would have anticipated questions about improving tier two compliance and have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version.

Id. at 11. As the trial court noted, the Coalition Plaintiffs were able to easily improve tier-two compliance:

The Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably. Indeed, CP-1 is hands down the best tier two performing map of the group. As to Districts 20-27 it is more compact and splits fewer cities than any of the others.

Id. at 12.

When reviewing CP-1 as to Districts 20 through 27, the trial court paid special attention to the Legislature's configuration of Districts 26 and 27, districts this Court specifically invalidated in *Apportionment VII*:

I understand why the Plaintiffs might be suspicious as to Districts 26 and 27. The Florida Supreme Court, in its July 9th Order, found that the Legislature had needlessly split the City of Homestead, *270 thereby turning one Democratic and one Republican district into two Republican-leaning districts. The proposed map, 9071, which admittedly does not split Homestead, actually enhances the partisan effect in favor of the Republican Party. *The irony of the cure being worse than the illness is not lost on me.*

Id. at 10. (Emphasis supplied.)

Because the House and the Senate could not agree on six districts in central Florida, the trial court was tasked with recommending which configuration for that region best complied with the directives this Court set out in *Apportionment VII* and all other constitutional requirements. Accordingly, the trial court recommended adoption of the House Plan for Districts 9, 10, 11, 15, 16, and 17.

After careful analysis, including an evaluation of the expert witnesses offered by both sides, the trial court recommended that this Court adopt the House's configuration of Districts 1 through 19 and the configuration of Districts 20 through 27 contained in CP-1. In its order, the trial court found that the Legislature did not meet "its burden of justifying the proposed versions of Districts 20 through 27 in [the House's and the Senate's plans]." *Id.* at 19.

ANALYSIS

In *Apportionment VII*, we held eight specific districts had constitutional deficiencies—Districts 5, 13, 14, 21, 22, 25, 26, and 27—focusing on those districts that were a central feature of the Legislature's unconstitutional intent. During the unsuccessful special session, the Legislature addressed each of these districts, attempting to remedy the problems we identified. The trial court found that, as to the first nineteen congressional districts, the Challengers did not

dispute the Legislature's proposed configuration of these districts, including Districts 2, 3, 4, 6, 7, 9, 10, 11, 12, 15, 16, and 17, which were affected by the redrawing of Districts 5, 13, and 14 that we invalidated in *Apportionment VII*.³ While the Senate contends that its configuration of Districts 9, 10, 11, 15, 16, and 17 is preferable to the House's configuration, we review the dispute between the House and the Senate as to these six districts last.

In reviewing the trial court's recommendations, we note that there are actually three different inquiries and address them in the following order: First, we review the trial court's recommendations and the agreement between the Senate and the House and the Challengers as to redrawn Districts 2, 3, 4, 5, 6, 7, 12, 13, and 14, which comprise the invalidated Districts 5, 13, and 14 and the uncontested districts affected by the redrawing of those districts. Second, we review the Challengers' arguments regarding the South Florida districts: Districts 20 through 27. Third, we review the trial court's recommendations regarding the districts that were the subject of disagreement between the Senate and the House: Districts 9, 10, 11, 15, 16, and 17.⁴

*271 [1] In reviewing the trial court's order "recommending adoption of remedial map," we are mindful that as the trier of fact, the trial court was charged with the evaluation of the expert witnesses and testimony of all those who testified. Accordingly, we uphold the trial court's factual findings so long as these findings are supported by competent, substantial evidence.  See *Apportionment VII*, 172 So.3d at 372–73, 391–92. In first reviewing the districts uncontested by the Legislature and the Challengers, we remain mindful that the Legislature bears the burden of demonstrating that the configuration it selected must comply with this Court's directions in *Apportionment VII* and the constitutional requirements as set forth in [article III, section 20](#).

I. THE UNCONTESTED DISTRICT CONFIGURATIONS OF THE REDRAWN DISTRICTS

The redrawn districts that all parties agree to include the three districts invalidated in *Apportionment VII*—Districts 5, 13, and 14—and seven other redrawn districts affected by the redrawing of the invalidated districts—Districts 2, 3, 4, 6, 7, 12, and 18. Because all parties agree as to the redrawn configurations and because the trial court concluded

that the Legislature met its burden to justify its redrawn configurations for these seven districts, we approve the trial court's recommendation.

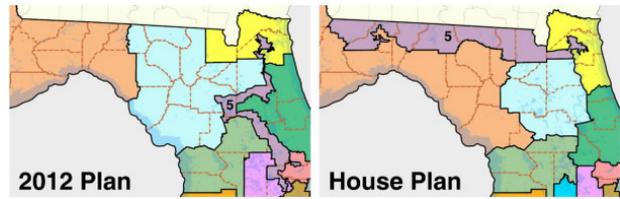
As to the uncontested districts that we specifically invalidated in *Apportionment VII*, we begin with District 5.

A. DISTRICT 5

[2] In *Apportionment VII*, District 5 was the “focal point of the challenge to the Legislature's redistricting plan,” and the Challengers alleged that the Legislature's winding, North–South configuration of this district was “a linchpin to the Legislature's efforts to draw a map that favors the Republican Party.” *Apportionment VII*, 172 So.3d at 402.

We held that the trial court—which had concluded that District 5 was “a key component of the Legislature's unconstitutional intent in the drawing of the congressional redistricting plan”—erred in “deferring to the Legislature's North–South configuration on the basis of unstated ‘non-partisan policy reasons.’ ” *Id.* at 403. Because we concluded that the Legislature could not establish “that the North–South configuration is necessary to avoid diminishing the ability of black voters to elect a candidate of their choice”—the justification offered by the Legislature for its enacted configuration—we determined that “District 5 must be redrawn in an East–West manner.” *Id.*

Although District 5 was required to be drawn from East to West, no specific configuration was mandated in *Apportionment VII*. Nor did the Court specify a certain Black Voting Age Population (BVAP) or black share of registered Democrats as a “floor” below which the ability of black voters to elect a candidate of choice was certain to be diminished. In other words, in *Apportionment VII*, this Court examined the Legislature's enacted configuration and justification and held that this justification could not withstand legal scrutiny under the appropriate standard of review, leaving it to the Legislature to redraw the district based on the guidance the Court provided.



*272 Both the Senate and the House, choosing not to deviate from the Base Plan drawn by legislative staff during the special session, adopted the East–West version of District 5 presented in the alternative “Romo A” plan that was introduced into evidence during the original trial. Although the trial court observed that the District 5 drawn by the Legislature “appears still to be one of the least compact of the districts,” the Challengers do not object to District 5 as proposed by the House and Senate and have presented no alternatives for the district. As the trial court noted, there was “no evidence” presented at the relinquishment hearing that District 5 “could have been drawn more tier-two compliant without adversely affecting minority voting rights protected under tier one.”⁵ Accordingly, the trial court recommended that this Court adopt this configuration for District 5 and the surrounding districts.

We agree with the trial court and conclude that this proposed district—drawn by legislative staff, passed by both the House and Senate, and agreed to by the Challengers—complies with this Court's directions in *Apportionment VII*. It is an East–West district that remedies the improper partisan intent found in the prior version of District 5. The new District 5 contains four whole counties and parts of four others, and is more visually and statistically compact than both the 2012 enacted district that was previously invalidated and the Legislature's 2014 remedial plan.

As we noted in *Apportionment VII* when analyzing the “Romo A” configuration of this district, the ability of black voters to elect a candidate of their choice is not diminished. With a black share of registered Democrats of 66.1%, the black candidate of choice is likely to win a contested Democratic primary, and with a Democratic registration advantage of 61.1% to 23.0% over Republicans, the Democratic candidate is likely to win the general election. *Apportionment VII*, 172 So.3d at 405.

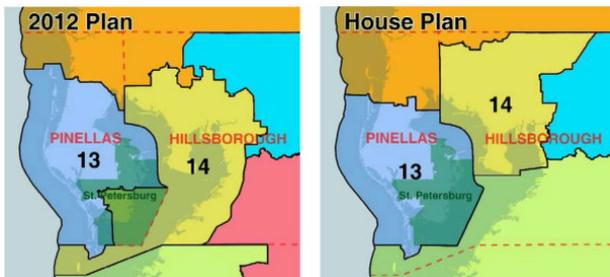
*273 None of the parties in this case object to the Legislature's proposed configuration for District 5, which was the same in all seven proposed plans submitted for the trial court's consideration. Because the proposed district comports with this Court's directions in *Apportionment VII* and does

not diminish the ability of black voters to elect a candidate of choice, the Legislature has met its burden to justify the configuration it selected.

B. DISTRICTS 13 & 14

[3] The next two districts we invalidated in *Apportionment VII* were Districts 13 and 14. In 2012, the Legislature drew these districts so that District 14 crossed Tampa Bay from Hillsborough County, splitting Pinellas County and the City of St. Petersburg to include a portion of the black population in southern Pinellas County in District 14. The Challengers contended that the Legislature's configuration of these districts—which “added more Democratic voters to an already safely Democratic District 14, while ensuring that District 13 was more favorable to the Republican Party”—was “directly connected to the trial court's finding that the enacted map was unconstitutionally drawn to favor the Republican Party.” [Apportionment VII](#), 172 So.3d at 407.

Addressing this challenge, we concluded that the trial court erred in deferring to the Legislature's enacted configuration and failing to view these districts “through the lens of the direct and circumstantial evidence of improper intent presented at trial.” *Id.* We rejected the Legislature's race-based justification for crossing Tampa Bay—that it allegedly was necessary to pick up voters from Pinellas County in District 14 to increase the minority voting strength in that district—and held that “Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay.” [Id.](#) at 408–09.



During the special session, both the House and the Senate adopted the configuration of these districts drawn by legislative staff in the Base Plan. That configuration remedied the improper intent we previously identified, keeping District 14 entirely within Hillsborough County and not crossing Tampa Bay. District 13, which remains completely within Pinellas County, now includes the entirety of the southern portion of that county and all of the City of St. Petersburg. The

trial court reviewed this area with special focus, noting that this Court required it to be redrawn based on constitutional infirmities. The trial court then reviewed this area and the surrounding areas and found, as a whole, the districts are now “more *274 compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps.” Trial Court Order at 8.

No party objects to the Legislature's chosen configuration for these districts, which was the same in all seven proposed plans submitted for the trial court's consideration. As with District 5, we agree with the trial court and conclude that the Legislature has met its burden to demonstrate that its selected, agreed-upon configuration of Districts 13 and 14 complies with this Court's directions in *Apportionment VII* and the constitutional requirements.

II. THE CONTESTED DISTRICT CONFIGURATIONS

Before considering the configuration of districts contested by the Challengers, we address the Legislature's general attacks on the Challengers' maps: (a) that the Challengers violated this Court's instructions and also fundamental fairness by not presenting its maps to the Legislature; and (b) that this Court and the trial court erred in failing to consider the intent of the Challengers in drafting the maps presented to the trial court and this Court. After analyzing this argument, we then proceed to review the challenged districts. In our review of the challenged districts, we remain mindful, as the trial court did in its own review, that the Legislature bears the burden of justifying its proposed remedial congressional plans.

A. THE LEGISLATURE'S CONTENTIONS: FUNDAMENTAL FAIRNESS AND THE INTENT BEHIND THE DRAWING OF THE ALTERNATIVE MAPS

Before turning to an analysis of the contested districts, we first must address the Legislature's allegations concerning the Coalition Plaintiffs' alternative maps. Specifically, the Legislature presents two arguments: (1) the adoption of CP–1 violates fundamental fairness because the Coalition Plaintiffs failed to present the CP–1 plan to the Legislature first and because this plan adopts revised districts that had not been invalidated in *Apportionment VII*; and (2) the trial court erred by failing to consider the intent of the drafters of CP–1.

[4] First, the House contends that the trial court's order violates "fundamental fairness" because the Coalition Plaintiffs did not submit CP-1 to the Legislature during its special session and produced it only one week before the hearing. The House argues that it "had no opportunity (if it were even proper) to redraw its proposal and to participate in the Coalition Plaintiffs' game of leapfrog." The Senate similarly argues that because the Coalition Plaintiffs' alternative maps were not publicly proposed to the Legislature, and "they waited until the special session ended and sprang them forth in litigation," the public and the trial court had little opportunity to review and consider their proposals. The Challengers counter this specific contention by explaining that after publication of the Base Plan, the League of Women Voters of Florida and Common Cause sent a letter specifically expressing their concerns regarding the configuration of Districts 26 and 27 and urging the Legislature to "find a more non-partisan way to draw" these districts. In response, the Legislature accused the Coalition Plaintiffs of making a "blatant request to make District 26 'more Democratic' and asking 'the Legislature to engage in partisan gerrymandering.'"

We first note that even assuming that it would have been preferable for the Legislature to have the alternative plans during special session, once the special session adjourned without the Legislature passing a remedial plan, it was the House that *275 requested that all parties be permitted to submit alternative plans and the agreed-to scheduling order included specific details about the information that should be included with the alternative plans to ensure full disclosure.

Second, as to the specific argument regarding the Coalition Plaintiffs' failure to submit alternative plans during the special session, the trial court rejected it and stated as follows:

The Legislature complains that the Plaintiffs did not participate in the open and transparent process of drawing a remedial map. But when the Plaintiffs tried to participate by pointing out what anyone in the Legislature could also have determined—that the new districts were more Republican leaning than before—they are accused of

trying to improperly insert political performance into the equations.

Trial Court Order at 11.

We agree with the trial court that there was no violation of fundamental fairness by the alternative plans not being submitted during the special session. It was logical that the Challengers awaited the release of the Base Plan to ascertain what changes the Legislature contemplated. As the League of Women Voters of Florida and Common Cause expressed to legislative leadership in their letter, the groups "applaud [the Legislature's leaders and their staff] for [their] efforts to follow the suggestions of the Florida Supreme Court" and that "[f]or the most part the base map appears to comply with" the opinion.

Moreover, the Legislature knew of alternative, more tier-two compliant ways in which to draw the South Florida districts, but rejected them. In the original trial court proceeding in 2014, the Romo Plaintiffs submitted configurations for these districts that are conceptually the same as the configuration of most of the districts in CP-1. In particular, the Romo trial map and CP-1 both contain a reconfigured District 20 that lacks an appendage down I-95 in Palm Beach County and that extends south to the Broward-Miami-Dade County line. Both maps contain a reconfigured District 25 that withdraws from Broward County to reduce the number of times that county is split. Both maps contain a reconfigured District 27 that sits compactly in central Miami-Dade County, rather than stretching south along the coast to the Miami-Dade-Monroe County line. Certainly, the Legislature had notice of the possibility of making some, if not all, of the South Florida districts more tier-two compliant. Further, the Legislature also had notice of a more tier-two compliant way to draw Districts 26 and 27 through the introduction of Senator Bullard's amendment during the special session, but rejected that amendment.

The House next claims, as part of its fundamental fairness argument, that the trial court's order ignores this Court's own instructions to the Legislature to only redraw the specific districts we invalidated in *Apportionment VII*. The House therefore argues that the trial court, in recommending a specific configuration of districts that were not ordered to be redrawn in *Apportionment VII*, exceeded this Court's directions to "focus" on the House and Senate plans. The Legislature is correct that *Apportionment VII* did not require

the Legislature to redraw the entire map and start anew.  See *Apportionment VII*, 172 So.3d at 413 (“The Legislature need not, in addition, redraw the entire map.”). However, redrawing the districts this Court invalidated in South Florida—Districts 21, 22, 25, 26, and 27—would necessarily require redrawing the boundary lines and ultimately the shape of adjacent South Florida Districts 20 and 23. Indeed, this Court stated exactly that: “[T]he Legislature *276 must redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected thereby.”  *Id.* at 416 (emphasis supplied). Accordingly, the trial court did not err in considering configurations of districts not specifically invalidated in *Apportionment VII*.

[5] Finally, we address a claim raised by both the Senate and the House—that the trial court erred in not considering the intent of the drafters of CP–1 or, for that matter, the other alternative maps. The House asserts that this proceeding “abounds with glaring ironies and striking contradictions that undermine the fairness and credibility of the entire proceeding,” including that the courts “condemned the ‘secretive shadow process’ in which the Legislature allegedly drew districts” while the “creation of CP–1 in an apartment in Los Angeles failed to raise an eyebrow.” In sum, the House argues that “different rules applied to different maps.” The Senate, while somewhat more restrained, echoes the House’s arguments that the adoption of CP–1 would endorse a map “drawn in secret, instead of in the open and transparent legislative process this Court envisioned in *Apportionment VII*.”

This contention is contrary to the record. As we have noted, the trial court’s scheduling order, which all parties agreed to, required specific identification of “every person involved in drawing, reviewing, directing, or approving the proposed remedial plan.” Although the maps themselves were not on trial, their drafters were called to testify during the relinquishment hearing and were subject to cross-examination. For instance, on direct examination during the evidentiary hearing, the Coalition Plaintiffs’ map drawer, O’Neill, testified to the type of instructions he received regarding how to draw CP–1: “You pointed me to the constitution, and you made sure I read the specific sections about redistricting. And you directed me to follow only those criteria and use no other considerations in deciding how to evaluate a district or the map as a whole.” On cross-examination, he further testified that “I was just asked to draw nonpartisan, constitutionally-compliant maps that reflected

the Supreme Court’s directions.” After hearing O’Neill’s testimony, the trial court found him “straightforward,” and “logical in his approach to drawing the districts and persuasive in his conclusions.” Ultimately, the trial court stated that it found no evidence “to suggest that CP–1 was drawn with improper partisan intent.”

The trial court, like this Court, reviewed the proposed plans to analyze the objective criteria this Court has set out in our past seven opinions, giving effect to the Fair Districts Amendment. The trial court then discussed each of the submitted proposed maps by written order, setting out its determinations regarding the tier-two criteria. With those objective criteria of [Article III, section 20](#) and this Court’s interpretation of those criteria in mind, the trial court noted that CP–1 was more compact, had fewer miles of border perimeter, and reduced the number of split cities. The alternative maps submitted to the trial court demonstrated that the Legislature did not meet its burden of justification as to its configuration of Districts 20 through 27 when these alternative maps, specifically CP–1, were objectively better by tier-two standards.

Moreover, the Legislature’s and Justice Polston’s argument that the trial court should have considered the intent of the drafters of CP–1 fundamentally misunderstands the trial court’s role and this Court’s role in the current proceeding. As explained in this Court’s relinquishment orders, and as set out in *Apportionment VII*, this Court directed the trial court to approve or disapprove the Legislature’s *277 enacted remedial map—or, as what ultimately occurred, approve or disapprove the proposed remedial maps of the parties after the Legislature failed to enact a map during the special session. Based on the finding that the Legislature’s prior proposed remedial congressional plan was tainted with partisan intent coming out of a shadow process in which political operatives infiltrated and influenced the Legislature, the burden switched to the Legislature to justify its configuration of its plans. Thus, as the trial court correctly noted in this proceeding, “It is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs.” In other words, we are tasked with determining whether the Legislature met its burden as to its proposed remedial congressional maps.

Additionally, *Apportionment VII* did not forbid a citizen affiliated with a particular party from drawing a map, nor was our affirmance of the trial court’s finding of unconstitutional intent based solely on the fact that political consultants aligned with the Republican Party had drawn maps.  172 So.3d at 374. Instead, this Court’s decision rested largely

on the Legislature's own claims that it had conducted an open and transparent redistricting process, while it was being manipulated into a violation of its constitutional duty. This Court explained that “if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.” *Id.* (quoting [Apportionment IV](#), 132 So.3d at 149).

Our decision detailed, at length, the circumstantial evidence revealing the Legislature's improper intent—evidence found and cited by the trial court in reaching that conclusion—including destruction of records and numerous “coincidences.” [See, e.g., Apportionment VII](#), 172 So.3d at 385. Our conclusion that the process was tainted with improper intent did not rest on the fact that partisans submitted maps but that “a group of partisan political operatives ‘conspire[d] to manipulate and influence the redistricting process’ and succeeded in ‘infiltrat[ing] and influenc[ing] the Legislature, to obtain the necessary cooperation and collaboration’ to ‘taint the redistricting process and the resulting map with improper partisan intent.’” [Id.](#) at 376. (emphasis omitted).

In reaching our conclusion, we used the trial court's detailed findings as to how the operatives concealed their actions by using proxies to submit their proposals, wrote scripts for others to state, and made a mockery of the Legislature's proclaimed transparent and open process, and that they “[found] other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part.” [Id.](#) at 377.

Thus, the Legislature is trying to conflate several arguments. The reason that improper partisan intent was found in the drawing of the map was not because of the intent of a particular map drawer or partisan operative. And assuming in this case that the Legislature wants to ascribe an improper intent to the Challengers' redistricting plan, we would point out that the very record here belies that motive, especially as to the Coalition Plaintiffs. An excellent example is the Coalition Plaintiffs' map with regard to Districts 21 and 22. Although Democrats complained that the redrawn map pitted two Democratic incumbents against one

another, and even though the Romo Plaintiffs championed a vertical configuration before the trial *278 court, the Coalition Plaintiffs maintained their advocacy for a “stacked” configuration of Districts 21 and 22 that substantially improves tier-two compliance.

[6] A redistricting process is not tainted merely by permitting citizens to speak out in a public forum and suggest a plan or portion of a plan. Nor was it tainted here when the Coalition Plaintiffs' map drawer proposed an alternative configuration of the South Florida districts that substantially improved tier-two compliance of those districts as the trial court found, based on its ability to hear extensive testimony as to how this map was drawn.

Simply put, as this Court's directive in *Apportionment VII* made clear—and as Justice Polston's dissent chooses to ignore—the “alternative maps are not on trial themselves, as is the Legislature's map.” *Id.* at 401 n. 11. Rather, in this case, the alternative plans, specifically the Coalition Plaintiffs' plans, CP-1, CP-2, and CP-3, serve to demonstrate that the South Florida districts could have been drawn to be more tier-two compliant. As the trial court noted:

I remain convinced that the best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for these shortcomings. If there is a way to make a map more tier two compliant without sacrificing tier one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, it will go far in minimizing the risk, or perception, that was drawn with a partisan intent.

Trial Court Order at 9.

[7] We stated as much in *Apportionment I*. As we noted, “in the context of Florida's constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by

absolute terms.”  *Apportionment I*, 83 So.3d at 640.  *See also Apportionment VII*, 172 So.3d at 399.

As discussed in this opinion, the alternative maps were an objectively better configuration of the South Florida districts as to tier-two compliance. The evidence of the alternative maps were considered by the trial court that the Legislature had not met its burden to justify its chosen configurations under both tier-one and tier-two constitutional considerations.

Having rejected the argument that the trial court did not give proper effect to the intent of the Challengers in submitting the alternative plans, we now review the trial court's recommendation as to Districts 20 through 27, located in South Florida. Both the House and the Senate were in agreement as to the configuration of these districts, but the Challengers asserted that these districts could be drawn more tier-two compliant, and submitted alternative plans to the trial court during the evidentiary hearing demonstrating this possibility. As to Districts 20 through 27, the trial court concluded that CP-1 was “hands down the best tier two performing map of the group,” because “it is more compact and splits fewer cities than any of the others.” Trial Court Order at 12. The Romo Plaintiffs also submitted a plan proposing a vertical configuration for Districts 21 and 22 and changes to Districts 25, 26, and 27, but have advocated for the Coalition Plaintiffs' plan before this Court. Our review of these South Florida districts focuses on the five districts we invalidated in *Apportionment VII*—21, 22, 25, 26, and 27. In redrawing the invalidated districts, we note that the Legislature also redrew adjacent Districts 20 and 23. District 24, though not redrawn in the Legislature's *279 plans, is altered in CP-1 as a result of making Districts 21 and 22 more compact and making additional cities whole in surrounding districts. We start with Districts 26 and 27, the first pair of South Florida districts we invalidated in *Apportionment VII*.

B. DISTRICTS 26 & 27

Districts 26 and 27 were the focus of the most controversy during the relinquishment proceedings. In *Apportionment VII*, this Court determined that Districts 26 and 27 “must be redrawn to avoid splitting Homestead” because “the enacted configuration of these two districts needlessly divided the  City of Homestead to Republican gain.” 172 So.3d at 409. In support of these conclusions, we explained some of the specific evidence of partisan intent as to these districts:

The challengers also mounted an individual attack against the validity of Districts 26 and 27, claiming that the enacted configuration of these two districts needlessly divided the City of Homestead to Republican gain—turning one Republican district and one Democratic district into two Republican-leaning districts. In support, the challengers relied on the general evidence of improper intent in the plan as a whole, as well as specifically on an e-mail chain between consultants Heffley, Terraferma, and Reichelderfer that took place after the Senate released a draft map that did not split Homestead. In this e-mail chain, the operatives stated that the configuration of these districts was “pretty weak” and that the House “need[ed] to fix” it.

 *Id.* at 409 (footnote omitted).

The last maps passed by both the House and the Senate during the special session had identical configurations of these districts, where District 26 included all of Homestead, yet was even more favorable for the Republican Party than the previous district that this Court held must be redrawn. This was something the League of Women Voters of Florida and Common Cause expressly pointed out in a letter to leaders of the Legislature during the special session.

At the evidentiary hearing, both the Coalition Plaintiffs and the Romo Plaintiffs submitted proposed maps to the trial court and demonstrated that these districts could be drawn markedly more tier-two compliant. Like with the other contested South Florida districts, the trial court found that CP-1 was “hands down the best tier two performing map.” Trial Court Order at 12. The court found that CP-1 split fewer cities, was more compact than the Legislature's configuration, and would not “deprive Hispanic voters of their ability to elect a candidate of their choice in District 26.” *Id.* at 18. The trial court recommended adopting CP-1 because of its significant improvement in tier-two compliance.

The Legislature claims that since this Court's only direction was to redraw the districts to avoid splitting Homestead, the trial court's recommendation goes beyond our instructions. The Legislature also claims that CP-1 violates the tier-one minority protection provisions of the Florida Constitution by diminishing the ability of Hispanic voters to elect a representative of their choice in District 26.

[8] For the reasons more fully explained below, we reject the Legislature's arguments and approve the trial court's determination that the Legislature did not meet its burden of justification for its proposed configuration of Districts 26 and 27—a finding supported by competent, substantial evidence.

First, the Legislature's proposed configuration of Districts 26 and 27 was even *280 more favorable to the Republican Party than the enacted district, which was invalidated partly for being drawn with the intent to favor the Republican Party. Second, although the Legislature bore the burden of justifying its chosen configuration of the redrawn area, the redrawn Districts 26 and 27 are less compact and split more cities than the alternative maps submitted at trial. Considering that an amendment was offered during the special session to draw the two districts more tier-two compliant, and that a map offered by the Romo Plaintiffs during the original merits trial of this case also demonstrated a more tier-two compliant configuration of the districts, the Legislature was aware of alternative, more tier-two compliant ways to draw these districts, yet did not seriously consider any of these alternatives. Third, the Legislature now provides a post hoc rationalization that its configuration for Districts 26 and 27, despite being less tier-two compliant than the alternative maps, is better than CP-1's plan because it avoids retrogression, as the Legislature asserts CP-1 does. Yet, during the special session, the Legislature performed only a cursory retrogression analysis for these districts.

Our determination that the Legislature has not met its burden of justification as to its chosen configuration of Districts 26 and 27 is first grounded in our previous conclusion that the enacted plan needlessly split Homestead to “benefit the Republican Party,” *Apportionment VII*, 172 So.3d at 410.

The Legislature's redrawn configuration has actually improved Republican performance. The trial court noted, “[t]he irony of the cure being worse than the illness is not lost on me.” Trial Court Order at 6.

This result is contrary to *Apportionment VII*. Specifically, this Court's decision in *Apportionment VII* regarding this area did not just rest only on the fact that Homestead involved a city split, as Justice Canady asserts in his concurring in part and dissenting in part opinion, but also because the Legislature rejected other tier-two compliant configurations drawn by the Legislature's map drawer, configurations that were less favorable to the Republican Party. *Id.* at 410. Furthermore, the Legislature's decision to split Homestead was a product of what the trial court in its final judgment called “a conspiracy to influence and manipulate the Legislature into a violation of its constitutional duty.” *Id.* at 382 (quoting trial court order). As this Court noted in *Apportionment VII*:

In another e-mail between [political consultants] Terraferma, Heffley, and Reichelderfer sent on the same day the Senate released a public map that did not divide the City of Homestead—a division considered by the consultants to be important to favor Republicans—Terraferma noted that District 26 was “pretty weak.” Heffley responded, “The [H]ouse needs to fix a few of these,” and Terraferma, copying Reichelderfer, responded, “yes.” The enacted configuration did, indeed, split the City of Homestead between Districts 26 and 27, which turned one Republican district and one Democratic district into two Republican-leaning districts.

Id. at 383–84.

In an attempt to comply with this Court's directive that Homestead not be split, when drawing the Base Plan, legislative staff moved the eastern part of Homestead into District 26 from District 27. Consequently, a certain number of people needed to be added to District 27 to equalize the population between the districts. The question was then where to shift the population between the districts.

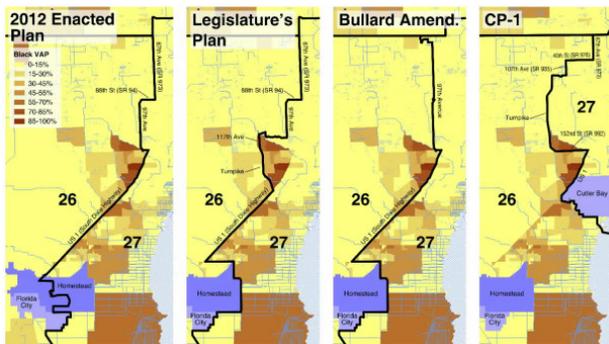
*281 The legislative staff chose to shift a predominantly black population, which had the effect of making District 26 even more Republican-leaning than in the map we disapproved. The Legislature's Base Plan moved 34,785 people in the predominantly black neighborhoods of Palmetto Estates, Richmond Heights, and West Perrine from District 26 into District 27. At the time, legislative staff did not assert that it was necessary to move the black population based on any minority protection concerns.

The resulting shifting of the predominantly black population from District 26 into District 27 did not even follow major

roadways. After the Base Plan was released to the public, the League of Women Voters of Florida and Common Cause sent a letter to the Speaker of the House of Representatives and President of the Senate that, while praising the Legislature's "efforts to follow the suggestions of the Florida Supreme Court in drawing most of the [Base Plan]," criticized the Legislature's decision to attempt to remedy the constitutional deficiencies in these two districts by "shift[ing] Democratic, African American population into [District] 27 in order to maintain a lower Democratic performance index in [District] 26."

As the trial court observed, given that the Legislature bears the burden, one "would think the Legislature would have anticipated questions about improving tier two compliance and [would] have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version." Trial Court Order at 11. Ultimately, neither the House nor the Senate adopted any amendments to the staff-drawn districts—although one was offered by Senator Dwight Bullard—and the final maps passed out of each legislative chamber included the staff-drawn configuration.

Significantly, the boundary between Districts 26 and 27 in the Legislature's plan follows a variety of roads as it wraps around the black neighborhoods (including the Florida Turnpike, 117th Avenue, 97th Avenue, 88th Street, and 87th Avenue), while the Bullard Amendment follows a much more logical, regular, and compact boundary (almost exclusively U.S. 1 and 97th Avenue), but does not move those black neighborhoods out of District 26.



*282 As we emphasized in *Apportionment VII*, the Legislature now has the burden to justify its chosen configuration. As was the case with the alternative maps in *Apportionment VII*, the alternative maps introduced by the Challengers demonstrate several other ways these districts could have been configured that actually would

have *improved* the tier-two compliance of the districts and done so in a manner that complied with our directive in *Apportionment VII*.

In its order, the trial court spoke to the shortcomings of the Legislature's approach:

It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions—one with Homestead in District 26 and one with Homestead in District 27. They then made a cursory analysis to see if it would perform for minorities, compared the tier two metrics of both, and chose the one that was most compact.

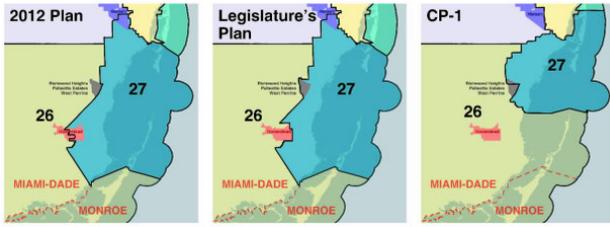
The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the expert did not make such a comparison to the benchmark district either.

...

The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits.

Trial Court Order at 10–11.

CP–1, and indeed every other plan proposed by the Challengers during the relinquishment proceedings—as well as previous maps submitted during the initial trial which are similar to CP–1's configuration of these districts, in addition to the Bullard Amendment introduced during the special session—improves tier-two compliance in Districts 26 and 27. As the trial court noted, "[t]he Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably." *Id.* at 12. In particular, Districts 26 and 27 in CP–1 are more visually compact than in the Legislature's plan, as the maps below demonstrate. (Homestead is in red, and the neighborhoods of Palmetto Estates, Richmond Heights, and West Perrine are in gray. Hialeah, which is split in the Legislature's plan between Districts 25 and 27, but is whole in CP–1, is in blue.)



*283 This visual comparison is supported by the statistical compactness measurements. With the exception of the Reock score for District 26, which is the same, the statistical compactness measurements demonstrate improvement in CP-1 as compared to the Legislature's proposed configuration.

	Reock ⁶		Convex Hull ⁷		Polsby-Popper ⁸	
District	26	27	26	27	26	27
Legislature	.18	.46	.46	.82	.20	.43
CP-1	.18	.54	.48	.85	.22	.47

Further, CP-1 utilizes major geographical and political boundaries at least as effectively as the Legislature's proposed configuration, if not more so, and also allows for the City of Hialeah to be made whole, whereas it is split between Districts 25 and 27 in the Legislature's proposal. In other words, by essentially any and every tier-two measure, the configuration of these districts in CP-1 is objectively superior to the configuration in the House and Senate maps.

Despite its knowledge of alternative, more tier-two compliant ways to draw Districts 26 and 27, the Legislature did not attempt a more tier-two compliant configuration—even after the League of Women Voters of Florida and Common Cause expressed concerns about the Base Plan—and indeed rejected the one legislative amendment (the Bullard Amendment) that offered an alternative configuration. Notably, speaking in debate in the Senate, Reapportionment Committee Chair, Senator William Galvano, offered what appears to be the only justification for why the Senate rejected the more tier-two compliant configuration: “If we adopt the Bullard Amendment, because of the Hispanic population shift that would move one to the other, I would suspect that the Court in its review would find that we have in fact packed District 27. So I would ask that you vote this down.” Nothing in the record indicates that either legislative staff or counsel performed a functional analysis on Districts 26 and 27 in the Bullard Amendment to determine whether they violated the tier-one minority protection provisions, or the Voting Rights Act.

The decision not to consider *any* alternatives for Districts 26 and 27 in drawing the Base Plan—and to reject the one proposed *284 amendment offering a different configuration—is indicative of the Legislature's shortcomings in meeting its burden. This is particularly true

where it is clear that the “cure” the Legislature chose for the improper partisan intent that caused the Court to require these districts to be redrawn in the first place actually *improves* the Republican performance of the districts.

Although the Legislature bears the burden, as the trial court found, it offers hardly any justification for its chosen configuration of Districts 26 and 27. But while the Legislature's “minimalist” approach may have sufficed if it were starting from a blank slate, “that was not,” as the trial court stated, “the situation facing the Legislature.” Rather, “it had been tasked with preparing a remedial map” and “would have the burden of defending its choices in all respects.” Trial Court Order at 11.

In an attempt to meet its burden of justification, the Legislature provides a post hoc rationalization for its demonstrably less tier-two compliant map by asserting—as it also did when justifying various challenged districts in the 2012 plan—that the alternative configuration of Districts 26 and 27 offered by the Coalition Plaintiffs would violate the tier-one minority protection provisions of the Florida Constitution. [Cf. Apportionment VII, 172 So.3d at 411](#) (rejecting Legislature's “post-hoc rationalizations” for its enacted configuration of District 25). Specifically, the Legislature alleges that the configuration of District 26 in CP-1 diminishes the ability of Hispanic voters to elect a representative of their choice. The trial court did not find the Legislature's experts persuasive on the issue of whether CP-1 retrogresses, and ultimately rejected the Legislature's retrogression analysis.

In support of its position that District 26 in CP-1 would result in retrogression, the Legislature presented testimony from

two expert witnesses, Professor Liu and Professor Moreno. The trial court “did not find [Professor Liu's] testimony to be particularly helpful,” because “the data he used to draw his conclusions from was suspect.” Trial Court Order at 15–16. For instance, of the ten elections Professor Liu analyzed when performing his retrogression analysis, “only six involved Hispanic candidates and three of those were non-partisan judicial races.” *Id.* Further, except for one of these non-partisan judicial races, Professor Liu “could not identify any election in which a coalition of African Americans and non-Hispanic whites effectively defeated the Hispanic candidate of choice.” *Id.* at 16.

Regarding the Legislature's other expert, Professor Moreno, the trial court concluded that this testimony “had little probative value to me.” *Id.* Most troubling in Professor Moreno's retrogression analysis was that his analysis was based on a comparison between CP–1 and the Legislature's proposed plan, rather than the benchmark map of 2002. In addition, the trial court noted the “speculative nature” of Professor Moreno's testimony and found his testimony to be “long on pure opinion based on experience and short on systematic, scientific analysis of accepted statistical data.” *Id.* Further, contrary to his testimony at the evidentiary hearing, Professor Moreno had previously testified at the merits trial that the invalidated District 26, which has substantially similar demographic, registration, and Democratic primary turnout metrics as CP–1, preserved Hispanics' ability to elect the candidate of their choice.

On the other hand, the expert witness presented by the Coalition Plaintiffs, Professor Lichtman, explained that Districts *285 25, 26, and 27 in CP–1 are all Hispanic-performing districts. While the Legislature now attempts to discredit Professor Lichtman's report, it chose not to object to the report being entered into evidence. Additionally, in contrast to the trial court's findings regarding the Legislature's experts, the trial court found Professor Lichtman's opinions to be persuasive:

The Plaintiffs' expert, Professor Lichtman, testified via his report. In it, he favorably compared Districts 26 and 27 in CP–1 to districts in both the 2012 congressional plan and 2002 benchmark congressional plan and found no retrogression. Although I did not have the opportunity to judge his demeanor while testifying, his report is persuasive. He systematically analyzed the subject matter with accepted scientific methodologies and found that the Hispanic candidate or Hispanic candidate of choice won 29 out of 29 elections that took place between 2006 and 2014

in comparable Miami–Dade County based districts that had similar Hispanic voting age population to the proposed Hispanic districts in CP–1. He also analyzed the 2010 U.S. Senate Election and demonstrated that Marco Rubio, a Hispanic Republican, carried the proposed Hispanic districts in CP–1 by landslide margins.

And, through ecological regression, Lichtman showed that in CP–1's District 26, for instance, Rubio received an overwhelming 71% of the Hispanic vote (including support from non-Republican Hispanics) and substantial crossover votes from non-Hispanic voters, regardless of the fact that the district performed for the Democratic Gubernatorial Candidate, Alex Sink, in 2010.

Lichtman concluded that, “according to the range of most pertinent factors, [District 26] in CP–1 is a Hispanic opportunity district beyond any reasonable doubt,” and that Districts 25, 26, and 27 in CP–1, CP–2, and CP–3 all function as performing Hispanic districts.

Trial Court Order at 14–15.

Critically, despite the burden the Legislature bears, the retrogression analysis the Legislature performed when drawing its configuration was not nearly as intensive as the retrogression analysis it has applied when attacking CP–1. As the trial court noted:

It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions—one with Homestead in District 26 and one with Homestead in District 27. *They then made a cursory analysis to see if it would perform for minorities*, compared the tier two metrics of both, and chose the one that was most compact.

The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the expert did not make such a comparison to the benchmark district either.

Id. at 10. (emphasis supplied).

Under the version of District 26 in CP–1, Hispanics were 65.5% of registered Republicans and 64.9% of registered

Republicans who actually voted in the 2012 general election. A comparison with the benchmark district in the 2002 plan confirms that Hispanic voting ability in the Republican primary is not diminished. Under the benchmark District 25 configuration, Hispanics were 66.7% of registered Republicans and 65.7% of registered Republicans *286 who actually voted in the 2012 general election.⁹ In District 26 under the precleared 2012 plan—which the Legislature itself defended earlier in this proceeding—Hispanics constituted 66.2% of registered Republicans and 65.9% of registered Republicans who actually voted in the 2012 general election. Therefore, we can conclude that Hispanic Republicans' candidate of choice is just as likely to win a contested Republican primary as in the benchmark plan.

As to Hispanic Democrats' ability to nominate their candidate of choice in a contested primary, Hispanics were 45.0% of registered Democrats and 41.6% of registered Democrats who actually voted in the 2012 general election under CP–1's configuration for District 26. Although Hispanics do not constitute a majority of Democrats, a comparison with the benchmark district of 2002 confirms that Hispanic voting ability in the Democratic primary is not diminished. In benchmark District 25, Hispanics were 51.9% of registered Democrats and 48.9% of registered Democrats who actually voted in the 2012 general election. In District 26 under the precleared 2012 plan, Hispanics constituted 45.3% of registered Democrats and 42.2% of registered Democrats who actually voted in the 2012 general election.¹⁰

These figures are comparable, and based on this statistical analysis, it is clear that Hispanic Democrats' candidate of choice is just as likely to win a contested Democratic primary in CP–1 as in the benchmark plan. The Legislature contends that because CP–1 makes District 26 Democratic-leaning, whereas the district was Republican-leaning in the Benchmark, and because Hispanics do not control the Democratic primary, the Hispanic candidate of choice is unlikely to emerge from the Democratic primary, yet the Democratic nominee is likely to prevail in the general election. Therefore, the Legislature argues, Hispanic voters' ability to elect a representative of their choice is diminished in CP–1.

As the trial court noted, this “is a cogent, logical, argument. The problem is that the argument is much more compelling than the evidence offered in support of it.” Trial Court Order at 14. The Legislature's argument rests on an unproven assumption of Hispanic voting cohesion and polarized racial

bloc voting—the establishment of which is the first step in any regression analysis.¹¹ Indeed, the *287 evidence before this Court suggests a lack of Hispanic voting cohesion in this district. In 2012, of the registered Hispanic voters in benchmark District 25, 29.8% were Democrats, 37.5% were Republicans, and 32.7% were registered with neither party. In 2012, of the registered Hispanic voters in the enacted, precleared District 26, 28.1% were Democrats, 40.6% were Republicans, and 31.3% were registered with neither party. Professor Lichtman noted this fact in his expert report submitted to the trial court. Of the four counties that comprise Districts 25, 26, and 27 in CP–1, Lichtman found that “Hispanic registered voters are closely divided among Republicans (36.5%), Democrats (30.6%), and Independents and Others (32.9%)” based on 2014 registration.

Because there is scant evidence before this Court that Hispanics in Benchmark District 25 vote cohesively, and since the trial court found that the Legislature's experts were “less persuasive” than the Coalition Plaintiffs' expert, we affirm the trial court's conclusion that District 26 in CP–1 does not diminish the ability of Hispanics to elect representatives of their choice.

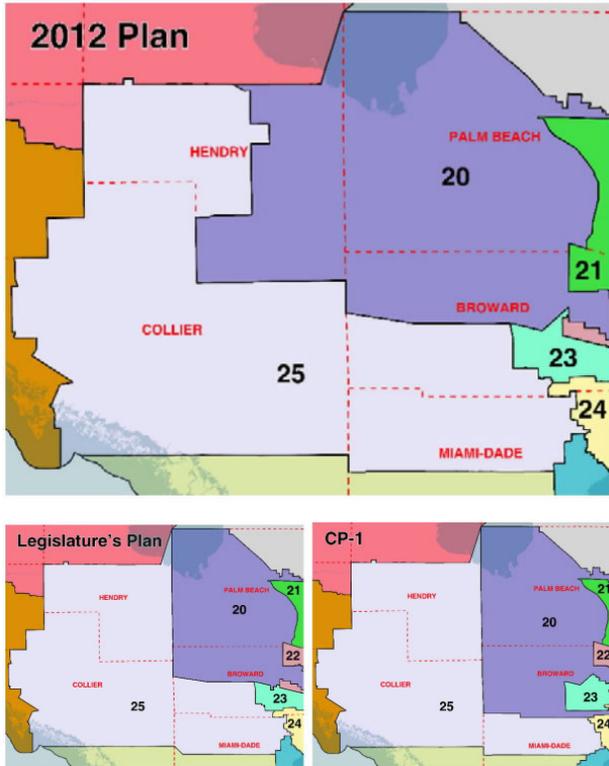
In conclusion, there was competent, substantial evidence to support the trial court's findings that the Legislature failed to meet its burden justifying its chosen configuration of Districts 26 and 27 when CP–1's configuration of these districts were objectively better by tier-two standards. We affirm the trial court's recommended adoption of CP–1's configuration of Districts 26 and 27.

C. DISTRICT 25

[9] In 2012, the Legislature split Hendry County between Districts 20 and 25. The Challengers objected to this configuration on the basis that it resulted in unnecessary tier-two deficiencies. In *Apportionment VII*, we determined that the Legislature could not justify its configuration, and that “ District 25 must be redrawn to avoid splitting Hendry County.” 172 So.3d at 411.

During the special session, legislative staff drew the Base Plan to keep Hendry County wholly within District 25, and made resultant changes to the surrounding Districts—Districts 20, 21, 22, and 23.¹² The House and the Senate adopted the *288 Base Plan configuration of District 25, and adopted

amended configurations of Districts 20, 21, 22, and 23 to keep additional cities whole.



During the trial court proceedings, the Coalition Plaintiffs objected to the Legislature's configuration of District 25 and the surrounding South Florida districts. They argued that their proposed remedial plan, CP-1, demonstrated that the Legislature rejected more tier-two compliant configurations, and that therefore the Legislature could not justify its configurations.

The trial court found that “[t]he Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two

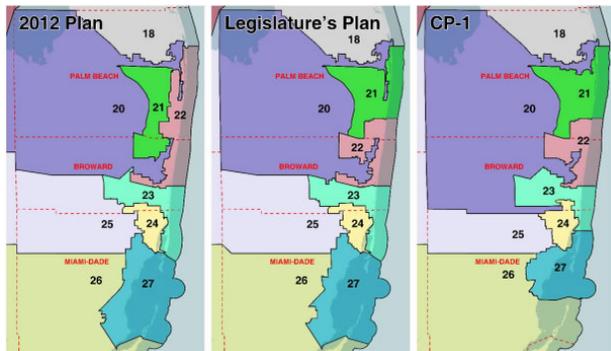
compliance considerably,” calling CP-1 “hands down the best tier two performing map” of the plans proposed by the parties. Trial Court Order at 12. The trial court found CP-1 more visually compact than the Legislature's plan, and noted that it was also superior with respect to statistical compactness and city splits. Specifically, the trial court found that CP-1's District 20 “incorporates the whole city of Miramar, which the legislative proposals split between Districts 24 and 25. As such, CP-1's configuration of District 20 changes the border of District 24. It also eliminates an appendage protruding down from District 20 into District 21 in the legislative proposals that splits six cities along the borders of Districts 21 [and 22].” Trial Court Order at 4. Accordingly, it determined that the Legislature has not met its burden *289 with respect to the South Florida districts and recommended that this Court adopt CP-1.

We agree with the trial court's factual determinations and conclusions. The alternative maps do indeed demonstrate that the Legislature could have complied with this Court's directive regarding District 25 in a way that improved tier-two compliance dramatically across South Florida. CP-1 makes seven more cities whole, eliminates a county split, has seventy-three fewer miles of border perimeter, improves statistical compactness in five districts, and improves or maintains visual compactness in the three others. Although statistical compactness decreases in one district—District 25—this is a direct result of the district withdrawing from Broward County and increasing the number of whole cities. District 25's visual compactness remains the same, especially considering that the area of Broward County which was removed from the District, resulting in the decreased compactness scores, is mostly unpopulated.

	District	20	21	22	23	24	25	26	27
Reock									
	Legislature	.48	.37	.41	.27	.38	.48	.18	.46
	CP-1	.48	.37	.48	.35	.47	.41	.18	.54
Convex Hull									
	Legislature	.75	.64	.70	.63	.73	.73	.46	.82
	CP-1	.75	.64	.74	.65	.77	.67	.48	.85
Polsby-Popper									

Legislature	.20	.24	.15	.25	.28	.38	.20	.43
CP-1	.20	.30	.24	.26	.30	.36	.22	.47

The Legislature argues that CP-1 renders District 20 unconstitutionally noncompact by adding a new, unnecessary appendage on its south end. Although District 20's south Broward arm is an appendage, it is entirely made up of one whole city (Miramar), uses the county line for its entire southern boundary, uses the city line for its entire northern and eastern boundaries, and has no impact on the district's compactness scores. The Miramar arm results from the elimination of a different, more visually bizarre appendage that stretches down I-95 through the middle of District 21, splitting three cities in the process. It also has the effect of eliminating an appendage of District 22 that reaches between Districts 20 and 23 in the Legislature's plan. Furthermore, District 23's southern appendage that reaches down into Miami Beach, and District 20's appendage that reaches up I-95 north of Fort Lauderdale, are both reduced. The map's improvements to city splits, county splits, and compactness are directly a result of that Miramar arm.



***290** The Legislature's claim that CP-1 disregards the compactness standard in an effort to preserve cities misses the mark, since neither the Legislature's nor CP-1's District 20 can be considered "compact." That noncompactness is necessary to comply with tier-one and maintain its status as a district in which black voters have the ability to elect representatives of their choice. But the fact that a district may be less compact does not mean that the Legislature is free to disregard the other tier-two standards, like following political and geographical boundaries where feasible. In addition, the Legislature's premise that CP-1's District 20 is visually less compact than the Legislature's is incorrect. CP-1's District 20 is at least as compact—as every compactness score suggests—if not more so, as the trial court found, and as we agree.

In sum, CP-1 adheres to tier-two criteria more faithfully than the Legislature's plan, while presenting no tier-one issues. The Legislature does not offer an adequate justification for its adoption of a less tier-two compliant plan, and we therefore conclude that there was competent, substantial evidence to support the trial court's findings that the Legislature does not meet its burden with respect to District 25 and the surrounding districts.

D. DISTRICTS 21 & 22

[10] Districts 21 and 22 were the last pair of the eight specific districts we invalidated in *Apportionment VII*. In 2012, the Legislature drew Districts 21 and 22 to run North-South, parallel to each other along the Atlantic coast. Both the Coalition Plaintiffs and the Romo Plaintiffs, in their arguments to this Court in *Apportionment VII*, contended that these districts could have been drawn in a more constitutionally compliant manner and that the Legislature unjustifiably rejected one such configuration in which the districts were "stacked" on top of each other. [172 So.3d at 411.](#)

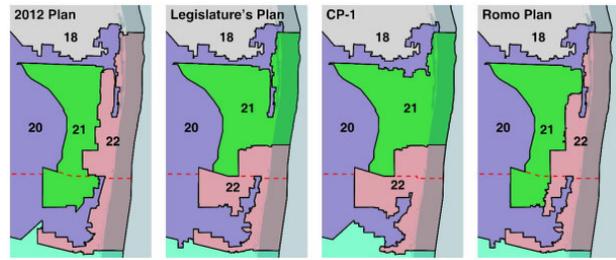
Addressing this challenge in *Apportionment VII*, we concluded that the trial court erred in deferring to the Legislature's enacted configuration. [Id. at 412.](#) Based on evidence that the Legislature had rejected a staff-drawn proposal to draw Districts 21 and 22 in a more tier-two compliant "stacked" orientation, and based on the Challengers' trial maps, which maintained ***291** a North-South orientation but improved tier-two compliance by keeping more cities whole and eliminating an irregular appendage into District 22, we held that the Legislature had not justified its configuration and directed that the districts must be redrawn. *Id.* "We [did] not, however, instruct that the Legislature must necessarily redraw the districts in a 'stacked,' horizontal configuration," but rather "[left] it for the Legislature to determine how to redraw these two districts, with the understanding that tier-two compliance could be improved and, given the shift in the burden, that the Legislature must be able to justify its redrawn configuration of these districts." [Id. at 412-13.](#)

During the special session, both the House and the Senate adopted the configuration of Districts 21 and 22 drawn by legislative staff in the Base Plan, as amended solely to keep additional cities whole. That configuration redrew these districts in a “stacked” manner.

During the session, there was considerable public testimony from Palm Beach and Broward County leaders in support of maintaining a North–South configuration in order to respect the separate coastal and inland communities of interest there. During the trial court's remedial proceedings, the Romo Plaintiffs also objected to the Legislature's adopted configuration, arguing that the Legislature redrew Districts 21 and 22 with the intent to disfavor their Democratic incumbents, Congresspersons Ted Deutch and Lois Frankel, by pairing them both in District 21. The trial court, however, rejected the Romo Plaintiffs' argument, concluding that there was “insufficient evidence” that “such was the intent.”

The trial court found that CP–1, besides being more tier-two compliant with respect to Districts 20 through 27, was preferable with respect to Districts 21 and 22 because CP–1 “eliminates an appendage protruding down from District 20 into District 21 in the legislative proposals that splits six cities along the borders of Districts 21 [and 20].” Trial Court Order at 4.

Before this Court, the Romo Plaintiffs do not object to CP–1's configuration, despite that this configuration pairs two Democratic incumbents against each other. The Coalition Plaintiffs object to the exact “stacked” configuration the Legislature adopted, as part of the general reconfiguration of these South Florida districts in CP–1. Specifically, the Coalition Plaintiffs allege that the Legislature cannot justify its configuration for Districts 21, 22, and surrounding districts because it rejected more tier-two compliant alternatives. Indeed, CP–1 presents such an alternative, by marrying the “stacked” configuration first introduced by legislative staff in 2012 with the “appendage-less” configuration included in the original Romo trial maps. Thus, CP–1 creates a more tier-two compliant configuration of the two districts.



*292 Compared to the Legislature's proposal, Districts 21 and 22 in CP–1 are more visually compact. CP–1 eliminates an incursion by District 20 into the middle of District 21, eliminates a southern appendage of District 22, and reduces District 20's finger into District 22.

CP–1 also keeps the cities of Boynton Beach, Lake Worth, and Lantana whole within District 21, and keeps Deerfield Beach whole within District 22, whereas those municipalities are split in the Legislature's proposal. As the trial court determined, CP–1 improves tier-two compliance “considerably” over the Legislature's proposal, both with respect to Districts 21 and 22 and in South Florida as a whole.

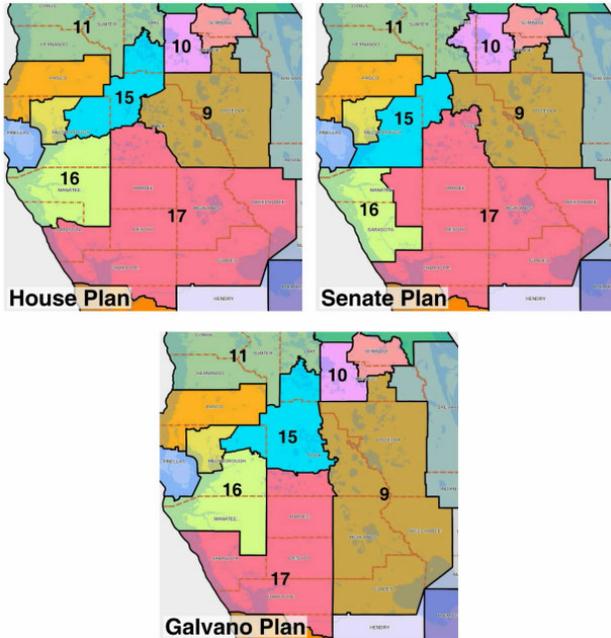
Because we instructed in *Apportionment VII* that Districts 21 and 22 be redrawn to improve compactness, we have no reason to reject an obviously more tier-two compliant configuration. For these reasons, we uphold the trial court's findings based on competent, substantial evidence and affirm the trial court's finding that the Legislature has not met its burden to justify its chosen configuration of Districts 21 and 22 that was less compact.

E. THE HOUSE AND SENATE VERSIONS OF CENTRAL AND SOUTHWEST FLORIDA

[11] Having addressed the eight districts we specifically required the Legislature to redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27—and the districts affected thereby, we now turn to the districts that were the subject of disagreement between the House and the Senate in the special session that ultimately ended deadlocked. The trial court and this Court address six districts—Districts 9, 10, 11, 15, 16, and 17—as a result of the House's motion for further relinquishment and the House and Senate's inability to agree.

We emphasize that these districts, located in central and southwest Florida, were not the subject of dispute in *Apportionment VII*, but were redrawn to accommodate necessary changes to nearby districts invalidated in

Apportionment VII. The Challengers do not dispute the configuration of these districts, although, as discussed below, they do prefer one variation over the others.



*293 Specifically, the House Plan (9071) and the Senate Plan (9062) differ in these six districts, and the Galvano Plan (9066) differs from the House Plan only in four districts and from the Senate Plan in six. Importantly, the six districts within each of the plans have no impact on the configurations of other districts before this Court for review. Ultimately, after reviewing the House, the Senate, and the Galvano Plans for tier-two compliance, the trial court recommended adoption of the House Plan for these districts.

In weighing which of the three plans—the House Plan, the Senate Plan, or the Galvano Plan—to recommend to this Court, the trial court determined that “[b]oth the House and Senate have legitimate reasons for preferring their respective configurations” and that “[i]t is a close call.” Comparing the House Plan to the Senate Plan, the trial court determined that “compactness is slightly better” in the House Plan but did not note any other tier-two differences. The trial court stated that the Senate Plan “was purportedly designed to address the perceived ‘donor’ *294¹³ status of Hillsborough County, but it makes no similar effort to address the ‘donor’ status of other counties in the map, and it exacerbated the ‘donor’ status of Orange County.” Trial Court Order at 6.

Comparing the House Plan to the Galvano Plan, the trial court found that the Galvano Plan preserves one more county, splits one more city, and decreases visual and statistical

compactness somewhat. The Challengers prefer the House Plan, because, as they claim, it does not contain tier-two defects present in the Senate and Galvano Plans, and does not raise any tier-one questions, as the Senate and Galvano Plans do.

Because the Legislature did not agree on a configuration in this area of the state, we face a novel and somewhat different task than in our review of the other districts. As to these six districts, we are not comparing a legislatively enacted or agreed-upon plan to alternative plans in order to determine whether there is a violation of the constitutional standards. We are, in addition, not fashioning our own plan.

Instead, in light of our directions to the trial court to make a recommendation between the plans presented by the parties in this remedial process, we review the trial court's recommendation, keeping in mind that the Legislature has the burden of justifying their proposed configurations.

During its review of these districts, the trial court first determined whether each plan complies with the constitutional requirements. Although the Coalition Plaintiffs argue that the Senate's plans “give rise to potential incumbent favoritism concerns,” the trial court did not make any finding that would suggest so. Before this Court, the Coalition Plaintiffs focus on the alleged tier-two shortcomings of the Senate and Galvano Plans.

Based on the evidence in the record, we approve the trial court's findings that none of the three plans violate the tier-one standards with respect to these six central and southwest Florida districts.

The trial court next focused on whether the plans were tier-two compliant. To determine whether the districts are compact, this Court begins “by looking at the ‘shape of a district’ ” to evaluate whether the district has “an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement.”

 *Apportionment I*, 83 So.3d at 634 (quoting *Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992)).

During the evidentiary hearing, the House claimed that its plan is the most compact, citing its higher compactness scores, superior visual compactness, “smoother boundaries,” and “clear and consistent methodology.” The House criticizes the Senate Plan for having an unpersuasive justification, for being “designed to address the perceived ‘donor’ status of

Hillsborough County” but “not address[ing] the ‘donor’ status of other counties,” and for “exacerbate[ing] the ‘donor’ status of Orange County.” The Challengers agree.

The Senate, on the other hand, claimed before the trial court—as it does before this Court—that its plan is preferable because it leaves District 16 unchanged from the enacted 2012 plan and avoids an unnecessary split to Hillsborough County.¹⁴ Alternatively, *295 the Senate claims that the Galvano Plan is preferable because it keeps more counties whole better than any other plan.

The trial court found the House Plan to be more compact than the Senate Plan and the Galvano Plan and noted that while the Senate Plan does not divide Sarasota County, as the House Plan does, it achieves this result by dividing Manatee County (which the House Plan does not). Additionally, upon an examination of the numerical compactness scores, the trial court found that overall, the House Plan was more tier-two compliant. Trial Court Order at 6–7.

The trial court noted that “[b]oth the House and Senate have legitimate reasons for preferring their respective configurations.” Trial Court Order at 5. We agree, and commend both the House and the Senate for passing plans that comply with our constitutional requirements. As we stated in *Apportionment I*, once the constitutional criteria are satisfied, there may still be other factors to determine which plan ought to be adopted. *See, e.g., Apportionment I*, 83 So.3d at 673 (“[M]aintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives.”).

Acknowledging that redistricting does not have to be a mechanical exercise, we note that the Senate Plan, like the House Plan, keeps rural communities of interest together in District 17. However, the Galvano Plan splits up rural areas between Districts 9, 16, and 17. The Senate Plan additionally does not make any changes to District 16, which was not invalidated by this Court in *Apportionment VII*, from its 2012 configuration. This district contains all of Sarasota County and the vast majority of the population of Manatee County. While the trial court found the House Plan's configuration of this district to be more tier-two compliant, we appreciate the Senate's desire to keep the Sarasota–Manatee community of interest intact in District 16.

Given the unique procedural posture of this case, the Legislature's inability to agree forces the Court to adopt one—and only one—of these configurations. Mindful of the trial court's findings that the House Plan best complies with tier-two standards, we now review the trial court's finding that the House Plan is preferable over the Senate and Galvano Plans.

Our analysis concludes that no plan has a meaningful advantage with respect to compactness. As we have already established, all three plans are constitutionally compact. They are also all equally visually compact. The differences in statistical compactness are slight, and certainly not great enough to give any one plan a clear edge. *See Apportionment I*, 83 So.3d at 635 (“The Florida Constitution does not mandate ... that districts within a redistricting plan achieve the highest mathematical compactness scores.”).

Similarly, with regard to utilizing existing boundaries, no plan has a meaningful advantage. Each makes tradeoffs to follow some boundaries over others for legitimate policy reasons. For instance, the Senate Plan prioritizes reducing the number of times Hillsborough County is split, while giving less priority to keeping a district wholly within Orange County. Alternatively, the House Plan does keep a district wholly within Orange County, our *296 state's fifth-largest, within a district. While the House Plan's Districts 15 and 16 do divide eastern Hillsborough, the division line is the Alafia River, which is a geographic boundary. While there may be competing policy interests at play, we are not in a position to evaluate those policy concerns. We also do not consider any of these tradeoffs to be objectively superior to any other.

We conclude that there is no discernible difference between the three plans when it comes to the tier-two standards. No plan is more constitutionally compliant than any other and none is objectively superior in any meaningful way.

But, ultimately, the Legislature's failure to agree and enact one of these configurations forces us, as it did the trial court, to choose a plan. The trial court determined that the House Plan is preferable and the Challengers incorporated the House Plan into CP–1 and now urge its adoption before this Court. While both Senate plans and the House Plan are tier-two compliant, as the trial court found, the House Plan, statistically, is slightly more compact than the two Senate Plans. No party has given us legal basis to conclude that the House Plan poses more problems than either the Senate Plan or the Galvano Plan. Accordingly, this Court approves

the trial court's recommendation to adopt the House Plan's configuration of Districts 9, 10, 11, 15, 16, and 17.

REMEDY AND CONCLUSION

We remain “[c]ognizant that this Court's role is not to select a redistricting map that performs better for one political party or another, but is instead to uphold the purposes of the constitutional provision approved by Florida voters to outlaw partisan intent in redistricting.” [Apportionment VII, 172 So.3d at 369](#). We have endeavored to give meaning to the Fair Districts Amendment throughout our previous opinions. As we stated in *Apportionment I*:

The citizens, through our state constitution, have now imposed upon this Court a weighty obligation to measure the Legislature's Joint Resolution with a very specific constitutional yardstick. The constitutional imperatives set forth in [article III, sections 16 and 21, of the Florida Constitution](#) are the instructions given to the Legislature by the citizens, mandating how apportionment plans are to be drawn. These instructions are a further expression of the will of this state's citizens to ensure that their right to elect representatives is not frustrated as a result of partisan favoritism or incumbent protection. The citizens have expressed their will, requiring the Legislature to “redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations” and “to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts ... are avoided.” [Standards for Establishing Legislative Dist. Boundaries, 2 So.3d 175, 181, 187–88 \(Fla.2009\)](#) (plurality opinion). The new constitutional provisions seek to level the playing field in how legislative districts are drawn. These mandates are specific, and the citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in [article III, sections 16 and 21](#).

[Apportionment I, 83 So.3d at 684](#).

The Fair Districts Amendment “sought to eliminate the age-old practice of partisan political gerrymandering where the political party and representatives in power *297 manipulate the district boundaries to their advantage.” [Apportionment](#)

[VII, 172 So.3d at 369](#). The amendment established “stringent new standards” for the “ ‘once-in-a-decade’ apportionment,” and these new standards “clearly act as a restraint on the Legislature.” [Apportionment I, 83 So.3d at 597](#). The goal of the Fair Districts Amendment was, in the words of the Eleventh Circuit Court of Appeals, to “level the playing field.” [Brown v. Sec’y of State of Fla., 668 F.3d 1271, 1285 \(11th Cir.2012\)](#).

At the same time, we recognized that “any redrawing of lines, regardless of intent, will inevitably have an *effect* on the political composition of a district and likely whether a political party or incumbent is advantaged or disadvantaged.” [Apportionment I, 83 So.3d at 618](#). We also recognized that improper intent did not indicate a “malevolent or evil purpose.” [Apportionment VII, 172 So.3d at 378](#). In *Apportionment I*, we rejected any suggestion that “once the political results of the plan are known, the Legislature must alter the plan to bring it more in balance with the composition of voters statewide. The Florida Constitution does not require the affirmative creation of a fair plan, but rather a neutral one in which no improper intent was involved.” [83 So.3d at 643](#).

In our first opinion after Florida voters approved the Fair Districts Amendment, we emphasized that despite the stringent constitutional standards that operated as a restraint on the legislature, we would defer to legislative decisions on the drawing of districts as long as there was no violation of constitutional requirements. [Apportionment I, 83 So.3d at 608](#). We noted that our limited role was simply to “ensur[e] compliance with constitutional requirements” and to invalidate a redistricting plan only if it ran afoul of such mandates. *Id.* In that vein, in *Apportionment I* we upheld the facial constitutionality of the House's legislative plan and in [In re Senate Joint Resolution of Legislative Apportionment, 89 So.3d 872 \(2012\)](#) (*Apportionment II*) we upheld the facial constitutionality of the Senate plan.¹⁵

Now, however, as we explained in *Apportionment VII*, the Court has a “solemn obligation to ensure compliance with the Florida Constitution in this unique context, where the trial court found the Legislature to have violated the constitutional standards during the 2012 redistricting process.” [Apportionment VII, 172 So.3d at 415](#). We have an additional obligation to provide certainty to candidates

and voters regarding the legality of the state's congressional districts. [Id.](#) at 373.

Having reviewed the Trial Court Order recommending adoption of a remedial plan, we approve the House Plan's configuration of Districts 1 through 19, and approve the trial court's recommended configuration of Districts 20 through 27. In doing so, we reject the Challengers' request that we retain jurisdiction of this case, as we have every confidence that the Legislature and the State will adhere to the congressional redistricting plan this Court approves today. As the Senate made clear in its supplemental reply brief filed in this Court, the "Senate has no intention of adopting another congressional plan before the next redistricting cycle."

Accordingly, we affirm the Trial Court Order and approve the trial court's recommended remedial plan. The congressional redistricting plan approved by this Court ***298** as set forth in Appendix A¹⁶ shall be used for the 2016 Florida congressional elections and for Florida congressional elections thereafter until the next decennial redistricting. The trial court shall enter a final judgment incorporating the approved plan as set forth in Appendix A.

Because of the extremely limited timeframe, we limit the time for filing a motion for rehearing or clarification to five days from the date of this opinion and three days for a response from the date the motion is filed.

IT IS SO ORDERED.

LABARGA, C.J., and LEWIS, QUINCE, and PERRY, JJ., concur.

PERRY, J., concurs with an opinion, in which QUINCE, J., concurs.

CANADY, J., concurs in part and dissents in part with an opinion.

POLSTON, J., dissents with an opinion.

PERRY, J., concurring.

While I concur fully with my colleagues in the majority, I write separately to provide the context in which we make this decision. What concerns me are line-drawers who create districts for political advantage, but disingenuously cloak their explanations in the language of protecting minority

voting rights. Cf. [In re Senate Joint Resolution of Legislative Apportionment 1176 \(Apportionment I\)](#), 83 So.3d 597, 692–93 (Fla.2012) (Perry, J. concurring). This course of action is antithetical to the Fair Districts Amendment and the basic principles of democratic self-governance. Neither our constitution nor the Voting Rights Act implicitly condones or justifies the practice.

As explained by the United States Supreme Court, the [Voting Rights Act] "was designed by Congress to banish the blight of racial discrimination in voting," [South Carolina v. Katzenbach](#), 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), and to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged ... on account of race, color, or previous condition of servitude." [Voinovich v. Quilter](#), 507 U.S. 146, 152, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (quoting U.S. Const. amend. XV).

[Id.](#) at 621.

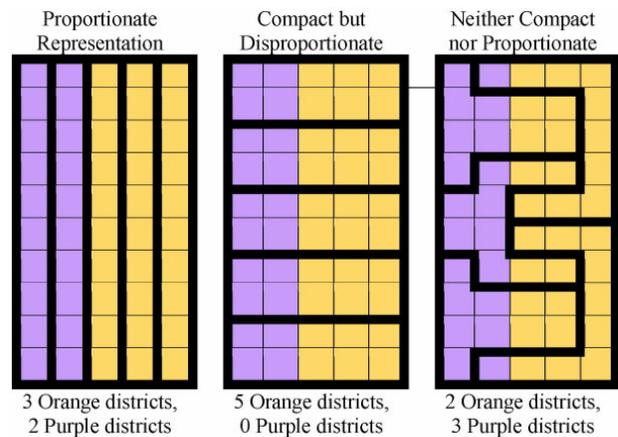
Historically, the Voting Rights Act protected minority voters from attempts to dilute their voting power. Enacted in 1965, it sought to eliminate traditional disenfranchisement mechanisms like literacy tests. See [Pub.L. No. 89–110, 79 Stat. 437 \(1965\)](#). In response, states turned to "second-generation barriers"—the principal tool being the gerrymandering of voting districts. See [Shelby Cnty., Ala. v. Holder](#), — U.S. —, 133 S.Ct. 2612, 2634–35, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Courts invalidated the most blatant racial gerrymanders as unconstitutional violations of the right to vote. See [Gomillion v. Lightfoot](#), 364 U.S. 339, 348, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); see, e.g., [League of United Latin American Citizens v. Perry](#), 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (holding that a congressional district violated the Voting Rights Act's prohibition on election practices or procedures with a discriminatory effect); ***299** [Allen v. Va. State Bd. of Elections](#), 393 U.S. 544, 565, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (holding that the preclearance provisions of the Voting Rights Act apply to redistricting changes).

In the decades that followed, minority Democrats and white Republicans often formed alliances during redistricting sessions.¹⁷ Under the guise of protecting minority voters,

line-drawers would group large numbers of minority voters into small numbers of districts, a practice known as “packing.” See, e.g., [Voinovich v. Quilter](#), 507 U.S. 146, 153–54, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Consequently, the surrounding districts contained very few minority voters, an effect known as “bleaching.” See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L.Rev. 731, 740 (1998). Minority Democrats and white Republicans who supported these plans increased the reelection prospects for individuals in both groups: minority Democrats ran in districts replete with like-minded minority voters, while white Republicans ran in districts replete with like-minded white voters. See, e.g., [Hays v. Louisiana](#), 839 F.Supp. 1188, 1205 n. 54 (W.D.La.1993) (“Testimony at the trial revealed that [the redistricting plan] was passed by a legislative alliance between the Black and the Republican Caucuses, historically uncommon bedfellows but, according to expert testimony, a phenomenon occurring with increasing frequency across the country.”), *vacated*, 512 U.S. 1230, 114 S.Ct. 2731, 129 L.Ed.2d 853 (1994).

To understand the effect on the redistricting process, consider the example of State X, a small state comprised of fifty people. Thirty people belong to the Orange party and twenty people belong to the Purple party. The state's line-drawers must divide the state into five congressional districts. Drawing the lines one way—in this case, vertically down the state—results in Orange winning 60% of the seats, and Purple winning 40% of the seats—an identical reflection of the partisan components of the state.

Now assume that the line-drawers are controlled by the Purple party. Knowing that their party is numerically disadvantaged, population-wise, the Purple line-drawers divide the state in an unwieldy manner, such that Purple wins 60% of the seats (despite support from only a 40% minority of the people) and Orange wins 40% of the seats (despite support from a 60% supermajority of the people).¹⁸



***300** When the legislature draws congressional districts and a single party controls both legislative chambers, the party has unfettered power in the redistricting process. Partisan-controlled legislatures often create redistricting plans that ensure the controlling members' party is disproportionately represented in the state's congressional delegation in comparison to the actual political makeup of the state. In exchange for working with the controlling party, the incumbents from the non-controlling party practically ensure their own reelections.

This Court is uniquely aware of how closely divided Florida's electorate can be. See [Gore v. Harris](#), 772 So.2d 1243, 1247 n. 4 (Fla.2000), *rev'd*, [Bush v. Gore](#), 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); see also [Porter v. Bowen](#), 496 F.3d 1009, 1012 (9th Cir.2007) (describing Florida as a “swing state”). Florida's political dead heat suggests that its members of Congress should be split relatively evenly between the two parties. Yet, the Republican Party holds a virtual supermajority. The Republican political advantage is, in large part, a result of the party's influence on the redrawing of boundary lines. However, “[t]he desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties.” [Apportionment I](#), 83 So.3d at 615; [In re Senate Joint Resolution 2G, Special Apportionment Session 1992](#), 597 So.2d 276, 285 (Fla.1992) (“[S]everal of the opponents observe that the Joint Resolution is nothing more than a gerrymandering effort by the Democratic majority of the legislature to protect Democratic incumbents. We have little doubt that politics played a large part in the adoption of this plan.”) (footnote omitted).

The people of this great state passed a constitutional amendment seeking to address the errors of the past. *See* [Apportionment I](#), 83 So.3d at 597. Floridians voted to add these new redistricting mandates, *301 and they “could not have spoken louder or with more clarity.” *Id.* at 695 (Perry, J., concurring). “The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process.” *Id.* at 616 (citations omitted). Specifically, the Fair Districts Amendment prohibits lines “drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.” Art. III, § 20(a), Fla. Const. In other words, “the standards governing the ... apportionment process are now more stringent than the requirements under the United States Constitution and prior versions of the Florida Constitution.” [Apportionment I](#), 83 So.3d at 604. Despite this populous mandate, those who were elected to represent the interests of the citizenry instead chose to use the undeniably gerrymandered 2002 map as the starting point and then opted to make as few changes as possible to create maps that could pass constitutional muster.

After more than three years of litigation and appeals, even with clear instruction from this Court, [League of Women Voters of Florida v. Detzner](#), 172 So.3d 363, 372 (Fla.2015), there is criticism that the representatives of the people have spent more than \$10 million in taxpayer dollars¹⁹ and have failed to pass a single constitutionally-sound plan. It now falls to this Court to provide the Supervisors of Elections with a constitutionally compliant map.

Judge Lewis has worked tirelessly and diligently below to do just that. The efforts to paint this process as partisan or invoke the antebellum period are an unjustified attack on the integrity of our judicial system. Had those who were elected by the people heeded their electorate, our involvement would never have been required.

As it stands, once adopted, the plan we approve today increases the number of districts where minorities, both racial and ethnic, will have the opportunity to elect the representatives of their choice. The boundaries may have changed, but the purpose and goal of the Voting Rights Act and Florida's Fair Districts Amendment have been better met under this plan.

I understand that it is nearly impossible to remove politics from an inherently political process, and both parties have had the advantages of drawing the lines at some point in history. However, this Court is constitutionally required not to protect any individual incumbent, but to protect the interests of each individual voter. To do otherwise would be contrary to the democratic principles embodied in our constitution.

Originally, the right to vote was limited to white male landowners. Others had to fight and die for the privilege to be extended to them. It is an insult to their struggle for politicians to now use that sacrifice for personal benefit. The Florida Constitution protects the ability of minority communities to elect representatives of their choice. *See* art. III, § 20, Fla. Const. That protection belongs to the minority community—not to the incumbents they choose to elect.

QUINCE, J., concurs.

*302 CANADY, J., concurring in part and dissenting in part. I disagree with the decision to reject the configuration of Districts 20 through 27 contained in the House and Senate plans. I would approve Districts 20 through 27 of the House and Senate plans because those districts meet the requirements of *Apportionment VII* and result in no new constitutional violations. Regarding the configuration of the six central and southwest Florida districts on which the House and Senate plans did not agree, I would adopt the Galvano plan. Finally, I agree with the approval of the configuration of the remaining redrawn districts contained in the House and Senate plans.

The majority's decision suffers from two fundamental flaws. First, as Justice Polston has explained in greater detail, the majority has failed to examine the intent involved in drawing CP-1 and thus has failed to carry out the mandate of the Fair Districts Amendment. Second, the majority has imposed a morphing remedy by requiring additional changes that go beyond those mandated in *Apportionment VII*. The first error constitutes a clear departure from the express mandate of the Fair Districts Amendment. The second error has imposed a fundamentally unfair burden on the Legislature, a burden that no litigant could reasonably be expected to meet.

The Majority's Failure to Examine the Intent of CP-1

Justice Polston correctly concludes that the majority seriously errs in 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.”²⁰ It is axiomatic that replacing one partisan redistricting plan with another partisan redistricting plan does not satisfy the requirements of the Fair Districts Amendment. Yet the majority's analysis here—as in *Apportionment VII*—rejects that fundamental point.

The Majority's Morphing Mandate

Apportionment VII held that the 2014 remedial plan for certain districts was constitutionally defective in particular ways and directed that those specific defects be corrected. Under the mandate of *Apportionment VII*, it is appropriate to require that the Legislature meet the burden of showing that redrawn districts comply with the directions contained in that decision. And it is appropriate to require that the redrawing of districts be accomplished in a way that avoids new constitutional violations. But the trial court and the majority have gone far beyond imposing those reasonable requirements on the Legislature. 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 by *Apportionment VII* without any showing that the districts drawn in the House and Senate plans resulted in new constitutional violations.

The Court thus has effectively imposed a morphing remedy, and the Legislature has confronted the confounding challenge of hitting a target that has been moved after the House and Senate have acted. Whenever a court moves the goalposts on any litigant, the specter of arbitrary judicial action is likely to arise. The resulting *303 harm is compounded when the affected litigant is a coordinate branch of government.

Although I do not suggest that the majority intends to act arbitrarily, I cannot avoid the conclusion that the deeply flawed approach adopted here—as in *Apportionment VII*—does serious harm to the judicial process. The result of the daunting burden placed on the Legislature is that the challengers—whose motivations have been immune from scrutiny—have been virtually guaranteed to prevail in obtaining the approval of a map that suits them. It is highly problematic that the non-transparent process used to produce CP-1 thus has been allowed to trump the process in the Legislature that was implemented after *Apportionment VII* was handed down.

Districts 26 & 27

In *Apportionment VII*, the Court directed that Districts 26 and 27 “must be redrawn to avoid splitting Homestead.”
 172 So.3d at 410. The districts drawn in the House and Senate plans unquestionably comply with that direct and unambiguous requirement. In those plans, Homestead lies wholly within District 26. The trial court expressly declined to find that Districts 26 and 27 in the House and Senate plans were drawn with “improper partisan intent.” And there is no suggestion that the districts drawn by the House and Senate created other new constitutional violations.

Nevertheless, the trial court and the majority reject Districts 26 and 27 in the House and Senate plans on the ground that tier-two compliance would be improved by the configuration of the districts in CP-1. The majority, like the trial court, focuses on superior compactness. But as shown in the majority's chart comparing the statistical compactness measurements for Districts 26 and 27 in the House and Senate plans with CP-1, the improvements in compactness obtained by CP-1 can only be described as minor. *See* majority op. at 283. More importantly, in *Apportionment VII*, the Court did not hold that Districts 26 and 27 were flawed because of a lack of compactness. And the statistical compactness measurements relied on by the majority show that the compactness of Districts 26 and 27 as redrawn by the Legislature is virtually indistinguishable from the compactness of those districts in the 2014 remedial plan.

	Reock		Convex Hull		Polsby–Popper	
District	26	27	26	27	26	27

Legislature	.18	.46	.46	.82	.20	.43
Remedial Plan	.18	.46	.46	.81	.20	.43

So a level of compactness that was no problem when the Court reviewed the 2014 remedial plan has now become a basis for rejecting the configuration agreed on by the House and Senate for Districts 26 and 27.

The majority also relies on the splitting of the city of Hialeah between Districts 25 and 27 as a basis for rejecting the configuration chosen by the House and Senate. The majority prefers CP-1, which does not split the city of Hialeah. But, as with the issue of compactness, the splitting of Hialeah was not an issue in the Court's invalidation of districts in the 2014 remedial plan—a plan that also split Hialeah. So a particular city split that was not disapproved in the 2014 remedial plan is now condemned and cited as a basis to reject *304 districts approved by the House and Senate that comply with the Court's direction in *Apportionment VII*.

I strongly disagree with moving the goalposts in this manner. Because Districts 26 and 27 in the House and Senate plans comply with the requirements imposed by *Apportionment VII* and create no additional constitutional violations, I would conclude that those districts should be approved.

District 25

In  *Apportionment VII*, the Court held that “District 25 must be redrawn to avoid splitting Hendry County.” 172 So.3d at 411. The House and Senate plans eliminated the split, keeping all of Hendry County in District 25. But, once again, compliance with the unambiguous directive contained in *Apportionment VII* is not enough for the majority. The House and Senate are faulted for not taking additional steps to improve the tier-two performance of districts other than District 25, although *Apportionment VII* did not impose any general requirement to make such improvements.

Again, the trial court and the majority focus on statistical measures of compactness, but the numbers do not show that CP-1 has realized anything more than de minimus improvements in compactness. *See* majority op. at 288–89. More to the point, as shown in the chart below, the configuration in the House and Senate plans for Districts 20 through 27—compared with the 2014 remedial plan—has enhanced compactness in certain districts and has not diminished compactness overall.

District	20	21	22	23	24	25	26	27
Reock								
Legislature	.48	.37	.41	.27	.38	.48	.18	.46
Remedial Plan	.48	.28	.18	.27	.38	.40	.18	.46
Convex Hull								
Legislature	.75	.64	.70	.63	.73	.73	.46	.82
Remedial Plan	.74	.60	.61	.57	.73	.73	.46	.81
Polsby–Popper								
Legislature	.20	.24	.15	.25	.28	.38	.20	.43

Remedial Plan	.22	.26	.13	.23	.28	.32	.20	.43
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I would conclude that the House and Senate plans comply with the requirements of *Apportionment VII* regarding the redrawing of District 25, and have done so without creating any new constitutional violations.

Districts 21 & 22

In *Apportionment VII*, the Court invalidated Districts 21 and 22 and directed that they be redrawn “with the understanding that tier-two compliance could be improved.” [172 So.3d at 413](#). Although the Court declined to “instruct that the Legislature must necessarily redraw the districts in a ‘stacked,’ horizontal configuration,” the Court relied on testimony by the House’s chief map drawer that a stacked “configuration would have been more compact and would have broken fewer political boundaries.” *Id.* at 412. The Court also referred to a draft House map showing such a stacked configuration. *Id.* at 411.

The House and Senate plans adopted a stacked configuration for Districts 21 and 22. As shown in the preceding chart, that configuration did make improvements to the compactness of the two districts. In addition, city splits were reduced from a *305 total of 15 to 11, and one county split was eliminated. Nonetheless, these districts in the House and Senate plans are rejected in large part because of what the majority identifies as a “visually bizarre appendage that stretches down I-95 through the middle of District 21, splitting three cities in the process.” Majority op. at 289. The appendage is a portion of minority District 20. Although the appendage now dooms Districts 21 and 22 in the House and Senate plans, the appendage was never an issue in *Apportionment VII*. Indeed, the appendage is a prominent feature of the map the Court referred to in *Apportionment VII* as an example of how a stacked configuration could improve the tier-two performance of Districts 21 and 22. It is ironic that the Legislature is now faulted for failing to remove the same appendage contained in a map cited by the majority to show the potential for improvement in the 2014 remedial plan. The majority’s mandate morphs once more.

I would conclude that the House and Senate plans comply with the mandate of *Apportionment VII* regarding Districts

21 and 22, and do so in a way that does not result in new constitutional violations.

Central and Southwest Florida Districts

I agree with the majority that none of the three plans under consideration for the six central and southwest Florida districts “has a meaningful advantage with respect to compactness,” majority op. at 295, and that all of the plans comply with the requirements of the Florida Constitution. Given the absence of legislative agreement on those districts, I would conclude that on balance the Galvano plan is marginally superior because it avoids splitting either Manatee or Sarasota Counties.

Conclusion

Accordingly, I would reverse the portion of the trial court’s order adopting the configuration of Districts 20 through 27 in CP-1 and instead adopt the configuration in the House and Senate plans. I would also reverse the portion of the trial court’s order regarding the six central and southwest Florida districts and instead adopt the Galvano plan. I would affirm the trial court’s order approving the remaining districts contained in the House and Senate plans.

POLSTON, J., dissenting.

This is a Court-adopted map, not a legislative-drawn map. The map the trial court recommended and the majority adopts was drawn by a Democratic consulting firm, a firm that has performed mapping and data analysis for numerous Democratic candidates and causes. Although 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 Coalition Plaintiffs even stated in oral argument (and the majority apparently agrees)²¹ that, if the remedial plan had been drawn by the Democratic National Committee itself, the outcome would be the same. Not only is this result ironic,²² it is an unconstitutional violation of the

Fair Districts Amendment (as interpreted *306 previously by the majority) and the separation of powers. I dissent.

The Fair Districts Amendment to Florida's constitution provides that “[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” Art. III, § 20(a), Fla. Const.

And, in [League of Women Voters of Florida v. Detzner \(Apportionment VII\)](#), 172 So.3d 363, 392 (Fla.2015) (quoting trial court order), a majority of this Court invalidated the legislatively enacted plan because “ ‘circumstantial evidence introduced at trial’ [proved] that the political operatives ‘obtain[ed] the necessary cooperation and collaboration’ from the Legislature to ensure that the ‘redistricting process and the resulting map’ were ‘taint[ed]’ with ‘improper partisan intent.’ ” The majority's list of evidence establishing improper intent primarily consisted of the Legislature's destruction of its communication records relating to redistricting in accordance with its previously established records retention policies as well as e-mails between Republican consultants indicating the consultants' desire to submit map proposals anonymously and to influence the legislative process. See [id.](#) at 381–85, 390–91.

There is much stronger and more direct evidence of partisan “infiltration” regarding the map that this Court is currently adopting than the evidence of partisan “infiltration”²³ that this Court found unconstitutional previously. Here, the Coalition Plaintiffs filed a notice in the trial court actually acknowledging that the map they proposed as CP–1 (and that the majority is adopting in its entirety)²⁴ was drawn by a mapping software employee of a Democratic consulting firm headquartered in Washington, D.C. Of course, who knows what additional evidence of improper partisan intent would have surfaced if this Court had permitted the same discovery regarding this mapmaking process that it permitted regarding the legislative mapmaking process. And, 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 is due to the fact that the majority of this Court expressly prohibited any discovery regarding the maps proposed by the non-legislative parties. See [League of Women Voters of Fla. v. Detzner](#), No. SC14–1905, Order at 4 (Fla. Sup.Ct. order filed Sept. 4, 2015) (“The Court further denies the House's motion to the extent it seeks any discovery.”); cf. [League of Women Voters of Fla. v. Fla. House of Reps.](#), 132 So.3d 135 (Fla.2013) (holding

—I believe improperly—that legislative privilege does not prevent broad and invasive discovery regarding the legislative process, including depositions of legislators and legislative staff, legislative communications, documents, testimony, etc., to test whether legislative map was drawn with partisan intent). However, even without discovery, the knowledge that a Democratic political operative actually drew CP–1 should prevent *307 this Court's adoption of CP–1 under this Court's decision in *Apportionment VII*.

The majority emphasizes the burden of proof it outlined in *Apportionment VII*, repeatedly stating that the burden has shifted and that the Legislature must now demonstrate that the remedial map it enacted is constitutional. But the Legislature did not actually enact a map. The House passed a map, and the Senate passed a different map and also submitted a third distinct map. It is unclear how the Legislature could possibly bear the burden of establishing that something it did not enact is constitutional. In reality, without the plaintiffs even alleging any tier-two violations of the constitution with respect to the legislative proposals, the majority is requiring the Legislature to establish that the one House map and the two Senate maps are “objectively better” (as judged by the majority) in meeting tier-two requirements than a map that was never submitted to the Legislature for consideration. See majority op. at 287, 288–89, 290, 292, 295–96; cf. *Beaubien v. Ryan*, 198 Ill.2d 294, 260 Ill.Dec. 842, 762 N.E.2d 501, 505 (2001) (“Where, as here, challengers to a redistricting plan allege that districts formulated by the Commission fail to meet our constitution's compactness requirement, the applicable burden of proof requires those challengers to establish that the plan is against the manifest weight of the evidence.”). In other words, the majority unlawfully imposes a burden on the Legislature to prove matters of judicial preference regarding compactness, unrelated to constitutional deficiencies. This inapposite burden of proof allows CP–1 to go untested.

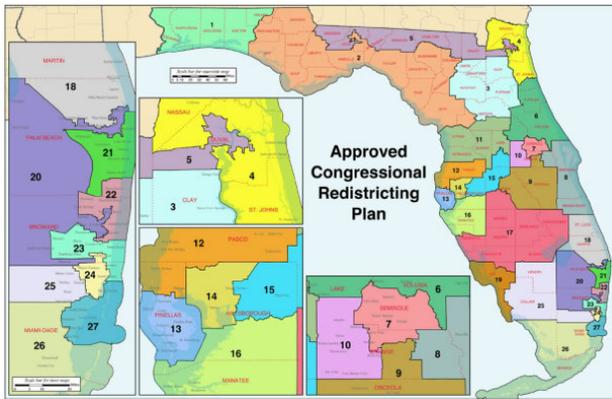
Given that this is now a judicial process to adopt a court redistricting plan, we should at the very least ensure that the proposal we adopt passes constitutional muster. See *Maestas v. Hall*, 274 P.3d 66, 79 (N.M.2012) (remanding state court adopted redistricting plan for reconsideration because it “did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone”). And each party submitting a proposal to the court for consideration should be the party that bears the burden to establish that its proposal is constitutional. See Philip J. Padavano, *Florida Civil Practice* § 16:1 (2015 ed.) (“Generally, the burden of proof is on the party who asserts

the proposition to be established.”). Instead, the Coalition Plaintiffs are having their proposed CP–1 map adopted in its entirety without sustaining any burden whatsoever in these judicial proceedings. I am unaware of any other legal process where this has been permitted. Furthermore, this is contrary to the United States Supreme Court’s direction that when “‘faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying’ a state plan—even one that was itself unenforceable—to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.’ ” *Perry v. Perez*, — U.S. —, 132 S.Ct. 934, 941, 181 L.Ed.2d 900 (2012) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997)).

Additionally, the majority many times declares that today’s opinion marks the end point of state litigation, but then remands the case back to the trial court to enter a final judgment. I guess it is not really the end. In this procedural posture, the trial court acted as a special master by conducting evidentiary proceedings and making a recommendation to this Court. The map is this Court’s final judgment, not the trial court’s, and it should rule accordingly.

*308 Because the majority imposes an improper burden upon the Legislature and fails to consider whether the map it adopts passes constitutional muster, I respectfully dissent. I also dissent because of the majority’s “morphing mandate,” as described by Justice Canady.

APPENDIX A



*309 **APPENDIX B**

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

RENE ROMO, ET AL., PLAINTIFFS,

vs.

KEN DETZNER AND PAM BONDI, DEFENDANTS.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, ET AL., PLAINTIFFS,

vs.

KEN DETZNER, ET AL., DEFENDANTS.

CASE NO.: 2012–CA–00412

CASE NO.: 2012–CA–00490

**ORDER RECOMMENDING
ADOPTION OF REMEDIAL MAP**

THIS CASE is before me on a temporary relinquishment of jurisdiction from the Florida Supreme Court for the purpose of evaluating proposed remedial congressional redistricting maps and making a recommendation to the Court as to which map, or portions thereof, should be adopted. I have reviewed the proposed maps, considered the evidence presented and the arguments of counsel. For the reasons set forth below, I find that the alternative map proposed by the Coalition Plaintiffs, identified as CP–I, best complies with the Court’s directions and with all constitutional requirements, and therefore recommend its adoption.

**BACKGROUND AND PROCEDURAL
POSTURE OF THE CASE**

On July 10, 2014, I entered Final Judgment in this case, finding that the Congressional Redistricting Map enacted by the Legislature in 2012 violated Article III, Section 20 of the Florida Constitution. I directed the Legislature to draw another map to address the defects I found, and subsequently approved the remedial map drawn by the Legislature. Both Plaintiffs and Defendants appealed.

On July 9, 2015, the Florida Supreme Court issued its opinion in [League of Women Voters of Florida v. Detzner](#), 172 So.3d 363 (Fla.2015) (“*Apportionment VII*”), affirming my finding of constitutional violation but determining that I had not gone far enough in my requirements of the Legislature to correct the constitutional deficiencies. The Court directed the Legislature to draw a third map and gave specific instructions as to how to address problems it noted with certain districts (5, 13, 14, 21, 22, 25, 26 and 27.)

As to District 5, the Court declared that it must be an east/west rather than a north/south configuration; Districts 13 and 14 must be re-drawn to avoid crossing Tampa Bay; Districts 21 and 22 must be made more compact, suggesting but not requiring a stacked configuration for these two districts; District 25 must be drawn without dividing Hendry County; Districts 26 and 27 must be drawn so as not to split the City of Homestead.

The Florida Supreme Court temporarily relinquished jurisdiction to this Court for a period of 100 days for remedial proceedings, specifically, to hear evidence and arguments as to the new map and to recommend whether or not it should be approved. The Legislature met in special session but was unable to enact a remedial congressional map as directed. As there was no enacted map for me to evaluate, I requested further instruction from the Florida Supreme Court.

The Court modified its previous order of temporary relinquishment of jurisdiction, directing me to “make a recommendation to [the Florida Supreme] Court, before the end of the relinquishment period, as to which map proposed by the parties—or *310 which portions of each map—best fulfills the specific directions in [*Apportionment VII*] and all constitutional requirements.” Order at 2–3, [League of Women Voters of Fla. v. Detzner](#); No. SC14–1905 (Fla. Sept. 4, 2015).

PROPOSED REMEDIAL MAPS

The parties have submitted seven proposed remedial maps: 9071, submitted by the House; 9062 and 9066, submitted by the Senate; CP–1, CP–2, and CP–3, submitted by Coalition Plaintiffs; and the Romo Map, submitted by Romo Plaintiffs. A general overview of the maps is as follows:

a. 9071—The House proposes a modified version of the base map the staff drew. It differs from the base map by keeping whole four additional cities: Groveland, Auburndale, Riviera Beach, and Sunrise. 9071 includes (1) the same East–West version of District 5 as in the map designated Romo Plan A at trial, (2) a District 14 that does not cross Tampa Bay or divide Pinellas County, (3) a “stacked” configuration of Districts 21 and 22, (4) a District 25 that keeps Hendry County whole, and (5) a District 26 and District 27 that does not split the City of Homestead. 9071 includes 18 split counties and 20 split cities.

b. 9062—Passed by the Senate during the special session, this map modifies Districts 9, 10, 11, 15, 16, and 17 from the staff-drawn configurations in the base map and the House Map 9071. 9062 keeps Sarasota County whole, whereas 9071 divides it. 9062 divides Manatee County, whereas 9071 keeps it whole. 9062 does not include a district wholly within Orange County, as does 9071. It includes 18 split counties and 20 split cities.

c. 9066—The Senate's alternative map, 9066, was drawn by Senate staff after the special session. It differs from 9071 only as to Districts 9, 15, 16, and 17. It keeps both Sarasota County and Manatee County whole, while 9071 divides Sarasota County, but it divides the City of Longboat Key. Like 9062, it does not include any district wholly within Orange County. 9066 includes 17 split counties and 21 split cities.

d. CP–1—Coalition Plaintiffs offer CP–1 as their principal alternative map. Northern and Central Florida in CP–1 include 19 identical districts to the House Map 9071. It differs from 9071, however, in its alternative configurations of Districts 20 through 27 in South Florida. First, CP–1 reconfigures District 20 to keep Hendry County whole (within neighboring District 25), to remain an African American majority-minority district. CP–1's District 20 incorporates the whole city of Miramar, which the legislative proposals split between Districts 24 and 25. It also eliminates an appendage protruding down from District 20 into District 21 in the legislative proposals that splits six cities along the borders of Districts 21.

CP–1, like the legislative proposals, eliminates the split of Homestead between Districts 26 and 27, but also makes them more compact. The border between Districts 26 and 27 in CP–1 also follows major roadways far more closely than the legislative proposals. CP–1 includes 18 split counties and only 13 split cities.

e. CP-2 and CP-3—These are alternatives that use the basic configuration of the legislative proposals for Districts 26 and 27, and were offered to show that it was possible to draw districts that more closely follow major roadways, without adversely affecting compactness or dividing additional cities or counties.

*311 f. Romo Map—Romo Plaintiffs modelled their proposed remedial map after 9071 in Northern and Central Florida, modifying only the South Florida districts. There are two significant differences between the Romo Map and 9071, First, the Romo Map retains the non-“stacked” configuration of Districts 21 and 22 in the 2012 and 2014 congressional maps. Second, the Romo Map modifies the boundary between Districts 26 and 27 so that the African-American communities in Richmond Heights, Palmetto Estates, and West Perrine are in District 26, rather than District 27. The Romo Map includes 18 split counties and 23 split cities.

What then am I to make of the language that directs me to especially focus on the House and Senate maps, any amendments offered thereto, and the areas of agreement between the legislative chambers? Presumably this means that, even though the Legislature did not enact a map, the ones passed by each chamber, especially where they are in agreement, are the closest we will come to an expression of the preferences of the elected representatives of the people as to a remedial map.

Accordingly, I should first evaluate the maps proposed by the House and Senate to determine which map, or portions thereof, best meet the Court's criteria. Then I should evaluate that configuration in light of any challenges thereto by the Plaintiffs to determine if the Legislative defendants can meet their burden as noted above, or if some other configuration best fulfills the Court's directions and all constitutional requirements.

THE APPLICABLE LEGAL STANDARD AND PARAMETERS OF REVIEW

The Florida Supreme Court has directed me to “make a recommendation ... as to which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [Apportionment VII] and all constitutional requirements.” The Court has emphasized that the burden remains on the House and Senate to justify their chosen configurations, and that no deference is due to their choices regarding the drawing of districts.

THE MAPS PROPOSED BY THE HOUSE AND SENATE

The House Map (9071) and the Senate Map (9062) as well as the alternative offered by the Senate (9066) are very similar. They differ only as to the configuration of certain districts in Central and Southwest Florida. Both the House and Senate have legitimate reasons for preferring their respective configurations. It is a close call, but I find the House Map (9071) preferable to either Senate map.

First, as to 9062, compactness is slightly better in 9071.

HOUSE MAP (9071)

	LENGTH (MILES)	PERIMETER (MILES)	REOCK	CONVEX HULL	POLSBY- POPPER
District 9	69	269	0.63	0.87	0.46
District 10	36	115	0.49	0.89	0.49
District 11	84	332	0.52	0.80	0.33
District 15	67	240	0.33	0.76	0.26
District 16	58	200	0.64	0.90	0.52
District 17	118	416	0.57	0.79	0.46

AVERAGE	72.0	262.0	0.53	0.84	0.42
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SENATE MAP (9062)

	LENGTH (MILES)	PERIMETER (MILES)	REOCK	CONVEX HULL	POLSBY- POPPER
District 9	78	293	0.56	0.85	0.39
District 10	36	151	0.64	0.85	0.36
District 11	84	344	0.53	0.81	0.32
District 15	66	206	0.34	0.78	0.34
District 16	63	186	0.40	0.81	0.45
District 17	116	478	0.61	0.77	0.36
AVERAGE	73.8	276.3	0.51	0.81	0.37

*312 The Senate Map does not divide Sarasota County, while the House Map does, but the Senate Map divides Manatee County, while the House Map does not. The Senate Map was purportedly designed to address the perceived “donor” status of Hillsborough County, but it makes no similar effort to address the “donor” status of other counties in the map, and it exacerbated the “donor” status of Orange County.

The Senate alternative map (9066), referred to as the Galvano Map, was drawn by staff at the request of Senator Galvano in the hopes of addressing some concerns the House had with 9062. It was drawn after the session and thus was not filed, debated, or voted on by the Senate. It splits neither Sarasota nor Manatee County, and thus preserves one more county, but it splits Longboat Key, which straddles the boundary between Sarasota and Manatee Counties. As shown below, it decreases somewhat the visual and numerical compactness of the four districts that differ between it and the House Map.

HOUSE MAP (9071)

	LENGTH (MILES)	PERIMETER (MILES)	REOCK	CONVEX HULL	POLSBY- POPPER
District 9	69	269	0.63	0.87	0.46
District 15	67	240	0.33	0.76	0.26
District 16	58	200	0.64	0.90	0.52
District 17	118	416	0.57	0.79	0.46
AVERAGE	78.0	281.3	0.54	0.83	0.43

GALVANO MAP (9066)

	LENGTH (MILES)	PERIMETER (MILES)	REOCK	CONVEX HULL	POLSBY– POPPER
District 9	126	400	0.42	0.86	0.42
District 15	61	272	0.50	0.74	0.25
District 16	56	209	0.62	0.82	0.44
District 17	91	333	0.52	0.77	0.39
AVERAGE	83.5	303.5	0.52	0.80	0.38

*313 Although 9066 is an improvement over 9062, I find that the House Map (9071) still compares favorably to it. I also note that the Plaintiffs' proposed maps are aligned with the House Map (9071) relative to these districts and represents their agreement that the proposed House Map is preferable to those proposed by the Senate.

That does not mean, however, that the Plaintiffs agree that 9071 is constitutionally drawn and best complies with the Court's directions. They do not. I now consider their challenges to 9071 and their proposed alternatives.

PLAINTIFFS' CHALLENGES AND THEIR ALTERNATIVE MAPS

One of the tenets of our adversarial system of justice is that a **court should limit** itself to a consideration and resolution of disputed issues between the parties before it. In the context of this case, that means that if the parties are in agreement as to any particular district, it is no longer an issue for me to resolve. This conclusion is strengthened by the directions of the Florida Supreme Court to me to recommend one of the maps proposed by the parties or some combination thereof. I am not at liberty to draw something different than what is contained within the maps proposed by the parties.

In this regard, neither the Coalition Plaintiffs nor the Romo Plaintiffs take issue with Districts 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 18, and 19, as reflected in 9071, 9062 and 9066. These districts are, on the whole, more compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps. The Plaintiffs' proposed maps also contain the same configuration for these districts.

This group includes Districts 5, 13 and 14—which the Court required to be redrawn. I made inquiry of the witnesses as *314 to District 5 specifically, as it appears still to be one of the least compact of the districts. I was told that the Legislature felt safe with the configuration chosen as it was one previously proposed by the Romo Plaintiffs and referenced with approval in the Court's July 9th Order. Regardless, I have no evidence before me that it could have been drawn more tier two compliant without adversely affecting minority voting rights protected under tier one.

The Plaintiffs do take issue, however, with Districts 20 through 27. The Plaintiffs complain that Districts 26 and 27 in 9071 were drawn to favor Republicans and disfavor Democrats in violation of the tier one prohibition, and that all of the contested districts could have been made more tier two compliant. Romo Plaintiffs also complain that Districts 21 and 22 were drawn to disfavor two Democratic incumbents.

It appears that the Legislature took appropriate steps to guard against improper partisan influence in the drawing of its base map and in opening up the process of amendments to public scrutiny. Plaintiffs complain that the actual drawing of the base map was not open to the public, nor recorded. Recording the sessions would probably have been a good idea, less so perhaps drawing the map in public. Neither would prevent a map drawer from manipulating lines with a partisan intent. One can research political performance in private. Team members can communicate outside a recorded session.

And, more importantly, once staff has drawn a base map, individual legislators can easily determine the expected political performance of each district. They

can recommend changes which might improve tier two performance somewhat, but motivated by a desire to affect political performance. They might recommend no changes, recognizing that by a happy coincidence the base map had the political effect desired.

In short, there are many opportunities to manipulate the lines of a map for partisan reasons, all the while producing a map that is reasonably compact and appropriately respectful of county and city boundaries. And it is difficult to know, or to prove, that improper intent is involved.

I remain convinced that the best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for those shortcomings. If there is a way to make a map more tier two compliant without sacrificing tier one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, it will go far in minimizing the risk, or the perception, that it was drawn with a partisan intent.

This difficult issue of intent is complicated here because there is no official legislative map to consider. There is not a single map to approve or disapprove. **9071** was the product of the House, so it is the intent of that chamber that is relevant. And for the most part, 9071 is little changed from the base map prepared by staff—and any changes improved tier two compliance. Districts 20–27, which are the ones in dispute, were unchanged. So the intent or motivation of the map drawers takes on particular importance. And I do not find from the evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent,

I understand why the Plaintiffs might be suspicious as to Districts 26 and 27. The Florida Supreme Court, in its July 9th Order, found that the Legislature had needlessly split the City of Homestead, thereby turning one Democratic and one Republican district into two Republican- ***315** leaning districts. The proposed map, 9071, which admittedly does not split Homestead, actually enhances the partisan effect in favor of the Republican Party. The irony of the cure being worse than the illness is not lost on me.

There is also an irony as well, however, in taking great pains to draw a map without any consideration of political performance but with the effect of doing so, which is then considered as evidence of improper partisan intent. The fact that 9071 has the effect of favoring a political party in Districts

26 and 27 is simply not enough to convince me that those districts were drawn with that specific intent.

What does concern me, however, is the shortcomings in the House Map as to tier two requirements. It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions—one with Homestead in District 26 and one with Homestead in District 27. They then made a cursory analysis to see if it would perform for minorities, compared the tier two metrics of both, and chose the one that was most compact.

The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the expert did not make such a comparison to the benchmark district either.

This approach would not be of such concern if they were at the beginning of the process, enacting the original redistricting map, which would be reviewed for compliance only and with deference given to the Legislature's choices. But that was not the situation facing the Legislature. Rather, it had been tasked with preparing a remedial map. It would have the burden of defending its choices in all respects.

The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits. I would think the Legislature would have anticipated questions about improving tier two compliance and have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version.

The Legislature complains that the Plaintiffs did not participate in the open and transparent process of drawing a remedial map. But when the Plaintiffs tried to participate by pointing out what anyone in the Legislature could also have determined—that the new districts were more Republican leaning than before—they are accused of trying to improperly insert political performance into the equations.

I understand the dilemma faced by the Legislature in that situation. If it has drawn the map without regard to political

performance, then it would be improper for it to “correct” the political effect of the map in certain districts when someone complains. But if a citizen cannot point out what appears to them to be political gerrymandering in certain districts, without the Legislature shutting down any further consideration of those districts because they would then be “favoring a political party” it is difficult to see how public participation in the process could ever effectively occur. There was no reason why the Legislature could not have taken another look at the South Florida districts, not for political performance but for better tier two compliance, either in

response *316 to the Plaintiffs' complaint, or better yet, on its own initiative.

The Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably. Indeed, CP-1 is hands down the best tier two performing map of the group. As to Districts 20–27 it is more compact and splits fewer cities than any of the others.

The following charts show the differences in compactness and city splits among the proposed plans:

SOUTH FLORIDA COMPACTNESS CHART

	Reock Scores			Convex–Hull Scores			Perimeter Mileage		
	9062	CP–1	Romo	9062	CP–1	Romo	9062	CP–1	Romo
	9066			9066			9066		
	9071			9071			9071		
CD20	.48	.48	.48	.75	.75	.75	360	387	360
CD21	.37	.37	.29	.64	.64	.60	137	121	114
CD22	.41	.48	.18	.70	.74	.64	150	119	205
CD23	.27	.35	.27	.63	.65	.63	120	113	120
CD24	.38	.47	.38	.73	.77	.73	73	69	73
CD25	.48	.41	.48	.73	.67	.73	363	361	363
CD26	.18	.18	.18	.46	.48	.46	550	545	548
CD27	.46	.54	.44	.82	.85	.78	131	96	139
	Reock Averages			Convex–Hull Averages			Perimeter Totals		
	.38	.41	.34	.68	.69	.67	1,884	1,811	1,922

SOUTH FLORIDA SPLIT CITIES

9071,9062,
9066

CP–1

ROMO

Split
Cities

15

8

18

The Romo Plaintiffs argue that their map is superior, in part, because it corrects what they perceived to *be a* tier-one violation of targeting incumbents. Professor Ansolabehere testified that two Democratic incumbents live in the panhandle shaped area in the southwest of District 21 in both the Legislative proposal and CP-1. There is insufficient evidence for me to conclude, however, that such was the intent. Accordingly, there is no justification for this less tier-two compliant configuration.

The Legislature seeks to defend its map against CP-1 by arguing that CP-1 is not visually compact, was drawn with improper partisan intent, and causes retrogression, i.e., diminishes the ability of Hispanics in District 26 to elect a candidate of their choice. As to the argument concerning visual compactness, I suppose that is in the eye of the beholder, but I find CP-1 more visually compact than 9071. And, as noted above, its metrics are much better for compactness and it splits less cities.

On the issue of partisan intent, it is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs. While evidence that a map drawer might be a partisan or have a bias is **317* certainly relevant, it would not be a reason to automatically reject it. Just as the Legislature could receive input from partisans in its process of drawing a map and give it the weight it felt appropriate, so can I.

Moreover, I find no evidence to suggest that CP-1 was drawn with improper partisan intent. Mr. O'Neill, Coalition Plaintiffs' map drawer, testified that he strove to draw the most tier-two compliant configuration of South Florida, did not consider political or incumbent data in drawing the maps, and was not given any other direction but to focus on and comply with the requirements of [Article III, section 20](#) and *Apportionment VII* and to improve compactness and adherence to major roadways where possible. I found him to be straightforward in his testimony, logical in his approach to drawing the districts and persuasive in his conclusions.

As to the claim that Districts 26 and 27 as drawn in CP-1 would be retrogressive, the Legislature presents a two-step argument. First they assert that District 26 in CP-1 weakens the Hispanic vote share in the Democratic primary. This leads to retrogression, they assert, because CP-1 also makes District

26 into a district that will lean Democratic in the general election. If the Hispanic candidate of choice cannot win the Democratic primary, there will be no Hispanic candidate elected in the general election because the Republican Hispanic candidate cannot defeat the Democratic candidate. It is a cogent, logical, argument. The problem is that the argument is much more compelling than the evidence offered in support of it.

The Plaintiffs' expert, Professor Lichtman, testified via his report. In it, he favorably compared Districts 26 and 27 in CP-1 to districts in both the 2012 congressional plan and 2002 benchmark congressional plan and found no retrogression. Although I did not have the opportunity to judge his demeanor while testifying, his report is persuasive. He systematically analyzed the subject matter with accepted scientific methodologies and found that the Hispanic candidate or Hispanic candidate of choice won 29 out of 29 elections that took place between 2006 and 2014 in comparable Miami-Dade County based districts that had similar Hispanic voting age population to the proposed Hispanic districts in CP-1. He also analyzed the 2010 U.S. Senate Election and demonstrated that Marco Rubio, a Hispanic Republican, carried the proposed Hispanic districts in CP-1 by landslide margins.

And, through ecological regression, Lichtman showed that in CP-1's District 26, for instance, Rubio received an overwhelming 71% of the Hispanic vote (including support from non-Republican Hispanics) and substantial crossover votes from non-Hispanic voters, regardless of the fact that the district performed for the Democratic Gubernatorial Candidate, Alex Sink, in 2010.

Lichtman concluded that, "according to the range of most pertinent factors, [District 26] in CP-1 is a Hispanic opportunity district beyond any reasonable doubt," and that Districts 25, 26, and 27 in CP-1, CP-2, and CP-3 all function as performing Hispanic districts.

Defendants find fault with his conclusions, asserting that he did not address the effect that a smaller Hispanic vote share in the Democratic primary would have in a district that is now more Democratic leaning. In fact, we don't know if he considered this particular factor. His testimony (via his report) was that he considered "not only the Hispanic

demography in the districts, but such additional factors as Hispanic registration, turnout, and candidate voting: the electoral history of congressional, state senate, and state house districts with comparable Hispanic demographics; *318 and the electoral history of the only recent statewide Hispanic candidate in Florida (Rubio in the 2010 general election for U.S. Senate).” He was present at the hearing and available for cross examination about his methods and conclusions. He could have been asked about this specific concern, but the Defendants chose not to do so.

The experts for the Legislature on this issue were less persuasive. Professor Liu opined that African Americans and Hispanics do not vote as a coalition in South Florida. Intuitively, this makes sense, but the data he used to draw his conclusions from was suspect. Of the ten elections he analyzed, only six involved Hispanic candidates and three of those were non-partisan judicial races. He could not identify any election in which a coalition of African Americans and non-Hispanic whites effectively defeated the Hispanic candidate of choice, except for a non-partisan judicial race involving a challenge to a sitting county judge. I did not find this expert testimony to be particularly helpful.

Professor Moreno, who no doubt has a good bit of knowledge and expertise about elections in South Florida, testified to his concerns that the CP-1 configuration would diminish the ability of Hispanics to elect a candidate of their choice. His testimony was long on pure opinion based on experience and short on systematic, scientific analysis of accepted statistical data. More troublesome is that, for whatever reason, he based his opinion on a comparison between CP-1 and the House proposed map (9071), not the Benchmark Map of 2002, or even the enacted Map of 2012. Moreover, his concern was for the future—what might happen. Given the legal test for retrogression, and the speculative nature of his testimony, his opinion had little probative value to me.

The undisputed political data provides some support for both sides on this issue. In the last three presidential and gubernatorial elections the district has leaned Democratic. While the benchmark district also leaned Democratic, District 26 is 1.1% more Democratic in its partisan performance on average.¹

*319 The Hispanic demographic and political data also show that in many metrics CP-1 is actually stronger than benchmark District 18, However, when it comes to control of the Democratic primary, Hispanics made up only 22.8%

of the Democratic primary electorate in 2010, compared to 26.7% in Benchmark District 18.² The fact that this erosion of Hispanic control of the Democratic primary comes in a district that is also the most Democratic in its general election performance gives me some pause in accepting Professor Lichtman's conclusions. I am mindful that “[c]ircumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice ...” *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 625 (Fla.2012).

BENCHMARK HISPANIC PERFORMANCE METRICS													
	Hisp. % Voting Age Pop.		Hisp. % Reg. Voters			Hisp. % of Dems		Hisp. % of Reps.		Hisp. % of Dem. Primary Turnout		Hisp. % of Rep. Primary Turnout	
	2010	2010	2012	2010	2012	2010	2012	2010	2012	2010	2012	2010	2010
CD 18	67.18	51.7	52.7	40.5	43.3	62.9	62.5	49.8	51.8	26.7	66.4		
CD 21	77.12	61.9	64.0	47.6	50.8	73.3	74.3	58.7	63.2	28.9	76.5		
CD 25	72.22	59.2	61.3	49.2	51.9	65.8	66.7	54.7	59.7	29.6	63.0		

CP-1 HISPANIC PERFORMANCE METRICS													
	Hisp. % Voting Age Pop.		Hisp. % Reg. Voters			Hisp. % of Dems		Hisp. % of Reps.		Hisp. % of Dem. Primary Turnout		Hisp. % of Rep. Primary Turnout	
	2010	2010	2012	2010	2012	2010	2012	2010	2012	2010	2012	2010	2010
CD 25	75.0	59.8	62.6	55.2	59.8	61.0	61.7	54.4	60.0	39.4	56.8		
CD 26	68.3	54.7	56.5	42.5	45.0	64.7	65.5	50.3	55.0	22.8	62.4		
CD 27	69.2	54.5	55.6	40.9	43.6	67.1	67.0	52.4	55.1	26.0	71.4		

However, applying the retrogression analysis employed by the Court in *Apportionment I*, the vast majority of the factors *320 show that District 26 in CP-1 is not retrogressive. The district has Hispanic voting age population of 68.3 % and Hispanics comprise 54.7 % of registered voters. In 2010, Hispanics comprised 50.3 % of the general election electorate. In South Florida elections with similar demographic statistics, Hispanics have consistently elected the candidate of their choice. Weighing all the evidence presented on the issue, I am not convinced that the deviations as noted above will deprive Hispanic voters of their ability to elect a candidate of choice in District 26, as drawn in CP-1.

The Legislature has thus not met its burden of justifying the proposed versions of Districts 20 through 27 in Plans 9062, 9066, and 9071. Districts 20 through 27 in CP-1 are, on the whole, more compact and split fewer cities than in Plans 9062, 9066, and 9071 or the Romo Plan, without running afoul of tier one requirements. CP-1 best complies with the directions in *Apportionment VII* and the requirements of [Article III, section 20](#). I therefore recommend its adoption.

DONE AND ORDERED this day of October, 2015.

/s/

Copies to all counsel of record

Terry P. Lewis

All Citations

Circuit Judge

179 So.3d 258, 40 Fla. L. Weekly S667

Footnotes

- 1 As we explained in *Apportionment VII*, “[w]e use the term ‘challengers,’ which has been used by this Court in prior opinions during the course of this litigation, to refer collectively to the plaintiffs in the trial court, who are the Appellants/Cross–Appellees in this Court. These litigants that challenged the constitutionality of the congressional redistricting plan enacted in 2012 include two separate groups, which have described themselves as the ‘Coalition plaintiffs’ and the ‘Romo plaintiffs.’ The ‘Coalition plaintiffs’ consist of the League of Women Voters of Florida, Common Cause, and four individually named parties. The National Council of La Raza was formerly a member of the ‘Coalition plaintiffs’ but later voluntarily dismissed all claims and withdrew as a party in the case prior to the trial. The ‘Romo plaintiffs’ consist of lead plaintiff Rene Romo and six other individually named parties.” [172 So.3d at 372 n. 6.](#)
- 2 We append the Trial Court Order to this opinion as Appendix B.
- 3 Districts 1, 8, and 19 were not redrawn, and are included in all of the parties’ plans we review.
- 4 The Challengers do not contend that any of these districts proposed by the House in either of its proposed plans is constitutionally deficient. However, the Challengers do claim that the Senate’s proposed configuration may “raise potential tier-one concerns,” basing their argument on the Senate’s “tier-two defects not present in [the House’s plan].” The House takes the position that all of these districts were required to be redrawn as a result of redrawing the invalidated districts. The Senate disputes that claim as to District 16.
- 5 In *Apportionment VII*, Defendant–Intervener the Florida State Conference of NAACP Branches (“Florida NAACP”), opposed the East–West configuration of District 5. The Florida NAACP, however, did not present any arguments or testimony during the relinquishment proceedings before the trial court, nor did the organization submit an alternative plan. During the special session, the long-time incumbent representative of District 5, Congresswoman Corrine Brown, testified in opposition to the East–West configuration and has separately filed a lawsuit in federal court to enjoin the implementation of a redistricting plan that she alleges violates the 1965 Voting Rights Act and the Fourteenth and Fifteenth Amendments. Pl.’s V. Compl., *Brown v. Detzner*, No. 4:15–cv–00398–WS–CAS (N.D.Fla. Aug. 12, 2015). That case has been stayed pending the imposition of a remedial District 5. Congresswoman Brown continues to object to the East–West configuration.
- 6 The Reock method of quantifying compactness “measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.” [Apportionment I, 83 So.3d at 635.](#) [See also Apportionment VII, 172 So.3d at 408, n. 17.](#)
- 7 The Convex Hull method, which “measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district,” also ranges from 0 to 1, “with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1” under this measure. [Apportionment I, 83 So.3d at 635.](#) [See also Apportionment VII, 172 So.3d at 408, n. 18.](#)
- 8 The Polsby–Popper score measures the ratio between the area of the district and the area of the circle with the same perimeter as the district (the isoperimetric circle). A circle has a Polsby–Popper score of 1; a

square has a score of about 0.79. See, e.g., *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100, 109 n. 6 (2002) (describing the Polsby–Popper measure of compactness).

9 Since District 26 in CP–1 draws 73.8% of its population from District 25 in the 2002 plan, we use District 25 from the 2002 plan as the benchmark district.

10 As we have noted when performing previous functional analyses, one relevant statistic in determining minority voting ability is the share that the minority group constituted in recent party primary elections. See [Apportionment I](#), 83 So.3d at 608. Unfortunately, the most recent primary turnout data in the record is from the 2010 primary election. Because this data will be six years old the next time a congressional primary election is held, we rely on the more recent 2012 general election registration and turnout data to compare minority voting ability within the Democratic and Republican parties in the proposed, benchmark, and enacted versions of District 26.

11 We note that in their arguments before this Court, all parties correctly stated two prongs of our test for retrogression—whether the minority candidate of choice is likely to prevail in the relevant contested party primary, and whether that candidate is likely to prevail in the general election—but omitted from their analysis the first prong of our test, whether the minority group votes cohesively. [See Apportionment VII](#), 172 So.3d at 404–05; [Apportionment II](#), 89 So.3d at 889; [Apportionment I](#), 83 So.3d at 667–68.

As to cohesion, this Court expressly stated in *Apportionment I* that the leading case interpreting some of these requirements requires a preliminary showing of cohesion. Specifically, the opinion stated, “[[Thornburg v. Gingles](#)], 478 U.S. 30, 50, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)], set out three ‘necessary preconditions’ that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with Section 2. These preconditions require an individual challenging the plan to show that: (1) a minority population is ‘sufficiently large and geographically compact to constitute a majority in a single-member district’; (2) the minority population is ‘politically cohesive’; and (3) the majority population ‘votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.’ ” [Apportionment I](#), 83 So.3d at 622 (quoting [Gingles](#), 478 U.S. at 50–51, 106 S.Ct. 2752). “When the three *Gingles* preconditions are met, courts must then assess the totality of the circumstances to determine if the Section 2 ‘effects’ test is met—that is, if minority voters’ political power is truly diluted.” *Id.*

The *Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis. See, e.g., *Texas v. United States*, 831 F.Supp.2d 244, 262–63 (D.D.C.2011) (noting that “[a]t the outset, a court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White polarization is present”). “[W]hen we interpret our state provision prohibiting the diminishment of racial or language minorities’ ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.” [Apportionment I](#), 83 So.3d at 625.

12 Districts 21 and 22 were also changed for other purposes not directly related to the Hendry County issue.

13 The parties use this term to refer to instances in which a county has a district that splits the county and draws part of its population from other counties.

14 An uninhabited portion of far southwestern Hillsborough County, which includes Egmont Key and a portion of the Sunshine Skyway Bridge, is assigned to District 16 in the Senate Plan. Since District 16 includes no population from Hillsborough County, it is not considered to include part of the county for the purpose of counting splits.

15 Related litigation challenging the as-applied constitutional validity of the Legislature’s 2012 plan apportioning districts for the Florida Senate remains pending in the trial court.

16 Appendix A includes a statewide map of the approved plan. The approved plan’s .doj file can be accessed online at http://www.floridasupremecourt.org/decisions/2015/sc14-1905_app_doj.zip. When read by a computer redistricting application, a .doj file defines the districts in a redistricting plan by delineating

which census blocks comprise the districts. It is the format in which this Court has required all plans be submitted in this case.

17 See, e.g., Alex Larry, *Democrat U.S. Rep. Corrine Brown again aligns with GOP in Florida redistricting battle*, Tampa Bay Times, May 14, 2011, <http://www.tampabay.com/news/politics/national/democrat-us-rep-corrinebrown-again-aligns-with-gop-in-florida/1169453>.

18 This illustration is adapted from The Washington Post. Christopher Ingraham, *This is the best explanation of gerrymandering you will ever see, How to steal an election: a visual guide*, Wash. Post: Wonkblog, Mar. 1, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/>.

19 See, e.g., Michael Auslen, *4 Sessions, 3 breakdowns for Florida Legislature come at a cost to taxpayers*, Miami Herald, Nov. 7, 2015, <http://www.miamiherald.com/news/politics-government/state-politics/article43500222.html>.

20 In *Apportionment VII*, I dissented from the majority's conclusion that the whole 2014 remedial plan was tainted by an improper partisan intent to benefit the  Republican Party. 172 So.3d at 417 (Canady, J., dissenting). I adhere to the view that there was no basis for the majority's broad finding of improper intent.

21 See majority op. at 276–77 (avoiding any examination of whether CP–1 was drawn with partisan intent by explaining that this Court's only role is to determine whether the Legislature met its burden with respect to its proposed maps).

22 See majority op. at 270 (“The irony of the cure being worse than the illness is not lost on me.”) (majority's emphasis omitted) (quoting trial court order).

23  See *Apportionment VII*, 172 So.3d at 385 (“[T]here was ‘just too much circumstantial evidence’ and ‘too many coincidences’ to reach any conclusion other than that the political operatives had ‘infiltrate[d] and influence[d] the Legislature.’”) (emphasis added) (quoting trial court order).

24 The majority repeatedly describes what it is adopting as a piecemeal map compiled from various proposals, but the majority, in fact, is adopting CP–1 in its entirety as proposed by the Coalition Plaintiffs. The majority expressly acknowledges that it is approving the trial court's recommendation, and, as reflected in the trial court's order appended to this opinion, the trial court recommended the adoption of CP–1 in its entirety. There is overlap between CP–1 and the House plan on districts 1–19 but not districts 20–27. Importantly, however, the legislative proposals were in agreement regarding districts 20–27.

1 The three Hispanic access districts in the benchmark plan from 2002 are significantly different in their configurations than any of the plans now before me, and District 26 in CP–1 contains portion of District 18, 21, and 25 of the 2002 plan. For the purposes of this analysis, I am using District 18 as the benchmark because it was most democratic of the three predecessor districts.

BENCHMARK DISTRICT 18 POLITICAL PERFORMANCE

	Democrat Vote Share	Republican Vote Share
2012 President	54.8% (Obama)	45.2% (Romney)
2010 Governor	49.2% (Sink)	50.8% (Scott)
2008 President	51.0% (Obama)	49.0% (McCain)
Average	51.7%	48.3%

CP–1 DISTRICT 26 POLITICAL PERFORMANCE

	Democrat Vote Share	Republican Vote Share
2012 President	55.8% (Obama)	44.2% (Romney)
2010 Governor	50.7% (Sink)	49.3% (Scott)
2008 President	51.8% (Obama)	48.2% (McCain)
Average	52.8%	47.2%

2 The decline in Hispanic share of the Democratic electorate comes with a rise in the black share of the Democratic electorate. Blacks are the second most represented group in the 2010 Democratic primary electorate under CP–I, with Hispanics falling to third.

End of Document

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To: [Newman, Ryan](#)
Subject: Accepted: Meeting with Josh

From: [Jason Torchinsky](#)
To: [Mohammad O. Jazil](#); [Adam Foltz](#); [Kelly, Alex](#)
Subject: FL Cong Map Call

Jason Torchinsky is inviting you to a scheduled Zoom meeting.

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From: [Mohammad O. Jazil](#)
To: [Pratt, Joshua](#)
Subject: Jason's email address
Date: Wednesday, January 12, 2022 5:18:03 PM

Jason Torchinsky jtorchinsky@HoltzmanVogel.com

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To: [Meros, Nicholas](#); [Newman, Ryan](#); [MO Jazil](#); jtorchinsky@HoltzmanVogel.com; [Uthmeier, James](#); [Kelly, Alex](#)
Subject: Meeting @ EOG Legal

From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: Presentment - Cases
Date: Wednesday, January 12, 2022 5:23:00 PM
Attachments: [State ex rel Cunningham v Davis.pdf](#)
[State ex rel Thompson v Davis.pdf](#)

See highlighted portions re. presentment.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

123 Fla. 41
Supreme Court of Florida, Division A.

STATE ex rel. CUNNINGHAM et al.

v.

DAVIS et al.*

Feb. 25, 1936.

Synopsis

Original proceeding in mandamus by the State, on the relation of one Cunningham and others, against Robert W. Davis, Junior, and others.

Peremptory writ denied, and alternative writ quashed.

ELLIS, P. J., and BROWN, J., dissenting.

West Headnotes (24)

[1] **Constitutional Law** 🔑 Political Questions

Supreme Court may on direct attack inquire whether legislature has attempted to exceed its jurisdiction by remaining in unadjourned session beyond constitutional period. F.S.A.Const. art. 3, § 2.

[2] **Constitutional Law** 🔑 Political Questions

Supreme Court will entertain appropriate proceedings to determine whether purported record of legislative action during regular session is actually record duly made under circumstances importing conclusive verity. F.S.A.Const. art. 3, § 12.

[1 Cases that cite this headnote](#)

[3] **States** 🔑 Orders and resolutions

Constitutional provision requiring presiding officer and clerk of each House of Legislature to sign all bills and joint resolutions passed held mandatory. F.S.A.Const. art. 3, § 17.

[1 Cases that cite this headnote](#)

[4] **States** 🔑 Orders and resolutions

Presiding officer and clerk of each House of Legislature must sign bills and joint resolutions in open session of proper House. F.S.A.Const. art. 3, § 17.

[5] **Statutes** 🔑 Presentation

No bill passed by Legislature can become law until presented to Governor while Legislature is in session. F.S.A.Const. art. 3, §§ 2, 28.

[6] **Statutes** 🔑 Enrollment, authentication, and filing

Enrolled bill signed by presiding officer and clerk of each House of Legislature before adjournment and approved by Governor held prima facie evidence of compliance with mandatory constitutional provisions, but such evidence may be overcome by journals.

[1 Cases that cite this headnote](#)

[7] **Statutes** 🔑 Presentation

Approval by Governor held certification that bill after its passage was presented to him while Legislature was in session. F.S.A.Const. art. 3, § 28.

[8] **Statutes** 🔑 Approval

Governor's approval of bill passed by Legislature held executive record importing same verity and entitled to same faith, credit, and respect as records of court or Legislature. F.S.A.Const. art. 3, § 28.

[9] **Statutes** 🔑 Enrollment, authentication, and filing

Silence of Legislature's journals on question whether bill was signed by presiding officers and clerks does not overcome prima facie evidence of regularity afforded by enrolled bill bearing

Governor's approval and officers' signatures apparently attached before adjournment.

in adjourning sine die (Comp.Gen.Laws 1927, § 98; Const. art. 3, §§ 1, 2, 6, 12, 17, 28).

2 Cases that cite this headnote

[10] **Statutes** 🔑 Status of legislative body

Legislature, held unauthorized under Constitution to transact legislative business or perform any lawmaking function after midnight on sixtieth day of regular session. F.S.A.Const. art. 3, § 2.

[15] **Constitutional Law** 🔑 Nature and scope in general

Test of legislative power is constitutional restriction; Legislature being authorized to do what organic law does not forbid.

2 Cases that cite this headnote

[11] **Statutes** 🔑 Presentation

Constitutional requirements as to presentation of bills to Governor held to contemplate performance of duties imposed while Legislature is in actual session and undissolved. F.S.A.Const. art. 3, §§ 17, 28.

[16] **Statutes** 🔑 Status of legislative body

Though lawmaking sessions may be held only at times and for periods limited by Constitution, such limitations restrict exercise only of prerogative lawmaking powers, and not performance of constitutional duties incidental to due exercise of such powers, unless Constitution provides otherwise. F.S.A.Const. art. 3, §§ 2, 12, 17, 28.

2 Cases that cite this headnote

[12] **Statutes** 🔑 Presentation

Presentation for Governor's approval held unauthorized prior to complete passage of bill by Legislature. F.S.A.Const. art. 3, § 28.

[17] **Constitutional Law** 🔑 Nature and scope in general

Legislature's implied powers are as potent as express powers.

[13] **States** 🔑 Orders and resolutions

Legislative prerogatives exercisable only within sixty-day session limited by Constitution held to comprehend introduction, consideration, and passage of bills and joint resolutions, and appointment of committees and consideration and disposition of reports thereof relating thereto, prior to final passage. F.S.A.Const. art. 3, § 2.

[18] **Statutes** 🔑 Status of legislative body

Legislature's constitutional right to remain in regular session for sixty-day period held to imply right to exercise lawmaking functions until last moment of such period, thereby implying right to remain in session thereafter if necessary for preparation of journals, authentication of bills passed during sixty-day period, and presentation thereof to Governor. F.S.A.Const. art. 3, §§ 2, 12, 17, 28.

2 Cases that cite this headnote

[14] **Statutes** 🔑 Status of legislative body

Constitutional limitation of sixty days for regular session *held* not to restrain Legislature from holding over to perform nondiscretionary legislative duties, such as keeping of journals, signing in open session of bills passed during sixty-day period, and presentation thereof to Governor; Legislature being bound to perform such duties before it is constitutionally warranted

[19] **Statutes** 🔑 Status of legislative body

Legislature having become *functus officio* as to its lawmaking power under Constitution

limiting regular session to sixty days, and having dispersed as legislative body adjourned sine die, possesses no power to reassemble as Legislature, though it is still duly constituted Legislature, subject to being recalled into extra session. F.S.A.Const. art. 3, § 2.

1 Cases that cite this headnote

[20] Statutes 🔑 Enrollment, authentication, and filing

Where bill was passed by Legislature on or before sixtieth day of regular session, enrollment, authentication, and presentation thereof to Governor after constitutional sixty-day period held properly made to appear of record nunc pro tunc on journals evidencing legislative proceedings of sixtieth day. Acts 1935, c. 16848, F.S.A. § 204.01 et seq. notes; F.S.A.Const. art. 3, §§ 2, 12, 17, 28.

1 Cases that cite this headnote

[21] Mandamus 🔑 Motion to quash or dismiss alternative writ

Where court, after filing of motion for peremptory writ of mandamus because of insufficient return, adjudged return sufficient, alternative writ should be quashed.

1 Cases that cite this headnote

[22] Statutes 🔑 Presentation

Statutes 🔑 Enrollment, authentication, and filing

Constitutional requirements as to presentation to Governor of bills passed by Legislature held to contemplate compliance therewith under Legislature's direction within reasonable time and in due course. F.S.A.Const. art. 3, §§ 17, 28.

[23] Statutes 🔑 Enrollment, authentication, and filing

Constitutional requirements as to signing of bills held to contemplate performance of duties

imposed while Legislature is in actual session and undissolved. F.S.A.Const. art. 3, §§ 17, 28.

[24] Statutes 🔑 Enrollment, authentication, and filing

Constitutional requirements as to signing of bills passed by Legislature held to contemplate compliance therewith under Legislature's direction within reasonable time and in due course. F.S.A.Const. art. 3, §§ 17, 28.

Attorneys and Law Firms

***44 **290** H. H. Wells, B. K. Roberts, and William K. Whitfield, all of Tallahassee, and Stanton Walker and George A. Pierce, both of Jacksonville, for relators.

Cary D. Landis, Atty. Gen., H. E. Carter and J. V. Keen, Asst. Attys. Gen., and Henry C. Tillman, of Tampa, for respondents.

The Florida Constitution contains the following:

‘Article III.

‘Legislative Department.

‘Section 1. The Legislative authority of this State shall be vested in a Senate and a House of Representatives, which shall be designated, The Legislature of the State of Florida and the sessions thereof shall be held at the seat of government of the State.

‘Section 2. The regular sessions of the Legislature shall be held biennially, commencing on the first Tuesday after the (first) Monday in April, A. D. 1887, and on the corresponding day of every second year thereafter, but the Governor may convene the same in extra session by his proclamation. Regular sessions of the Legislature may extend to sixty days, but no special session convened by the Governor shall exceed twenty days. * * *

***45** ‘Section 6. Each house shall judge of the qualifications, elections and returns of its own members, choose its own officers, and determine the rules of its proceedings. The Senate shall, at the convening of each regular session thereof, choose from among its own members a permanent president

of the Senate, who shall be its presiding officer. The House of Representatives shall, at the convening of each regular session thereof, choose from among its own members a permanent Speaker of the House of Representatives, who shall be its presiding officer. Each house may punish its own members for disorderly conduct; and each house, with the concurrence of two-thirds of all its members present, may expel a member.

* * *

‘Section 12. Each House shall keep a Journal of its own proceedings, which shall be published, and the yeas and nays of the members of either House on any question shall, at the desire of any five members present, be entered on the Journal.

* * *

****291** ‘Section 17. Every bill shall be read by its title, on its first reading in either House, unless one-third of the members present desire it read by sections. Every bill shall be read on three several days, unless two-thirds of the members present when such bill may be pending shall deem it expedient to dispense with this rule. Every bill shall be read by its sections on its second reading and on its final passage, unless on its second reading two-thirds of the members present in the House where such bill may be pending shall deem it expedient to dispense with this rule. The vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journal of each House: Provided, that any general revision of the entire laws embodied in any bill shall not be required to be read by sections upon its final passage, ***46** and its reading may be wholly dispensed with by a two-thirds vote. A majority of the members present in each House shall be necessary to pass every bill or joint resolution. All bills or joint resolutions so passed shall be signed by the presiding officer of the respective Houses and by the secretary of the Senate and the clerk of the House of Representatives. (Amended, Joint Resolution 2, Acts 1895; adopted at general election, 1896.) * * *

‘Section 28. Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor; if he approves it he shall sign it, but if not he shall return it with his objections to the House in which it originated, which House shall cause such objections to be entered upon its journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote of members present, which vote shall be entered on the journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted), the same shall be a law, in like manner as if he had signed it. If the Legislature, by its

final adjournment prevent such action, such bill shall be a law, unless the Governor, within ten days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law.’

Section 98(82), Compiled General Laws 1927, is as follows:

‘All bills and joint resolutions passed by the Senate and House of Representatives shall be duly enrolled in black record ink, by typewriting machines, on paper, by the enrolling clerk of the Senate or the enrolling clerk of the ***47** House, accordingly as the bill or joint resolution may have originated in the Senate or House, before they shall be presented to the Governor or filed in the office of the Secretary of State.

‘The size, style and quality of the paper to be used shall be prescribed by the Secretary of State and furnished by him, in sufficient quantities, to the enrolling clerk of the Senate and the enrolling clerk of the House.’

The alternative writ alleges that Senate Bill No. 724 ‘was signed by all of the ‘Legislative’ officials subsequent to 9 o'clock A. M. of Saturday, June 1st, A. D. 1935’; and that ‘The signing of the bill by the officers of the House and Senate and the presentation thereof to the Governor took place after the Florida Legislature for 1935 was functus officio.’

The period of the regular session of the Legislature ended by constitutional limitation at midnight, May 31, 1935.

The answer of respondent secretary of the Senate contains the following:

‘This Respondent has no recollection independent of the Senate Journal of May 31, 1935, as to when Senate Bill 724 was signed by the President and Secretary of the Senate and referred to the Joint Committee on Enrolled Bills on the part of the Senate to be conveyed to the Governor for his approval, and as to the time when said Senate Bill 724 was presented to the Governor for his approval, and is without knowledge as to when those things were done other than what is shown by the Senate Journal for May 31, 1935, and having no recollection independent of said Senate Journal as to when said Senate Bill 724 was signed by the President and Secretary of the Senate and presented to the Governor for his approval, this Respondent cannot admit that said Senate Bill 724 was signed by the ***48** President and Secretary of the Senate and presented to the Governor for his approval, other than as is shown by the Senate Journal for May 31, A.

D. 1935. This Respondent says that said Senate Bill 724 was signed by this ****292** Respondent and the President of the Senate, while the Senate was in session, and presented to the Governor, all before final adjournment of the 1935 session of the legislature. This Respondent, however, shows unto the Court that all proceedings of the Senate and the acts of its officers, committees and employees are shown in the Senate Journal as of May 31, A. D. 1935, by order of and at the direction of the Senate, prior to midnight, May 31, 1935.'

'This Respondent shows unto the Court that he did not carelessly, mistakenly, or incorrectly permit the Senate Journal of May 31, 1935, to show that Senate Bill 724 was 'duly signed by the President and Secretary of the Senate in open session and ordered referred to the Joint Committee on Enrolled Bills on the part of the Senate to be conveyed to the Governor for his approval', but that the same was shown as it appears at the direction and by order of the Senate in session prior to adjournment of the Session of 1935.'

The answer of the respondent clerk of the House of Representatives contains the following:

'This respondent admits that the enrolled Senate Bill No. 724, known as chapter 16848, Acts of 1935, was signed by this Respondent as Chief Clerk of the House of Representatives, and by the Speaker of the House of Representatives during the forenoon of June 1, A. D. 1935, but says that the said Senate Bill No. 724 was so signed by this Respondent and the Speaker of the House of Representatives while the House was in session and before final adjournment of the 1935 session of the Legislature. This ***49** Respondent, however, shows unto the Court that all proceedings of the House of Representatives and the acts of its officers, committees, and employees, are shown in the House Journal as of May 31, A. D. 1935, by order and at the direction of the House of Representatives prior to midnight, May 31, 1935.'

'This Respondent shows unto the Court that he did not carelessly, mistakenly or incorrectly, permit the House Journal of May 31, 1935, to show that Senate Bill 724 was 'duly signed by the Speaker and Chief Clerk of the House of Representatives in open session, and ordered referred to the chairman of the Committee on Enrolled Bills on the part of the House of Representatives to be conveyed to the Senate for the signatures of the President and Secretary thereof' but that the same was shown as it appears at the direction and by order of the House of Representatives while in session prior to adjournment of the Session of 1935.'

The relators filed the following:

'Motion for Peremptory Writ.

'Come now the Relators herein and without waiving the benefit of Demurrer and Motion to Strike heretofore filed herein, moves this Honorable Court to grant and issue Peremptory Writ in due and proper form, directed to the Respondents, Robert W. Davis, Jr., as Secretary of Senate, State of Florida, 1935 Session of the Legislature, and Weldon G. Starry, as Chief Clerk of the House of Representatives, State of Florida, 1935 Session of the Legislature, and R. A. Gray, as Secretary of State of the State of Florida, because of insufficient return in law to the Alternative Writ, and because of the admission of the Respondent Starry, in his answer and return, that said Senate ***50** Bill 724 was not signed by himself and the Speaker of the House of Representatives prior to June 1st., 1935.'

Opinion

DAVIS, Justice (after stating the facts as above).

Senate Bill No. 724 (now chapter 16848, Acts 1935, General Laws of Florida, is in controversy in this proceeding, the complaint being (as set forth in the alternative writ of mandamus issued herein) that although the said bill duly 'passed' the Senate and the House of Representatives on or before the legislative calendar day of May 31, 1935, that said bill was not, as required by section 17 and 28 of article 3 of the Constitution of Florida 'signed by the presiding officer of the respective Houses and by the secretary of the Senate and the clerk of the House of Representatives' nor 'presented to the Governor' until on or after the calendar day of June 1, 1935.

A motion to quash the alternative writ of mandamus has been heretofore overruled (but without opinion) on the authority of [State ex rel. Landis v. Thompson \(Fla.\) 164 So. 192](#), decided November 14, 1935. By a return filed by the respondent ministerial officers of the Legislature, the fact is admitted that the regular 1935 session of the Florida Legislature did not in fact adjourn sine die on the calendar day of May 31, 1935, as set forth on the face of its purported legislative journals of that day's session; that, on the contrary, it continued its actual sitting as a legislative assembly much beyond that calendar day, indeed, into the calendar day of June 1, 1935, and afterward; ****293** that although all legislative action on said Senate Bill No. 724, up till and including its final passage as a legislative act, occurred in the Legislature, on or before the calendar day of May 31, 1935, that nevertheless the Legislature's enrollment of the bill as a 'passed' bill, its

formal authentication by the attaching to it of the signature of the presiding officers of the Senate and of the House of *51 Representatives, the attestation of the secretary of the Senate and of the clerk of the House of Representatives, and the actual presentation by the Legislature of the enrolled bill to the Governor for his consideration and approval in purported compliance with sections 17 and 28 of article 3 of the State Constitution, did not in truth and in fact transpire or occur until on or after the calendar day of June 1, 1935.

So the proposition of constitutional law now required to be decided on the pleadings in this case is: 'Did the 1935 regular session of the Florida Legislature, whose constitutional authority to legislate and ordinarily function as a law-making body admittedly expired at midnight on May 31, 1935, according to section 2 of article 3 of Florida Constitution, nevertheless, by virtue of the intendments of sections 12, 17 and 28 of the same article possess implied constitutional authority to remain undissolved as a legislative assembly until June 1, 1935, and afterward, in order to carry out its constitutional duty to make a proper journal of its proceedings already lawfully had during its sixty days term of existence, as well as to formally authenticate and present to the Governor all bills it had constitutionally passed during its regular session?' In other words, did the 1935 regular session of the Legislature retain authority to continue to sit unadjourned sine die on and after June 1, 1935, for a sufficient period of time to complete and approve, nunc pro tunc as of May 31, 1935, the journals of its regular legislative proceedings that required completion and approval, as well as to have its officers enroll, sign, and cause to be presented to the Governor in constitutional form, any unauthenticated legislative acts it may have constitutionally 'passed' during its regular sixty days of legislative session?

[1] [2] In *52 *State ex rel. Landis v. Thompson*, 164 So. 192, *supra*, we definitely held that, on direct attack, this court can inquire into whether the Legislature has attempted to exceed its jurisdiction as a Legislature by remaining in unadjourned session beyond its allotted constitutional number of days. And to that end this court held that it would entertain appropriate judicial proceedings to determine whether that which purports to be a record of legislative action taken during a regular constitutional session of the Legislature, is, in truth and in fact, a record duly made by the Legislature under such circumstances as to import to it a conclusive verity as such record, or is some other sort of record not entitled to be judicially noticed as conclusive record evidence within the range of our judicial knowledge when brought to the court's attention.

We now reaffirm what was held in that case. And in so holding, we now proceed to the subordinate inquiry whether or not the particular relief in this case should be awarded in view of the showing made and admitted to be true on the face of the pleadings herein which establishes the fact that no lawmaking action with reference to Senate Bill No. 724 was taken after May 31, 1935, by the 1935 regular session of the Legislature save and except to have the bill as already passed on or before May 31, 1935, duly enrolled and signed on Saturday, June 1, 1935, by the legislative officers in the presence of the Legislature which still remained in actual session on that date for that purpose, as well as for the purpose of duly presenting (before it actually dissolved as a Legislature) the enrolled and authenticated bill to the Governor of the state for his approval or rejection in the manner contemplated by the constitutional provisions on the subject, to which we have heretofore made reference.

To decide this question we first consider and discuss what *53 was heretofore held by this court in the cases of *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, 629, and *State ex rel. Landis v. Thompson*, 164 So. 192.

In neither of the cited cases was any question of interpretation of the precise limitations imposed by section 2 of article 3 of the Constitution involved. The whole scope of inquiry in the *Amos v. Gunn* Case was whether or not a legislative bill once duly passed by the Legislature during its allotted constitutional term of sixty days of lawmaking session was required by sections 17 and 28 of article 3 of the Constitution to be subsequently enrolled and signed by the legislative officers and presented to the Governor for his approval or rejection, while the Legislature was still in undissolved session.

**294 And in that proceeding this court originally (and on rehearing) in perhaps the most able and exhaustive series of opinions ever written by justices of this court on a controverted proposition of constitutional legislative procedure, reviewed the authorities pro and con on the proposition whether or not a legislative bill duly passed by the Legislature in constitutional session is likewise required to be enrolled and authenticated by the legislative officers and by the Legislature presented to the Governor while the Legislature still sits as a legislative body for the performance of the act of authentication and presentation to the Governor in accordance with the commands of the Constitution.

In deciding that case, this court (on rehearing) adopted the opinion of Mr. Justice Ellis to the effect that:

[3] '(1) The provisions contained in section 17, article 3, of the Constitution, requiring the presiding officers and the clerks of each house of the Legislature to sign all bills and joint resolutions passed, is mandatory.

[4] *54 '(2) That such signing of bills and joint resolutions must be done in open session of the house over which the officer signing is then presiding and to which the clerk signing is attached.

[5] '(3) That no bill passed by the Legislature can become a law until it has been presented by the Legislature to the Governor.

'(4) The such presentation can be made by the Legislature only while in session.

[6] '(5) That the enrolled bill on file with the Secretary of State, showing upon its face to have been signed by the presiding officers of the two houses and their respective clerks before the Legislature adjourned, and to have been approved by the Governor, is prima facie evidence that all mandatory provisions of the Constitution as to the requirements to be observed by the Legislature in the passage of the bill, signing by the officers and presentation to the Governor, have been complied with.

'(6) That such prima facie evidence may be overcome by reference to the journals of either house, which, if they affirmatively show such mandatory provisions were not complied with, the so-called act of the Legislature must fail.

[7] '(7) That the approval by the Governor of a bill which has passed the Legislature is a certification by him that the bill after its passage was presented to him while the Legislature was in session.

[8] '(8) That the Governor's approval of a bill passed by the Legislature constitutes an executive record which imports the same verity, is as solemn and dignified an act and entitled to the same faith, credit, and respect as the records of a court or those of the Legislature.

[9] '(9) That the silence of the journals of the Legislature upon the question of whether the bill passed by the *55 Legislature was signed by the presiding officers of the two houses and their clerks does not overcome the prima facie evidence of regularity afforded by the enrolled bill on file with the Secretary of State, bearing upon its face the approval of the Governor and the signatures of the presiding officers

of the two houses of the Legislature, appearing to have been attached before the Legislature adjourned.'

To that opinion we still adhere, and so holding, we here and now approve and reaffirm the principles of law that were therein set forth in the opinion of Mr. Justice Ellis as the views of a majority of this court in the premises.

This brings us to the proposition whether or not the provisions of section 2 of article 3 confining the duration of a regular session of the Legislature to not exceeding sixty (consecutive) days, operates also as a constitutional limitation on the authority of the Legislature to formally sit unadjourned sine die for the purpose of authenticating and presenting to the Governor for his consideration and approval 'bills' that may have been regularly passed during its sixty constitutional days of lawmaking session, but the authentication and presentation of which to the Governor in accordance with sections 17 and 28 of article 3 of the Constitution it was not able to completely accomplish during the period of days comprehended within the limitation prescribed by section 2 of article 3 for the duration of its regular session.

The foregoing proposition is not concluded by anything that has been heretofore decided either in the case of *Amos v. Gunn*, supra, or in the case of *State ex rel. Landis v. Thompson*, supra.

In the *Amos v. Gunn* Case the allegations of the pleadings showed that the legislative bill involved had been regularly passed during the sixty-day regular session of the *56 1921 Legislature. But it was further **295 alleged without any matter of record being referred to in support of such allegation that due to some inadvertence in its handling thereafter, it was never enrolled, nor signed by the presiding officers and clerks of the two Houses in the presence of the Legislature before it actually dissolved, nor by the Legislature itself presented to the Governor for his approval. In consequence of such stated omission, it was contended that the bill was never constitutionally authenticated in the manner contemplated by the Constitution, nor properly presented to the Governor. By reason of such defaults, it was thereupon asserted that the bill was undeniably void.

This court, conceding that the bill would be unconstitutional if not signed by the presiding officers and by the clerks of the two Houses of the Legislature in the presence of the Legislature and by the Legislature presented to the Governor while the Legislature was still undissolved, nevertheless refused to strike the bill down, because of the showing that

the bill was there being attacked collaterally in an injunction proceeding wherein the officials accused of the alleged acts of misconduct were not made parties, and, further, because of the conclusive presumption of proper authentication and presentation of the bill to the Governor that attached to the Governor's signature to the enrolled bill when he signed it and placed it on file in the secretary of state's office.

In the State ex rel. Landis v. Thompson Case the principal holding was that in a direct, not collateral proceeding, this court would require to be judicially corrected any putative legislative record within the range of judicial knowledge if on its face it appeared to have been made within constitutional authority during an authorized legislative *57 session, but was in truth and in fact not a genuine legislative record that it purported to be.

The rationale of that decision was that if the Legislature has no constitutional power to further legislate, or to further act as such with regard to any legislative proposition after its constitutional term of sixty days has run out, that then, by the same token, no mere record it may make of its nonconstitutional sitting as a Legislature after it becomes functus officio can rise to any greater evidentiary dignity in the consideration of the courts than the unconstitutional sitting itself could rise. Accordingly, it was held that since the courts are bound under the law to take judicial notice of legislative records, but notice only of constitutionally made records of the Legislature, as importing absolute verity in their contents, they are necessarily invested with inherent power to use their appropriate judicial processes to expunge from the range of their judicial observation in an appropriate case any purported legislative journal entries that were not made in contemplation of law as a record of what the Legislature did during a constitutionally authorized sitting as a Legislative Assembly.

So until the present case, no controversy has arisen, nor has any controversy been decided by this court, involving the implied power of the Legislature to, in effect, 'hold over,' not under the direct authority of section 2 of article 3 of the Constitution, but under the implied authority of sections 12, 17 and 28 of article 3 aforesaid, for the purpose of executing its mandatory duty to carry out that which the organic law in those sections requires to be made of record and put in due form as a duly approved authentication of all legislative acts that have been properly passed within the limitations of section 2 of said article 3 and other sections and articles of the Constitution.

[10] *58 Section 2 of article 3 of the Constitution as construed and applied in our recent opinion in the case of State ex rel. Landis v. Thompson, 164 So. 192, supra, undoubtedly operated as a definite limitation on the authority of the 1935 regular session of the Legislature to remain in session for the purpose of transacting any legislative business or performing any lawmaking function, whatever its character after midnight on the day of May 31, 1935. This is so, because at that time the 1935 Legislature became functus officio as a lawmaking body and was no longer entitled under the Constitution to originate, consider, agree to, or vote upon any 'bill' or resolution which at that time remained in the status of a mere legislative proposal.

But it does not follow from the rationale of that decision nor from anything implied in its holding, that the 'days of session' limitations of section 2 of article 3 of the Constitution are to be construed and applied so as to defeat the Legislature's performance of its mandatory duties under sections 12, 17, and 28 of the same article to properly authenticate and make a record of all 'bills' it may have already completely **296 'passed' during the sixty days' term of its constitutional existence as a lawmaking body.

[11] Sections 17 and 28 of article 3 of the Constitution, as was held in Amos v. Gunn, 84 Fla. 285, 295, 94 So. 615, supra, clearly contemplate that the specific duties imposed by such sections on the Legislature as such, shall be performed while the Legislature is still in actual session and undissolved as a legislative body. Indeed, it was definitely so held by a majority of this court on the rehearing granted and had in that case. But there is nothing in that opinion, nor is there anything contained in any other opinion of this court, which implies that the Legislature's obedience to sections 17 and 28, or with section 12 of said article *59 3 of the Constitution, must be fully accomplished during the sixty days of lawmaking session authorized by section 2 of article 3 of the Constitution, so long as such compliance is had while the Legislature remains in actual session and undissolved as a parliamentary body for the purpose of fully completing the constitutional duties specifically imposed upon it to make a proper record of what it may have constitutionally done, as well as to constitutionally authenticate and thereupon present to the Governor all bills that it may have already constitutionally passed before its ordinary powers as a lawmaking body became functus officio under section 2 of article 3 at the end of the limited sixty days therein specified.

The constitutional duty of enrolling and signing a bill and thereupon presenting it to the Governor for his approval, is a duty that in the nature of things can only be carried out by the Legislature after such bill has been completely passed. Prior to final passage of a legislative bill no enrollment nor authentication of it as contemplated by section 17 of article 3 of the Constitution can be had. Nor can it be presented by the Legislature to the Governor in accordance with section 28 of the same article, because only a bill that has been duly 'passed' and 'signed by the presiding officers,' etc., of the Legislature after passage is authorized to be by the Governor received for his consideration. Thus, as it was stated in *Amos v. Gunn*, supra, 'The Governor has no power to approve a document as a bill which has passed the Legislature, unless it has been presented to him by that body with the signatures thereon of the presiding officers and clerks of the two houses.' 84 Fla 285, text 344, 94 So. 615, 635.

[12] By the same course of reasoning, the Legislature has no constitutional authority to have a bill presented to the Governor *60 with the signatures thereon of the presiding officers and clerks of the two Houses, until after it has first been completely and irrevocably passed by it. Hence every legislative compliance with the constitutional requirement of authentication and presentation of bills 'passed' is an act that, in its very essence, is nothing more than the making nunc pro tunc as of the date of passage, a proper constitutional record of that which has already been completely disposed of in limine by the legislative will. The performance of such acts is therefore not the exercise of any legislative prerogative that can be accomplished only during the sixty days limited by section 2 of article 3, but is the simple performance of an implicit constitutional duty that devolves upon the Legislature at all events by reason of its already exerted legislative prerogative whenever it has been lawfully exercised in the form of an affirmative vote passing the bill while the Legislature is in ordinary lawmaking session for the purpose.

[13] [14] Section 2 of article 3 of the Constitution is unquestionably a constitutional limitation upon the time a regular session of the Legislature, once convened, may continue in actual session thereafter as a lawmaking body for the purpose of exercising its legislative prerogative of enacting laws. Such legislative prerogatives comprehend the introduction, consideration, and passage of bills and joint resolutions, the appointment of committees and the consideration and disposition of the reports thereof relating thereto prior to the final passage, etc. But said section 2 of article 3 of the Constitution is not by any means a limitation

that operates to restrain the Legislature from accomplishing full compliance with definitely imposed nondiscretionary legislative duties, as distinguished from the exercise of its prerogative lawmaking powers, even though *61 'holding over' unadjourned sine die may be required for that purpose beyond the specified number of days allotted by section 2 of article 3 of the Constitution for the exercise of lawmaking prerogatives.

The requirement imposed by sections 12, 17, and 28 of article 3 of the Constitution with reference to the keeping of proper **297 legislative journals covering the last days of a session of the Legislature, as well as the earlier days, the requirement of seeing to it that all bills passed by it during its allotted sixty days are subsequently signed in open session in the presence of the two Houses, and thereafter, by the Legislature through its appropriate agencies constituted for that purpose (as distinguished from its mere officials acting on their own initiative) presented to the Governor for his approval, are not lawmaking prerogatives, but are nondiscretionary mandatory legislative duties which the Legislature not only has power and authority to perform before it actually dissolves sine die as a Legislature sitting in regular constitutional session, but are duties which, under the Constitution, the Senate and House of Representatives are bound to fully carry out before they are constitutionally warranted in actually adjourning sine die thereby bringing about their irrevocable dissolution as a legislative body. The fact that the individual legislators may in practice defeat their own legislative acts by their unconstitutional neglect to fully perform such duties before they actually disperse as a Legislature adjourned sine die, is no ground for holding that the duties themselves never existed.

[15] The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do. *Woodson v. Murdock*, 22 Wall. 351, 22 L.Ed. 716. The Legislature is *62 but an instrumentality appointed by the Constitution of this state to exercise a part of its sovereign prerogatives, namely, the lawmaking power. In that capacity it holds and exercises governmental powers of the highest order. From the commencement of independent government in the United States to the present time the legislative powers of the several states have been vested in their respective Legislatures. But without exception it has been provided in State Constitutions that Legislatures shall be limited as to time in the exercise of their prerogative powers of lawmaking to stated regular or special sessions during which sessions only, said prerogative lawmaking powers can be constitutionally exercised.

[16] When the Constitution fixes the period of permissible legislative activity, lawmaking sessions can be held at no other times, and for no longer periods of time than the Constitution of state provides. But the limitations so placed by the Constitution upon the right of a Legislature to convene and sit as a parliamentary body for the exercise of its normal lawmaking legislative functions have reference to a restriction on the exercise of prerogative lawmaking powers only, not on the carrying out of inescapable constitutional duties that may have arisen solely as an incident to a lawmaking power already duly exercised in limine.

Unless expressly or impliedly made applicable to the performance of legislative duties that are merely incidental to the proper recording or authentication of legislative acts evidencing a duly completed exercise of lawmaking power, organic limitations specifying a stated number of permissible days for the Legislature to be in session do not restrict absolutely the time of performance of such incidental duties. This is so, because limitation restricting the exercise of lawmaking powers permitted to the legislative department *63 should not in reason be construed to defeat the performance by that department of mandatory incidental duties that are indispensable to be performed in order to effectuate its lawmaking power already exercised in due and proper season.

In the present proceeding it is established by the legislative journals and by the allegations of the return filed to the alternative writ of mandamus, that the Legislature of 1935 had fully exercised all of its lawmaking privileges and powers with reference to the final passage of Senate Bill No. 724 at the time the Legislature became functus officio as to its lawmaking powers at midnight on May 31, 1935. All that is shown by the pleadings to have been done by the Legislature after that time, so far as Senate Bill No. 724 was concerned, was that it remained together on June 1, 1935, in a 'hold over' assembly declining to effectuate its own dissolution by sine die adjournment until it had first fully complied with sections 17 and 28 of article 3 of the Constitution by enrolling and authenticating said Senate Bill No. 724 that it had already constitutionally passed in an acknowledged proper 'exercise' of its prerogative lawmaking power to enact it as a law during the sixty days' period prescribed by section 2 of article 3 as the permissible 'regular session' for such an enactment.

[17] [18] Implied powers of the Legislature are as potent as expressly conferred **298 powers. The express declaration of the power of the Legislature to cause any regular session to

'extend to sixty days' in accordance with section 2 of article 3 of the Constitution, ex necessitate implies its right to exercise its prerogative lawmaking functions as a Legislature up until the very moment of its constitutional prorogation. This in turn implies that under sections 12, 17, and 28 of article 3 of the Constitution the 1935 Legislature was entitled *64 to remain in session on June 1, 1935, undissolved as a parliamentary body adjourned sine die when it found such holding over and continuation of its sittings to be indispensable to enable it to comply with the express commands of sections 12, 17 and 28 of article 3 as to acts it had already constitutionally passed, but which had not been duly authenticated as such and presented to the Governor, during the sixty days' period prescribed by section 2 of article 3.

We hold, therefore, that in so far as the 1935 Legislature actually held over in unadjourned sitting on June 1, 1935, or after that date for the sole purpose of fully complying with sections 12, 17, and 28 of article 3 of the Constitution as to acts of legislation already duly passed within the regular session period limited by section 2 of said article 3, that it was constitutionally in unadjourned session for the limited and special purposes aforesaid, notwithstanding the limitations of section 2 of article 3 of the Constitution, and that it continued invested with all necessary authority as a Legislature to fully accomplish compliance with the express commands of sections 12, 17, and 28 of said article 3 as to its journals and enrollment, signing and presentation to the Governor of the bill that it had constitutionally passed prior to June 1, 1935, before it undertook to disperse as a parliamentary body adjourned sine die.

[19] This we hold not only for the reasons hereinbefore set forth, but for the further reason that once the Legislature becomes functus officio as to its lawmaking power under section 2 of article 3 of the Constitution and thereupon actually disperses as a legislative body adjourned sine die, it then possesses no power to reassemble as a Legislature in any sort of session, although it still is the duly constituted *65 Legislature of the state of Florida, and is, as such, subject to being recalled into extra session by the Governor.

[20] The final act of enrollment, the authentication of Senate Bill No. 724, by the signing of it in the presence of each House by the presiding officers and clerks thereof, and its final presentation to the Governor by the Legislature, although each of such steps actually transpired on the calendar day of June 1, 1935, must, in contemplation of the Constitution, relate back to the time final lawmaking action on the bill was definitely and irrevocably completed on or before May

31, 1935, the last day of the regular legislative session. Therefore such steps were properly made to appear of record nunc pro tunc on the official legislative journals evidencing the legislative proceedings of May 31, 1935. This is so, because that which was finally completed under constitutional authority on June 1, 1935 (as we have herein held was the case), is merely a continuation and subsequent carrying out of constitutional duties that arose, and were inescapably required to be performed as a result of what had already transpired as an exercise of lawmaking power that occurred on or before May 31, 1935. The record of the performance of such duties was therefore constitutionally incorporated into the record of the Legislature's May 31, 1935, legislative day's business and is not subject to the particular attack leveled against it in this proceeding.

To restate the proposition in simile: The death of the 1935 regular session of the Legislature by constitutional limitation at midnight on May 31, 1935, did not defeat performance of its constitutional duty under sections 12, 17, and 28 of article 3 of the Constitution to make an orderly disposition of its remains by properly winding up its affairs as soon as practicable thereafter, so long as the assembly *66 did not actually disperse as a parliamentary body and thereby put it beyond its power to reassemble for that purpose absent the call of the Governor into extra session.

[21] The return of the respondents is adjudged sufficient so the alternative writ of mandamus must now be quashed.

 [State ex rel. Gillespie v. Carlton, 103 Fla. 810, 138 So. 612;](#)

 [State v. Seaboard Air Line R. Co., 92 Fla. 61, 109 So. 656.](#)

Peremptory writ denied, and alternative writ of mandamus quashed.

WHITFIELD, C. J., and TERRELL and BUFORD, JJ., concur.

ELLIS, P. J., and BROWN, J., dissent.

****299** WHITFIELD, Chief Justice (concurring).

It is not contended here that Senate Bill No. 724, published as chapter 16848, Laws 1935, was not duly passed by each House of the Legislature. See [State ex rel. X-Cel Stores, Inc., v. Lee \(Fla.\) 166 So. 568](#), filed January 14, 1936. The contention is that the bill was not signed by the legislative

officers and presented to the Governor within the time required by the Constitution, which provides that:

‘All bills * * * so passed shall be signed by the presiding officer of the respective Houses and by the secretary of the Senate and the clerk of the House of Representatives.’ Section 17, art. 3, as amended.

‘Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor’ for his approval or disapproval. Section 28, art. 3.

The Constitution does not provide that bills passed by the Legislature shall be signed by the legislative officers and presented to the Governor within the limits of sixty days to which a regular session of the Legislature ‘may extend’ under section 2 of article 3. Nor does the Constitution require the signing of bills passed by the Legislature or the *67 presentation of such bills to the Governor, to be stated in the legislative journals or proceedings which each House ‘shall keep’ by command of section 12, article 3.

The terms of office of the members of the Legislature do not expire at the end of the biennial regular sessions of the Legislature which are required to commence ‘on the first Tuesday after the (first) Monday in April, A. D. 1887, and on the corresponding day of every second year thereafter,’ and ‘may extend to sixty days.’ Section 2, art. 3. The sixtieth day of the 1935 regular session expired at midnight on May 31, 1935. The terms of Senators and members of the House of Representatives expire at the election of their successors in November of the years when general elections are held.

The answers of the ministerial officers of the Legislature, as shown by the statement preceding the main opinion, aver that the bill here considered was signed by the legislative officers and presented to the Governor while the Legislature was in session; and the court holds that such signing and presentation, as done, comply with the commands of sections 17 and 28 of article 3 of the Constitution and do not violate section 2 of article 3 of the Constitution, even though such signing and presentation were done after the expiration of the sixty days limited by section 2, article 3, for the regular legislative session, when done before the members of the Legislature dispersed after the expiration of the sixty days.

[22] The signing by the legislative officers and the presentation to the Governor of bills that have been duly passed by the Legislature are not discretionary lawmaking functions, but such signing and presentation are nondiscretionary functions that are mandatorily required to be done after the bills shall have been duly passed by both

Houses of *68 the Legislature; and bills may be duly passed up to the expiration of the last minute of the sixtieth day of a regular session of the Legislature; therefore to make effective the express organic commands that 'all bills * * * so passed shall be signed by the presiding officer of the respective Houses,' etc., and that 'every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor,' the necessary intendments of such organic commands are that bills which may be passed by the Legislature towards the end of the sixty-day period of a regular session shall be duly signed and presented to the Governor as commanded after the due passage of the bills, even if the passage of the bills was so near the end of the period of a session that such signing of duly passed bills by the legislative officers and the presentation of the signed bills to the Governor could not be done till after the expiration of the last day of the session. Of course the quoted organic commands intend that the prescribed mandatory duties shall be performed under direction of the legislative body within a reasonable time and in due course of appropriate procedure.

Each House is expressly commanded to 'determine the rules of its proceedings.' Section 6, article 3. This express power is intended to enable the Legislature to effectuate its lawmaking powers and also to perform the organic commands as to the signing and presentation to the Governor of 'every bill that may have passed the legislature,' including bills passed during the last hour of, but before the expiration **300 of, a session, as limited by section 2 of article 3, even though, because the bills were passed so near the end of the period of the session, the commanded signing and presentation cannot be done until after the expiration of the last hour of the last day of the session limitations.

*69 In effect, the holding in this case is that at and after the hour of midnight on the sixtieth day of a regular session of the Legislature, the Constitution, in providing that a regular session 'may extend to sixty days,' necessarily forbids any lawmaking function to be performed by the Legislature after the end of the sixtieth day, unless an extra session is duly called. But members of the Legislature and the legislative officers may, at and after the hour of 12 o'clock p. m. of such sixtieth day, proceed in due course to have all bills and resolutions 'that may have passed the legislature' before the expiration of the sixtieth day of the session, and when such duly passed bills have not been signed by the legislative officers and presented to the Governor before the end of the sixtieth day of the regular session, duly signed by the legislative officers and presented to the Governor before

the members disperse from their duties. Such signing and presentation, though commanded by the Constitution, are not lawmaking functions, but are the prescribed method of authenticating the identity of the matter contained in the enrolled bills presented to the Governor as being the same as the engrossed bills that 'passed the legislature.' The enrolled bills signed by the legislative officers and signed by the Governor, as well as the engrossed bills that 'passed the legislature,' are filed and kept in the office of the secretary of state. Sections 98(82), 116(94), C.G.L. Bills duly presented to the Governor may be acted on by him after the final adjournment of the Legislature within the limitations prescribed by section 28, article 3, Constitution.

TERRELL, BUFORD, and DAVIS, JJ., concur.

ELLIS, Presiding Justice (dissenting).

I am unable to agree with the opinion and decision of the majority in this case because I think that, according to the allegations of the alternative *70 writ and averments of the return the relators are entitled to a peremptory writ; that the relators have such an interest in the proceedings as to entitle them to question the legality of the enactment of Senate Bill No. 724 (which is claimed by the Attorney General's office to have been duly enacted at the regular session of the Legislature of the session of 1935 and numbered as chapter 16848, Laws Florida) and in pursuance of that end may in such proceedings as are here instituted require Honorable R. W. Davis, Jr., who was secretary of the Senate and Honorable Weldon G. Starry, who was Chief Clerk of the House of Representatives of the regular session of the Legislature of 1935, to correct and revise the respective journals of the Senate and House of Representatives for the last three days of the legislative session, to the end that the said journals as finally incorporated into the bound volumes 'may present a truthful and accurate account of the proceedings of the two Houses' pursuant to the requirements of 'House Concurrent Resolution No. 30 of the 1935 Session of the Florida Legislature' (Laws 1935, p. 1545).

That by such proceedings as here instituted, that is to say, by direct attack, relators may establish the fact that the document which purports to be the record of legislative proceedings is not in truth and in fact a true account of such proceedings; that the records in the office of the secretary of state purporting to be authentic legislative records of the last three days of the regular session of the 1935 Legislature are not in truth and fact a record of the last days of the regular session before

it became 'functus officio,' and that certain entries in the purported journals of the last three days of the regular session relating to Senate Bill No. 724 were false in that the acts and transactions therein recited to have occurred on May 31, 1935, did not *71 occur upon that day, but did occur upon the following day when the regular session had ceased to exist and be a 'legislative body by operation of the Constitution.' see *State ex rel. Landis v. Thompson* (Fla.) 164 So. 192, 194.

The allegations of the alternative writ are such in relation to certain pretended acts and transactions of the regular session of the Legislature that being established show that the certain constitutional duties required to be performed by the Legislature in regular session in the matter of the attempted enactment of Senate Bill No. 724, chapter 16848 were not in truth performed by that body while in regular session, or during the period of time fixed by the Constitution for regular **301 sessions, but were attempted to be done by an assemblage of persons in the state capitol who may have been legislators, but after the constitutional period of time fixed by the organic law for regular sessions of the Legislature and after the Legislature as a lawmaking body had become dormant or functus officio; that such facts as alleged in the alternative writ being established, Senate Bill No. 724, chapter 16848, did not become effective as a constitutionally enacted statute.

I think the 'answers and returns' of the respondents Robert W. Davis, Jr., and Weldon G. Starry are insufficient and in substance are admissions of the allegations of the alternative writ; that the relators upon the face of the proceedings in this case are clearly entitled to the peremptory writ under the doctrine announced in the case hereinbefore cited, *State ex rel. Landis v. Thompson*.

This brings me, therefore, to the consideration of the question whether members of the Legislature may after the full sixty days have expired during which the Constitution empowers them to be in regular session by merely remaining *72 in the capitol perform certain constitutional duties in the matter of exercising the power and performing the acts necessary to the production of a statute, the bringing into existence of a legislative enactment.

I think that proposition cannot be logically supported, nor can any such theory be supported under a Constitution such as ours.

The opinion of the majority, prepared by Mr. Justice DAVIS presents, in his usual vigorous and facile way, possibly the best reason for upholding such a proposition that could be

found in the books, if any such attempt may be found among them, but I am unable to agree with his reasoning and am impelled to place my views of record.

The term "rump' session of the Legislature,' used in the able concurring opinion of Mr. Justice Davis in the case of *state ex rel. Landis v. Thompson* (Fla.) 164 So. 192, 196, to distinguish an assemblage of persons in the capitol building, who, as members of the legislative branch of the government, assembled there after the expiration of the time designated and fixed by the Constitution during which as members of the legislative branch of the government they were authorized and empowered to be in session for the transaction of legislative business, from the duly organized constitutional session of the legislative branch, is, in my judgment, an unfortunate use of words tending to produce confusion of thought.

It is so because the term is unknown in the science of American government, inconsistent with its institutions, foreign in origin, and a political impossibility under our Constitution. The term is confusing also because, while it impliedly condemns the assemblage as constitutionally without power to transact any legislative business, it yet *73 retains by remote intimation the suggestion of some elements existing in a constitutional legislative session.

The term 'Rump Parliament' was one applied to a remnant of a Parliament which assembled in the year 1648 in London, England, during the reign of Charles I. It had made certain concessions to the King which offended the army. That armed body interfered, expelled about ninety-six Presbyterian members, leaving about fifty or sixty which were afterwards known as the 'Remp.' That illegal and unconstitutional body committed the abhorrent crime of regicide, which ever afterwards was condemned as an ineradicable blot upon the history of England, and then proceeded to set up a new government called the Commonwealth. It but followed the tendency usually observed in all illegal or unconstitutional assemblages parading in the name of sovereign power.

There is no place, therefore, in my thought, for the term 'session of the Legislature,' however qualified by adjective or phrase, as applied to any assemblage of men and women members of the legislative branch of the government held outside of the period of time definitely fixed by the Constitution for the exercise by them of the sovereign power of legislation and all matters pertaining to legislative functions. Nor does such an assemblage of legislators recognize the applicability of such term to such

an assemblage, for it is commonly known and reported that as the hour of the constitutional session approaches for its constitutional dissolution, some members resort to the puerile expedient of stopping the clocks placed in their respective halls in simulation of an arrest of time, as if to anoint by this fanciful procedure the consciences of some of their fellows who know that no authority exists under the Constitution for a prolongation of their legal session beyond the constitutional *74 period of **302 sixty calendar days to which their regular sessions may extend. Section 2, art. 3. Const.

The conclusion of the majority that the constitutional termination of the legislative session at midnight on May 31, 1935, did not preclude an assemblage of the members of the Legislature the following day and other days indefinitely in order to prepare a journal of its proceedings, cause all bills passed to be signed by the presiding officer of the respective Houses and secretary of the Senate and clerk of the House of Representatives and to be presented to the Governor, rests upon several hypotheses, none of which is supported by any historical or judicial reference and all depend upon the assumption that the exertion of the legislative power consists only in submitting a proposition or bill, discussing its merits and voting upon its passage; that keeping a journal by each House, recording therein the yea and nay vote on the final passage of every bill, the signing of the same by the presiding officers of each House, and their clerks or secretaries and the presentation of the bill so passed to the Governor, constitute no part of the sovereign power of legislation, but are the mere mechanics of legislative action, which the Constitution imposes upon the members of the Legislature to operate to the end that a proper record of legislative activities may be preserved and the constitutional mandates be obeyed.

The majority opinion seems to admit, however, that in order to operate such mechanical devices or discharge such purely ministerial duties there must be no dispersing of the members of the Legislature after the constitutional expiration of the period of time during which the 'Regular sessions of the Legislature may extend,' but they must continue together at the place where they were when the period of time during which they could be in constitutional session *75 expired, because if they dispersed and went out to their meals or to their respective boarding houses or hotels or to their homes they could not again assemble in constitutional session unless recalled into extra session by the Governor.

Now the Constitution does not require the sessions of the Legislature to be terminated by a motion duly adopted to adjourn sine die. A majority of the members of each House

constitutes a quorum of the House to do business, but a smaller number may adjourn from day to day. Article 3, § 11, Const. And neither House may, without the consent of the other, adjourn for more than three days. Article 3, § 13, Const. At the expiration of the constitutional period of sixty days, to which the regular sessions of the Legislature may extend, the session stands adjourned under the Constitution. No motion is necessary to confirm the passage of time, or give sanction to the constitutional limitation.

The majority opinion admits the 'death of the * * * Legislature by constitutional limitation at midnight' of the sixty-day period. That is an incorrect expression. The 'Legislature,' a branch of the government, does not die. It continues in existence. The members continue to hold office to be recalled in extra session, if the Governor deems proper so to do, but the regular session does die. If it is dead, then it has no life to perform mechanical or ministerial duties.

If the session could, after death, that is, after its legal and constitutional end, correct journals, cause its presiding officers to sign bills which were passed during the session, and present the same to the Governor, how could he return the bill to the House in which it originated should he immediately exercise his power of veto? Or if the members of the Legislature continued in assemblage within the room *76 in which they were when the regular session died constitutionally, and remained there without food or rest for two or three days winding up the mechanics or discharging so-called ministerial duties, and presented a bill to the Governor two or three days after the constitutional death of the session and then immediately dispersed for much needed rest, recreation, food, and drink, how will such curtailment of the Governor's ten days' time after adjournment which he has in which to veto a bill so presented be explained? Will the Constitution be construed to be amended in such cases by the extension of the ten days from the constitutional adjournment by so many days as the session corpse has utilized to operate the mechanics of its creations when alive?

The duties imposed by sections 12, 17 and 28 of article 3 of the Constitution are not merely mechanical or ministerial duties. They constitute part of the limitations upon the power of legislation imposed by the people to insure an orderly, careful, **303 and circumspect exercise of the power. Such was the ratio decidendi of the opinion and decision in the case of *Amos v. Gunn*, 84 Fla. 285, 94 So. 615.

The power of legislation is the supreme power of a state. Blackstone so recognizes it in the definition of municipal law

which he gives. A rule of conduct prescribed by the supreme power of a state prescribing what is right and prohibiting what is wrong. See Sharswood's Blackstone's Com.

It is the power to prescribe rules of conduct for the people, regulating their reciprocal obligations and rights, the acquisition and defense of property and the protection of the unalienable rights of man. It is the power to direct the material, and, by indirection or resultant effect, the spiritual, destiny of the people. It is the power to build or destroy, to encourage or discourage; the power to promote the happiness of the people or to destroy it. Laws are the *77 expressed will of the sovereign power and operate upon the lives of the people to promote their welfare or destroy their peace and happiness.

Beneficent and wise laws are the ultima Thule of the Supreme power in the cause of humanitarian objects and purposes, while ill-considered, wicked, or cruel laws are the de profundis of political degradation. We are accustomed to say that the powers of government are divided into three arms or branches: The legislative, the executive and judicial, which means that one power is to make laws, another is to interpret or explain them, and another is to enforce them. If there were no laws to govern a society, there would be no field in which either the judicial or executive could function. There would be no laws to interpret, none to enforce. The will of the most selfish and powerful would reign—every man his own lawgiver, his own interpreter, and therefore his own executioner. There would be chaos worse confounded. The rule of the jungle beast would be established. Natural law would be man's only measure of activity in any enterprise.

Governments which derive their just powers only from the consent of the governed are established to protect the people in the possession of their unalienable rights to life, liberty, and the pursuit of happiness, and the power to make laws in the execution of that design is the greatest and most sacred power of the sovereign authority.

In the establishment of governments like ours Constitutions are written as the measure of power which the sovereign commits to its agencies. Is it unreasonable, therefore, to say that in committing the greatest of all powers of the sovereign—that of the power of making laws—to the legislative agency, the people in their written Constitution would circumscribe, define, limit the exercise of such *78 power by prescribing an orderly, carefully considered, and meticulous procedure according to which the power to make laws is exercised? That is exactly what the Constitution does by sections 12, 17 and 28 of article 3. According to such course

only may legislation be brought into existence. To attempt it in any other way is anarchy.

The people, in vesting the power to make laws in the legislative branch, section 1, art. 3, prescribed with meticulous care how the power should be exercised. The regular sessions shall be held biennially. Section 2. A majority of each House shall constitute a quorum to do business. Section 11. Each House shall keep a journal of its proceedings. Section 12. The enacting clause of every law shall be in a certain form. Section 15. Each law shall embrace but one subject and matter properly connected therewith. Section 16. Every bill shall be read by its title on its first reading, or by sections if one-third of the members of the House require it. Section 17. Every bill shall be read on three several days unless two-thirds of the members present dispense with the rule (section 17); every bill on its second reading shall be read by sections unless two-thirds of the members present in the House where the bill is pending dispense with the rule (section 17); the vote on the final passage of every bill shall be taken by yeas and nays (section 17), such vote shall be entered on the journal of each House (section 17); all bills passed shall be signed by the presiding officer of the respective Houses and by the secretary of the Senate and the clerk of the House of Representatives (section 17). Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor (section 28); if the Governor does not approve it, he shall return it to the House in which it originated, which House shall cause such objections to be entered upon its journal and proceed to reconsider **304 it (section *79 28); if the Legislature by final adjournment prevent such action by the Governor, the bill shall be a law unless the Governor within ten days after the adjournment shall file such bill with his objections thereto in the office of the secretary of state (section 28). Regular sessions of the Legislature may extend to sixty days commencing on the first Tuesday after the first Monday in April in every second year after the year 1887 (section 2); all of article 3, Constitution.

These rules and regulations constitute the orderly procedure according to which the sovereign will may be expressed in the enactment of legislation. In sustaining legislation which has been attacked because, as it was alleged, the Legislature in regular session or extra session had ignored any one or more of those constitutional requirements, this court has invariably said that where the journal of the Legislature is silent upon the proposition except in the two instances of a defective title or the record of the yea and nay vote, it will presume that the Legislature observed the constitutional requirements and

limitations in the exercise of the legislative power; that the members of the Legislature are under oath to support, protect, and defend the Constitution and government of the state and are presumed to have observed and obeyed their oath of office; that it would require journalistic evidence or evidence as high in dignity as the legislative journals to overcome the presumption.

The courts are therefore concluded by the legislative judgment that it has complied with the requirements imposed by the Constitution.  [Stockton v. Powell](#), 29 Fla. 1, 10 So. 688,  15 L.R.A. 42; *Amos v. Gunn*, supra.

The converse of that proposition is true and has been declared by this court since 1849. Courts of justice cannot ***80** act upon the presumption that powers conferred by the Constitution will be abused. *Curry v. Marvin*, 2 Fla. 411.

The courts would not presume that the Legislature had disobeyed any one of the constitutional mandates required to be observed in the exercise of the legislative power. If it were the rule or lawful to do so, then, in the absence of a record showing to the contrary, the failure to observe any one of the requirements would invalidate the attempted legislation.

The recited constitutional requirements are, in my view, all of equal dignity and importance. They must all be observed by the Legislature in the exercise of its power to enact laws with equal fidelity to the organic law and devotion to its expressed limitations.

The majority opinion, however, distinguishes between the recited constitutional elements in the process of making law, emphasizing the importance of some and reducing others to a mere mechanical or ministerial function which may be performed by persons designated by the members of the Legislature when in session or by the membership of the Legislature after the expiration of the session, whether a majority of the membership of both houses remain in the capitol or not.

If a question of the presence of a quorum should arise in such case, it could not be determined by those present, because there would be no power to determine it, as that power exists only in the members in regular session.

The majority opinion refers to 'legislative prerogatives.' That is a phrase which has recently been used in discussions pertaining to the activities and powers of the Congress of the United States. I do not agree that the State Legislature

has in the true sense of the word any 'prerogatives.' That word, as Judge Merrill E. Otis, of the United States ***81** District Court of Missouri, said, is in history associated with the exercise of a power for which there is no responsibility or accountability. Certainly the Legislature has no 'prerogative' to enact laws in disregard of the limitations imposed upon it by the Constitution in the exercise of that great power. The Legislature is empowered only to enact statutes in discharge of that enormous responsibility in strict observance of the limitations, rules, and manner of procedure specifically outlined and charted by the people in the Constitution.

If the members of the Legislature do not observe the constitutional instructions in the matter of its procedure in enacting laws, why do they swear to support, protect, and defend the government and Constitution of the state? If the Legislature is at liberty to ignore the least of these limitations, if indeed there are any degrees of importance in them, and the court is foreclosed from reviewing the act when it ****305** is properly presented, then this matter of legislation is worse than solemn mockery.

There cannot be a de facto session of the Legislature, which the so-called 'holdover session' is said by some persons to be because it was either in regular session or it was not on June 1, 1935. The regular session had expired by constitutional limitations at midnight on May 31, 1935. The members of the Legislature who were present in the state capitol on June 1, 1935, were not assembled in a 'de facto' session. There cannot exist such an anomalous thing in a constitutional government. The assemblage is either in constitutional session or it is not. If it is not, then it is without power to do any act relating to the enactment of laws. *State ex rel. Landis v. Thompson (Fla.)* 164 So. 192; *State v. Tippett*, 101 Fla. 1117, 134 So. 52.

***82** To hold that there could be a de facto legislative session at which laws may be enacted or any act performed in relation to the enactment of laws as the Constitution requires to be done is to countenance revolution. See,  *Norton v. Shelby County*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178.

I am therefore of the opinion that the return to the alternative writ is insufficient, and the peremptory writ should issue notwithstanding such return.

BROWN, J., concurs.

BROWN, Justice (concurring with ELLIS, Justice).

All the members of the court agree that all bills must be passed by the Legislature during the constitutional session in order to have any validity. No bill adopted after the constitutional session has expired can have any validity. The stream cannot rise higher than its source. The Legislature cannot continue in lawful session beyond the period allotted to it by the Constitution which created it. That is perfectly plain.

But the question here presented is whether a bill passed before the constitutional session has expired, can, after such expiration, be lawfully signed by the prescribed officers of the two Houses and presented to the Governor.

As pointed out in both the foregoing opinions, section 17 of article 3 provides that ‘All bills or joint resolutions so passed shall be signed by the presiding officer of the respective Houses and by the secretary of the Senate and the clerk of the House of Representatives.’

Section 28 of the same article of the Constitution reads as follows:

‘Section 28. Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor; if not be shall return it with his objections if not he *83 shall return in with his objections to the House in which it originated, which House shall cause such objections to be entered upon its journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote of members present, which vote shall be entered on the journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted), the same shall be a law, in like manner as if he had signed it. If the

Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor, within ten days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law.’

I agree with Mr. Justice ELLIS that the intent of this section is that all bills ‘that have passed the legislature’ must be presented to the Governor while the Legislature is still in session—which means in lawful and constitutional session. And, of course, all such bills necessarily must be signed by the officers of the respective Houses, as required by section 17, before they can be presented to the Governor. It follows, therefore, that all bills that have passed the Legislature must be signed by the officers of the respective Houses and presented to the Governor while the Legislature is still in constitutional session.

If there can be such a thing as a ‘defacto’ or ‘hold-over’ session of the Legislature for any purpose, after the sixty-day period prescribed by the Constitution has expired, which I do not concede, certainly none such was contemplated by the Constitution, nor could that kind of session carry out the mandates of sections 17 and 28 of article 3, hereinabove *84 referred **306 to. In my opinion, the Constitution nowhere contemplates any session of the Legislature other than a constitutionally authorized session.

All Citations

123 Fla. 41, 166 So. 289

Footnotes

* Rehearing denied 166 So. 574.

124 Fla. 592
Supreme Court of Florida.

STATE ex rel. THOMPSON

v.

DAVIS, Secretary of Senate, et al.

June 9, 1936.

Synopsis

Original proceeding by the State of Florida, on the relation of Uly O. Thompson, for a writ of mandamus to Robert W. Davis, as Secretary of the Senate of the State of Florida, and others. On respondent's motion to quash an amended alternative writ.

Writ quashed, with leave to amend.

See, also, 165 So. 379.

ELLIS, P. J., and BROWN, J., dissenting.

West Headnotes (12)

[1] **Mandamus** 🔑 Right of petitioner, and authority, duty, or power of respondent, in general

Allegations of amended alternative writ of mandamus, commanding secretary of State Senate and chief clerk of House of Representatives to expunge from journals and enrolled bill statements that it was signed by legislative officers and presented to Governor on last day of session, that bill was not enrolled, signed by such officers, or presented to Governor before midnight of such day, but after 9 a. m. on following day, held insufficient for failure to allege that bill was not so signed and presented before expiration of session or within reasonable time thereafter. F.S.A. §§ 26.01–26.16, 27.01; Const. art. 3, §§ 1, 2, 12, 17, 28.

[2] **Statutes** 🔑 Presentation

Bills duly passed by Legislature during fixed period of session thereof, but too near last hour to

be enrolled and signed by legislative officers and presented to Governor before end of such period, may be signed and presented within reasonable time thereafter. F.S.A.Const. art. 3, §§ 1, 2, 17, 28.

1 Cases that cite this headnote

[3] **Statutes** 🔑 Enrollment, authentication, and filing

Bill, duly passed by Legislature before end of session period, cannot be reconsidered or amended after expiration of such period, but does not become law unless signed by legislative officers within reasonable time thereafter. F.S.A.Const. art. 3, §§ 1, 2, 14, 17, 28.

[4] **Evidence** 🔑 Legislative proceedings and journals

Supreme Court takes judicial notice of executive record of Governor's approval of bill passed by Legislature. F.S.A.Const. art. 3, § 28.

[5] **Statutes** 🔑 Approval

Executive record of Governor's approval of bill passed by Legislature and filing thereof in office of secretary of state on last day of legislative session cannot be challenged in proceeding for writ of mandamus to expunge, from legislative journals and enrolled bill, statements that it was signed by legislative officers and presented to Governor for approval on such day. Acts 1935, c. 17085; F.S.A.Const. art. 3, §§ 1, 2, 12, 17, 28.

[6] **Mandamus** 🔑 Motion to quash or dismiss alternative writ

Motion to quash amended alternative writ of mandamus has effect of demurrer, which does not admit allegations not well pleaded, such as allegations of conclusions of law or conclusions of fact not sustained by facts alleged, allegations contradicted by record in case or other records or matters of which court takes judicial notice, and allegations which law does not permit to be proven.

1 Cases that cite this headnote

[7] **Statutes** 🔑 Approval

Executive record of Governor's approval of bill passed by Legislature and filing thereof in office of secretary of state on last day of legislative session imports verity and is sufficient to show that bill was signed by legislative officers and presented to Governor on such day, as against contrary allegations of amended alternative writ of mandamus to expunge from legislative journals and enrolled bill statements that it was so signed and presented on such day. Acts 1935, c. 17085; F.S.A.Const. art. 3, §§ 1, 2, 12, 17, 28.

2 Cases that cite this headnote

[8] **Statutes** 🔑 Enrollment, authentication, and filing

Statements in legislative journals that each House adjourned sine die at noon on last day of session, which could legally have continued until midnight, held not to invalidate bill, shown by journals to have been duly passed, enrolled, signed by legislative officers, approved by Governor, and filed in office of secretary of state on such day, though after noon thereof. F.S.A. § 26.01 et seq.; F.S.A.Const. art. 3, §§ 1, 2, 12, 17, 28.

[9] **Statutes** 🔑 Approval

Enrolled bill, duly passed by Legislature, as shown by legislative journals, not questioned, and signed by legislative officers and approved by Governor on last day of session, as shown by executive record, held valid enactment. Acts 1935, c. 17085; F.S.A.Const. art. 3, §§ 1, 2, 12, 17, 28.

[10] **Mandamus** 🔑 Interest in Subject-Matter

One claiming office of circuit judge under statute repealed by statute redividing state into judicial circuits held without justiciable interest in correctness of legislative journals, stating that

bill for such act was duly passed, enrolled, signed by legislative officers, and approved by Governor on last day of session, and hence not entitled to writ of mandamus, commanding secretary of Senate and chief clerk of House to expunge such statements from journals and enrolled bill, shown by executive record to have been so signed and approved on such day. F.S.A. § 26.01 et seq. Const. art. 3, §§ 1, 2, 6, 12, 17, 28; art. 5, § 45, as amended in 1934.

1 Cases that cite this headnote

[11] **Statutes** 🔑 Enrollment, authentication, and filing

Bills duly passed by Legislature during fixed period of session thereof, but too near last hour to be enrolled and signed by legislative officers before end of such period, may be signed within reasonable time thereafter. F.S.A.Const. art. 3, §§ 1, 2, 17, 28.

[12] **Statutes** 🔑 Presentation

Bill, duly passed by Legislature before end of session period, cannot be reconsidered or amended after expiration of such period, but does not become law unless signed by legislative officers and presented to Governor within reasonable time thereafter. F.S.A.Const. art. 3, §§ 1, 2, 14, 17, 28.

Attorneys and Law Firms

***594 **204** D. H. Redfearn, R. H. Ferrell, Thomas H. Anderson, H. H. Eyles, and E. F. P. Brigham, all of Miami, for relator.

****205** Cary D. Landis Atty. Gen., H. E. Carter, Asst. Atty. Gen., and Cockrell & Cockrell, Francis P. Fleming, E. J. L'Engle, L. R. Milton, and P. H. Odom, all of Jacksonville, Erskine W. Landis, of De Land, Frank D. Upchurch, of St. Augustine, and Henry E. Williams, of Tampa, for respondents.

****200** The amended alternative writ of mandamus filed herein contains the following:

‘Whereas, * * * it was alleged that:

‘On May 31st, 1935, the Senate and House of Representatives adopted Concurrent Resolution No. 30 of the 1935 Session of the Florida Legislature; that said Resolution appears on page 1498 of the 1935 House Journal and on page 1088 of the 1935 Senate Journal, and said Resolution provides that said respondents, the Chief Clerk of the House of Representatives and the Secretary of the Senate, are authorized and directed to correct and revise the respective Journals of the House and of the Senate for the last three days of the legislative session, to the end that the said Journals as finally incorporated into the bound volumes ***595** may present a truthful and accurate account of the proceedings of the two Houses.

‘Relator alleges that, by virtue of the legal duty imposed on the said Chief Clerk of the House and Secretary of the Senate, respondents herein, and by virtue of said Concurrent Resolution No. 30, it became and was and is now the duty of the said respondent Starry and the said respondent Davis, to comply with said Concurrent Resolution No. 30 and to correct and revise their respective Journals so as to present truthfully and accurately the proceedings of said Legislature; that said respondents have not truthfully and accurately kept said Journals, but, on the contrary, have included therein the false statements that the said Legislature adjourned at twelve o'clock noon in the daytime on May 31st, 1935; that said alleged Senate Bill No. 4, chapter 17085, General Laws of Florida, was engrossed, enrolled, and signed by the respective officers of the House and Senate and presented to and approved by the Governor on May 31st, 1935. Relator alleges that said enrolled bill was never legally signed for the reasons hereinafter set forth and, therefore, it became and was the duty of said respondents to expunge their respective signatures therefrom and to expunge from said Journals the false statements above mentioned. Nevertheless, each of said respondents, Starry and Davis respectively, have failed and refused and still fail and refuse so to do.

‘Relator further alleges that, for the purpose of correcting and revising said respective Journals and said enrolled bill, it became and was the duty of the respondent, R. A. Gray, Secretary of State, to permit said respondents, Starry and Davis, to have access to and to deliver possession of said Journals and of said enrolled bill respectively, to said Starry and Davis, until said Journals and said enrolled bill

***596** could be corrected and revised. Nevertheless, the said Secretary of State has failed and still fails so to do.

‘The said purported Journals of the said Senate and said House of Representatives for May 31st, 1935, as so prepared and published by the said Davis and the said Starry as Secretary and Chief Clerk as aforesaid, are false and untrue in this:

‘(1) The Legislature of the State of Florida did not adjourn sine die at twelve o'clock in the daytime on May 31st, 1935, but, on the contrary, the said Legislature of the State of Florida was adjourned sine die, by operation of law, at twelve o'clock midnight on May 31st, 1935, and was not thereafter reconvened or called into extra session as provided by law.

‘(2) That said alleged chapter 17085 was not, in fact, engrossed, enrolled, signed, presented, and approved, as it purports to be, on May 31st, 1935, but, on the contrary, the said alleged act was not engrossed, was not enrolled, was not signed by the President of the Senate of the State of Florida and the said Secretary of the said Senate, was not signed by the Speaker of the House of Representatives of the State of Florida and was not signed by the said Chief Clerk of the House of Representatives of the State of Florida, and was not presented to the Governor before twelve o'clock midnight on May 31st, 1935, but the same was so signed and presented after nine o'clock A. M. on Saturday, June 1st, 1935.

****201** ‘That article 3, section 2, of the Constitution of Florida requires all regular sessions of the Florida Legislature to commence on the first Tuesday after the first Monday in April of each odd numbered year, and that in accordance therewith the regular 1935 Session of the Florida Legislature duly and legally commenced on April 2nd, 1935, the ***597** same being the first Tuesday after the first Monday in April, A. D. 1935; that said article 3, section 2, of the Constitution of Florida limits all regular sessions of the Legislature to sixty days, and that, accordingly, the regular 1935 Session of the Florida Legislature legally ended on May 31st, 1935.

‘That article 3, section 17, of the Constitution of Florida requires that all bills passed by the Florida Legislature shall be signed by the presiding officer of the respective Houses and by the Secretary of the Senate, and by the Clerk of the House of Representatives, and that this provision of the Constitution as interpreted and defined by this Honorable Court requires such signatures to be affixed to any and all enrolled bills prior to the end of the legislative session.

'Relator alleges that the above provision, as so interpreted by this Court, made it mandatory for the Speaker and the Clerk of the House of Representatives, and the President and the Secretary of the Senate, to affix their respective signatures to the enrolled bill known as Senate Bill No. 4, chapter 17085, of the General Laws of Florida for 1935, prior to the end of the last day of the 1935 Session of the Legislature, said last day being May 31st, A. D. 1935.

'Relator alleges that said enrolled bill known as Senate Bill No. 4, chapter 17085, of the General Laws of Florida for 1935, was not signed by the above officers or any of them prior to the end of the 1935 regular session of the Legislature, and that said enrolled bill known as Senate Bill No. 4, chapter 17085, of the General Laws of Florida, for 1935, was signed by all of the above named officials subsequent to nine o'clock A. M., Saturday, June 1st, A. D. *598 1935, and that, accordingly, said purported act never became a law.

'By reason of the said failure of the said Davis and the said Starry, as Secretary and Chief Clerk respectively, accurately and truthfully to correct and revise said Journals, your petitioner is about to be ousted from his said office because the State of Florida, on the relation of its Attorney General, has obtained a writ of quo warranto against your petitioner in this court wherein it is charged that, because of the alleged passage of said act, chapter 17085, your petitioner's said office has been abolished, and said court in said action has held that your petitioner can not show in answer to said writ that the said purported Journals of said Houses for May 31st, 1935, are false and untrue, unless the same are corrected by appropriate proceedings.

'Relator further alleges that the action of said respondents, Robt. W. Davis as Secretary of the Florida Senate, 1935, Session of the Legislature, and Weldon G. Starry as Chief Clerk of the House of Representatives, 1935 Session of the Legislature, respectively, in refusing to comply with said Concurrent Resolution No. 30 to make said Senate and House Journals present a truthful and accurate account of the proceedings of the two Houses for the last three days of the Legislative Session of 1935 in so far as the same applies to said Senate Bill No. 4, and respectively to expunge from the respective House and Senate Journals of 1935 each and every statement that said Senate Bill No. 4, known as chapter 17085, General Laws of Florida, 1935, was enrolled and presented to the Speaker, the Chief Clerk of the House of Representatives, the President, and the Secretary of the Senate, on May 31st, 1935, for their signatures; that said

officers signed said bill on May 31st, *599 1935; that said bill was presented to the Governor on May 31st, 1935, for his approval on May 31st, 1935 and in refusing to correct said Journals and said enrolled bill so that the same speak the truth as to the true date that said bill was so signed, is in violation of their duty and is in violation and prejudicial to the private legal rights of your relator, and that said Senate Bill No. 4, known as chapter 17085, General Laws of Florida, 1935, is invalid, unconstitutional, and of no effect, because the enrolling of the bill, the signing of the bill by the officers of the House and of the Senate, and the presentation thereof to the Governor, took place after said Florida Legislature for 1935, was functus officio (in accordance with article 3, section 2 and 28, Constitution of Florida), and without jurisdiction to take such legislative steps mandatorily required by article 3, section 17, of the Constitution of Florida, in order to **202 make said bill a valid law, and that your relator has no remedy save in the present application to this Honorable Court.'

'Now, therefore, we being willing that full and speedy justice shall be done in the premises, so command you, Robt. W. Davis, as Secretary of Florida Senate, 1935 Session of the Legislature, and Weldon G. Starry, as Chief Clerk of the House of Representatives, State of Florida, 1935, Session of the Legislature, to comply with said Senate and House Concurrent Resolution No. 30 to make said Senate and House Journals present a truthful and accurate account of the proceedings of the said House and Senate for the last three days of the Legislative Session for 1935, as far as the same applies to Senate Bill No. 4, chapter 17085, General Laws of Florida, 1935, and that said Weldon G. Starry expunge from the House Journal the Statement that said Senate Bill No. 4, was duly signed by the Speaker *600 and Chief Clerk of the House of Representatives in open session and ordered referred to the chairman of the committee on enrolled bills on the part of the House of Representatives, to be conveyed to the Senate for the signatures of the President and the Secretary thereof, and that said Robt. W. Davis, as aforesaid, expunge from the Senate Journal, and statements that said Senate Bill No. 4 was duly signed by the President and Secretary of the Senate in open session and ordered referred to the joint committee on enrolled bills on the part of the Senate, to be conveyed to the Governor for his approval on said day; and that said Weldon G. Starry, the Chief Clerk of said House, and Robt. W. Davis, Secretary of the Senate of the State of Florida, expunge from said House Journal and said Senate Journal respectively of May 31, 1935, all other matters and things which show that the said Senate Bill No. 4 was signed by said respective officers of the House and Senate and presented to the Governor on May 31, 1935, and that

said respondents, Weldon G. Starry as aforesaid and Robt. W. Davis as aforesaid, expunge from the enrolled bill the fact that said bill was signed by the said respondents, the President of the Senate and the Speaker of the House, and presented to the Governor for his approval on May 31st, 1935; and commanding R. A. Gray, as Secretary of State of the State of Florida, to permit said respondents, Weldon G. Starry and Robt. W. Davis, access to or to deliver possession of said House and Senate Journals and said enrolled bill, respectively, to the said Weldon G. Starry and Robt. W. Davis so that the same can be corrected and revised as prayed, or that, in default thereof, you do appear before this Court at the court room on the 14th day of February, A. D. 1936, and show cause why you refuse so to do and have you then and there this Writ.'

*601 The resolution referred to is as follows:

'House Concurrent Resolution No. 30

'Be it resolved by the House of Representatives of the State of Florida, the Senate Concurring:

'That the Chief Clerk of the House of Representatives and the Secretary of the Senate be, and they are hereby authorized and directed to correct and revise the respective Journals of the Senate and the House of Representatives for the last three days of the Legislative Session, to the end that the said Journals, as finally incorporated into the bound volumes, may present a truthful and accurate account of the proceedings of the two Houses; and be it further

'Resolved, by the House of Representatives, the Senate concurring, that the Chief Clerk of the House of Representatives and the Secretary of the Senate be, and they are hereby further authorized and directed to prepare and cause to be printed with the bound volumes of the Journals of their respective Houses an errata sheet which shall note any errors of form and substance in the said bound volumes covering the period of the entire session of 1935, and that said errata sheet, when so made, attached and printed in connection with the bound Journals shall be and become a part thereof as a record of the history and proceedings of the regular Session of the Legislature of 1935.'

The respondents filed a motion to quash the amended alternative writ. Among the grounds of the motion are the following:

'27. It is not alleged that Senate Bill No. 4 was not in fact filed in the office of the Secretary of State, before twelve o'clock midnight on May 31st, 1935.

*602 '28. The Governor of the State of Florida is a necessary party. * * *

'30. It affirmatively appears from the records in the office of the Secretary of State, of which the Court take judicial notice, that Senate Bill No. 4, Acts of the **203 Legislature of 1935, was deposited in the office of the Secretary of State on May 31st, 1935, and this fact is not denied by the alternative writ.

'31. The legislature has the right to remain in session a reasonable time after the expiration of the sixty day period provided by the Constitution, in which to have all bills which were passed during the constitutional period enrolled and signed by the presiding officers of the respective Houses, and by the Secretary of the Senate and Clerk of the House of Representatives, and presented to the Governor.'

Predicated on the motion to quash, counsel for the respondents state, with an omitted question, the following:

'Question No. 2. Is it sufficient for amended alternative writ to allege merely that Senate Bill No. 4 was not enrolled, signed by Legislative officials and presented to the Governor before 12 o'clock midnight on May 31st, 1935, when sixty day period for passing bills ended?

'Question No. 3. Is there any inconsistency between the Legislative Journals and the photostatic copy of enrolled bill that is attached to answer of Secretary of State, R. A. Gray, with respect to date of its passage?'

At the argument counsel exhibited a filed photostatic copy of the indorsements, signatures, and dates appearing on the enrolled Senate Bill No. 4 on file in the office of the secretary of state, the legal custodian of the enrolled bill, of which bill this court takes judicial notice.

A copy of such indorsements follows:

*603 'Senate Bill No. 4

'Passed the Senate this 24th day of May, A. D. 1935.

'Wm. C. Hodges

'President of the Senate

'Robt. W. Davis

'Secretary of the Senate

‘Passed the House of Representatives this 30th day of May, A. D. 1935.

‘W. B. Bishop

‘Speaker of the House of Representatives

‘Weldon G. Starry

‘Chief Clerk of the House of Representatives

‘Examined and found correctly enrolled.

‘F. P. Parker

‘Chairman of Committee on Enrolled Bills

‘I certify that this act originated in the Senate.

‘Robt. W. Davis

‘Secretary of the Senate

‘Ida B. Stephens

‘Enrolling Secretary of the Senate

‘Approved this 31st day of May, A. D. 1935.

‘David Sholtz

‘Governor

‘Filed in office Secretary of State, of the State of Florida, this 31 Day of May, A. D. 1935.

‘R. A. Gray

‘Secretary of State

‘By E. C.’

*604 Legislative rules, and not the Constitution, regulate the engrossing and the enrolling of legislative bills. See, also, section 98, C.G.L., section 82, R.G.S. Ordinarily the bill as introduced, or a substitute therefor, is used in actions taken thereon in each House, and appropriate indorsements are made on the bill. As amendments to the bill are adopted,

they are engrossed and attached to the bill. After a bill has been passed by both Houses and all the amendments thereto proposed by either House have been duly adopted or rejected, the bill as introduced with the engrossed adopted amendments thereto is enrolled with the amendments incorporated therein. The enrolled bill is signed by the legislative officers. It is then presented to the Governor. If he approves it, he signs it, and it is then filed in the office of the secretary of state.

By section 1 of article 3 of the Constitution, the legislative authority of this state is vested in the Senate and House of Representatives as the Legislature of the State of Florida, and such legislative authority is required to be exercised during the periods of biennial regular sessions fixed by the Constitution, or during special sessions convened by executive proclamation.

‘Regular sessions of the Legislature may extend to sixty days, but no special session convened by the Governor shall exceed twenty days.’Section 2.

‘Each House shall keep a Journal of its own proceedings, which shall be published.’Section 12.

‘Any bill may originate in either House of the Legislature, and after being passed in one House may be amended in the other.’Section 14.

‘Every bill shall be read by its sections on its second reading and on its final passage. * * * The vote on the final *605 passage of every bill * * * shall be taken by yeas and nays, to be entered on the journal of each House.’Section 17.

‘The ‘final passage’ of a bill, within the meaning of the provisions of the constitution of 1885 (section 17, art. 3), relating to the vote on the final passage of bills being taken by yeas and nays, and entered upon the journals of the legislature, means the vote in each house which adopts the bill, after it has passed its first and second readings, and after it has been read again for the purpose of being put upon its passage and it is not required that a bill passed in one house, and amended and passed in the other, shall be read three times in the house originating the bill before it concurs in the amendments proposed by the other; nor is it required that the vote on the adoption of such amendments be taken by yeas and nays, and entered on the journal.’*State v. Dillon*, 42 Fla. 95, 28 So. 781; *State ex rel. Lane Drug Stores, Inc., v. Simpson* (Fla.) 166 So. 262; *State ex rel. X-Cel Stores, Inc., v. Lee* (Fla.) 166 So. 568.

‘All bills * * * passed’ by the Legislature ‘shall be signed by the presiding officer of the respective Houses and by

the secretary of the Senate and the clerk of the House of Representatives.’ Section 17.

All previous Constitutions of the State contained provisions similar to the last quotation. Section 16, art. 4, Constitution of 1838; section 16, art. 4, Constitution of 1861; section 15, art. 4, Constitution of 1865; section 15, art. 4, Constitution of 1868.

‘Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor; if he approves it he shall sign it.’ Section 28, Art. 3, Constitution of 1885.

The legislative journals show the due passage of Senate *606 Bill No. 4 by each House of the Legislature, and such due passage is not here questioned or denied. Senate Bill No. 4 passed the Senate by a recorded vote of 38 to 0 on May 24, and passed the House by a vote of 75 to 3 on May 30, 1935. The legislative journals also show that Senate Bill No. 4 was on May 31, 1935, enrolled and signed by the legislative officers and then referred to the legislative committee to be presented to the Governor, and that the bill was presented to the Governor by the committee on May 31, 1935; and the enrolled bill signed by the legislative officers shows it was approved by the Governor and filed in the office of the secretary of state on May 31, 1935. Senate Bill No. 4 has been officially published as chapter 17085 of the Laws of Florida, Acts 1935.

As against the executive record showing the approval of the bill by the Governor on May 31, 1935, the amended alternative writ alleges:

‘That said alleged chapter 17085 was not in fact engrossed, enrolled, signed, presented, and approved, as it purports to be, on May 31st, 1936, but that on the contrary, the said alleged Act was not engrossed, was not enrolled, was not signed by the’ legislative officers, ‘and was not presented to the Governor before twelve o’clock midnight on May 31st, 1935, but the same was so signed and presented after nine o’clock A. M. on Saturday, June 1st, 1935.’

The executive record of approval of the bill shows the enrolled bill on file in the office of the secretary of state was approved by the Governor on May 31, 1935. The entries in the legislative journals are in accord with the executive record of the approval of Senate Bill No. 4, by the Governor, May 31, 1935. The executive record of the Governor’s approval of the signed, enrolled bill on May 31, *607 1935, shows the bill must have been signed and presented to the Governor on May 31, 1935.

The allegations of the amended alternative writ that the bill was not enrolled and was not signed by the legislative officers ‘and was not presented to the Governor’ until after May 31, 1935, is contrary to the executive record showing the approval of the bill by the Governor on May 31, 1935. The Governor is not a party to this action, and there is no allegation of fraud or misconduct of any nature. See *Amos v. Gunn*, 84 Fla. 285, text 345, 94 So. 615, 635.

The words ‘signed by the legislative officers,’ as used in this statement and in the opinion herein, have reference to the president and secretary of the Senate and the speaker and clerk of the House of Representatives, who are required by the Constitution to sign all bills passed by the Legislature. Section 17, art. 3. See, also, section 6, art. 3, Constitution.

Opinion

WHITFIELD, Chief Justice (after stating the facts as above).

This is a mandamus proceeding ancillary to a quo warranto action brought by the Attorney General of Florida to test the legal right of Hon. Uly O. Thompson to continue to exercise the powers and duties of a circuit judge of the Eleventh judicial circuit of Florida, notwithstanding the enactment of Senate Bill No. 4, now published as chapter 17085, Laws of Florida, Acts 1935. See *State ex rel. Landis v. Thompson*, 120 Fla. 860, 163 So. 270; *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192. The original alternative writ of mandamus in this case was quashed with leave to amend. *State ex rel. Thompson v. Davis, Secy. of Senate, et al. (Fla.)* 165 So. 379. Senate Bill No. 4, chapter 17085, Acts 1935, provides for recircuiting the state of Florida into judicial circuits under section 45 of article 5 of the Constitution, adopted in 1934. The *due passage* by the Legislature of *608 Senate Bill No. 4, and its operation as chapter 17085, Laws of Florida, Acts 1935, have been adjudicated in *State ex rel. v. Thompson*, 120 Fla. 860, 163 So. 270. See, also, *State ex rel. X-Cel Stores, Inc., v. Lee (Fla.)* 166 So. 568; *State ex rel. Lane Drug Stores, Inc., v. Simpson (State ex rel. X-Cel Stores, Inc., v. Lee) (Fla.)* 166 So. 262, text 263; *State ex rel. v. Bird and Viney*, 120 Fla. 780, 163 So. 248.

In this mandamus action it is sought to show that the legislative journal entries made by the respondents Robert W. Davis, secretary of the Senate, and Weldon G. Starry, clerk of the House, purporting to record the proceedings of the last day of the regular legislative session of 1935, are not correct and truthful entries wherein such journal entries purport to show

that Senate Bill No. 4 chapter 17085, Acts 1935, was signed by the legislative officers and was presented to the Governor on May 31, 1935, the last day of the regular session; and to show that Senate Bill No. 4 was not signed by the legislative officers and was not presented to the Governor until after 9 o'clock a. m. Saturday, June 1, 1935, which time was subsequent to the expiration of the sixty days during which the Legislature could be in regular session. The constitutional limitation of sixty days for a regular session of the Legislature expired at midnight, or 12 o'clock p. m. Friday, May 31, 1935.

Matters herein discussed were not adjudicated in quashing the original alternative writ. [State ex rel. Thompson v. Davis \(Fla.\) 165 So. 379.](#)

It is contended that the Constitution requires all bills passed by the Legislature to be signed by the legislative officers *during* the sixty-day regular session and also requires the bills so signed to be presented to the Governor *before* the expiration of the sixty days limited by the Constitution *609 for a regular session of the Legislature; and that *such signing and such presentation* to the Governor *during* the sixty days of a regular session are essential to the validity as a law of a duly enacted legislative bill; and that Senate Bill No. 4 was not enrolled and signed by the legislative officers and was not presented to the Governor *during* the sixty-day limitation of the regular session of the Legislature of 1935; wherefore it is claimed that Senate Bill No. 4 never became a valid law to terminate, by the repeal of a then existing law, relator Thompson's right to continue as circuit judge in the Eleventh judicial circuit.

In the amended alternative writ of mandamus herein it is in substance alleged that the relator was in 1930 duly appointed, confirmed, and commissioned a judge of the circuit court for the Eleventh judicial circuit of the state of Florida; 'that he has since that time exercised the franchises, functions, jurisdictions and powers of said office * * * and that, although the term of the commission' expired June 6, 1935, 'he is now holding over and acting in pursuance of a continuing constitutional commission, and, by reason thereof, is exercising the functions, franchises, jurisdictions and powers as Circuit Judge of the Eleventh Judicial Circuit of Florida, because his successor has not been appointed by the Governor of the State of Florida and confirmed by the Senate of the State of Florida, as is provided by the constitution and laws of the State of Florida.'

****206 [1]** In support of the claim of the relator herein that Senate Bill No. 4 never became a valid statute to repeal a prior law and thereby to terminate relator's right to continue in

office, it is alleged in the amended alternative writ as copied in the statement, not that Senate Bill No. 4 was not duly passed by the Legislature before the end of the sixty-day *610 period of the regular session, but that Senate Bill No. 4 was not enrolled, or signed by the Legislative officers, or presented to the Governor, 'before twelve o'clock midnight on May 31st, 1935, but the same was so signed and presented after nine o'clock A. M. on Saturday, June 1st, 1935.' It is not specifically alleged that Senate Bill No. 4 was not approved by the Governor nor filed in the office of the Secretary of state May 31, 1935.

The allegations of the amended alternative writ in this case proceed upon the theory that the Constitution of this state requires all bills, passed by the Legislature during a regular session of the Legislature, to be enrolled, signed by designated legislative officers, and presented to the Governor *before* the expiration of the expressly limited sixty-day period of the regular session of the Legislature. It is not alleged that Senate Bill No. 4, the due passage of which by both Houses was completed on May 31st, 1935, was not signed by the legislative officers and presented to the Governor on that day *or* within a reasonable time thereafter, within the limitations stated in the case of [State ex rel. Cunningham v. Davis \(Fla.\) 166 So. 289](#), decided here February 25, 1936. The amended alternative writ was issued February 2, 1936, and was not further amended after the decision in the Cunningham Case.

In support of the motion to quash the amended alternative writ, it is argued by counsel for respondents that the writ should allege that Senate Bill No. 4 was not signed by the legislative officers and was not presented to the Governor *before* the expiration of the period of the legislative session *or* at any other time thereafter within the limitations stated in the Cunningham Case, *supra*. This contention is well founded.

[2] In *611 [State ex rel. Landis v. Thompson, 121 Fla. 561, 164 So. 192](#), it was in effect adjudicated that under the legislative authority conferred by section 1, article 3, of the Constitution, upon the Senate and House of Representatives, a legislative bill could not have been legally introduced in, or amended or passed by, either House of the Legislature, after 12 o'clock midnight of May 31, 1935, at which time the sixty-day period of a regular session of the Legislature expired by virtue of the limitation contained in section 2, article 3, of the Constitution, that 'regular sessions of the Legislature may extend to sixty days.'

Without in any way receding from or qualifying, but reiterating, the adjudication in *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192, as stated above, under section 1 and 2, article 3, of the Constitution, this court in *State ex rel. Cunningham v. Davis*, 166 So. 289, 574, has in effect adjudged that the peremptory command of section 17, article 3, of the Constitution, that every bill passed by the Legislature shall be signed by stated legislative officers, and that the absolute command of section 28, article 3, of the Constitution, that every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor, for his consideration, do not require the exercise of a *lawmaking discretion*, but the commanded duties are *absolute* and are intended to secure the authentication by the legislative officers and the due presentation to the Governor, of *all bills* passed by the Legislature, including *all bills* that may be passed shortly before the end of a legislative session as well as *all bills* passed earlier in the session, the Legislature having authority to pass bills at any time during the *entire* period of a session; therefore where bills are *duly passed by the Legislature during the fixed period of the session*, but such due passage is too near the last hour *612 of the session for the bills to be enrolled and signed by the legislative officers and presented to the Governor before the end of the session period, such mandatorily required signing by the legislative officers and presentation to the Governor, of such *duly passed* bills, may be done by the proper legislative officials in orderly and consecutive procedure even if the time needed to comply with the commanded absolute nondiscretionary duties extends reasonably beyond the end of the session period, the commanded duties being absolute and applicable to *all bills duly passed* by the Legislature during the expressly limited period of the legislative session, and there being no express or necessarily implied **207 limitation that such absolute duties shall be performed *during* the legislative session period.

This interpretation of sections 17 and 28 of article 3 of the Constitution is not inconsistent with section 2, article 3, of the Constitution or with the adjudication in *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192. Such interpretation cannot and does not prolong the legislative session *after* the end of the period fixed by the Constitution. Nor does it authorize any lawmaking function to be performed *after* the end of the period of the legislative session as definitely fixed and limited by section 2, article 3, of the Constitution. But such interpretation makes effective the intent of the absolute organic commands that *all* duly passed bills shall be signed by stated legislative officers and shall be presented to the

Governor. Such mandatory organic requirements are designed to secure a definite official authentication of *all* bills that may be *duly passed* during the *entire* session period, and to insure the due presentation of *all* such duly passed bills to the Governor with promptness after the expressly required authentication.

[3] *613 A bill that is *duly passed by the Legislature* before the end of the session period cannot be reconsidered or amended after the expiration of the session period, for that would be the exercise of a discretionary lawmaking power after the end of the definitely limited session period. But a bill *so duly passed* will not become a law unless it is signed by the legislative officers and presented to the Governor within the reasonable limitations of time and procedure that are necessary to effectuate the intent of the organic command that *all* bills passed by the Legislature, including bills duly passed near the end of the session period, shall be signed by designated legislative officers, and before becoming a law shall be presented to the Governor for his executive consideration.

[4] [5] Grounds of the motion to quash that are quoted in the statement raise the question whether the allegations of the amended alternative writ are legally sufficient, as against the executive record of the approval of the bill by the Governor on May 31, 1935, to show that Senate Bill No. 4 was not signed by the legislative officers and was not presented to the Governor until after 12 o'clock midnight of May 31, 1935. The *executive record* of which the court takes judicial notice shows that Senate Bill No. 4 was approved and signed by the Governor and filed in the office of the secretary of state on May 31, 1935; and such executive record cannot be challenged in this case as it is made here.

As shown by the statement herein, the indorsements, signatures, and dates upon Senate Bill No. 4, signed by the legislative officers and on file in the office of the secretary of state, include the following:

‘Approved this 31st day of May A. D. 1935.

‘David Sholtz, Governor.

*614 ‘Filed in office of Secretary of State of the State of Florida this 31st day of May A. D. 1935.

‘R. A. Gray, Secretary of State.

‘By E. C.’

In *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, this court said:

‘An allegation in a bill of complaint, attacking the validity of an act of the Legislature that a certain document on file in the office of the Secretary of State, purporting to be an official act of the Legislature, and purporting to be duly enrolled and signed by the presiding officers of the two houses of the Legislature and their respective clerks and duly approved by the Governor, is not in fact an act of the Legislature because it was never presented by that body to the Governor, nor signed by the presiding officers and clerks of the two houses of the Legislature while that body was in session, is not susceptible of proof by parol evidence or other means aliunde the legislative journals or other public records in the office of the Governor or Secretary of State. And such allegation, standing alone, which does not also affirm the existence of a public record in the office of the Governor or Secretary of State, which shows the alleged defect to exist, is not admitted by demurrer to the bill of complaint. * * *

‘A document on file in the office of the Secretary of State, purporting to be an enrolled bill duly passed by the *615 Legislature and duly signed by the presiding officers and clerks of the two houses of the Legislature, is prima facie a valid act of the Legislature, and may not be impeached by any evidence of less dignity than a public record of an official executive or legislative act. * * *

****208** ‘A document of file in the office of the Secretary of State, purporting to be an enrolled bill duly passed by the Legislature and duly signed by the presiding officers and clerks of both houses and duly approved by the Governor, is a public record of an official act of the legislative and executive departments. * * *

‘The approval by the Governor of a bill purporting to have been duly passed by the Legislature and presented to him in conformity with the requirements of section 28 of Article 3 of the Constitution, is equivalent to a certificate by the Governor that it came into his possession in due course. Such a document is a public record of a co-ordinate branch of the state government and the judicial branch of the government has no power to adjudge it to have been made in a manner not in conformity with the rules and regulations of law, in the absence of a specific and unequivocal charge of fraud on the part of the officials concerned, or the existence of some public record of equal dignity to show the abuse of authority or violation of law by them.’

[6] ‘A demurrer does not admit allegations that are not well pleaded; among them being allegations of conclusions of

law, allegations of conclusions of fact not sustained by facts alleged, allegations that are contradicted by the record in the case or by other records or matters of which the court takes judicial notice, and allegations that the law does not permit to be proven.’ *Martin v. Dade Muck Land Co.*, 95 Fla. 530, 116 So. 449, 452.

The motion to quash has the effect of a demurrer to the amended alternative writ.

The Governor is not a party to this action, and the executive record made by the Governor's approval on May 31, 1935, of Senate Bill No. 4, on file in the office of the secretary of state, of which executive record the court takes judicial notice, refutes the allegation of the amended *616 alternative writ that Senate Bill No. 4 was not presented to the Governor before 12 o'clock midnight on May 31, 1935. The enrolled bill that is signed by the legislative officers could not have been approved by the Governor on May 31, 1935, and filed in the office of the secretary of state on May 31, 1935, unless it had previously been duly signed and presented to the Governor. *Amos v. Gunn*, 84 Fla. 285, 94 So. 615.

[7] It thus appears that the allegations of the amended alternative writ are not legally sufficient to show that Senate Bill No. 4 was not signed by the legislative officers and was not presented to the Governor until after 12 o'clock midnight of May 31, 1935. The executive record of the Governor's approval of Senate Bill No. 4 and of its filing in the office of the secretary of state on May 31, 1935, imports verity and is sufficient, as against the allegations of the amended alternative writ, to show that Senate Bill No. 4 was signed by the legislative officers and was presented to the Governor on May 31, 1935.

The alternative writ alleges that Senate Bill No. 4 was not signed by the legislative officers and was not presented to the Governor until after 12 o'clock midnight of May 31, 1935. But the executive record of the approval of Senate Bill No. 4 by the Governor, and of its filing in the office of the secretary of state on May 31, 1935, is not duly challenged here, since the Governor is not a party and no wrong-doing is suggested. Such executive record sustains the journal entries made by the respondents Davis and Starry, which entries state that Senate Bill No. 4 was enrolled and was signed by the legislative officers and was ordered to be presented to, and was presented to, the Governor all on May 31, 1935. Such executive record of approval of the bill is indorsed on Senate Bill No. 4 as it *617 is enrolled and signed by the legislative officers,

thereby showing that the bill was so enrolled and signed and presented to the Governor before he approved and signed the bill, May 31, 1935, and had it filed in the office of the secretary of state May 31, 1935.

The indorsement on the enrolled bill signed by the president and secretary of the Senate that Senate Bill No. 4 ‘passed the Senate *this* 24th day of May, 1935,’ has reference to the passage of the bill by the Senate by a recorded yea and nay vote of 38 to 3 on the third reading of the bill, May 24, 1935; not to the date on which the House amendments to the bill were concurred in by the Senate or to the date on which the bill was enrolled or when it was signed by such legislative officers. The word ‘this’ is superfluous and may be disregarded. The indorsements by the Senate legislative officers on the enrolled bill, that the bill was passed by the Senate May 24, 1935, do not purport to show, even if they could legally show, that ****209** the bill was or was not amended by the House after it passed the Senate. The indorsements of the Senate legislative officers on the enrolled bill as to the date of the passage of the bill do not purport to contradict, and are not inconsistent with, the journal entries showing amendments by the House to the bill after its passage by the Senate on May 24, 1935. Amendments may be made to a bill after it has passed either House of the Legislature. Section 14, article 3, Constitution; [State v. Dillon, 42 Fla. 95, 28 So. 781](#). The House Journal shows that Senate Bill No. 4 was passed by the House by a yea and nay vote of 75 to 3 on May 30, 1935, which accords with the indorsements of the speaker and clerk of the House on the enrolled bill.

[8] The journals state that the legislative bodies severally adjourned sine die at noon on May 31, 1935; but as the ***618** Legislature could legally have remained in session until 12 o'clock midnight May 31, 1935, the journal entries stating that each House of the Legislature adjourned sine die at 12 o'clock noon on May 31, 1935, cannot invalidate Senate Bill No. 4, since it appears by the enrolled Senate Bill No. 4, that it was signed by the legislative officers and that it was approved by the Governor May 31, 1935, and that it was filed in the office of the secretary of state May 31, 1935, the legislative journals showing without question that Senate Bill No. 4 was duly passed by both houses of the Legislature.

[9] [10] Senate Bill No. 4, chapter 17085, Acts of 1935, having been duly passed by each House of the Legislature, as shown by the legislative journals not here questioned, and the enrolled bill signed by the legislative officers having been approved by the Governor, May 31, 1935, as shown by the executive record, it must be concluded on this record that Senate Bill No. 4 was signed by the legislative officers and

presented to the Governor before he approved it. This being so, the bill became a valid enactment upon its approval by the Governor. It repealed the statute under which the relator here, Hon. Uly O. Thompson, claims to hold his office as circuit judge. [State ex rel. v. Bird and Viney, 120 Fla. 780, 163 So. 248](#). The relator therefore is not shown to have a justiciable interest in the correctness of the legislative journals here involved. [State ex rel. v. Davis \(Fla.\) 165 So. 379](#).

In [Amos v. Gunn, 84 Fla. 285, 94 So. 615](#), it is alleged:

‘That the said alleged statute * * * was never signed in the respective Houses by the Speaker of the House of Representatives and the Clerk thereof and by the President of the Senate, and the Secretary thereof, or by any of them.’

That the regular session of the Legislature for the year 1921 ***619** was adjourned sine die on the 3d day of June A.D.1921.

That ‘complainant is informed and believes and so alleges that after said Legislature had adjourned as aforesaid, that on Saturday, the 4th day of June A.D.1921’ the chief clerk of said House of Representatives ‘found in his desk what appeared to be an engrossed bill.’

‘That said bill had not been enrolled, and was not signed by the Speaker or presiding officer of the House of Representatives, or by the Chief Clerk of the House of Representatives, and was not signed by the President or presiding officer of the Senate, or the Secretary of the Senate.’

That the clerk of the House of Representatives ‘had said engrossed bill copied by someone in the form in which bills are usually enrolled in the Legislature.’

It is also alleged that such bill was signed by the president and secretary of the Senate and by the speaker and clerk of the House of Representatives after the Legislature had adjourned sine die on June 3, 1921. It is also alleged that after the enrolled bill was signed, the chief clerk of the House of Representatives ‘then took the same to the Governor.’

The enrolled bill in the Amos v. Gunn Case showed it was approved by the Governor June 10, 1921. The bill of complaint prayed that the enforcement of the statute be enjoined on the ground that it was not a valid law. A general demurrer of the bill of complaint was overruled. On appeal this court reversed the order overruling the demurrer.

The opinion of the court contains the following:

‘The Governor has no power to approve a document as a bill which has passed the Legislature, unless it has been presented to him by that body with the signatures ****210** thereon of the presiding officers and clerks of the two houses, yet he approved this bill and transmitted it to the Secretary of ***620** State. It follows, therefore, that his signature attached to such bill in approval is equivalent to a certificate by him under oath that it reached his hand in due course. It is therefore a public record of a co-ordinate branch of the state government, and the judicial branch has no power to adjudge it to have been made in a manner not in conformity with the rules and regulations of law, in the absence of a specific and unequivocal charge of fraud on the part of the officials concerned, or the existence of some public record of equal dignity to show the abuse of authority or violation of law by them or the forgery of their signatures. * * *

‘The power of the Governor to certify to the approval of a law, enacted by the Legislature and presented to him for consideration, is one of the trusts of the Constitution. That he has done so in this case the record shows. And unless it appears by an executive record of equal dignity that his approval was an error or mistake, the law must stand so far as the first attack made upon it is concerned. * * *

‘The signature of the Governor to the bill is the record of an executive act in which the executive acted in a legislative capacity, says this court in [State v. Deal, 24 Fla. 293, 4 So. 899, 12 Am.St.Rep. 204](#), and [Advisory Opinion, 23 Fla. 297, 6 So. 925](#). That record in so far as it relates to the Governor's power or authority to make it, is prima facie valid, and imports verity and is unimpeachable except by an executive record of equal dignity. In announcing this doctrine we apply by analogy the journal entry rule; that is to say, as an enrolled bill in the Secretary of State's office, being the record of an official act of the Legislature, may be impeached only by the legislative journals, so the record of the executive ***621** official act may be impeached only by an executive record of equal dignity.’

In the *Amos v. Gunn* Case there was no attempt to directly impeach the legislative or the executive record as to the signing, presentation, and executive approval of the act. The act in that case was approved by the Governor June 10, 1921. The Legislature adjourned June 3, 1921.

In this case the legislative record of the signing and of the presentation to the Governor of the bill is challenged, but the

executive record of the approval of the bill by the Governor is not challenged. The executive record shows that the enrolled bill was approved by the Governor and filed in the office of the secretary of state on May 31, 1935. The sixty-day period for a regular session of the Legislature of 1935 expired at midnight May 31, 1935.

In [State ex rel. Cunningham v. Davis et al., 166 So. 289, 297](#), in a direct proceeding impeaching the legislative journals in stated particulars, this court adjudged that:

‘The implied powers of the Legislature are as potent as expressly conferred powers. The express declaration of the power of the Legislature to cause any regular session to ‘extend to sixty days’ in accordance with section 2 of article 3 of the Constitution, ex necessitate implies its right to exercise its prerogative lawmaking functions as a Legislature up until the very moment of its constitutional prerogation. This in turn implies that under sections 12, 17, and 28 of article 3 of the Constitution the 1935 Legislature was entitled to remain in session on June 1, 1935, undissolved as a parliamentary body adjourned sine die when it found such holding over and continuation of its sittings to be indispensable to enable it to comply with the express commands of sections 12, 17 and 28 of article 3 as to acts it had already constitutionally passed, but which had not ***622** been duly authenticated as such and presented to the Governor, during the sixty days’ period prescribed by section 2 of article 3.’

This case directly challenges particular entries in the legislative journals for May 31, 1935, the last day of the regular session of the Legislature in 1935. It is alleged in the amended alternative writ of mandamus:

That the ‘respondents have * * * included’ in the journal entries ‘the false statements that * * * said alleged Senate Bill No. 4 was * * * enrolled and signed by the respective officers of the House and Senate and presented to and approved by the Governor on May 31st, 1935. * * *

‘That said alleged chapter 17085 was not, in fact, engrossed, enrolled, signed, presented, and approved, as it purports to be, on May 31st, 1935, but, on the contrary, the said alleged act was not engrossed, ****211** was not enrolled, was not signed by the President of the Senate of the State of Florida and the said Secretary of the said Senate, was not signed by the Speaker of the House of Representatives of the State of Florida and was signed by the said Chief Clerk of the House of Representatives of the State of Florida, and was not presented to the Governor before twelve o'clock midnight on May 31st,

1935, but the same was so signed and presented after nine o'clock A. M. on Saturday, June 1st, 1935.'

In the last above-quoted paragraph it is alleged that the act was not 'approved as it purports to be, on May 31, 1935'; but the word 'approved' is not included in the subsequent allegations in the same sentence and paragraph.

The approval of the bill by the Governor before the expiration of the sixty-day limitation of the legislative session was not essential to the validity of the act, because the act would become a law if the Governor did not veto it *623 within ten days after the final adjournment of the Legislature. Section 28, article 3, Constitution. But in this case the executive record of the approval of the bill by the Governor on May 31, 1935, is sufficient to withstand the allegation that the bill was not enrolled, signed, or presented to the Governor before midnight of May 31, 1935, 'but the same was so signed and presented after nine o'clock A. M. on Saturday, June 1st, 1935.'

Similar allegations in *Amos v. Gunn* were overcome by an executive record showing the bill in that case was approved by the Governor on June 10, 1921, seven days after the expiration of the sixty-day session and the final adjournment of the Legislature on June 3, 1921.

The enrolled bill, signed by the president and secretary of the Senate and by the speaker and clerk of the House of Representatives, shows it was approved by the Governor May 31, 1935; and that executive record is not duly challenged here. If the enrolled bill was approved and signed by the Governor May 31, 1935, it must have been duly signed and presented to the Governor prior to his official approval of the bill on May 31, 1935, when the Legislature could have been in regular session. In the *Amos v. Gunn* Case the Legislature adjourned since die on June 3, 1921, and the litigated act was approved by the Governor June 10, 1921. In this case the session term ended at midnight May 31, 1935, and the challenged act was approved on May 31, 1935, as shown by the enrolled bill, and the executive record of approval is not challenged here. As the executive record of the approval of the bill by the Governor on May 31, 1935, is not impeached, the allegation that the bill was signed and presented to the Governor after 9 o'clock a. m. on Saturday June 1, 1935, is insufficient *624 and the alternative writ should be quashed with leave to amend.

It is so ordered.

TERRELL, BUFORD, and DAVIS, JJ., concur.

ELLIS, P. J., and BROWN J., dissent.

ELLIS, Presiding Justice (dissenting).

The majority opinion rests upon two independent hypotheses eight one of which, if true, is sufficient to support the conclusion reached. One of those hypotheses definitely repudiates the law as announced in the case of *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, and reaffirmed in the case of *State ex rel. Cunningham v. Davis* (Fla.) 166 So. 289, 294. In the other the law as announced in the *Gunn* Case, supra, is definitely adopted and affirmed.

The first hypothesis is that a bill passed by the Legislature may be enrolled and 'signed by stated Legislative officers' and 'presented to the Governor' after the constitutional legislative regular session has expired by limitation of time, if such enrolling, signing, and presentation to the Governor are done within *reasonable* time 'beyond the end of the session period.'

In the *Gunn* Case, supra, it was held, first, that the constitutional provision requiring presiding officers and clerks of each House of the Legislature to sign all bills is mandatory; second, that such signing of bills 'must be done in open session of the house over which the officer signing is then presiding and to which the clerk signing is attached'; third, that no bill passed by the Legislature can become a law until it has been presented by the Legislature to the Governor; fourth, that such presentation *can* be made by the Legislature *only* while in session.

In the *Cunningham* Case, supra, this court said, referring to the *Gunn* Case, supra: 'To that opinion we still adhere, *625 and so holding, we here and now approve and reaffirm the principles of law that were **212 therein set forth in the opinion of Mr. Justice Ellis as the views of a majority of this court in the premises.' That statement was made after setting forth the principles referred to above in the language which was used in the *Gunn* Case. In the *Gunn* Case Mr. Justice Whitfield and Mr. Justice West were of the opinion that the 'constitution does not require duly passed bills to be signed by the legislative officers in open session or before final adjournment, and does not make such signing in open session a prerequisite to the effectiveness of the act, and does not require such bills to be presented to the Governor before adjournment.' See *Gunn* Case, 84 Fla. 285, text 382, 94 So. 615, 647. Mr. Chief Justice Browne, Mr. Justice Taylor, and

the writer of this opinion agreed that the bills duly passed by the Legislature were required by the Constitution to be signed by the proper officers of the legislative session in open session and presented to the Governor only while in session.

The Cunningham Case restated and reaffirmed that doctrine.

I believe that the reason advanced in support of those views has never been answered and, indeed, cannot be where all provisions of the Constitution as to lawmaking power are considered. The term 'lawmaking discretion,' as used in the majority opinion, has no application whatsoever under our system of government in so far as the term is sought to be applied to the modus operandi in exercising legislative power. The lawmaking power is absolutely controlled by the express words of the Constitution. In the act of 'making' a law, in the physical sense of formulating the proposition and preparing it for presentation to the Governor *626 after it has been voted on and adopted or passed by the Legislature, there is no discretion whatsoever in the Legislature because the Constitution prescribes how that shall be done. Such was the holding in the cases of *Amos v. Gunn*, supra, and *State ex rel. Cunningham v. Davis*, supra.

If the term 'lawmaking discretion' applies to the wisdom or policy of the Legislature in enacting the measure as one for the welfare of the state in the exercise of legislative power, the term has no application whatsoever as the policy, wisdom, or reasonableness of the act is in no wise involved in this litigation, therefore to use the term in that sense in this case can only produce confusion of thought, distraction, embarrassment in the mental processes.

The term 'discretion' as applied to legislative activities is appropriate only when legislative power is constitutionally exercised for the public welfare. As to the mental activity of the Legislature in formulating and enacting a measure, the term 'discretion' has been applied. What is good and wise is for legislative judgment. In that matter only has this court spoken of legislative discretion. See [Davis v. Florida Power Co.](#), 64 Fla. 246, 60 So. 759, Ann.Cas.1914B, 965; [Everglades Sugar & Land Co. v. Bryan](#), 81 Fla. 75, 87 So. 68; [Board of Com'rs of Hillsborough County v. Savage](#), 63 Fla. 337, 58 So. 835.

The term 'lawmaking discretion' has no place in the terminology of lawmaking activities as the same relate to the ministerial or mechanical processes by which the legislative will may expressed in duly enacted statutes. To use the term is to introduce a misleading and confusing

thought relating to legislative power in contravention of the express letter of the Constitution. It is to exert legislative power in violation of the 'organic' law, to subordinate the Constitution to the legislative convenience, to *627 paralyze the Constitution in its inhibitions against disorderly, capricious, or desultory lawmaking activities by eliminating well-chosen words directing how and in what manner the enormous power of enacting laws may be exercised by 'legislative authority'; it amounts to judicial amendment of the Constitution, to setting at naught the will of the people, as expressed in that document called their 'organic law.'

The term 'absolute' duties, as used in the majority opinion, is likewise misused as intending to convey the idea that 'legislative officers' are required to authenticate measures voted upon affirmatively by the Legislature. There is no such term as 'legislative officers' used in the Constitution. The speaker of the House and the clerk, the president of the Senate and secretary, are merely parliamentary agents of the numerous members of the Legislature, each and every one of whom is a 'legislative officer' in the sense that their duties relate to the enactment of laws. See [State v. Kelly](#), 103 Mo.App. 711, 77 S.W. 996; [O'Grady v. Polk](#), 132 App.Div. 47, 446 N.Y.S. 290; 446 N.Y.S. 290; [Braithwaite v. Cameron](#), 3 Okl. 630, 38 P. 1084.

The president of the Senate and speaker of the House are merely 'presiding officers' **213 of the deliberative body which at each regular session the two Houses are required to choose from among its own members. Section 6, art. 3, Const.1885.

The designation by the Constitution of the president of the Senate and, in case of his death or inability to act, the speaker of the House, as persons upon whom in a given situation the powers and duties of Governor shall devolve, set on 19, art. 4, Const., confers no official powers upon them as 'legislative officers' in addition to their powers as members of the Legislature. There are merely two members *628 of the Legislature upon whom the powers of Governor shall devolve in certain circumstances. No such provision exists as to the secretary of the Senate or clerk of the House of Representatives, yet their signatures are as essential to the bill as passed as the signature of the presiding officers. Section 17, art. 3, Const. The secretarial employees of the two Houses cannot be said to be 'legislative officers.' They are merely parliamentary agents or clerks of the Legislature, who perform their duties while the session of the Legislature, their principal, is in existence. Their duties as such agents cease when the session ends. To hold that they have any official

capacity as 'legislative officers' is to ignore the meaning of words and create a governmental functionary from the substance of which sleeping visions are made; certainly not from any material existing in the Constitution.

The use of those terms 'lawmaking discretion' and 'absolute duties' introduces into the concept of legislative power two elements which, as applied to the method of preparing a proposition or bill to be considered and voted upon and after its passage for authentication and submission to the Governor, have no place in the constitutional power of bringing a proposition submitted to the Legislature into fruition as a lawfully enacted statute.

No discretion exists in the manner prescribed by the Constitution as to how a bill shall be read; none exists as to how the final vote shall be taken. Neither does any discretion exist as to how and by whom and when the bill as passed shall be signed and presented to the Governor. Those are duties about which there can be no discretion if the Constitution is to be observed. The signing of a bill by certain agents of the deliberative body is as certainly and *629 definitely required as any other legislative duty imposed by the Constitution.

The majority opinion seems to concede that bills 'duly passed,' that is to say, within the period of sixty-day session, must be presented by the presiding officers of the two Houses and the secretary and clerk thereof to the Governor 'within the reasonable limitations of time and procedure that are necessary to effectuate the intent of the organic command that *all* bills passed by the legislature' shall be presented to the Governor.

What are the 'reasonable limitations of time and procedure'? One looks in vain to the Constitution for any standard by which the time or the procedure may be determined to be reasonable if the bills so duly passed may be presented after the expiration of the constitutional limitations of time and procedure in which it may be done. So the conclusion is forced upon the majority that the court must determine from evidence outside the legislative journals just what 'time and procedure' are necessary in every case when the question is presented. There is no requirement in constitutional provisions that a bill 'duly passed' shall be immediately signed by the presiding officers and clerks and presented to the Governor for his approval or disapproval. May the presiding officers therefore postpone the time for signing them and the observance of such other 'procedure,' which the opinion vaguely mentions, until after the expiration of the sixty-day period during which the Legislature may

be constitutionally in regular session, and thus in the circumstances defer the observance of such procedure and the signing and presentation of the bills so passed for ten days or more, and thus set aside another constitutional requirement that the Governor shall have five days after presentation to him in which to return it, if he *630 desires, with his objections to the House in which it originated?

Will another provision thus be set aside which allows the Governor ten days after adjournment of the Legislature to veto a bill passed, otherwise it shall be a law? Section 28, art. 3, Const. 1885.

I am of the opinion that the first hypothesis upon which the majority opinion rests is unsound and cannot be logically sustained under the Constitution.

The second hypothesis on which the opinion rests is that the allegations of the alternative writ are 'legally insufficient as against the Executive record of the approval of the bill by the Governor on May 31st, **214 1935,' to show that the bill was not signed by 'legislative officers and was not presented to the Governor until after twelve o'clock midnight of May 31st, 1935.'

It is difficult to perceive why that point should be mentioned at all in view of the conclusion at which the majority had already arrived; that the signing of the bill and its presentation to the Governor was not necessary to be done within the constitutional period of sixty days during which the legislature could be legally in session but that such signing and presentation could be legally done within a reasonable time thereafter.

The allegations of the writ are sufficient to definitely and clearly present the point. It definitely alleges that the bill, chapter 17085, Laws 1935, was not engrossed, enrolled, signed, presented, and approved on May 31, 1935, but on the contrary that it was not done before 12 o'clock midnight on May 31, 1935, or at any time prior thereto. Surely if it was not done prior thereto and was done at all, it must have been done after that date.

*631 This mandamus proceeding was begun to compel Davis as secretary of the Senate and Starry as clerk of the House to correct the journal entries of May 31, 1935, so as to speak the truth in conformity to the duty with which they were charged specifically by concurrent resolution. The motion to quash the writ admitted its allegations well pleaded.

In the case of *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192, 196, this court held that the court may inquire into the question on direct attack. The court also held that recitals of legislative action which did not occur before the legislative session became functus officio (*false entries*) may be expunged; that where the legislature had exceeded its '*jurisdiction as a Legislature*' by continuing in session beyond its '*allotted constitutional total number of sixty days*,' the conclusive legal presumption that ordinarily attaches to legislature records does not attach, Const. art. 3, § 2; that the court has authority when private legal rights are shown to be prejudiced by unauthorized acts of 'legislative officials' to judicially coerce clerical officers of the Legislature to stay within bounds of delegated authority in making up what purports to be legislative records. *State v. Thompson*, supra.

The pleadings in this case having established the fact that certain recitals of legislative action in what purported to be the legislative journal of May 31, 1935, did not occur before the legislative session became functus officio and that such entries were false, this court either has or has not the authority to coerce the legislative clerks to make the corrections necessary to a truthful recital of the transactions.

The Thompson Case, supra, held that the court has such authority, and in the Cunningham Case, supra, this court held, as does the majority opinion in this case, that the so-called 'legislative officers,' meaning thereby the presiding *632 officers of the two Houses and their clerks, have not only the power but it is their duty to remain at the capital after the sixty-day regular session of the Legislature has

expired by constitutional limitation of time to complete their 'absolute duties,' meaning thereby the enrollment, signing, and presentation of the 'duly passed' bills to the Governor. If that is true, then such 'legislative officers,' the clerks, have not only the authority, but it is their duty, to make correct recital of the transactions occurring after the legislative session has become functus officio by expiration of the sixty-day limit. Then, if they have such authority, the entries become when correctly made and not falsely made a legislative record. So it follows that the case of *Amos v. Gunn*, heretofore cited to another point, has no bearing whatsoever upon this point.

I think the case of *Amos v. Gunn*, supra, is authority for both propositions of law, viz.: First, that a bill duly passed by the Legislature must be signed by the proper officers of the Legislature in open session and by the Legislature through its authentic agencies during the session presented to the Governor. That point was *precisely* determined. Second, that a legislative and executive public record is made in due course of official action without fraud or deception. Such record may not be successfully attacked in the absence of another public record of equal dignity contrary thereto. Believing such to be the law of the land, I am necessarily of the opinion that the motion to quash the alternative writ should be overruled.

BROWN, J., concurs.

All Citations

124 Fla. 592, 169 So. 199

From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: Advisory Opinion - Cases
Date: Thursday, January 13, 2022 9:16:00 AM
Attachments: [In re Advisory Opinion to the Governor \(2\).pdf](#)
[In re Advisory Opinion to the Governor.pdf](#)
[In re Executive Communication.pdf](#)
[Opinion to the Governor.pdf](#)
[Advisory Opinion to Governor.pdf](#)
[Advisory Opinion to Governor--1996 Amendment 5 \(Everglades\).pdf](#)
[In re Advisory Opinion to the Governor \(1\).pdf](#)

Here are a few advisory opinion cases that may be a useful start. [REDACTED]
[REDACTED] Have to run to a doctor's appointment, but see y'all soon!

--
Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

150 So.2d 721
Supreme Court of Florida.

In re ADVISORY OPINION TO THE GOVERNOR.

Jan. 31, 1963.

Synopsis

A question was propounded by the governor to the justices of the Supreme Court as to his executive powers and duties with regard to legislative reapportionment. The Justices of the Supreme Court were of the opinion that a federal court decision that state constitutional and statutory provisions for reapportionment, [F.S.A.Const. art. 7, § 3](#), are prospectively void for violation of equal protection of the laws requirement of the United States Constitution, [U.S.C.A.Const. Amend. 14](#), eliminated from state Constitution provisions limiting the size of the legislature and that the governor has power to continue to call recurring extraordinary sessions of the legislature until a reapportionment bill in conformity with the Fourteenth Amendment is enacted.

Question answered.

West Headnotes (3)

[1] Courts 🔑 Questions submitted by Legislature or Governor or other officer

Governor's request for judicial advice as to his executive powers and duties with regard to reapportionment of state legislative districts was justified, in view of federal court decision as to invalidity of state constitutional and statutory provisions for reapportionment and necessity for prompt action to comply with requirements of United States Constitution. [F.S.A.Const. art. 4, §§ 6, 8, 13](#); [art. 7, §§ 1 et seq., 3](#); art. 16, § 2; [U.S.C.A.Const. Amend. 14](#).

4 Cases that cite this headnote

[2] Federal Courts 🔑 Elections, voting, and political rights

United States district court had jurisdiction to determine whether state constitutional

and statutory provisions for legislative reapportionment violate the equal protection of the laws requirement of United States Constitution and power to enforce compliance with such requirement. [F.S.A.Const. art. 7, § 3](#); [U.S.C.A.Const. Amend. 14](#).

1 Cases that cite this headnote

[3] States 🔑 Constitution in general

States 🔑 Sessions and meetings

Federal court decision that state constitutional and statutory provisions for reapportionment of state legislative districts are prospectively void for violations of equal protection of laws requirement of United States Constitution eliminated from state Constitution provisions limiting size of legislature, and governor has power under state Constitution to continue to call recurring extraordinary sessions of legislature until reapportionment bill in conformity with Fourteenth Amendment is enacted. [F.S.A.Const.](#)

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3 Cases that cite this headnote

*721 PER CURIAM.

SUPREME COURT OF FLORIDA

Tallahassee

January 30, 1963

Honorable Farris Bryant

Governor of Florida

The Capitol

Tallahassee, Florida.

Dear Governor:

We have the honor to acknowledge your communication of January 29, 1963, requesting our advice pursuant to [Article IV, Section 13, Florida Constitution, F.S.A.](#), regarding certain executive powers and duties under the Constitution.

Omitting the formal parts, your letter reads as follows:

‘In March of 1962, two cases, styled Sobel vs. Adams and Swann vs. Adams, were filed in the District Court of the United States in and for the Southern District of Florida. These suits were designed to question the constitutionality of the Florida constitutional and statutory provisions relating to apportionment. The District Court, on July 23, 1962, entered an Interlocutory Judgment declaring the existing constitutional ^{*722} constitutional and statutory provisions of the Florida Constitution, relating to the apportionment and reapportionment for the nomination and election of the Senate and House of Representatives of the Florida Legislature, to be invidiously discriminatory and repugnant to the equal protection clause of the Federal Constitution and, therefore, prospectively null, void and inoperative. There is attached hereto the complete text of the above-mentioned Order and the Opinion ¹ rendered pursuant thereto.

‘An extra session of the Florida Legislature was convened on August 1, 1962, pursuant to my Executive Order calling the Legislature into session for the sole and exclusive purpose of considering reapportionment. After ten days of deliberation, the Legislature passed House Joint Resolution No. 30–X providing for 135 House members and 46 Senators. On September 5, 1962, the District Court entered its Order and Opinion ² wherein it was stated that this reapportionment proposal satisfied the requirements of the Equal Protection clause of the Federal Constitution. There is attached hereto the complete text of the above-mentioned Order and Opinion rendered pursuant thereto.

‘This proposed constitutional amendment was placed on the ballot for the General Election on November 6, 1962, at which time the amendment failed of adoption by a vote of 373,259 to 306,442. Subsequent to the General Election, the Legislature was again called into extra session on November 9, 1962, and labored until November 28, 1962, at which time the extra session terminated by operation of law without effecting a solution to the apportionment problem.

‘The responsibility for apportionment of the membership of the Florida Legislature is delegated to that body by the Florida Constitution. In an effort to preserve to the elected representatives of the people of Florida this decision-making

power, I entered my Executive Order of January 23, 1963, again calling into extra session the Florida Legislature for the sole and exclusive purpose of considering reapportionment.

‘The Florida Senate, on January 29, 1963, passed Senate Bill No. 1–X(63) providing for the reapportionment of the Senate by statutory means in conflict with Article VII of the Florida Constitution, which action ripened the doubts created by the Federal Court’s action.

‘In view of the Federal Court’s decision and the resulting doubt cast on the composition of the Florida Legislature, it is felt that unless a proper legal course is followed by me as Chief Executive and by the Legislature, there is a distinct possibility that Florida will be without a legally constituted Legislature for the ensuing regular session. The State, therefore, is facing a serious crisis in that it may be without legal methods to provide the necessary governmental services to the people of Florida.

‘[Article VII, Section 3, Constitution of Florida](#), among other things, provides: ‘* * * In the event the Legislature shall fail to reapportion the representation in the Legislature as required by this amendment, the Governor shall (within thirty days after the adjournment of the regular session), call the Legislature together in extraordinary session to consider the question of reapportionment and such extraordinary session of the Legislature is hereby mandatorily required to reapportion the representation as required by this Amendment before its adjournment (and such extraordinary session so called for reapportionment shall not be limited to expire at the end of twenty ^{*723} days or at all, until reapportionment is effected, and shall consider no business other than such reapportionment).’

‘[Article IV, Section 6, of the Florida Constitution](#) imposes upon me, as Chief Executive, the responsibility to ‘take care that the laws be faithfully executed.’ Upon assuming my official duties as Governor, pursuant to the requirements of Article XVI, Section 2, of the Florida Constitution, I solemnly swore to uphold the Constitutions of the United States of America and of the State of Florida. As a result of the above-mentioned action of the District Court and the divergency of views as to the legal effect of such action, I am in grave doubt as to the proper exercise of my executive powers and duties in the handling of affairs of state, including my obligation to see that the laws are faithfully enforced and the exercise of my power of executive veto; and the holding of the Legislature in continuous session by recurring calls.

‘In light of the foregoing responsibilities imposed upon me by the Constitution of the State of Florida and in view of the critical conditions existing by reason of the Federal District Court decision, from which an appeal has not been taken, I have the honor to request your advisory opinion pursuant to the authority vested in me by [Article IV, Section 13, of the Florida Constitution](#) on the following question, affecting my executive powers and duties:

‘Do I have the power and is it my duty to call recurring sessions of the Florida Legislature until reapportionment is accomplished under Article VII, Constitution of Florida?’

Implicit in your inquiry is your justifiable executive concern regarding your duties under the Florida Constitution as affected by the Constitution of the United States and the interlocutory decrees of the United States District Court in *Sobel v. Adams* and *Swann v. Adams*.

[1] We understand that you are seeking advice as to your executive responsibilities under [Article IV, Section 6, Florida Constitution](#), which directs that ‘[t]he Governor shall take care that the laws be faithfully executed,’ and under [Section 3, Article VII, Florida Constitution](#), relating to the calling of extraordinary reapportionment sessions of the Legislature. In view of the decisions of the United States District Court in the cases mentioned, you have considered it to be your duty to call the Legislature into extra session pursuant to [Article IV, Section 8, Florida Constitution](#), and to [Section 3, Article VII, Florida Constitution](#), and have done so. By the decrees above mentioned, the United States Court has imposed upon the State of Florida the obligation to reapportion the Legislature ‘in compliance with the requirement of the United States Constitution,’ which the Federal Court held prohibits State action denying equal protection of the laws under the Constitution of the United States. That Court decreed that the obligation of the State was of such urgency that it should be performed with dispatch. We have concluded that, in view of the pronounced urgency, that you, the Chief Executive, are justified in seeking advice regarding the executive powers and duties set forth in your question hereinabove presented.

We take note that the aforementioned Federal Court, with reference to the provisions of the Florida Constitution relating to reapportionment said:

‘The Court concludes and hereby determines that the existing constitutional and statutory provisions relating to the apportionment and reapportionment for the nomination and election of the Senate and the House of Representatives of the Florida Legislature are invidiously discriminatory against the plaintiffs and others similarly situated, and deny to them equal protection of the law as guaranteed by the Constitution *724 of the United States. *Said provisions are hereby found and declared to be prospectively null, void and inoperative.*’ (Emphasis supplied.)

The opinion of the Federal Court, on which the above judgment rests, said, among other things:

‘If, at the end of that period, the Florida Legislature has been convened in special session for effectuating, *by legislation* or by amendment to the Florida Constitution, or both; or if at that time some other state action has been undertaken, an application for a further continuance would be looked upon with favor. Otherwise the Court will then proceed to fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection.’ (Emphasis supplied.)

[2] [3] It therefore appears that the controlling question giving you concern is whether or not the judgment of the aforementioned Federal Court dated July 23, 1962, has eliminated from the Constitution of Florida the State organic limitation on the House and Senate. We think the language is clear and unequivocal wherein the Federal Court said, ‘Said provisions are hereby found and declared to be prospectively null, void and inoperative.’ The only doubt might rest with whether or not the Court had jurisdiction to so order. Without conceding the right, we must concede the power, of the Federal judicial system to enforce its judgment in this cause. The jurisdiction is settled in view of the pronouncement of the Supreme Court of the United States in [Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663](#). And so it is that the decision of the Federal Court, *supra*, in this cause has eliminated the limitations provided in the Florida Constitution on the size of the House and Senate, and you have the power to continue to call recurring extra sessions under [Section 8, Article IV, Florida Constitution](#), until such times as a reapportionment bill is enacted by the Legislature in conformity with the Fourteenth Amendment of the Constitution of the United States, notwithstanding the aforesaid limitations as they were prior to the decision of the Federal Court, *supra*, on July 23, 1962, and which have been by virtue of that decree invalidated.

Respectfully submitted,

B. K. ROBERTS, Chief Justice

GLENN TERRELL,

ELWYN THOMAS,

E. HARRIS DREW,

STEPHEN C. O'CONNELL,

MILLARD F. CALDWELL, Justices

All Citations

150 So.2d 721

Footnotes

1 See 208 F.Supp. 316.

2 See 208 F.Supp. 319.

End of Document

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‘In view of the Federal Court’s decision and the resulting doubt cast on the composition of the Florida Legislature, it is felt that unless a proper legal course is followed by me as Chief Executive and by the Legislature, there is a distinct possibility that Florida will be without a legally constituted Legislature for the ensuing regular session. The State, therefore, is facing a serious crisis in that it may be without legal methods to provide the necessary governmental services to the people of Florida.

‘[Article VII, Section 3, Constitution of Florida](#), among other things, provides: ‘* * * In the event the Legislature shall fail to reapportion the representation in the Legislature as required by this amendment, the **Governor** shall (within thirty days after the adjournment of the regular session), call the Legislature together in extraordinary session to consider the question of reapportionment and such extraordinary session of the Legislature is hereby mandatorily required to reapportion the representation as required by this Amendment before its adjournment (and such extraordinary session so called for reapportionment shall not be limited to expire at the end of twenty ***723** days or at all, until reapportionment is effected, and shall consider no business other than such reapportionment).’

‘[Article IV, Section 6, of the Florida Constitution](#) imposes upon me, as Chief Executive, the responsibility to ‘take care that the laws be faithfully executed.’ Upon assuming my official duties as **Governor**, pursuant to the requirements of Article XVI, Section 2, of the Florida Constitution, I solemnly swore to uphold the Constitutions of the United States of America and of the State of Florida. As a result of the above-mentioned action of the District Court and the divergency of views as to the legal effect of such action, I am in grave doubt as to the proper exercise of my executive powers and duties in the handling of affairs of state, including my obligation to see that the laws are faithfully enforced and the exercise of my power of executive **veto**; and the holding of the Legislature in continuous session by recurring calls.

‘In light of the foregoing responsibilities imposed upon me by the Constitution of the State of Florida and in view of the critical conditions existing by reason of the Federal District Court decision, from which an appeal has not been taken, I have the honor to request your **advisory opinion** pursuant to the authority vested in me by [Article IV, Section 13, of the Florida Constitution](#) on the following question, affecting my executive powers and duties:

‘Do I have the power and is it my duty to call recurring sessions of the Florida Legislature until reapportionment is accomplished under Article VII, Constitution of Florida?’

Implicit in your inquiry is your justifiable executive concern regarding your duties under the Florida Constitution as affected by the Constitution of the United States and the interlocutory decrees of the United States District Court in *Sobel v. Adams* and *Swann v. Adams*.

[1] We understand that you are seeking advice as to your executive responsibilities under [Article IV, Section 6, Florida Constitution](#), which directs that ‘[t]he Governor shall take care that the laws be faithfully executed,’ and under [Section 3, Article VII, Florida Constitution](#), relating to the calling of extraordinary reapportionment sessions of the Legislature. In view of the decisions of the United States District Court in the cases mentioned, you have considered it to be your duty to call the Legislature into extra session pursuant to [Article IV, Section 8, Florida Constitution](#), and to [Section 3, Article VII, Florida Constitution](#), and have done so. By the decrees above mentioned, the United States Court has imposed upon the State of Florida the obligation to reapportion the Legislature ‘in compliance with the requirement of the United States Constitution,’ which the Federal Court held prohibits State action denying equal protection of the laws under the Constitution of the United States. That Court decreed that the obligation of the State was of such urgency that it should be performed with dispatch. We have concluded that, in view of the pronounced urgency, that you, the Chief Executive, are justified in seeking advice regarding the executive powers and duties set forth in your question hereinabove presented.

We take note that the aforementioned Federal Court, with reference to the provisions of the Florida Constitution relating to reapportionment said:

‘The Court concludes and hereby determines that the existing constitutional and statutory provisions relating to the apportionment and reapportionment for the nomination and election of the Senate and the House of Representatives of the Florida Legislature are invidiously discriminatory against the plaintiffs and others similarly situated, and deny to them equal protection of the law as guaranteed by the Constitution *724 of the United States. *Said provisions are hereby found and declared to be prospectively null, void and inoperative.*’ (Emphasis supplied.)

The opinion of the Federal Court, on which the above judgment rests, said, among other things:

‘If, at the end of that period, the Florida Legislature has been convened in special session for effectuating, *by legislation* or by amendment to the Florida Constitution, or both; or if at that time some other state action has been undertaken, an application for a further continuance would be looked upon with favor. Otherwise the Court will then proceed to fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection.’ (Emphasis supplied.)

[2] [3] It therefore appears that the controlling question giving you concern is whether or not the judgment of the aforementioned Federal Court dated July 23, 1962, has eliminated from the Constitution of Florida the State organic limitation on the House and Senate. We think the language is clear and unequivocal wherein the Federal Court said, ‘Said provisions are hereby found and declared to be prospectively null, void and inoperative.’ The only doubt might rest with whether or not the Court had jurisdiction to so order. Without conceding the right, we must concede the power, of the Federal judicial system to enforce its judgment in this cause. The jurisdiction is settled in view of the pronouncement of the Supreme Court of the United States in [Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663](#). And so it is that the decision of the Federal Court, *supra*, in this cause has eliminated the limitations provided in the Florida Constitution on the size of the House and Senate, and you have the power to continue to call recurring extra sessions under [Section 8, Article IV, Florida Constitution](#), until such times as a reapportionment bill is enacted by the Legislature in conformity with the Fourteenth Amendment of the Constitution of the United States, notwithstanding the aforesaid limitations as they were prior to the decision of the Federal Court, *supra*, on July 23, 1962, and which have been by virtue of that decree invalidated.

Respectfully submitted,

B. K. ROBERTS, Chief Justice

GLENN TERRELL,

ELWYN THOMAS,

E. HARRIS DREW,

STEPHEN C. O'CONNELL,

MILLARD F. CALDWELL, Justices

All Citations

150 So.2d 721

Footnotes

1 See 208 F.Supp. 316.

2 See 208 F.Supp. 319.

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23 Fla. 297
Supreme Court of Florida.

In re EXECUTIVE COMMUNICATION
CONCERNING POWERS OF LEGISLATURE. ¹

May 9, 1887.

West Headnotes (2)

- [1] **Constitutional Law** 🔑 **Constitutionality of Statutes or Acts of Other Branches in General**
F.S.A. Const. art. 4, § 13, which authorizes the **governor** to apply to the judges of the Supreme Court as to the interpretation of any portion of the constitution on any question affecting “his executive powers and duties,” does not authorize the judges to give an opinion as to what character of bills it would be unconstitutional for the legislature to pass, and the **governor's** duty to **veto**, as the duty of the **governor** to approve or disapprove bills is legislative in its character.

[9 Cases that cite this headnote](#)

- [2] **Courts** 🔑 **Questions Submitted by Legislature or Governor or Other Officer**
F.S.A. Const. art. 4, § 13, which authorizes the Governor to apply to the judges of the Supreme Court for the interpretation of the Constitution on any question affecting “his executive powers and duties,” does not authorize the judges to give an opinion as to what character of acts it would be unconstitutional for the Legislature to pass, as the governor's duty to approve or disapprove bills is legislative in its character.

[10 Cases that cite this headnote](#)

Opinion

****925** On May 9, 1887, the governor addressed the following communication to the justices of the supreme court:
***297** ‘EXECUTIVE OFFICE.

‘TALLAHASSEE, FLA., May 9, 1887.

‘To the Honorable the Justices of the Supreme Court of the State of Florida: If, in your judgment, it is a case in which your opinion can be properly required, I have the honor to ask your interpretation of section 21 of article 3 of the constitution, as to what character of bills, if any, the legislature, at its present session, is by said section denied the power to pass, and which, when submitted to me, it will be my duty, for that reason, to disapprove, though said bills may be otherwise unobjectionable.

‘Very respectfully,

E. A. PERRY.’

The justices responded as follows:

***298** ‘SUPREME COURT ROOM, STATE OF FLORIDA.

‘TALLAHASSEE, FLA., May 10, 1887.

‘Hon. Edward A. Perry, governor of the State of Florida-Sir: Your communication was received to-day, and has been considered by us. The question asked by you involves the construction of section 13, art. 4, of the constitution. The section is as follows: ‘The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing.’ Unlike the constitutions of some of the other states of the Union, which authorize the governor, or either branch of the legislature, to require to opinion of the justices of the supreme court, our constitution restricts such right to the governor alone. It further restricts the right of the governor to require such opinions on questions ‘affecting his executive powers and duties.’ Is the opinion you desire one relating to your ‘executive powers and duties?’ The exact legal meaning of the word ‘executive’ has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution, before the duty of executing it can exist. Any duty imposed by the constitution on the governor with reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and, when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is ***299**

legislative, and is performed by you as a part of the lawmaking power, and not as the law-executing power. We are of the opinion that the question affects a legislative duty imposed by the constitution; and, believing that a compliance on our part with your request is unauthorized by the constitution, we, with great respect for your excellency, beg to be excused from expressing opinions on the question submitted.

Very respectfully,

‘GEO. G. McWHORTER, Chief Justice.’

All Citations

23 Fla. 297, 6 So. 925

Footnotes

1 From 23 Fla. 297.

End of Document

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239 So.2d 1
Supreme Court of Florida.

In re Advisory OPINION TO THE GOVERNOR.

No. 39823.
|
July 1, 1970.

Synopsis

A question was propounded by the Governor to the Justices of the Supreme Court relating to the validity of the 1970 General Appropriations Act and other matters. The Justices of the Supreme Court were of the opinion that 1970 General Appropriations Act, against general attack, was valid and within orbit of legislative power, and that Governor was authorized to countersign warrants based on Act and presented to him in due course.

Questions answered.

Drew, J., declined to render any opinion upon questions propounded.

West Headnotes (14)

[1] **Statutes** 🔑 Government property, facilities, and funds

Provisions in general appropriations bill on any subject other than “appropriations for salaries of public officers and other current expenses of the state” and matters reasonably related thereto are invalid and are not law. 📄 F.S.A.Const. art. 7, § 1(c).

2 Cases that cite this headnote

[2] **Statutes** 🔑 Disapproval of portion; line-item veto

Legislature may not validly so draft general appropriations bill as to unduly and unreasonably preclude exercise of executive power to “veto any specific appropriation in a general appropriation bill”. F.S.A.Const. art. 3, § 8.

2 Cases that cite this headnote

[3] **Constitutional Law** 🔑 Particular Issues and Applications

Court should be slow to restrict legislative judgment in making appropriations but should not permit circumventing by legislature of powers of Governor including his power of veto. F.S.A.Const. art. 3, § 6.

1 Cases that cite this headnote

[4] **Constitutional Law** 🔑 Nature and scope in general

States 🔑 Appropriations

1970 General Appropriations Act, against general attack, was valid and within orbit of legislative power.

[5] **States** 🔑 Operation and effect

Appropriations may constitutionally be made contingent upon matters or events reasonably related to subject of appropriation, but may not be made to depend upon entirely unrelated events.

5 Cases that cite this headnote

[6] **States** 🔑 Mode of action in general

Appropriation to university might be made contingent upon registration of minimum number of students who could benefit from appropriation or contingent upon state revenues reaching certain level.

2 Cases that cite this headnote

[7] **States** 🔑 Mode of action in general

There is no constitutional impediment to appropriation being made contingent upon another bill, reasonably related to appropriation and where there is direct and relative interdependence between them, becoming law.

6 Cases that cite this headnote

[8] **Statutes** 🔑 Conditions or contingencies

Where appropriation was made contingent upon enactment of specified senate bill “or similar legislation,” and such legislation was not enacted, appropriation did not take effect.

[9] **States** 🔑 Operation and effect

Committee substitute for specified house bill was sufficiently closely related to bill that appropriation made contingent upon enactment of bill “or substantially equivalent legislation” was effective.

[2 Cases that cite this headnote](#)

[10] **States** 🔑 Mode of action in general

There is no constitutional impediment to general appropriations bill making allocations of state funds for previously authorized purpose in amounts different from those previously allocated for substituting adequate specific appropriations for prior continuing appropriations.

[4 Cases that cite this headnote](#)

[11] **Constitutional Law** 🔑 Necessity of Determination

Where factual situation which was condition precedent to any action under provision of bill relating to purchase by state of revenue certificates not sold on open market within maximum legal rate might never occur, Supreme Court would not make determination as to its validity.

[1 Cases that cite this headnote](#)

[12] **Statutes** 🔑 Government property, facilities, and funds

Any invalidity of provision of house bill relating to purchase by state of revenue certificates not sold on open market within maximum legal rate would not affect remainder of statute.

[13] **States** 🔑 Mode of action in general

Qualifications and restrictions imposed by legislature upon appropriations may not go to extent of changing other substantive law, but may limit or qualify use to which monies appropriated may be put, and may specify reasonable conditions precedent to their use, even though this may leave some governmental activities underfinanced in opinion of officers of other departments of government. *F.S.A.Const. art. 3, § 8.*

[2 Cases that cite this headnote](#)

[14] **States** 🔑 Operation and effect

Governor was authorized to countersign warrants based on 1970 General Appropriations Act and presented to him in due course.

Opinion

*2 PER CURIAM:

Honorable Claude R. Kirk,

Governor of Florida

The Capitol

Tallahassee, Florida.

Dear Governor:—

We have the honor to acknowledge your communication of June 15th, 1970, requesting our advice pursuant to [Section 1\(c\), Article IV, Constitution of Florida](#), relating to certain executive powers and duties.

Omitting the formal parts, your letter reads as follows:—

‘According to the provisions of [Section 1\(c\), Article IV, Constitution of Florida](#), the Governor is authorized to request the opinion of the Justices of the Supreme Court, as to the interpretation *3 of any portion of the Constitution upon any question affecting the Governor’s executive powers and duties.

‘Under [Section 1\(a\), Article IV](#), the Governor is mandated to take care that the laws be faithfully executed. Under [Section 4\(e\)](#), it is the duty of a Governor to countersign all warrants disbursing state funds. In specific regard to taxation, appropriations and state expenses, [Section 1\(d\), Article VII, Constitution of Florida](#), provides, ‘Provisions shall be made by law for raising sufficient revenue to defray the expenses of the State for each fiscal period.’

‘Under the provisions of [Section 31 of Chapter 69—106, Laws of Florida](#), referred to as the Governmental Reorganization Act, and now found in [Section 216.211\(1\)](#).

‘It shall be the duty of Governor, as Chief Budget Officer, to insure that revenues collected will be sufficient to meet the appropriations and that no deficit shall occur in any State Fund. If in the opinion of the Governor, a deficit will occur, he shall so certify to the Commission, and the Commission may, by affirmative action, reduce all State agency operating budgets and releases a sufficient amount to prevent a deficit in any fund.’

‘Therefore, in order to properly and effectively discharge my constitutional and statutory duties and responsibilities, it will be necessary to call upon this Honorable Court for the proper construction to be placed upon [House Bill 5210](#). Moreover, it is in furtherance of these executive powers and duties that I feel compelled to request the opinion of this Honorable Court as to whether I can properly discharge these executive powers and duties in accordance with the constitutional mandate. The facts giving rise to my inquiry and the doubt which I have regarding the exercise of these powers and duties are hereinafter set forth.

During the Regular Session commencing April 7, 1970, the Legislature enacted [House Bill 5210](#) and entitled:

“An Act making appropriations; providing moneys for the annual period beginning July 1, 1970, and ending June 30, 1971, to pay salaries, other expenses, capital outlay—buildings and improvements, and for other specified purposes of the various agencies of state government; providing an effective date.’

‘On Friday, June 5, the Legislature adjourned sine die, and on Monday, June 8, [House Bill 5210](#) was presented to the Governor for action. On Tuesday, June 9, 1970, I vetoed [House Bill 5210](#), together with [House Bill 4358](#), the latter bill relating to a formula for the distribution of minimum foundation program funds. A copy of my veto messages are attached for this Court’s review. As the Court will observe, I expressed a great concern about the constitutionality of the General Appropriation Act, insofar as it contained provisions on subjects other than appropriations for salaries for public officers and other current expenses of the State. [Section 12, Article III, Constitution of Florida](#), provides as follows:

“Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.’

‘In addition, [Section 6, Article III](#), supra, provides, in part, as follows:

“Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection *4 or paragraph of a subsection * * *’

‘It is my understanding that the history behind [Section 12 and 6](#) have been discussed in many court decisions in this and other states. I am advised that the purpose behind the people adopting [Section 6](#) was to require that the titles of acts be sufficiently informative so as to obviate surprise or fraud that would spring from hidden provisions not indicated in the title. (See note 24 in [Section 6, Article III](#), supra, Volume 25A, Florida Statutes Annotated) The purpose behind the people adopting [Section 12](#), supra, formerly appearing as [Section 30, Article III, Constitution of 1885](#), is set forth in this Court’s

decision in  *Lee v. Dowda*, 19 So.2d 570, at page 571 as follows:

“It is manifest that the Constitution considered this matter of appropriation Laws so important that it required they should be freed from all log rolling, by putting into such bills riders dealing with any other subject whatsoever, so that the attention of the Legislature should be concentrated upon the wisdom of and the necessity for the several items of appropriations made by and enumerated in the bill, and so also that the public could rest assured that when an appropriation bill was up for consideration in the Legislature nothing would be considered but the appropriations, and that this important matter should not be prejudiced by the injection into the appropriation bill of any other matters, regardless of their inherent merits or demerits.’

(See also *Amos v. Moseley*, 74 Fla. 555, 777, 619, (1918);  *State v. Lee*, 121 Fla. 316, 163 So. 859, (1935);  *Green v. Rawls*, 122 So.2d 10 (1960))

‘When reviewing House Bill 5210, in light of [Section 6 and 12](#), supra, and in light of the decisions, of this Court, it would appear to me that House Bill 5210 is unconstitutional, such unconstitutionality arising from the fact that the title does not sufficiently express and embrace the matters contained in the body of the bill; the bill embracing more than one subject not properly connected therewith; and the bill, being an appropriations bill, containing provisions on subjects other than salaries and current expenses of the State.

‘A listing of these provisions is attached to this request. Specific examples are hereinafter discussed. On pages 17 and 17a, item 188 appears, and is set forth in part as follows:

“*Grants and Aids*

From General Revenue Fund

Minimum Foundation

Program K—12 \$575,096,786

County School Sales Tax 33,476,120

County Capital Outlay

and Debt Service

Recalculation 651,696

Educational Research &

Development Program 1,200,000

State Textbook Program

Purchase of Textbooks 8,211,281

Exceptional Child Summer

Institutes 40,000

Driver Education (a) 4,200,000

Educational Leadership

Training Act 50,000

General Scholarships 930,000

Nursing Scholarships	176,000
Seminole Indian Scholarships	4,800
Children of Deceased Veterans	11,000
Exceptional Child Scholarships	213,750
Board of Regents Scholarships	1,520,000
Extended School Year Pilot Programs	400,299
Gifted Education Program	260,000

“(a) Provided, however, \$2,100,000 of this appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.

From Trust Funds

County Capital Outlay and Debt Service Trust Fund	25,747,714
Interest State School Trust Fund—MFP K-12	1,000,000
Educational Aid Trust Fund—Aid to Counties	40,083,055
National School Lunch Trust Fund	12,138,218
Student Financial Aid Trust Fund—Loans	900,000
Grants and Donations Trust Fund	5,000
Ex-Confederate Soldiers and Sailors Endowment Trust Fund—Scholarships	4,000

Teachers of Mentally

Retarded—Scholarships

94,000

“None of the appropriations in item 188 shall become effective unless CS for HB 4358 or substantially equivalent legislation becomes law.

*5 ‘This Court’s attention is directed to the underlined phrase, ‘None of the appropriations in item 188 shall become effective unless CS for HB 4358 or substantially equivalent legislation becomes law.’ In order for the **Governor** to be able to **veto** this language, he must also **veto** the Entire item 188, inasmuch as under [Section 8, Article III](#), the **Governor** may not **veto** ‘any qualification or restriction without also vetoing the appropriation to which it relates’. The appropriation to which the quoted language hereinabove relates is the entire item 188. Therefore, the **Governor** would have to **veto** all of item 188 in order to remove this objectionable language; unless, however, the foregoing quoted language is not a ‘qualification or restriction,’ but is in fact and law, a provision on another subject as prohibited by [Section 12](#), supra, in which case such language would not be subject to **veto**, but would fall based upon the fact that it violates [Section 12](#), as discussed in the aforementioned decisions by this Court; and also based upon the fact that the subject matter embraced within House Bill 4358 is nowhere mentioned in the title to House Bill 5210, nor is it in any way connected with the appropriations bill except by indirect reference in item 188.

‘It might also be observed that the purported ‘qualifications and restrictions’ upon item 188 is not merely limited to the foregoing quoted language, but must also include the provisions of House Bill 4358. If this language and House Bill 4358 were in fact and law a valid ‘qualification or restriction’ upon item 188, then it should have been included in the General Appropriations bill; the fact that House Bill 4358 was enacted as a separate piece of legislation clearly reflects that the Legislature considered the provisions thereof to be concerned with subjects other than appropriations for salaries and expenses. The inclusion of a reference to House Bill 4358 in item 188 and the enactment of House Bill 4358 as a separate piece of legislation appears to be an attempt to circumvent the spirit and intent of [Section 12, Article III](#), supra, and would encourage the doing of an act by indirection which would otherwise be prohibited directly. The foregoing quoted language in item 188 appears to be a classic example of the ‘logrolling’ evil which [Section 12](#) and [Section 8](#), supra, were designed to prevent. The Chief Executive is required to accept House Bill 4358, the provisions of which are

completely unknown to him, since they are not even included in the appropriations act, and if he does not accept House Bill 4358, none of the moneys appropriated by item 188 for education can be used. The foregoing quoted language, strangely enough, constitutes a condition precedent and a condition subsequent. Before item 188 can become effective, House Bill 4358 must become law—this is the happening of the event upon which the use of item 188 is conditioned; yet, there has been a specific appropriation made by item 188 and the so-called estate or rights have been vested, but are defeated upon the occurring of a future event, namely, the **veto** by the **Governor** of House Bill 4358.

‘Compounding the situation is the fact that the **Governor** must act on House Bill 5210 or any appropriations bill which might contain a similar condition, within a certain time period after he receives it; conceivably, that time period, whether it be 7 or 15 days, can expire before the **Governor** has constitutionally been presented *6 with the bill upon which the appropriation is conditioned. There are enumerable unforeseen situations that could develop as a result of permitting such conditional language to appear in appropriations bills; and I have merely set forth those that come to mind at the moment. I might also observe that House Bill 4358, a copy of which is attached, is an amendment of the minimum foundation program formula. However, if this Court will examine item 188, it will find that this item deals with appropriations totally unrelated to the minimum foundation program, such as Seminole Indian Scholarships, Nursing Scholarships, Children of Deceased Veterans, Exceptional Child Scholarships, Driver Education, etc. Yet, the Legislature has attached the conditional language as outlined above to the Entire item 188, and has required that the **Governor** either accept House Bill 4358 or the entire item 188 is not effective; regardless of the fact that there are specific appropriations contained within item 188 that are totally unrelated to House Bill 4358.

‘Another example of the invalidity of House Bill 5210 is the fact that it contains provisions which purport to amend, supercede or repeal other provisions in the general law which amendment or repeal is neither mentioned in the title nor is related to appropriation for salaries and current expenses of the State. For example, the language appearing immediately following items 130 and 131 of the Appropriation Act apparently amends the powers and duties of the Division of

Commercial Development, as set forth in [Section 288.03, et. seq., Florida Statutes](#), although no reference is made in items 130 and 131 to [Section 288.03](#); the aforementioned language appears to be provisions on subjects other than appropriations and conflicts with [Sections 6 and 12 of Article III, supra](#).

‘An example of the danger of including purported amendments to the general law is reflected by the language immediately preceding item 172 on page 15 of the General Appropriations Act relating to the Department of Education.

The phrase, ‘in lieu of [Section 236.071\(1\)](#), [236.074](#), [236.075](#) and [231.53 F.S.](#)’ is apparently intended to permit the expenditure of the funds appropriated to the Department of Education in the manner provided in the appropriation act, notwithstanding the aforementioned sections. Not only does this appear to conflict with [Sections 6 and 12 of Article III, supra](#), it purports to make reference to a section that was repealed during the last special session of the Legislature in 1969 (see Chapter 69—1735, Laws of Florida, repealing [Section 236.071, F.S.](#), supra). Although reference to a repealed section may, in this instance, be harmless, it does illustrate the inherent dangers of attempting to amend or repeal or modify provisions of the general law in an appropriation bill and in a manner not consistent with the Constitution.

‘Another example of the type of provisions which are of doubtful validity, and which render the appropriation act itself doubtful is found in the language appearing immediately after item 195 on pages 18 and 18(a) of the appropriations act. This language purports to amend the duties and responsibilities of the Division of Vocational Rehabilitation, formerly set forth in Chapter 229, Florida Statutes. Again, this language appears to be in direct conflict with [Sections 6 and 12 of Article III, supra](#), in that it is not reflected in the title and relates to subject matter other than salaries and expenses of the State; moreover, these provisions do not appear to constitute ‘qualifications or restrictions’ within the meaning of [Section 8, Article III, supra](#).

‘The following language in [Section 8](#) on page 73 of House Bill 5210 purports to amend the duties and responsibilities *7 of the State Board of Administration as follows:

‘It is the intent of the Legislature that if these revenue certificates cannot be sold on the open market within the

maximum legal rate authorized by law then the State Board of Administration shall purchase \$12,600,000.00 of these certificates at the maximum interest rate permitted by law as investments for any funds under its control which are authorized to invest in securities of this type.’

‘Not only is this language in apparent conflict with [Section 6 and 12 of Article III, supra](#), but additionally, this language appears to conflict with [Section 122.47, Florida Statutes](#), and [Section 215.44—53, Florida Statutes](#), as well as [Section 9, Article 12, Florida Constitution](#), in that it constitutes an effort on the part of the Legislature to control the exercise of discretion by the State Board of Administration, notwithstanding the aforementioned provisions to the apparent contrary.

‘One further set of examples is called to the Court’s attention. In the latter part of the appropriation act, there are provisions to the effect that, ‘no monies appropriated in this act,’ or, ‘no monies appropriated in item 1—871’ may be expended or used for certain purposes. I do not disagree with the intent of some of these provisions. In fact, I heartily support the purposes they are designed to serve. Yet, they are provisions on subjects other than appropriations for salaries or current expenses of the State, within the meaning of [Section 12, supra](#), and appear also to perpetuate ‘log-rolling.’ If these provisions were determined to be ‘qualifications or restrictions’ within the meaning of [Section 8, Article III, supra](#), I would be forced to **veto** an entire appropriations act in order to remove these ‘qualifications or restrictions’ if I found them to be objectionable. This places any **Governor** in the untenable position of forcing him to accept provisions which might be objectionable, or **veto** the entire appropriation act. This would seem to defeat the intent of the anti-logrolling provisions contained in the Constitution. Moreover, I do not believe that these provisions should be classified as ‘qualifications or restrictions’, but rather should be treated as provisions on subjects other than appropriations and more properly confined to separate pieces of legislation subject to **veto** by the **Governor** if he chooses to exercise such **veto**.

‘The provisions of [Section 6, 8 and 12 of Article III, supra](#), must be construed in such a manner as to permit the **veto** power of any **Governor** to be meaningful; the **veto** is always subject to the check and balance of the overriding action of the House and Senate. The significant point is that a **Governor** must be presented with an appropriations bill which gives him the opportunity to exercise the power of **veto** and does not perpetuate the evil of logrolling. The present bill contains

many doubtful provisions which raise serious questions as to the validity not only of the provisions but of the very act itself, the determination of which is necessary and vital to the discharge of my executive powers and duties under the Constitution. I feel that it is my duty as **Governor** of the State of Florida, and Chief Budget Officer, to request an **advisory opinion** from this Court regarding these provisions and regarding this act, which opinion I respectfully submit would also serve to avoid a multiplicity of suits which might otherwise cripple the orderly financing and administration of State government. In support of this Court's jurisdiction to entertain my request, I respectfully call this Court's attention to its decision in: In *The Matter of Executive Communication of February 19, 1872*, 14 Fla. 283; In *The Matter of Executive Communication of February 29, 1872*, 14 Fla. 285; and In *Re Advisory Opinion to The Governor*, 63 So.2d 321 (1953).

*8 'In view of the foregoing, I therefore have the honor to request your written opinion on substantially the following questions:

"1. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), does House Bill 5210, the General Appropriations Act, enacted during the 1970 Regular Session of the Legislature constitute a valid appropriation authorizing the countersigning of warrants by the **Governor** and the faithful execution thereof?"

"2. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), do the items or appropriations contained in House Bill 5210, as hereinabove and hereinafter referred to, constitute valid appropriation authorizing the countersigning of warrants by the **Governor** and the faithful execution thereof?"

"3. If the answer to Question 2 is in the affirmative, are the sections, clauses and phrases appearing in connection with those items described in Question 2 properly included within a General

Appropriations Bill in light of [Section 6, 8 and 12 of Article III](#)?"

'This Court's attention is invited to a recent decision rendered by the Circuit Court of the Twelfth Judicial Circuit of Florida in *Smith v. Kirk, et al.*, Case No. 11,195, July 15, 1969, construing language contained in the General Appropriations Act (in light of [Section 12, Article III, supra](#)) and declaring such language similar to the examples hereinabove and hereinafter described, to be unconstitutional. (copy attached) It is my understanding that this decision was not appealed.

'It should be clearly emphasized that many of the provisions which are contained in the General Appropriations Act and to which I have directed this Court's attention deal with matters which I approve of but which should be embodied in our general law by way of separate specific enactments; but, it is, nevertheless, my duty to call this Court's attention not only to provisions which I find to be objectionable but to provisions which I would generally approve and which have also been improperly included within a General Appropriations Bill. What must be resolved are not merely permissible limits of subjects within the General Appropriation Act but, more significant, the preservation of the duties and responsibilities of the independent branches of government.

'In view of the fact that House Bill 5210 will become effective on July 1, it is respectfully requested that the court waive the ten-day rule and render its opinion as soon as possible. Your assistance in resolving these vital questions is greatly appreciated.'

The import of your request is to have this Court pass upon the constitutionality vel non of the 1970 General Appropriations Bill referred to in your letter as House Bill 5210, recently identified as Chapter 70—95, Laws of Florida 1970. You also referred to Committee Substitute to House Bill 4358, now known as Chapter 70—90, Laws of Florida 1970, and to Senate Bill 1554 which apparently was not enacted into law.

This Court was not always in agreement under the Constitution of 1885 as to whether or not such a question could be answered. Compare [Advisory Opinion to Governor Dan McCarty](#), 63 So.2d 321, and [Advisory Opinion to Governor Collins](#), 113 So.2d 703. However, it is noteworthy that in the 1968 constitutional revision, authority and

direction were given this Court to permit interested persons to be heard, subject to the Rules of the Court which was followed by the implementation of our Rule F.A.R. 2.1(h) providing for such participation. Pursuant to such authority interested persons, including members of the Legislature, have presented both sides of this controversy by the filing of briefs. Because of the foregoing, *9 and in view of the great public interest in maintaining the fiscal stability of state government, we have decided to answer your request.

At the outset, our attention is directed to provisions of the Constitution that:

‘No money shall be drawn from the treasury except in pursuant to appropriation made by law.’  [Sec. 1\(c\), Article VII](#).

‘Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.’ [Sec. 12, Article III](#).

‘* * * The Governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.’ [Sec. 8, Article III](#).

In your executive communication you point out a large number of matters which you feel raise questions as to the constitutional validity of House Bill 5210 (Chapter 70—95) as a whole.

[1] Provisions in a General Appropriations Bill on any subject other than ‘appropriations for salaries of public officers and other current expenses of the State’ and matters reasonably related thereto are invalid and are not law. See  [Sec. 1\(c\), Article VII](#), supra.

[2] [3] The Legislature may not validly so draft a general appropriations bill as to unduly and unreasonably preclude the exercise of the executive power to ‘veto any specific appropriation in a general appropriation bill’. In the early history of the State, it was customary for such bills to fix in minute detail each authorized expenditure. In later years appropriations to state offices and for state activities have been in larger sums and have been more flexible as to how these funds may be expended. While the Court should be slow to restrict the legislative judgment in making appropriations, they should not permit the Circumventing by the Legislature of the proper powers of the Governor, including his power of veto.

[4] Our examination of House Bill 5210, in the light of your comments, does not reveal that the Legislature has, in this instance, exceeded its constitutional powers in this regard. There are, in this bill, over nine hundred ‘items’. Many of these items embrace numerous ‘specific appropriations’. For example ‘Item 188’, which will be discussed in more detail later, has twenty-five ‘specific appropriations’. Any of these could have been reached by individual veto. See [Sec. 8, Article III](#), supra.

[5] [6] [7] Appropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events. For example, an appropriation to a university might be contingent upon the registration of a minimum number of students who could benefit from the appropriation or contingent upon the state revenues reaching a certain level. There is no constitutional impediment to an appropriation being made contingent upon another bill, reasonably related to the appropriation and where there is a direct and relative interdependence between them, becoming law.

You make specific reference to ‘Item 188’ of House Bill 5210. Under this ‘item’ twenty-five specific dollar-amounts are listed. As respects one of these sums, it is ‘Provided, however, \$2,100,000 of this appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.’ As regards the entire ‘Item 188’, it is provided ‘None of the appropriations in Item 188 shall become effective unless Committee Substitute for House Bill 4358 or substantially equivalent legislation becomes law.’ We are advised and take judicial notice that Committee Substitute for House Bill 4358, now known as Chapter 70—94, Laws of Florida, has now become law, thus meeting the contingency and any question because of such contingency has therefore become moot.

*10 [8] The proviso involving Senate Bill 1554 above quoted appears in the following context—

‘(a) Provided, however, \$2,100,000 of this Appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.’ (Italics supplied.)

While it contained no appropriation, Senate Bill 1554—which did not pass—would have increased the tax on driver’s licenses ‘for the purpose of financing the driver education program in the secondary schools’. The specific appropriation

which was Made contingent upon the enactment of Senate Bill 1554 related to driver education in the amount of \$4,200,000. This is the type of qualification authorized by [Sec. 8\(a\) of Article III of the Constitution of Florida](#), and since Senate Bill 1554 did not become law the appropriation for driver education aforementioned must stand reduced from \$4,200,000 to \$2,100,000.

[9] Committee Substitute for House Bill 4358 amends several sections of the law relating to the overall educational program and particularly the minimum foundation provisions. Item 188 appropriates more than half a billion dollars, much of which is needed to meet the funds to be spent pursuant to Committee Substitute for House Bill 4358. If Committee Substitute for House Bill 4358 had not become law much of the appropriation in Item 188 would Not have been expendable. While it might have been wiser for the Legislature to have appropriated funds sufficient to meet the school needs without Committee Substitute for House Bill 4358 and then make a contingent appropriation of additional funds to meet the increased needs resulting from Committee Substitute for House Bill 4358, if enacted, it is clear that the relationship between Committee Substitute for House Bill 4358 and later Item 188 is so close that the proviso under scrutiny is within the legislative prerogative.

[10] You point out that Item 172 of House Bill 5210 is ‘in lieu of [Sections 236.071\(1\), 236.071, 236.075 and 231.53, F.S.](#)’ We find no constitutional impediment to a General Appropriations Bill making allocations of State funds for a previously authorized purpose in amounts different from those previously allocated or substituting adequate specific appropriations for prior continuing appropriations. Whether an appropriations bill can, by appropriating a lesser amount, reduce a continuing appropriation provided in preexisting law is a question neither properly presented nor decided here.

[Section 8](#) of House Bill 5210 is in part as follows—

‘It is the intent of the Legislature that if these revenue certificates cannot be sold on the open market within the maximum legal rate authorized by law then the State Board of Administration shall purchase \$12,600,000.00 of these certificates at the maximum interest rate permitted by law as investments for any funds under its

control which are authorized to invest in securities of this type.’

[11] [12] You suggest that this provision is invalid. Since the factual situation which is a condition precedent to any action under this provision may never occur, any present inquiry as to its validity is premature. To the extent that this provision in House Bill 5210 may affect the validity of the entire bill, it is our opinion that it does not. If held invalid in an adversary proceeding by a court of competent jurisdiction it is readily severable from the rest of the statute.

[13] You call attention to several provisions of House Bill 5210 relating to the expenditure of various items of money appropriated. The Constitution expressly recognizes the power of the Legislature to make appropriations subject to qualifications and restrictions. See [Sec. 8 of Article III](#). Such qualifications and restrictions may not go to the extent of changing other substantive law, but they may limit or qualify the use to which the moneys appropriated may be put and may specify reasonable conditions precedent to their *11 use, even though this may leave some governmental activities underfinanced in the opinion of officers of other departments of government.

It would be inappropriate for us, at this time, to undertake to analyze all the provisions of House Bill 5210 and discuss in detail all qualifications and restrictions upon appropriations found in this law. Much of your communication consists of pointing out dangers which you fear may arise from future efforts on the part of the Legislature to unduly restrict the Chief Executive in the exercise of the power of veto and in so drafting appropriation bills as to make them instruments of ‘logrolling’ contrary to the intent of [Secs. 6, 8 and 12, Article III](#). We have carefully considered these observations and, while they may well be of academic interest, we do not find such comments to require a judicial interpretation at this time.

We now turn to your specific question as distinguished from your general discussion of House Bill 5210:—

‘1. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), does House Bill 5210, the General Appropriations Act, enacted during the 1970 Regular

Session of the Legislature constitute a valid appropriation authorizing the countersigning of warrants by the Governor and the faithful execution thereof?’

[14] We do not find anything in your communication that would vitiate the 1970 General Appropriations Act and, while there may be some items which would have appropriately been a subject of your line item veto, we do not find any impediment created by your executive communication that would prevent your disbursing funds in accordance with the said Appropriations Bill, and except, unless and until some particular item is voided by a court of competent jurisdiction, you would be authorized to countersign warrants based thereon and presented to you in due course.

The other matters and things about which you have inquired are answered to the extent of our authority to do so in the body of this communication.

In summary, we advise you that:

(1) In our opinion, the 1970 General Appropriations Act, against a general attack, is valid and within the orbit of legislative power and against such a general attack a court of competent jurisdiction should and would hold it to be so.

(2) That the Legislature does not have the power nor the right under the Constitution of this State to make law in an appropriations bill on other subjects, unless the other subjects are so relevant to, interwoven with, and interdependent upon, the appropriations so as to jointly constitute a complete legislative expression on the subject.

Respectfully,

RICHARD W. ERVIN

Chief Justice

B. K. ROBERTS

CAMPBELL THORNAL

VASSAR B. CARLTON

JAMES C. ADKINS, JR.

JOSEPH A. BOYD

Justices

*12 The Honorable Claude R. Kirk, Jr.

Governor of the State of Florida

The Capitol

Tallahassee, Florida

My dear Sir:

An answer to your request for an advisory opinion concerning the Appropriations Act of 1970, in its last analysis, would require me to say whether the whole act was constitutionally valid or invalid. Whatever may be my individual views on the encompassing question of constitutionality, eleven years ago in majority of this Court in *In Re: Advisory Opinion to the Governor, 113 So.2d 703*, declined to answer a request for an advisory opinion from the then Governor Collins for the reason that this Court was without authority to render an advisory opinion to the Governor determining the constitutional validity vel non of an act of the Legislature. At that time in a separate opinion to Governor Collins, I stated (*113 So.2d 706*):

‘On several occasions since my appointment to this Court I have participated in advisory opinions to you and your predecessors in office which construed or passed upon the constitutionality of certain statutes of this State. It is now my view that, in rendering such opinions, I exceeded my authority as a Justice of this Court.

‘The Constitution plainly authorizes the Justices of this Court to advise you ‘as to the interpretation of any portion of (the Florida) Constitution upon any question affecting (your) executive powers and duties.’ From the adoption of the present Constitution until recent years the Justices of this Court have refused to advise the Governors of Florida as to their interpretation of or to pass upon the constitutionality of statutes of this State. It is my view that this Court should now return to that salutary principle epitomized in the conclusion of the *Advisory Opinion to the Governor, 50 Fla. 169, 39 So. 187*, where the then Justices said:

‘Reduced to its last analysis, the purpose of your letter is not to have us construe any clause of the Constitution affecting your executive powers and duties, but to have us pass upon the constitutionality of an act of the Legislature.

“Section 13 of article 4 of the Constitution authorizes the justices of the Supreme Court, on the Governor's request, to interpret only some portion of the Constitution, and does not authorize the Court, upon such request, to interpret or pass upon the constitutionality of statutes that affect the Governor's executive powers and duties. Advisory [Opinion to Governor](#), 39 Fla. 397, 22 So. 681. For the reasons stated, we must respectfully decline to give any opinion upon the questions propounded.”

The critical language of the Constitution of 1968 under which your request is presented is identical to the language of the Constitution of 1885 under which the request of Governor Collins was made. The provisions of the 1968 Constitution relating to procedure for obtaining advisory opinions does not—in my judgment—in any way enlarge the powers of this Court with respect to this basic constitutional question.

Looking back over more than a decade I can only conclude that the passage of time has confirmed the wisdom of this Court expressed by the majority in the advisory opinion above referred to, and my own views quoted above.

Consistency compels me therefore to respectfully decline to render any opinion upon the questions propounded.

Respectfully,

E. HARRIS DREW

Justice.

EHD:gr

All Citations

239 So.2d 1

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157 Fla. 885
Supreme Court of Florida, en Banc.

ADVISORY OPINION TO GOVERNOR.

Sept. 25, 1946.

West Headnotes (2)

- [1] **United States** 🔑 Vacancies; special elections
Under Seventeenth Amendment to federal Constitution the Governor would be authorized to issue a “writ of election” to fill vacancy caused by death of United States Senator, such writ being a written order from Governor directed to proper authority commanding it to hold a state-wide election on day certain as provided by law for purpose of electing a United States Senator for unexpired term of deceased senator. [U.S.C.A.Const. Amend. 17.](#)

[1 Cases that cite this headnote](#)

- [2] **United States** 🔑 Vacancies; special elections
Where United States Senator who was serving a term which was to expire the first Tuesday after first Monday of January, 1947, died 48 days prior to general election of 1946, Governor was authorized to fill the vacancy caused by the death by granting a commission for the unexpired term. [F.S.A. § 106.02](#); [F.S.A.Const. art. 4, § 7](#); [U.S.C.A.Const. Amend. 17.](#)

[1 Cases that cite this headnote](#)

Opinion

****409** Answers to questions propounded to the Supreme Court by the Governor.
“September 24, 1946

***886** Hon. Millard F. Caldwell

Governor

The Capitol

Tallahassee, Florida

Dear Governor:

We are in receipt of your letter of September 24, 1946, pursuant to [Section 13, Article IV of the Constitution](#) as follows:

“To the Honorable, the Chief Justice, and
Justices of the Supreme Court of Florida.

Gentlemen:

The incumbent United States Senator, Honorable Charles O. Andrews, died September 18, 1946, this being a day forty-eight days prior to the general election of 1946. At the time of his death Senator Andrews was serving a regular term which was to expire by operation of law the first Tuesday after the first Monday of January 1947.

[Amendment XVII, Constitution of the United States](#), so far as seems material to the questions confronting me under the Constitution of Florida, provides, that ‘When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.’

So far as I have been able to ascertain, the Florida Statutes providing for the filling of vacancies in office are [Sections 106.02 and 102.48, Florida Statutes, 1941, F.S.A. Section 106.02](#) provides, ‘Should a vacancy happen in the representation of this state in the senate of the congress of the United States, the governor shall issue writs of election to fill such vacancy at the next general election; and the governor may make temporary appointments until the vacancy is filled by election.’

***887** The pertinent portion of [Section 102.48](#) provides, ‘In the event of the death, resignation or removal of any person nominated for office in the primary election between such primary election and the ensuing general election or if for any cause there is a vacancy in any nomination or in any

office and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event the state executive committee, in the case of a vacancy in a state office or the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter; provided, however, that should a vacancy occur in any nomination for county office or in any county office less than thirty days before a general election, or should ****410** a vacancy occur in any nomination for a state office or in any state office less than forty-five days prior to a general election, then and in that event, the county executive committee or the state executive committee, depending upon the nature of the office for which a vacancy in nomination shall have occurred, shall fill such vacancy in nomination by selecting a nominee for such office and all such nominations whether by primary or by executive committee shall have the same force and effect and shall entitle the nominees to all the rights and privileges that would accrue to them if they had been nominated in the regular primary election.’

These statutes above quoted appear to be expressly delimited or restricted in their operation or scope by Sections 6 and 7, Article XVIII of the Constitution of Florida, which read as follows:

‘Section 6. The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution shall extend only to the first Tuesday after the first Monday in January next after the election and qualification of a successor.’

‘Section 7. In all cases of election to fill vacancies in office such election shall be for that part of the unexpired term ***888** commencing on the first Tuesday after the first Monday in January next after such election.’

[Section 7 of Article IV of the Constitution of Florida](#) provides: ‘when any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term.’

Because of the death of Senator Andrews a vacancy exists in the office of United States Senator and I am in grave doubt as to the powers and duties devolving upon me as Chief Executive in regard to such vacancy. Availing myself of the provisions of [Section 13 of Article IV of the Constitution](#)

of Florida, I respectfully request your written opinion upon questions affecting my Executive powers and duties under the Constitution as follows:

1. Whether I, as Chief Executive, have the power under the Constitution to fill such vacancy by granting a commission, there apparently being no mode provided by the Constitution or by the laws of Florida, for filling such vacancy otherwise?
2. If I have the power and duty to fill such vacancy by commission, shall the commission be granted for the whole unexpired term or shall the commission be granted to expire on the day of the General election of 1946 or until a successor shall have been duly elected and qualified?

Respectfully,

(signed) Millard F. Caldwell,

Governor”

[1] Under the quoted provision of the Federal Constitution you would be authorized, as Chief Executive, to issue a writ of election to fill the vacancy caused by the death of Senator Andrews. Such a writ may be defined as a written order from you, as Governor, directed to the proper authority, commanding it to hold a state-wise election on a day certain, as provided by law, for the purpose of electing a United States Senator for the un-expired term of Senator Andrews. Paine, *Law of Elections*, p. 355, par. 421; *Oxford English Dictionary*.

***889** The means provided by statute for filling vacancies is embraced in [Sections 106.02 and 102.48, Florida Statutes 1941, F.S.A. Section 106.02](#), is a repetition of the quoted part of the seventeenth amendment to the Federal Constitution, except for the latter clause which authorizes the Governor to make “temporary appointments until the vacancy is filled by election.” [Section 102.48](#) is the means provided for filling vacancies in nominations to, as well as vacancies in, county and state offices. Any attempt to read these sections in connection with other sections affecting the same subject matter results in hopeless confusion.

The proviso to [Section 102.48](#) has to do with filling vacancies in nominations to and actual vacancies in county offices that occur less than 30 days before the general election. It also has a like provision for filling similar vacancies in state offices that occur less than 45 days before the general election. We are here concerned with a ****411** vacancy in the office of United States Senator, a state office, occurring 48 days before

the general election of 1946, so the proviso has no application. The part of [Section 102.48](#) preceding the proviso authorizes the county executive committee to hold primary elections to fill vacancies in nominations and vacancies in county offices when they occur between the primary and the general election. A similar provision authorizes the state executive committee to fill vacancies in nominations to and vacancies in state offices occurring in the same manner when “no method is otherwise provided herein for filling such vacancy.”

In our view, this provision of the statute does not provide an adequate and effective means for filling the vacancy in the office brought in question. The reason for this conclusion is that the act contemplates one and perhaps a second primary. It would not be possible, within the period shown, to issue the writ of election, give the notice, call and hold one and possibly two primaries, as contemplated, and then have the name of the nominee placed on the general election ballot. It is not such a “special election” as is contemplated by [Section 98.08, Florida Statutes 1941](#), and no provision is made for the expense of such an election. Any election should be an intelligent *890 expression of the electorate, both as to men and measures involved, and that requires time for deliberation.

It is our view that [Section 7, Article IV of the Constitution](#), as quoted in your letter, clothes you with ample power and points the way for filling the vacancy in question. It is shown that, under facts presented, no other way is provided in the Constitution or by the statute for filling such a vacancy. If it had occurred months earlier, a different conclusion might have been reached. This interpretation does not clash with Section 6, Article XVIII of the Constitution, and, since we find no adequate means for filling the vacancy by election, any consideration of Section 7, Article XVIII, becomes unnecessary. We find nothing in [Section 98.08, Florida Statutes 1941](#), F.S.A., relating to Special Elections, or

[Section 114.01 et seq., Florida Statutes 1941](#), F.S.A., relating to vacancies, or any other section of the law relating to filing vacancies in Congress that militates against this view. It is further strengthened by the fact that a prompt method is provided for filling the vacancy, which is highly important at this time, and the fact that [Section 98.08\(3\)](#) relating to Special Elections contemplates the exercise of discretion on the part of the Governor in dealing with the question.

[2] You are, therefore, advised that, under [Section 7, Article IV of the Constitution](#), you are authorized to fill the vacancy in the office of United States Senator caused by the death of Senator Andrews by “granting a commission for the unexpired term”.

Respectfully yours,

ROY H. CHAPMAN

Chief Justice

GLENN TERRELL

ARMSTEAD BROWN

RIVERS BUFORD

ELWYN THOMAS

HAROLD L. SEBRING

Justices of Supreme Court of Florida.

All Citations

157 Fla. 885, 27 So.2d 409

706 So.2d 278
Supreme Court of Florida.

ADVISORY OPINION TO THE GOVERNOR
— 1996 AMENDMENT 5 (EVERGLADES).

No. 90042.

|
Nov. 26, 1997.

Synopsis

Governor requested advisory opinion regarding implementation of “polluter pays” constitutional amendment as it related to preservation of the Everglades. The Supreme Court held that: (1) amendment was not self-executing; (2) amendment required implementing legislation, notwithstanding the existence of the Everglades Forever Act; and (3) phrase “primarily responsible” require those in Everglades Agricultural Area (EAA) who cause water pollution in Everglades Protection Area or EAA to bear costs of abating pollution.

Questions answered.

West Headnotes (10)

[1] **Courts** 🔑 Questions submitted by Legislature or Governor or other officer

Questions regarding governor's duty in restoring Everglades System, following passage of “polluter pays” constitutional amendment by voter initiative were proper subjects of advisory opinion by Supreme Court. *West's F.S.A. Const. Art. 2, § 7(b)*; Art. 4, § 1(c).

3 Cases that cite this headnote

[2] **Constitutional Law** 🔑 Particular Provisions

“Polluter pays” constitutional amendment was not self-executing and could not be implemented without aid of legislative enactment because it failed to lay down a sufficient rule for accomplishing its purpose. *West's F.S.A. Const. Art. 2, § 7(b)*.

6 Cases that cite this headnote

[3] **Constitutional Law** 🔑 In pari materia

Where constitution contains multiple provisions on same subject, they must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision.

5 Cases that cite this headnote

[4] **Constitutional Law** 🔑 Particular Provisions
Environmental Law 🔑 Validity

Legislative action was required to implement “polluter pays” amendment to Constitution, despite pre-existing Everglades Forever Act; notwithstanding mutuality of subject matter, Everglades Forever Act was not enabling legislation for amendment. *West's F.S.A. Const. Art. 2, § 7(b)*; *West's F.S.A. § 373.4592*.

3 Cases that cite this headnote

[5] **Constitutional Law** 🔑 Operation as to statutes previously in force

In cases where constitutional provision is not self-executing, all existing statutes which are consistent with amended Constitution will remain in effect until repealed by the Legislature.

2 Cases that cite this headnote

[6] **Constitutional Law** 🔑 Intent in general

Touchstone for determining meaning of constitutional amendment adopted by initiative is intent of the voters who adopted it.

1 Cases that cite this headnote

[7] **Constitutional Law** 🔑 Plain, ordinary, or common meaning

Words and terms of Constitution are to be interpreted in their most usual and obvious meaning, unless text suggests that they have been used in technical sense.

4 Cases that cite this headnote

[8] Constitutional Law 🔑 Plain, ordinary, or common meaning

Presumption is in favor of natural and popular meaning in which words of Constitution are usually understood by people who have adopted them.

4 Cases that cite this headnote

[9] Constitutional Law 🔑 Plain, ordinary, or common meaning

Generally, dictionary may provide popular and common-sense meaning of terms presented to voters in initiative to adopt constitutional amendment.

8 Cases that cite this headnote

[10] Environmental Law 🔑 Civil liability; cleanup costs

In context of “polluter pays” amendment to Constitution, “primarily responsible” means that no one person or entity is responsible for 100% of pollution in Everglades Agricultural Area (EAA) or Everglades Protection Area (EPA), but those within EAA who are determined to be responsible must pay their share of costs of abating that pollution. *West's F.S.A. Const. Art. 2, § 7(b)*.

3 Cases that cite this headnote

Attorneys and Law Firms

***279** *W. Dexter Douglass*, General Counsel and *Deborah Kearney*, Assistant General Counsel, Office of the Governor, Tallahassee, for Presentor.

E. Thom Rumberger, *George N. Meros, Jr.*, *Richard A. Keller* and *William L. Sundberg* of Rumberger, Kirk & Caldwell, Tallahassee, and *Jon Mills* and *Timothy McLendon*, Gainesville, for Save Our Everglades, Inc.; *William L. Hyde*, *Osmer D. Batcheller* and *Richard Alonso* of Gunster, Yoakley, Valdes-Fauli & Stewart, P.A., Tallahassee, for U.S. Sugar Corporation; *William H. Green*, *David L. Powell*, *Gary P. Sams* and *Gary V. Perko* of Hopping, Green, Sams & Smith,

P.A., Tallahassee, and *Jeffrey J. Ward*, Vice-President of Legal Affairs, Sugar Cane Growers Cooperative of Florida, Belle Glade, and *Robert M. Rhodes*, Senior Vice-President and General Counsel for St. Joe Corporation, Jacksonville, for Sugar Cane Growers Cooperative of Florida and St. Joe Corporation; *William B. Killian*, *Joseph P. Klock, Jr.*, *Donald M. Middlebrooks*, *Victoria L. Weber* and *Donna E. Blanton* of Steel, Hector & Davis, LLP, Tallahassee, for Flo-Sun, Incorporated, Osceola Farms Co., Atlantic Sugar Association, Inc., and Okeelanta Corporation; *Susan L. Turner* of Holland & Knight, Tallahassee, for The Florida Chamber of Commerce, Inc.; *Michael L. Rosen*, Executive Director, Tallahassee, Florida, for Florida Legal Foundation, Inc.; and *Clay Henderson*, Winter Park, for Florida Audubon Society and National Audubon Society, Interested Parties.

Opinion

The Honorable Lawton Chiles

Governor, State of Florida

The Capitol

Tallahassee, Florida 32301

Dear Governor Chiles:

We acknowledge receipt of your communication of March 6, 1997, requesting our advice pursuant to [section 1\(c\)](#), [article IV of the Florida Constitution](#). Omitting the formal parts, your letter reads as follows:

Pursuant to [Article IV, Section 1\(c\) of the Constitution of the State of Florida](#), your opinion is requested as to the interpretation of my executive duties and responsibilities as chief executive under [Article IV, Section 1\(a\)](#), [Article III, s.19\(h\)](#), and [Article II, Section 7\(b\)](#), of the Constitution of the State of Florida.

[Article IV, Section 1\(a\)](#) relates to my general obligations as chief executive, in particular, my duty to ensure “that the laws be faithfully executed” and as “chief administrative officer of the state responsible for the planning and budgeting for the state.” [Article III, Section 19\(h\)](#) requires that I recommend revisions to the state planning document, and that I “report to the legislature on the progress in achieving the state planning document's goals.” [[Section 187.201\(10\) of the Florida Statutes](#), establishes a State Comprehensive Plan goal to “[p]romote restoration of the Everglades system and of the hydrological and ecological functions of degraded or

substantially disrupted surface waters.”] [Article II, Section 7\(b\)](#) requires that “[t]hose in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area shall be primarily responsible for paying the costs of the abatement of that pollution,” (hereinafter “Amendment 5”).

As background, it should be noted that the “Everglades Forever Act” was enacted after many years of litigation involving the United States of America, the State of Florida, the South Florida Water Management District, the Department of Environmental Protection, and certain large agricultural interests to determine how and at whose expense pollution of the Everglades should be abated. [s. 373.4592, Fla. Stat.](#)

The Everglades Forever Act established two funding sources for pollution abatement in the Everglades Agricultural Area (EAA); that is, the Everglades agricultural privilege tax, and the levy of a 0.1 mill ad valorem tax on property within the Okeechobee Basin. [Ss. 373.4592\(6\) and \(4\)\(a\)](#). Therefore, the law in effect at the time of the adoption of Amendment 5 was designed to divide the burden of the costs of pollution abatement on the public by the 0.1 mill tax and the agricultural users by the privilege tax of \$24.89 per acre.

*280 I.

Prior to the time that the debate on these issues rose to the current pitch, the Attorney General opined that Amendment 5 was self-executing. [Op. Att’y Gen. Fla. 96–92 \(1996\)](#). Other government entities have suggested an opinion that the amendment is not self-executing; that too many policy determinations remain unanswered. These entities question any agency’s ability to determine rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished.

Due to the uncertainty created by the unclear language of Amendment 5, the South Florida Water Management District and the Department of Environmental Protection, the governmental entities charged with enforcing the Everglades pollution abatement initiatives, are unable to move forward to enforce this amendment without a clear interpretation as to its meaning and effect. As Governor, I am responsible for providing these executive agencies with direction as to their enforcement

responsibilities, to see that the law is faithfully executed, and to report on the state’s progress in restoring the Everglades System.

II.

Several divergent interpretations have been suggested by interested parties as to the meaning of “primarily responsible.” Some government agencies believe that “primarily responsible” could mean something in excess of fifty percent. Therefore, polluters within the EAA are chiefly, but not totally, responsible for the costs of abatement. They also believe that whether these costs are to be apportioned according to the amount of pollution contributed, and whether and to what extent other entities not described in Amendment 5 are responsible for pollution abatement costs, is not clear from the text of Amendment 5 and is subject to clarification.

Proponents of Amendment 5 have opined that the amendment imposes the entire cost of abatement on polluters within the EAA. Only upon failure of the primarily responsible parties to satisfy the costs of abatement would a secondarily responsible party (the public) be called upon to satisfy the obligation.

As the state’s chief administrative officer responsible for planning and budgeting, I am in doubt as to my duties in seeing that Amendment 5 is being faithfully executed.

CONCLUSION

The consequences of these determinations are substantial and of immense importance to the well-being of the state and of the future of the Florida Everglades. Years of litigation have transpired, which has delayed implementation of the necessary steps to clean up this international treasure. The lack of clarity in Amendment 5 promises to engender further litigation absent an expeditious resolution of the questions I am posing.

For the foregoing reasons, I respectfully request the opinion of the Justices of the Supreme Court on the following questions affecting my executive duties and responsibilities:

1. Is the 1996 Amendment 5 to the Florida Constitution self-executing, not requiring any legislative action considering the existing Everglades Forever Act? Or is the Legislature required to enact implementing

legislation in order to determine how to carry out its intended purposes and defining any rights intended to be determined, enjoyed, or protected?

2. What does the term “primarily responsible” as used in 1996 Amendment 5 to the Florida Constitution, mean? Does it mean responsible for more than half of the costs of abatement, or responsible for a substantial part of the costs of abatement, or responsible for the entire costs of the abatement, or does it mean something different not suggested here?

[1] In accordance with our rules, we made a preliminary determination that your request is properly within the purview of [article IV, section 1\(c\)](#), in that Amendment 5 directly affects your duty as governor to see ***281** that the law is faithfully executed¹ (by providing the South Florida Water Management District and the Department of Environmental Protection with direction as to their enforcement responsibilities) and to report on the state's progress in restoring the Everglades System.² To ensure full and fair consideration of the issues raised, we permitted interested persons to file briefs and to present oral argument before the Court.³

The 1996 Amendment 5, also known as “polluter pays,” amended [article II, section 7 of the Florida Constitution](#) by adding [section 7\(b\)](#), and as amended, [section 7](#) provides:

SECTION 7. Natural resources and scenic beauty.—

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

(b) Those in the Everglades Agricultural Area [EAA] who cause water pollution within the Everglades Protection Area [EPA] or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For purposes of this subsection, the terms “Everglades Protection Area” and “Everglades Agricultural Area” shall have the meanings as defined in statutes in effect on January 1, 1996.

[2] As to your first question, that is, whether Amendment 5 is self-executing, we are guided by the test set forth in *Gray v. Bryant*, 125 So.2d 846 (Fla.1960), which states that

whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.

Id. at 851. Applying the aforementioned test, we conclude that Amendment 5 is not self-executing⁴ and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose. As you suggest in your letter, “too many policy determinations remain unanswered ... [such as the various] rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished.” Amendment 5 raises a number of questions such as what constitutes “water pollution”; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.

[3] In addition, Amendment 5 does not exist in isolation; it was incorporated into an existing section and employs key terms of that provision, now [article II, section 7\(a\)](#). Where the constitution contains multiple provisions on the same subject, they must be read in *pari materia* to ensure a consistent and logical meaning that gives effect to each provision. *In re Advisory Opinion of Governor Appointment of County Comm'rs*, 313 So.2d 697, 701 (Fla.1975). Article II, section 7(a) establishes the state's policy “to conserve and protect its natural resources” and directs the legislature to provide by statute for the “abatement of air and water pollution.” Thus, we answer the first part of your first question in the negative.

[4] [5] The second part of your first question asks whether legislative action is required in light of the pre-existing Everglades Forever Act.⁵ We answer in the affirmative. In cases where the constitutional provision is not self-executing, such as the instant case, ***282** “all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature.” *In re Advisory Opinion to the Governor*, 132 So.2d 163, 169 (Fla.1961).

We find no inconsistency between the Everglades Forever Act and Amendment 5. As you noted in your letter, the “Everglades Forever Act was enacted ... to determine how and at whose expense pollution of the Everglades should be abated.” Amendment 5 was adopted for a similar purpose—to require polluters to pay for the abatement of their pollution. Notwithstanding the mutuality of subject matter, we do not construe the Everglades Forever Act to be the enabling legislation for Amendment 5.

Based on our review of the pre-election publicity and promotion, most of which focused on Amendment 4, the “sugar tax” amendment,⁶ and some of which included discussion of the Everglades Forever Act, we conclude that the voters intended to defeat the penny per pound sugar tax and adopt Amendment 5, which requires polluters to pay “the costs of abatement of that pollution.” We believe the voters adopted Amendment 5 to effect a change, and construing the Everglades Forever Act as Amendment 5’s implementing legislation would effect no change, nullify the Amendment, and frustrate the will of the people.⁷ We therefore glean that in adopting Amendment 5, the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected.

[6] [7] [8] [9] [10] Your second question asks us to construe the phrase “primarily responsible” as used in Amendment 5. The touchstone for determining the meaning of a constitutional amendment adopted by initiative is the intent of the voters who adopted it,⁸ and it is well settled that

[t]he words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them.

City of Jacksonville v. Continental Can Co., 113 Fla. 168, 172, 151 So. 488, 489–90 (1933). In general, a dictionary may provide the popular and common-sense meaning of terms presented to the voters. *Myers v. Hawkins*, 362 So.2d 926, 930 n.10 (Fla.1978). The dictionary defines the word “responsible” to mean “liable” or “answerable,”⁹ and the word “primarily” is intended to qualify or limit the word “responsible.” The question then becomes to what extent does the word “primarily” qualify or limit the word “responsible.” The word “primarily” is defined to mean

“fundamentally,” “in the first place,” “for the most part,” “chiefly,” “principally,” or “mainly.”¹⁰ The dictionary does not restrict the word “primarily” to “entirely” or “substantially” or “more than half,” as you suggest in your question; thus we conclude that the voters did not attach such limited meanings. In the context of the amendment, we find that the voters contemplated the phrase “primarily responsible” to be a recognition that no one person or entity is responsible for 100% of the pollution in the Everglades Agricultural Area (EAA) or the Everglades Protection Area (EPA),¹¹ but *283 those within the EAA who are determined to be responsible must pay their share of the costs of abating that pollution. Voters reading the ballot summary or the entire amendment would most likely understand that the words “primarily responsible” would be applied in accordance with their ordinary meaning to require that individual polluters, while not bearing the total burden, would bear their share of the costs of abating the pollution found to be attributable to them.¹²

In conclusion, we answer your inquiries by finding that (1) Amendment 5 is not self-executing; (2) the amendment requires implementing legislation, notwithstanding the existence of the Everglades Forever Act; and (3) the words “primarily responsible” require those in the EAA who cause water pollution in the EPA or EAA to bear the costs of abating that pollution.

Respectfully,

/s/ Gerald Kogan

/s/ Gerald Kogan

/s/ Chief Justice

/s/ Ben F. Overton

/s/ Ben F. Overton

/s/ Justice

/s/ Leander J. Shaw, Jr.

/s/ Leander J. Shaw, Jr.

/s/ Justice

/s/ Major B. Harding

/s/ Major B. Harding

/s/ Justice

/s/ Justice

/s/ Stephen H. Grimes

/s/ Charles T. Wells

/s/ Stephen H. Grimes

/s/ Charles T. Wells

/s/ Senior Justice

/s/ Justice

/s/ Harry Lee Anstead

All Citations

706 So.2d 278, 22 Fla. L. Weekly S728

/s/ Harry Lee Anstead

Footnotes

1 [Art. IV, § 1\(a\), Fla. Const.](#)

2 [Art. III, § 19\(h\), Fla. Const.](#)

3 [Fla. R.App. P. 9.500\(b\)\(2\)](#). Briefs were filed on behalf of Save Our Everglades, Inc.; Florida Audubon Society and National Audubon Society; Flo-Sun, Inc., Osceola Farms Co., Atlantic Sugar Association, Inc., and Okeelanta Corporation; United States Sugar Corporation; Sugar Cane Growers Cooperative of Florida and St. Joe Corporation; The Florida Chamber of Commerce, Inc.; and Florida Legal Foundation.

4 We disagree with the opinion of the Attorney General. [Op. Att'y Gen. Fla. 96-92 \(1996\)](#)(opining that Amendment 5 is self-executing).

5 [§ 373.4592, Fla. Stat. \(1995\)](#).

6 See [Advisory Opinion to Attorney General Fee on Everglades Sugar Production, 681 So.2d 1124, 1127-28 \(Fla.1996\)](#)(approving place on ballot for proposed amendment imposing a levy of a penny per pound on raw sugar).

7 See [Gray v. Bryant, 125 So.2d 846, 851 \(Fla.1960\)](#)("The will of the people is paramount in determining whether a constitutional provision is self-executing....").

8 [Williams v. Smith, 360 So.2d 417, 420 n. 5 \(Fla.1978\)](#).

9 [Webster's Third New International Dictionary](#) at 1935 (1986); [Webster's Ninth Collegiate Dictionary](#) at 1005 (1990); [The American Heritage Dictionary](#) at 1053 (2d College ed.1985).

10 [Webster's Third New International Dictionary](#) at 1800 (1986); [Webster's Ninth Collegiate Dictionary](#) at 934 (1990); [The American Heritage Dictionary](#) at 983 (2d College ed.1985).

11 The causes of such pollution run the gamut from lawn run-off to pollution from cattle ranching and the growing of sugar cane.

12 We recognize, of course, that not all of the water pollution within the EPA and the EAA may be caused by polluters within the EAA. Therefore, while polluters within the EAA as a group must pay for 100% of the cost to abate the pollution they cause, Amendment 5 does not require them to pay for the abatement of such portion of the pollution they do not cause.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Lee County v. Brown](#), Fla.App. 2 Dist., June 9, 2006

509 So.2d 292
Supreme Court of Florida.

In re ADVISORY OPINION TO THE
GOVERNOR, Request of May 12, 1987.

No. 70533.

|
July 14, 1987.

Synopsis

The Governor requested advice of the Supreme Court as to facial validity of statute imposing sales and use tax on services. The Supreme Court held that: (1) imposition of tax on legal services did not unconstitutionally burden right to legal counsel or right to access to court; (2) requirement that all persons who purchase advertising out of state for consumption in Florida report to state did not constitute unconstitutional registration requirement; but (3) provision imposing sales and use tax on written construction contracts signed prior to enactment of statute if contractors failed to complete performance prior to future date violated state constitutional prohibition against impairment of contracts.

Question answered.

Grimes, J., concurred in part and dissented in part and filed opinion.

Ehrlich and Barkett, JJ., declined to answer question and filed opinions.

West Headnotes (32)

[1] **Courts** Questions submitted by Legislature or Governor or other officer

Supreme Court may not render advisory opinion regarding governor's statutory, as opposed to his constitutional, powers and duties. [West's F.S.A. Const. Art. 4, § 1\(c\)](#).

[2] **Courts** Questions submitted by Legislature or Governor or other officer

Supreme Court had authority to render advisory opinion as to constitutionality of statute imposing tax on sales or use of services, in light of potentially chaotic impact on governor's constitutional duties as fiscal manager which could be caused by finding statute invalid. [West's F.S.A. Const. Art. 4, § 1\(c\)](#); [Laws 1987, ch. 87-6, § 1 et seq.](#)

[3] **Courts** Operation and effect in general

Advisory opinions are merely legal opinions of individual justices, offered for governor's guidance in performance of his or her constitutional duties, and do not constitute decisions of Florida Supreme Court and thus are not binding in any future judicial proceedings. [West's F.S.A. Const. Art. 4, § 1\(c\)](#).

[4] **Courts** Questions submitted by Legislature or Governor or other officer

Advisory opinion of Florida Supreme Court to governor is limited in scope to questions arising under Florida Constitution when validity of state statute affects duties of governor, and court may not consider federal issues. [West's F.S.A. Const. Art. 4, § 1\(c\)](#).

[5] **Taxation** Validity of Acts and Ordinances

Imposition of tax on legal services did not facially constitute unconstitutional burden on right to legal counsel under State Constitution, where statute exempted from taxation pro bono legal services and government counsel appointed for indigents. [West's F.S.A. Const. Art. 1, § 16](#); [West's F.S.A. §§ 212.02\(21\)](#), [212.08\(6, 7\)](#), [212.0592](#).

1 Cases that cite this headnote

[6] **Criminal Law** Consultation with counsel; privacy

Right to counsel is violated only when access to attorney is impeded or where attorney's ability to consult with, advise, or defend his client is hindered. West's F.S.A. Const. Art. 1, § 16; U.S.C.A. Const.Amend. 6.

[7] **Constitutional Law** 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Imposition of tax on legal services did not facially violate state constitutional right of access to courts, where statute exempted from taxation pro bono legal services and government counsel appointed for indigents. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 212.02(21), 212.08(6, 7), 212.0592.

1 Cases that cite this headnote

[8] **Constitutional Law** 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Imposition of tax on legal services was not "sale of justice" prohibited by State Constitution, where tax imposed detached, incidental burden upon court access and was not levied in exchange for access to courts or to purchase justice. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 212.02(21), 212.08(6, 7), 212.0592.

1 Cases that cite this headnote

[9] **Clerks of Courts** 🔑 Filing papers

Constitutional Law 🔑 Costs and fees; indigency

State can directly assess fees and costs for access to court system only when fees and costs are directly related to administration of justice, but fees collected cannot be used for general revenue purposes. West's F.S.A. Const. Art. 1, § 21.

[10] **Constitutional Law** 🔑 Sales and use taxes

Taxation 🔑 Validity of Acts and Ordinances

Imposition of sale or use tax on legal services did not facially violate equal protection guarantees

of State Constitution, even though exemptions were granted for legal services provided to indigents, government, nonprofit entities, and employers. West's F.S.A. Const. Art. 1, § 2;

West's F.S.A. § 212.059.

[11] **Constitutional Law** 🔑 Taxation

State is accorded wide range of discretion when classifying for taxation purposes provided that classification is reasonable, nonarbitrary, and rests on some ground of difference having fair and substantial relation to object of legislation. West's F.S.A. Const. Art. 1, § 2.

3 Cases that cite this headnote

[12] **Taxation** 🔑 Power to Impose

Classification of item as essential or nonessential for tax purposes has no constitutional significance; government can tax essential goods and services such as food, medicine, gasoline, or electricity if it chooses to do so.

[13] **Taxation** 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not facially discriminate against advertising industry as a whole by placing upon it disproportionate tax burden, where taxation of advertising was expected to account for 4.7% of all revenues derived from new tax, and revenues derived from taxation of advertising services was projected to account for 1.4% of total tax revenues. West's F.S.A. § 212.01 et seq.

[14] **Taxation** 🔑 Validity of Acts and Ordinances

Requirement in statute imposing sales and use tax on services that all persons who purchase advertising out of state for consumption in Florida report to state, self-accrue the tax, and then remit tax directly to state did not constitute unconstitutional registration requirement. West's F.S.A. §§ 212.0595(6), 212.06(2)(k), 212.11(1).

1 Cases that cite this headnote

[15] Taxation 🔑 Power to Impose

Advertisers and the press are not immune from ordinary, nondiscriminatory taxes of general application. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 🔑 Advertising**Constitutional Law** 🔑 Taxation**Taxation** 🔑 Validity of Acts and Ordinances

Imposition of sales and use tax on services did not violate constitutional right of free speech due to taxation of advertisers and the press, where tax was one of general application which did not single out advertisers or the press for special taxation. West's F.S.A. § 212.01 et seq.; U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[17] Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not unconstitutionally discriminate between publications based on content, even though statute exempted sales and leases to religious, scientific, educational, and other nonprofit institutions when transactions were in furtherance of their customary nonprofit functions. West's F.S.A. § 212.08(6, 7), (7) (d) 2, (o) 1; U.S.C.A. Const.Amend. 1.

[18] Taxation 🔑 Validity of Acts and Ordinances

Exemption of government entities from sales and use tax on services did not unconstitutionally discriminate between publications based on content. West's F.S.A. § 212.08(6); West's F.S.A. Const. Art. 1, § 4; U.S.C.A. Const.Amend. 1.

[19] Taxation 🔑 Validity of Acts and Ordinances

Exemption of religious institutions from sales and use tax on services did not unconstitutionally

discriminate between publications based on content. West's F.S.A. § 212.06(9); West's F.S.A. Const. Art. 1, § 10; U.S.C.A. Const.Amend. 1.

[20] Taxation 🔑 Nature of Tax

Statute imposing sales and use tax on services was not "income tax" in violation of state constitutional prohibition against imposition of taxes in excess of any similar tax levied by United States or any state, where tax was levied upon privilege of engaging in occupation or business of selling services and was measured by gross receipts derived therefrom; act imposes tax on sale of services, not upon income; tax exempted services that employees rendered to their employers and services that partners supply to their partnerships; tax was wholly transactional in nature; and act allowed prevailing plaintiffs to recover applicable sales or use tax due on legal fees from defendant.

West's F.S.A. Const. Art. 7, § 5; West's F.S.A. §§ 57.071(3), 212.059, 212.0592(2, 4), 212.0594(3).

[21] Taxation 🔑 Double Taxation

No unconstitutional double taxation occurs where there are two taxpayers and two separate taxable transactions or privileges.

1 Cases that cite this headnote

[22] Taxation 🔑 Double Taxation

Even though prime contractors were required to collect and remit taxes for their purchases from subcontractors and their eventual sales to ultimate purchasers under statute imposing sales and use tax on services, permitting of taxes did not constitute unconstitutional double taxation, where effect was due to separate taxable transactions. West's F.S.A. § 212.0594(6, 8); West's F.S.A. Const. Art. 7, § 5.

1 Cases that cite this headnote

[23] Constitutional Law 🔑 To Executive, in General

State constitutional provision prohibiting any person belonging to one branch of government from exercising powers appertaining to other branches prohibits legislature from assigning its constitutional duties to administrative agencies within executive branch. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[24] Constitutional Law 🔑 Standards for guidance

Statutes granting enforcement power to executive agencies must clearly set out adequate standards to guide agency in execution of powers delegated and must define powers with sufficient clarity to preclude agency from acting through whim, favoritism, or unbridled discretion. West's F.S.A. Const. Art. 2, § 3.

2 Cases that cite this headnote

[25] Constitutional Law 🔑 Rule making

Legislature may validly delegate to agency officials authority to promulgate subordinate rules within proscribed limits and to determine facts to which established policies of legislation are to apply so long as agency is not delegated authority to determine what law shall be. West's F.S.A. Const. Art. 2, § 3.

2 Cases that cite this headnote

[26] Constitutional Law 🔑 Taxation and public finance

Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not unconstitutionally shift to Department of Revenue power to define taxable services or to make apportionment decisions, where statute incorporated by reference manual defining types of services touching on advertising, “market

coverage” was expressly defined in statute, and statute set out apportionment mechanism with sufficient specificity and clarity to guide Department as to legislature's intent. West's F.S.A. Const. Art. 2, § 3; West's F.S.A. §§ 212.02(22), 212.0595, 212.0595(4)(b).

3 Cases that cite this headnote

[27] Statutes 🔑 Purpose of single-subject rule

Single subject rule attempts to avoid surprise or fraud by insuring that public and legislators involved received fair and reasonable notice of contents of proposed act, and is intended to prevent hodgepodge, log-rolling legislation. West's F.S.A. Const. Art. 3, § 6.

1 Cases that cite this headnote

[28] Statutes 🔑 Acts Relating to One or More Subjects; Single-Subject Rule

Fact that scope of legislative enactment is broad and comprehensive is not fatal under single subject rule so long as matters included in enactment have natural or logical connection. West's F.S.A. Const. Art. 3, § 6.

1 Cases that cite this headnote

[29] Statutes 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not violate single subject rule in State Constitution, even though statute created comprehensive taxation scheme for services. West's F.S.A. § 212.01 et seq.; West's F.S.A. Const. Art. 3, § 6.

2 Cases that cite this headnote

[30] Taxation 🔑 Nature of Property

Contract rights are ordinarily subject to state's powers of taxation.

[31] Constitutional Law  **Obligation of Contract**

Any legislative action which diminishes value of contract is repugnant to and inhibited by State Constitution. *West's F.S.A. Const. Art. 1, § 10.*

[4 Cases that cite this headnote](#)

[32] Constitutional Law  **Taxation**

Statute imposing sales and use tax on written construction contracts signed prior to enactment of statute if contractor failed to complete performance prior to future date violated state constitutional prohibition against laws impairing obligation of contracts.  *West's F.S.A. §§ 212.0592(8)*,  *212.0594*,  *212.0594(6, 8)*; Laws 1987, ch. 87-6, §§ 31, 31(4); *West's F.S.A. Const. Art. 1, § 10.*

[2 Cases that cite this headnote](#)

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Robert A. Altman, J. Griffin Leshner and James C. Duff of Clifford & Warnke, Washington, D.C., for Daniel F. O'Keefe, Jr. and Eve E. Bachrach, The Proprietary Ass'n, Inc.

*297 Joseph C. Spicola, Jr., General Counsel to the Governor, and Alan C. Sundberg, Sylvia H. Walbot and Cynthia S. Tunncliff of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, Tallahassee, for the Governor.

Talbot D'Alemberte, Joseph W. Jacobs and Adam J. Hirsch, Tallahassee, for the Legislature.

William Townsend, General Counsel and Jeffrey Kielbasa, Deputy General Counsel, Tallahassee, and Steven S. Rosenthal and Walter Hellerstein of Morrison & Foerster, Washington, D.C., for the Florida Dept. of Revenue.

Robert A. Butterworth, Atty. Gen., and Joseph C. Mellichamp, III, Kevin J. Odonnell and Eric J. Taylor, Asst. Attys. Gen., Tallahassee, for the Atty. Gen.

Jack M. Skelding, Jr. and Julius F. Parker, Jr. of Parker, Skelding, McVoy & Labasky, Tallahassee, for Florida Informagement Services, Inc.

Opinion

The Honorable Bob Martinez
Governor of Florida

The Capitol

Tallahassee, Florida 32301

Dear Governor Martinez:

We have the honor of acknowledging your communication of May 12, 1987, requesting our advice, pursuant to [article IV, section 1\(c\) of the Florida Constitution](#) and [rule 9.500 of the Florida Rules of Appellate Procedure](#), as to the interpretation of a portion of the Constitution affecting your fiscal duties as Governor.

Omitting the formal parts, your letter reads as follows:

“Pursuant to [Article IV, Section 1\(c\) of the Constitution of the State of Florida](#), your opinion is requested as to the interpretation of my executive duties and responsibilities as chief executive under [Article VII, Section 1\(d\)](#) and [Article IV, Section 1\(a\)](#), of the Constitution of the State of Florida.

“[Article VII, Section 1\(d\)](#) requires that ‘provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period’ and [Article IV, Section 1\(a\)](#) relates to my general obligations as chief executive, in particular, my duty to insure ‘that the laws be faithfully executed.’ In furtherance of those constitutional mandates, I am required to submit to the Legislature a recommended budget which contains sufficient revenues to meet my recommended appropriations, Chapter 216, Florida Statutes, and to amend my recommendations if it comes to my attention that revenue sources are insufficient to fund the appropriations, [Section 216.168, Florida Statutes](#).

“Upon my election to office, I became acutely aware that in order to meet the requirements of this fast growing State, a new revenue source must be found to address pressing and compelling correctional, educational, health and

other infrastructure needs. Pursuant to my constitutional and statutory authority and responsibilities, I, therefore, recommended to the Legislature a budget which contained projected revenues from a tax to be imposed on the sale or use of services in this State and recommended that such tax be implemented by the enactment of appropriate legislation. The Legislature responded by enacting into law Chapter 87–6, Laws of Florida (1987).

“Chapter 87–6 imposes a general tax on the sale or use of services consumed or enjoyed in the state. Services that are sold in the state but are consumed or enjoyed outside the state generally are not taxed under Chapter 87–6. A sale of service is deemed to occur in the state when more than 50 percent of the service is performed within the state based on costs of performance. A use of a service is deemed to occur in the state when the sale of the service takes place outside the state and the service is consumed or enjoyed within the state. The structure of the tax on the sale or use of services imposed by Chapter 87–6 thus follows the traditional pattern of Florida’s sales and use taxes on tangible personal property, which imposes a tax on the use of property that is purchased outside the state but is subsequently used or consumed within the state.

“Moreover, the tax on the sale and use of services imposed by Chapter 87–6 in many cases is apportioned to the extent that the service is enjoyed (consumed) in the state. The preexisting provision of Chapter 212 [[Florida Statute 212.06\(7\)](#)] that effectively provides a credit for sales and use taxes paid to other states has been extended by Chapter 87–6 to taxes imposed on services by other states. Hence, Florida’s use tax on services will not apply insofar as the sale or use of such services in other states has lawfully been taxed by such other state.

“At the time I recommended a tax on the sale or use of services, there was no doubt in my mind that the tax was appropriate and valid. Indeed, I continue in that belief today. Since the enactment of Chapter 87–6, Laws of Florida, however, debate has raged as to the constitutional validity of the new tax. Numerous lawsuits attacking the statute have been filed or threatened.

“The challenges to the validity of Chapter 87–6 which have already been asserted or suggested can be categorized as follows:

(1) Due process—Whether a general tax on the sale or use of services consumed or enjoyed in the state,

including legal services, impermissibly burdens the right to legal counsel and access to the courts in violation of the due process clauses of [Article 1, Section 9 of the Florida Constitution](#) and the 14th Amendment to the U.S. Constitution.

(2) Equal protection—Whether a general tax on the sale or use of services consumed or enjoyed in the state, which exempts some users of a service, denies equal protection of the laws in violation of [Article I, Sections 2 and 9 of the Florida Constitution](#) and the 14th Amendment to the U.S. Constitution.

(3) Access to courts—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, impermissibly restricts access to and use of the state or federal courts in violation of [Article I, Section 21 of the Florida Constitution](#), Article III of the U.S. Constitution and the 5th, 6th and 14th Amendments to the U.S. Constitution.

(4) Free speech, press and association—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including advertising services, violates the freedom of speech, press or association of advertisers or of media in which the advertising is carried in violation of [Article I, Section 4 of the Florida Constitution](#) and the 1st and 14th Amendments to the U.S. Constitution.

(5) Income tax—Whether a general tax on the sale or use of services consumed or enjoyed in the state is an income tax prohibited by [Article VII, Section 5 of the Florida Constitution](#).

(6) Commerce clause—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including advertising services, where the tax is apportioned and a credit is provided for a tax imposed by another state, violates the Commerce Clause of Article I of the U.S. Constitution.

(7) Miscellaneous constitutional challenges—These challenges do not neatly fit into the above categories and are listed below:

(a) Separation of powers—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, violates the separation of powers requirement of [Article II, Section 3 of the Florida Constitution](#).

(b) Supremacy clause—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, in connection with litigation before the federal courts, violates the Supremacy Clause contained in Article VI of the U.S. Constitution.

(c) Single subject—Whether Chapter 87–6 violates the single subject requirement *299 of Article III, Section 6 of the Florida Constitution.

(d) Right to counsel—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, breaches the attorney/client privilege and, thus, impermissibly burdens the right to counsel under both Article I, Section 16 of the Florida Constitution and the 6th and 14th Amendments of the U.S. Constitution.

(e) Exercise of rights—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, impermissibly burdens the exercise of rights secured by the 5th, 6th, and 8th Amendments to the U.S. Constitution.

“The Justices of this Court have considered federal constitutional questions in past advisory opinions insofar as those issues have impacted upon a governor's duties. *Advisory Opinion to the Governor*, [157 Fla. 885], 27 So.2d 409 (1946); *In re Advisory Opinion to the Governor*, 150 So.2d 721 (1963).

“The uncertainty created by the pending and threatened litigation assailing the constitutionality of the statute has created doubt as to my constitutional duties and responsibilities. The Justices of this Court have determined that the Governor's duty to insure sufficient revenue sources to meet projected expenditures under Article VII, Section 1(d) and his duty to insure the laws are faithfully executed under Article IV, Section 1(a), are proper foundations upon which to base a request for an advisory opinion involving the validity of a new revenue source. See *In re Advisory Opinion to the Governor*, 243 So.2d 573 (1971), wherein this Court responded to the request of Governor Askew as to whether his corporate income tax proposal violated Article VII, Section 5 of the Constitution of the State of Florida.

“Specifically, I am in doubt as to whether under the fiscal responsibilities imposed on me by the Constitution and implementing legislation, it will be necessary for

me to submit an amended budget to the Legislature for consideration which eliminates as a revenue source taxes collected on the sale or use of services under Chapter 87–6, Laws of Florida.

“It is recognized that in advising me as to my constitutional duties under Article VII, Section 1(d) it will be necessary to determine the constitutional validity *vel non* of Chapter 87–6, Laws of Florida. The Justices of this Court have on other occasions responded to a request for an interpretation of the Governor's constitutional duties even though doing so required a determination of the constitutionality *vel non* of a legislative enactment, *In re Advisory Opinion of the Governor Civil Rights*, 306 So.2d 520 (1975) and *In re Advisory Opinion to the Governor*, 374 So.2d 959 (1979). In *In re Advisory Opinion to the Governor*, Governor Graham requested an opinion respecting his duty to appoint members of the judiciary pursuant to newly enacted legislation creating the Fifth District Court of Appeal and various other judicial positions. The Justices determined to answer Governor Graham's inquiry because ‘[t]o allow these questions to be raised by others after realignment of districts and appointment of judges, could be chaotic’ 374 So.2d at 962.

“The consequences of this revenue source being invalidated are staggering. If judicial determination is delayed and the statute invalidated, it is foreseeable that no corrective action could be taken during the 1987–88 budget year so as to balance the budget. Moreover, if the taxes are collected and the statute or portions of it are invalidated, the liabilities created by refund claims would be severely disruptive of the state's finances.

“This is not simply a problem of preventing increases in state agency programs. Without the funds generated by the tax on the sale or use of services, there will be a shortfall of \$232.2 million in funding a continuation budget. Thus, statewide programs would have to be cut and essential services curtailed.

*300 “The impact will be felt at all levels of government. For example, at least \$53.5 million of the funds raised by this revenue source will flow to local governments under the terms of current law, Section 218.61, Florida Statutes. Uncertainty as to the ability to expend these and other funds will wreak havoc with local government capital outlay, not to mention the required capital improvement elements of the Local Government Comprehensive Plans.

“By virtue of the foregoing, I respectfully request the opinion of the Justices of the Supreme Court on the following question affecting my executive duties and responsibilities:

“Did the Legislature by enacting Chapter 87–6, Laws of Florida, validly create revenue sources from the tax imposed on the sale or use of services consumed or enjoyed in this State as enumerated therein or did it fail in that effort which will require me to propose a supplemental budget which either reduces state expenditures or attempts to identify and propose alternative sources of revenue so that the budget of this State will be in balance as dictated by  [Article VII, Section 1\(d\), Florida Constitution?](#)”

Upon receiving your letter, the Justices, pursuant to [article IV, section 1\(c\), Florida Constitution](#), and [Florida Rule of Appellate Procedure 9.500\(b\)\(1\)](#) entered an interlocutory order stating:

“His Excellency, the Governor of Florida, has requested the opinion of the justices of this Court on the following question:

“Did the Legislature by enacting Chapter 87–6, Laws of Florida, validly create revenue sources from the tax imposed on the sale or use of services consumed or enjoyed in this State as enumerated therein or did it fail in that effort which will require me to propose a supplemental budget which either reduces state expenditures or attempts to identify and propose alternative sources of revenue so that the budget of this State will be in balance as dictated by  [Article VII, Section 1\(d\), Florida Constitution?](#)”

“The full text of the Governor's letter is attached hereto as an exhibit and made a part hereof.

“It is the decision of the Court that this request is answerable under the above-noted section of the Constitution and we exercise our discretion to do so.

“It is, therefore, the order of the Court that those interested parties who contend that the aforesaid statute is unconstitutional shall file their briefs on or before May 29, 1987, and serve a copy thereof on the Governor and the Attorney General. Those parties supporting the constitutionality of the statute shall file their briefs on or before June 8, 1987, and serve a copy thereof on those

parties who have filed a brief attacking the constitutionality of the tax. Reply briefs shall be filed on or before June 18, 1987. Oral argument is scheduled for 9:00 a.m. on Monday, June 22, 1987. All parties who have filed a brief shall have the opportunity of presenting oral argument. The amount of time allocated to each party will be determined after the filing of the briefs.

“It is so ordered.”

Pursuant to this order, both proponents and opponents of chapter 87–6, Laws of Florida, filed briefs and this Court heard oral argument.

As a threshold matter, many of the parties who have filed briefs or appeared to argue their positions before this Court have called upon us to reconsider issuing an advisory opinion in this matter. The proponents of this view make two principal arguments in support of their position. First, they argue that you have asked this Court to rule on the validity of a statute and that such an opinion is beyond the Court's advisory power under [article IV, section 1\(c\) of the Florida Constitution](#). Second, they argue that the issuance of an advisory opinion would be unwise because the Court has no facts or record upon which to base its ruling and because an advisory opinion could prejudice the effective resolution of future disputes between various taxpayers and the state. For the *301 reasons that follow, however, we adhere to our decision to render an advisory opinion.

[Article IV, section 1\(c\) of the Florida Constitution](#) provides in pertinent part that “[t]he governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties.” As reflected in your letter of May 12, 1987, set out above, [article IV, section 1\(a\) of the Florida Constitution](#) sets out the general obligations of the chief executive. Among these general obligations is the duty to ensure that the laws of the state are faithfully executed. A number of implicit fiscal responsibilities are inherently contained within this broad proviso of authority. Moreover,  [article VII, section 1\(d\), Florida Constitution](#), requires that the state raise sufficient revenue to balance Florida's budget for each fiscal period. This provision also impacts your fiscal responsibilities in a significant manner.

[1] [2] We agree with those who contend that [article IV, section 1\(c\), Florida Constitution](#), does not generally

empower this Court to issue advisory opinions concerning the validity of statutes enacted by the legislature. Thus, we are without power to render an advisory opinion regarding your statutory, as opposed to your constitutional, powers and duties. *In re Advisory Opinion to the Governor*, 225 So.2d 512, 514 (Fla.1969). Nor does this provision generally authorize this Court to resolve questions concerning the legal rights and obligations of private parties. As we noted in *In re Advisory Opinion to the Governor*, 113 So.2d 703, 705 (1959):

This Court has many times declined to pass upon the constitutionality of a statute in rendering advisory opinions, particularly where such a test can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel. This policy is the product of the historical recognition of the presumed constitutionality of an act of the Legislature until such presumption is set at rest by a court of competent jurisdiction in a proper adversarial proceeding.

Nevertheless, this Court has previously held that when a legislative enactment severely impacts the fiscal stability of the state, the enactment necessarily affects the chief executive's fiscal duties under the Florida Constitution. For example, in *In re Advisory Opinion to the Governor*, 243 So.2d 573, 576 (1971), this Court stated that due to the major impact that legislation creating a corporate income tax would have on the state, Governor Askew's fiscal duties under [article IV, section 1\(a\)](#), and  [article VII, section 1\(d\) of the Florida Constitution](#) were necessarily affected. Thus, the Court found it appropriate to issue an advisory opinion concerning the constitutionality of such an enactment. We noted similar considerations when we examined the constitutionality of the 1970 General Appropriations Bill in *In re Opinion to the Governor*, 239 So.2d 1, 8–9 (Fla.1970), in which we stated that “in view of the great public interest in maintaining the fiscal stability of state government, we have decided to answer your request.” Therefore, in light of the potentially chaotic impact upon your constitutional duties as fiscal manager of Florida which could be caused by finding chapter

87–6 invalid, we find that sufficient authority exists to answer your inquiry.

[3] Turning to the question of whether we should issue an advisory opinion on the tax law in question, we address the concerns of those opposing such an opinion by stressing its limited scope. First of all, advisory opinions are merely legal opinions of the individual justices, offered for the Governor's guidance in the performance of his or her constitutional duties. The opinions expressed in these advisory opinions do not constitute decisions of the Florida Supreme Court and, therefore, are not binding in any future judicial proceedings.

 *In re Advisory Opinion of Governor Civil Rights*, 306 So.2d 520, 523 (Fla.1975); *Amos v. Gunn*, 84 Fla. 285, 321, 94 So. 615, 627 (1922). Moreover, because by nature an advisory opinion is rendered without the benefit of a record or a specific factual scenario, when such an opinion discusses ***302** the constitutionality of a statute it is necessarily limited to the facial constitutionality of the enactment. Thus, in the case of the instant tax on the sales and use of services, any interested parties are free to initiate lawsuits to challenge the tax and are free to argue that this advisory opinion has either been wrongly decided or that the act is unconstitutional as applied to their particular situations. Our examination of chapter 87–6 is, therefore, limited to its facial validity and we will not address the validity of the law as applied to any particular set of facts.¹

[4] Significantly, we also find that the express language contained in [article IV, section 1\(c\), Florida Constitution](#), precludes us from addressing federal constitutional issues as they relate to chapter 87–6 in this opinion. Although we understand your concern that a decision not to address these federal issues would reduce the adequacy of our advice to you, we find that the express language contained in [article IV, section 1\(c\)](#) authorizing us only to issue advisory opinions concerning your duties and powers under “any portion of this constitution” inescapably limits the scope of our opinion to questions arising under the Florida Constitution when the validity of a state statute affects your duties.² Moreover, we must acknowledge another practical justification for declining to address federal questions in this advisory opinion. Although this Court is the final arbiter of questions arising under the Florida Constitution, the United States Supreme Court is the final arbiter of federal constitutional law. Thus, this Court cannot address federal questions as authoritatively as it can state constitutional questions.

Part I. Taxation of Legal Services

[5] We shall address the various challenges to the act roughly in the order set forth in your letter of May 12, 1987. Turning first to the imposition of the tax on legal services, we find that it does not facially constitute an unconstitutional burden on the right to legal counsel. [Article I, section 16 of the Florida Constitution](#) sets forth the rights of persons accused of crimes, one of which is the right to legal counsel. Opponents of the instant act argue that the right to counsel is a “preservative right” that safeguards many other constitutional rights and that, therefore, any burden on the exercise of that right is constitutionally impermissible. We do not, however, believe that this tax, on its face, burdens the constitutional right of access to counsel.

[6] The right to counsel is violated only when access to an attorney is impeded or where the attorney's ability to consult with, advise, or defend his client is hindered. *See* [United States v. Cronin](#), 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The instant tax does not appear to have such an effect. Although the act does tax legal services under its general provisions, the act also exempts from taxation pro bono legal services and government counsel appointed for indigents.³ Because of this exception, ***303** the act only taxes those who can afford to retain counsel and pay the tax. This exemption distinguishes the instant tax on legal services from the poll tax declared unconstitutional in [Harper v. Virginia State Board of Elections](#), 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). In *Harper*, every voter, regardless of financial ability, had to pay a \$1.50 tax as a prerequisite to voting. Under such a system, an indigent person would be denied his right to vote should he or she be unable to pay the tax. The instant exemption prevents such a result.

[7] For similar reasons, we also reject the contention that the act facially violates the constitutional right of access to the courts. [Article I, section 21 of the Florida Constitution](#) guarantees that the “courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” Because those persons who cannot afford to pay legal fees will pay no tax, the act does not appear to bar any person from seeking redress for any injury in the courts. The imposition of the instant tax should, at least theoretically, no more violate this provision than would any other rise in the cost of legal fees.

[8] [9] Nor should the instant tax in any way constitute a “sale of justice.” [Art. I, § 21, Fla. Const.](#) Clearly, the state can directly assess fees and costs for access to the court system only when such fees and costs are directly related to the administration of justice. Any such fees collected cannot be used for general revenue purposes. [Farabee v. Board of Trustees, Lee County Law Library](#), 254 So.2d 1 (Fla.1971). The instant act, however, does not impose a direct charge for the privilege of utilizing the courts. At most, the taxation of legal fees imposes a detached, incidental burden upon court access and it is not levied in exchange for access to the courts or to purchase justice.

[10] [11] We also find that the tax on legal fees does not facially violate the equal protection guarantee of [article I, section 2 of the Florida Constitution](#). Moreover, legal services are taxed under the general taxing provision of the act and are not targeted for a separate discriminatory tax. *See* ch. 87–6, § 1, Laws of Fla. (creating [§ 212.059, Fla.Stat.](#)). Thus, the strict judicial scrutiny required for enactments which impinge upon fundamental rights or discriminate against certain taxpayers is not triggered. The individual exemptions provided for certain types of legal services do not alter the act's overall character.⁴ Although the state must adhere to the principles of due process and equal protection when exercising its taxing power, those principles do not impose an ironclad rule of equality. The state must be allowed the flexibility and variety appropriate to taxation schemes. [Kahn v. Shevin](#), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). Accordingly, the state is accorded a wide range of discretion when classifying for taxation purposes, provided that the classification is reasonable, nonarbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation. *State ex rel. Vars v. Knott*, 135 Fla. 206, 184 So. 752 (1938), *appeal dismissed*, 308 U.S. 506, 60 S.Ct. 72, 84 L.Ed.2d 433 (1939), *vacated on other grounds*, 308 U.S. 507, 60 S.Ct. 72, 84 L.Ed. 434 (1939). We cannot say that the distinctions which the act draws are arbitrary. Rather, the exemptions granted for legal services provided to indigents, government, nonprofit entities, and employers are necessary for consistency with the overall act. Likewise, the exemptions are necessary in order to satisfy either constitutional requirements or social policy considerations. Accordingly, we find that the taxation scheme as it applies to legal services is reasonable and rationally related to the legitimate state purposes of raising revenue

without doing violence to either the Constitution or important social policies.

We do wish to express our concern, however, about the method set forth in [section 212.0592\(27\)\(a\)](#) for determining when taxes on legal services will be paid in criminal ***304** cases. [Section 212.0592\(27\)\(a\)](#) creates an exemption for:

Legal services rendered by an attorney to a client to the extent that the right to counsel is guaranteed pursuant to either the Sixth Amendment to the United States Constitution or [Article I, Section 16 of the Florida Constitution](#) is applicable to such legal services. However, this exemption shall only be applicable if the criminal charges brought in this case are dismissed or the client is ultimately adjudicated not guilty by a court of competent jurisdiction. This exemption shall only be granted pursuant to a refund of taxes previously paid on such services.

Ch. 87–6, § 3, Laws of Fla. Accordingly, the legislature has created a system under which, in order to be eligible for a refund, the suspect must actually be charged with criminal activity and wholly exonerated on all charges. Some question the appropriateness of giving the state a direct financial interest in whether a suspect is charged and convicted. Although we do not believe that this aspect of the tax is facially unconstitutional, such equal protection questions are fact specific and the true test of this provision will come if individual defendants should challenge the limiting language in the second sentence of subsection (27)(a) as applied to them. Nevertheless, though some may believe that basing taxation decisions upon whether one is charged and convicted for a crime is extremely unwise, it is not within the province of this or any other court to base a determination of statutory validity on our view of the particular enactment's wisdom absent a violation of constitutional guaranties. [State v. Yu](#), 400 So.2d 762 (Fla.1981), *appeal dismissed*, [Wall v. Florida](#), 454 U.S. 1134, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982); [Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State](#), 392 So.2d 1296 (Fla.1980).

Part II. Due Process and Equal Protection

Opponents of chapter 87–6 have expressed a number of other due process and equal protection concerns regarding the statute at bar. Of course, as we noted above, due process and equal protection concerns are inherently fact specific and, therefore, cannot be comprehensively addressed in this opinion. Representatives of three groups of businesses, however, have lodged facial challenges to the act on due process and equal protection grounds. We believe some, but not all, of these challenges are amenable to adequate analysis in this advisory opinion and we shall, therefore, examine each in turn.

A. Exemption 35

Representatives of the data processing industry charge that the exemption contained in the newly created [section 212.0592\(35\) of the Florida Statutes](#) (exemption 35) violates equal protection because it fails to treat all persons and businesses similarly circumstanced alike. Ch. 87–6, § 3, Laws of Fla. Exemption 35 exempts from taxation certain service corporations that perform data processing services for financial institutions described in group 61 of the Standard Industrial Classification Manual (SIC).⁵ In order to qualify for the exemption, the service corporation must meet several criteria, including that it be organized pursuant to section 545.74 of the rules of the Federal Home Loan Bank Board, that its capital stock be purchased only by savings and loan associations operating within the state, and that those savings and loans or savings banks satisfy certain percentage ownership requirements. Ch. 87–6, § 3, Laws of Fla.

Two data processing businesses that do not satisfy these criteria advance the equal protection argument that this exemption arbitrarily distinguishes between data processing services owned by savings and loans and those owned by other entities. ***305** This is the type of issue that should not be addressed in an advisory opinion. A decision on this claim has little or no adverse fiscal impact on the Governor's functions. Moreover, addressing the propriety of exemption 35 would amount to an adjudication of the legal rights and obligations of private parties. Hence, this issue should be resolved by private litigation of the directly affected parties.

B. Newspapers and Advertisers

[12] Representatives of the advertising industry and the press argue that the act violates equal protection principals by reclassifying the sales of newspapers and advertising as nonessential goods and singling out the sale of those items for discriminatory taxation. We note first that the classification of an item as essential or nonessential has no constitutional significance. The government can tax essential goods and services, such as food, medicine, gasoline, or electricity if it chooses to do so. See *Puget Sound Power & Light Co. v. City of Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934) (approving a license tax on electricity). Therefore, whether the act classifies advertising and newspapers as essential or nonessential is wholly irrelevant.

Nor do we view chapter 87–6 as singling out either advertisers or the press for discriminatory treatment. Advertising is taxed under the same general taxation provision of the act that imposes a tax on all other nonexempt services. Ch. 87–6, § 1, Laws of Fla. (creating § 212.059, Fla.Stat.). Although newly created section 212.0595 of the Florida Statutes sets out a number of special provisions relating to the collection and apportionment of the tax as applied to the advertising industry, these rules do not themselves impose any additional tax obligations. Rather, they simply set out the specific clarifying rules that the peculiar nature of modern interstate advertising necessitates.

[13] We also disagree that the act facially discriminates against the advertising industry as a whole by placing upon it a disproportionate tax burden. As the state points out, the taxation of advertising is expected to account for only 4.7% of all revenues derived from the new sales and use tax on services. The revenues derived from the taxation of advertising services is projected to account for only 1.4% of the total tax revenues derived from chapter 212 of the Florida Statutes during the 1987–88 fiscal year. We cannot say that, on its face, this smacks of discrimination.

Opponents of the tax on advertising also argue that the act violates due process by failing to fairly apportion the tax for interstate advertisers and by attempting to tax advertisers who have no significant nexus to Florida. Questions such as this, however, are wholly fact specific and we cannot answer them by a facial examination of the statute based on hypothetical fact patterns. Thus, this type of due process

challenge must await a specific “as applied” challenge in an adversarial setting.⁶

C. The Construction Industry

Representatives of the construction industry argue that the act violates due process because it fails to define “essential services” for purposes of tax exemption and because the exemptions listed in newly created section 212.0592 are unconstitutionally arbitrary. Ch. 87–6, § 3, Laws of Fla. Because, as we stated above, the essential nature of an item bears no relation to its taxability, we find any purported vagueness in the definition of “essential services” to be wholly irrelevant. Moreover, as counsel for the legislature pointed out during oral argument, the legislative process is a political one. Many of the exemptions that opponents of the act single out as examples of arbitrariness were enacted in order either to minimize the regressive nature of tax or to address the specific concerns of organizations that the general taxing mechanism affected. Thus, we cannot say that the exemptions listed in section 212.0592 are unconstitutionally arbitrary or unreasonable.

Part III. Freedom of Speech and Press

Opponents of the statute have raised various arguments pursuant to the freedom of speech and press guarantees of article I, section 4 of the Florida Constitution. We shall address each argument separately.

A. Registration Requirements of Chapter 87–6

[14] Addressing first the requirement that all persons who purchase advertising out-of-state for consumption in Florida report to the state, self-accrue the tax, and then remit the tax directly to the state, we reject the argument that these requirements constitute an unconstitutional registration requirement. See ch. 87–6, §§ 6 (creating § 212.0595(6), Fla.Stat.), 12 (amending § 212.06(2)(k), Fla.Stat.), & 16 (amending § 212.11(1), Fla.Stat.), Laws of Fla. Although opponents of these requirements contend that *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), prohibits such registration, we cannot agree. *Tally* involved an

ordinance forbidding the distribution of all handbills that did not contain the name of the printer, author or manufacturer, and distributor. Although the City of Los Angeles urged that it had carefully aimed the law solely at identifying those responsible for fraud, false advertising, and libel, the United States Supreme Court disagreed.  *Id.* at 63–64, 80 S.Ct. at 538–39.

While *Tally* did stress the historical importance of anonymity, it struck down the ordinance solely due to its overreaching nature. Unlike the ordinance at issue in *Tally*, however, we do not view the instant disclosure requirement to be unduly intrusive on its face. Realism dictates that the state have some method of enforcing the instant tax. Prohibiting the state from requiring a given group of taxpayers to identify taxable transactions would place an unreasonable and unrealistic burden on the Department of Revenue (DOR) and would no doubt result in an uneven and haphazard enforcement of the tax code. We believe that, on its face, the registration provisions contained in chapter 87–6 are drawn in a sufficiently limited manner to pass constitutional muster. The DOR should, however, exercise caution in promulgating regulations pursuant to this statutory authority to ensure that its provisions remain limited to furthering the state's interest in identifying taxable transactions.

B. Content-based Taxation and the Taxation of Fundamental Rights

[15] [16] Opponents of the tax also argue that chapter 87–6 constitutes a direct tax on the exercise of the constitutional right to free speech. As we pointed out during our previous discussion of the equal protection concerns of advertisers and the press, however, this tax on the sale and use of services is one of general application and does not single out advertisers or the press for special taxation. Moreover, as will be discussed in more detail later, the tax is levied upon those in the business of trafficking in first amendment expression rather than upon the exercise of the right to free speech itself.⁷ It is beyond question that advertisers and the press are not immune from ordinary, nondiscriminatory taxes of general application.  *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, —, 107 S.Ct. 1722, 1725, 95 L.Ed.2d 209 (1987);  *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369, 75 L.Ed.2d 295 (1983);  *Grosjean v.*

American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936). Therefore, we reject the argument that the instant tax is directly and discriminatory aimed at the exercise of the constitutional right of free speech.

Opponents of the act also argue, however, that the instant tax targets the press *307 and discriminates based on the content of the speech involved. Proponents of this view cite to *Arkansas Writers' Project, Inc.*, *Minneapolis Star*, and *Grosjean* in support of this view. We find, however, significant contrasts between chapter 87–6 and those tax schemes struck down in these three cases. Indeed, rather than support the opponents' arguments, we believe that these three cases support the facial constitutionality of the statute.

In *Grosjean*, Louisiana enacted a license tax that only applied to publications within the state of Louisiana with a circulation of more than 20,000 copies per week. Due to the narrow scope of the statute, the law taxed only thirteen newspapers out of the more than 124 publishers in the state.  *Minneapolis Star*, 460 U.S. at 579, 103 S.Ct. at 1368. In striking down the law, the United States Supreme Court rejected the state's argument that the law imposed a license tax for the privilege of selling or charging for advertising. Instead, the Court found the law to be a deliberate and calculated effort, in the guise of a tax, to penalize certain publishers and to limit the circulation of a selected group of newspapers.⁸

Over four decades later, in *Minneapolis Star*, the Supreme Court struck down a “use tax” on the cost of ink and paper products consumed in the production of publications.  460 U.S. at 577, 103 S.Ct. at 1367. In a situation similar to that encountered in *Grosjean*, the use tax in *Minneapolis Star* was drawn so narrowly that it applied only to fourteen out of the 388 paid circulation newspapers in Minnesota.⁹ Attaching significance to the fact that Minnesota had deliberately chosen not to apply its general sales and use tax to newspapers and had, instead, enacted a separate special tax applicable only to the press, the Court struck down the special use tax as facially discriminatory. In doing so, the Court made the following observation:

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group

of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

....

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing business generally....

 460 U.S. at 585–86, 103 S.Ct. at 1371–72. Of perhaps even greater significance to the situation before this Court, the Supreme Court specifically rejected one newspaper's argument that a generally applicable sales tax would be unconstitutional, concluding that “our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible.”

 460 U.S. at 587 n. 9, 103 S.Ct. at 1373 n. 9.

This latter conclusion was reemphasized in  *Arkansas Writers' Project*, 481 U.S. at —, 107 S.Ct. at 1727. In *Arkansas Writers' Project*, the Supreme Court found that the Arkansas sales tax selectively taxed some magazines and not others based solely on content. Accordingly, the Court struck down the tax law, which exempted from taxation “religious, professional, *308 trade and sports journals and/or publications printed and published within ... [Arkansas] when sold through regular subscriptions” as unconstitutionally discriminative of publications based on content.  *Id.* at — & —, 107 S.Ct. at 1724 & 1729. The Court, however, reemphasized that genuinely nondiscriminatory taxes on newspaper receipts are constitutionally permissible.

We find the instant tax to be facially consistent with both the letter and the spirit of these three cases. Unlike the statute considered in *Grosjean* and *Minneapolis Star*, chapter 87–6 does not impact only a select few advertisers or publications. Moreover, not only does it apply to the overall industries, it is part of the same general sales tax provision that will apply to all other nonexempt businesses involved in the sale or use of services in Florida. Thus, the instant tax is wholly dissimilar to the use tax on ink and paper considered in *Minneapolis Star*. Indeed, the instant tax does exactly what the Supreme Court approved and criticized Minnesota for failing to do, i.e., extend the general sales tax to the press.

Nor do we believe the instant tax to be similar to the tax struck down in *Arkansas Writers' Project*. Newly created  section 212.08(7)(o) 1 of the Florida Statutes exempts sales and leases to religious, scientific, educational, and other nonprofit institutions from the sales tax when those transactions are in the furtherance of their customary nonprofit functions. Ch. 87–6, § 14, Laws of Fla. This exemption, among other things, leaves intact the preexisting comprehensive exemption for the use, sale and distribution of religious publications.  § 212.06(9), Fla.Stat. (Supp.1986). Moreover, the general sales tax exemption for government, nonprofit institutions, and religious organizations predates chapter 87–6, which merely extends this exemption to cover the newly taxed services. See  § 212.08(6) &  (7), Fla.Stat. (1985).

[17] We disagree with opponents of the law that the act unconstitutionally discriminates between publications based on content. Notably, prior to the enactment of chapter 87–6, some commercial advertisements were exempt from taxation of the sale and use of goods while others were not.¹⁰ Additionally, magazines sold at newsstands were taxed while newspapers were not. Thus, in at least some ways, the instant enactment serves to eliminate content-based discrimination rather than create it. Moreover, the institutions exempted from taxation under  section 212.08(7)(o) 1 are not exempted solely from the taxation of publications and advertisements which they purchase and disseminate. Rather, they are exempted from taxation for *all* their transactions that would otherwise be taxable under a sales and use tax on goods and services. Therefore, unlike the tax law at issue in *Arkansas Writers' Project*, the instant law does not require an evaluation of a publication's content in order to determine its status for taxation purposes.

[18] [19] In the case of the exemption granted to government entities, contained under  section 212.08(6), Florida Statutes, as amended by the act, we find that both law and common sense require this provision. The federal government is constitutionally immune from taxation. Also, taxing the state government or its subdivisions to raise revenues to fund the operation of state government would be nonsensical and circuitous. In the case of religious institutions, the exemption is wholly consistent with the sort of “benevolent neutrality” that is constitutionally required.  *Corporation of the Presiding Bishop of the Church of Jesus*

Christ of Latter-Day Saints v. Amos, —U.S. —, —, 107 S.Ct. 2862, 2867, 97 L.Ed.2d 273 (1987); *Walz v. Tax Commission*, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). We believe that the instant exemption from taxation as applied to religious *309 institutions serves the “permissible legislative purpose [of alleviating] significant governmental interference with the ability of religious organizations to define and carry out religious missions” without advancing religion through state activities and influence. *Corporation of the Presiding Bishop*, 483 U.S. at —, 107 S.Ct. at 2868. Nor are we persuaded that the tax exemption for a select few types of motion picture productions makes the rest of the media selected targets of discriminatory taxation. Thus, the press' tax burden is not discriminatorily based on content and the strict scrutiny test is not triggered. We believe these exemptions set forth in the act are, at the very least, rationally related to the furtherance of important social policies and, therefore, constitutionally permissible.

In light of the above, we do not find that chapter 87–6 facially violates the freedom of speech and press guarantees contained in article I, section 4 of the Florida Constitution.¹¹

Part IV. Chapter 87–6 as an Income Tax

Those opponents of the sales and use tax on services contained in chapter 87–6 who believe the enactment constitutes an income tax argue that the tax treats the right to work and earn a livelihood by engaging in the business of selling services as a taxable privilege and that, therefore, the act constitutes the type of tax prohibited by article VII, section 5, Florida Constitution. We find this analysis to be oversimplistic.

We first note that this Court has previously upheld the imposition of a gross receipts tax on businesses. In *Gaulden v. Kirk*, 47 So.2d 567 (Fla.1950), the legislature had enacted, as part of the Florida Revenue Act of 1949, a tax upon persons engaging in the business of renting, leasing, or letting any living quarters, sleeping accommodation, or housing accommodation. 47 So.2d at 570. The tax was based on a percentage of the gross rentals charged for the accommodations. Gaulden operated a facility taxed under this provision and the Palm Beach County sheriff arrested him for refusing to pay the tax. This Court upheld the tax, finding the enactment to constitute a valid gross receipts tax

on the privilege of engaging in the business of renting such accommodations. *Id.* at 576.

Four years later, in *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla.), cert. denied, 348 U.S. 865, 75 S.Ct. 87, 99 L.Ed. 681 (1954), this Court addressed the constitutionality of a tax on the daily gross receipts from gambling operations at dog racing tracks. Although the Court struck down the tax due to its arbitrary classification scheme, the Court rejected the argument that the tax amounted to an unconstitutional income tax, finding instead that the enactment constituted an excise tax upon the privilege of operating dog racing tracks in Florida. *Id.* at 886. The Court found the legislature's desire to base the tax on the amount of revenues collected to be both reasonable and constitutionally permissible. *Id.* at 887.

[20] We can see no meaningful difference between the taxes upheld in *Gaulden* and *Volusia County Kennel Club* and the tax before us now. As were the taxes approved in these two cases, the instant tax is levied upon the privilege of engaging in the occupation or business of selling services and is measured by the gross receipts derived therefrom. *See also City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744 (1932) (gross receipts tax on the privilege of selling electricity did not constitute *310 an income tax). By its express language, the act imposes an excise tax upon the sale and use of services in Florida, not upon income. Ch. 87–6, § 1, Laws of Fla. Moreover, the tax has none of the vestiges of an ordinary income tax. First, it exempts from taxation the services that employees render to their employers and the services that partners supply to their partnerships. Ch. 87–6, § 3, Laws of Fla. (creating § 212.0592(2) & (4), Fla.Stat.). This provision effectively eliminates typical wages and salaries from taxation. Thus, the tax base that the instant act creates is inconsistent with the tax base of a traditional income tax. Moreover, the tax is wholly transactional in nature and makes no reference to profit or net income, a factor this Court found significant in analyzing the tax scheme considered in *Amos*, 106 Fla. at 878, 143 So. at 747. Indeed, at least one of the act's opponents acknowledge that this Court would have to recede from both *Volusia County Kennel Club* and *Gaulden* in order to conclude that chapter 87–6 constitutes a facially unconstitutional income tax. Even assuming we could so recede from precedent in an advisory opinion, no such action would be warranted.

We agree with the opponents of the act that the true economic impact of a tax is what ultimately determines its nature. *Owens v. Fosdick*, 153 Fla. 17, 13 So.2d 700 (1943); *State ex rel. McKay v. Keller*, 140 Fla. 346, 191 So. 542 (1939). For the reasons stated above, however, we do not believe that chapter 87–6 has the realistic economic effect of creating an income tax. The act's treatment of prime contractors as the final consumer of new construction does not alter this conclusion.

See ch. 87–6, § 5, Laws of Fla. (creating § 212.0594(3), Fla.Stat.). As to the argument that the act imposes an income tax upon the class of injured Floridians seeking judicial redress for lost earnings, we point out that section 42 of the act allows prevailing plaintiffs to recover any applicable sales or use tax due on legal fees from the defendant. Ch. 87–6, § 42, Laws of Fla. (amending § 57.071(3), Fla.Stat.). We believe that this provision effectively rebuts this facial challenge to the act.

[21] [22] Finally, representatives of the construction industry argue that the act subjects prime contractors to double taxation.¹² Although the effect of chapter 87–6 at various levels in the stream of commerce may be a pyramiding of taxes, no unconstitutional double taxation occurs where there are two taxpayers and two separate taxable transactions or privileges. *Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822 (Fla.1964); *American Video Corp. v. Lewis*, 389 So.2d 1059 (Fla. 1st DCA 1980). Despite the industry's arguments to the contrary, and although the prime contractor collects and remits taxes for both his purchases from the subcontractors and his eventual sale to the ultimate purchaser, the pyramiding of taxes complained of appears to occur due to separate taxable transactions. We do not believe that the case law discouraging double taxation was intended to address such a situation.¹³

In short, we do not view the instant tax on services to be fundamentally different in nature from the sales tax on goods, an enactment long recognized as a constitutional tax on the privilege of engaging in a *311 business or occupation. *Ryder Truck Rental*, 170 So.2d at 825.

Part V. Separation of Powers

[23] Opponents of the instant tax law argue that chapter 87–6 violates article II, section 3 of the Florida Constitution, which mandates that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other

branches unless expressly provided herein.” Among other things, this provision prohibits the legislature from assigning its constitutional duties to administrative agencies within the executive branch such as the DOR. *Florida State Board of Architecture v. Wasserman*, 377 So.2d 653 (Fla.1979). This nondelegation of duties doctrine places strict limitations on administrative agencies. In particular:

Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla.1978).

[24] [25] Pursuant to this doctrine, statutes granting enforcement power to executive agencies such as the DOR must clearly set out adequate standards to guide the agency in the execution of the powers delegated and must define those powers with sufficient clarity to preclude the agency from acting through whim, favoritism, or unbridled discretion. *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla.1977); *Flesch v. Metropolitan Dade County*, 240 So.2d 504 (Fla. 3d DCA 1970), cert. denied, 244 So.2d 432 (Fla.1971). The legislature, however, may validly delegate to agency officials the authority to promulgate subordinate rules within proscribed limits and to determine the facts to which established policies of legislation are to apply so long as the agency is not delegated the authority to determine what the law shall be. *Sarasota County v. Barg*, 302 So.2d 737 (Fla.1974); *Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co.*, 285 So.2d 386 (Fla.1973). The crucial inquiry in the case at hand is whether the statute is so couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, who or what is to be taxed. See *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981, 987 (Fla.1981); *Barg*, 302 So.2d at 742.

Opponents of the act charge that the legislature violates the nondelegation doctrine by granting the DOR authority to determine what is to be taxed. Specifically, the opponents allege that the legislature unconstitutionally shifted to the DOR the power to define such crucial definitions as “advertising,” “market coverage,” “fair,” and the like. They also contend that the legislature cannot constitutionally delegate the power to make apportionment decisions and to determine in which state the benefits of a service are enjoyed.

[26] We do not believe that the instant act so lacks guidelines that neither the DOR nor the courts can determine which services the legislature intended to tax. The specificity with which the legislature must set out statutory standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards. The same conditions that may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation for the guidance of administrative agencies impractical or undesirable. *State, Department of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970); *Burgess v. Florida Department of Commerce*, 436 So.2d 356 (Fla. 1st DCA 1983), *review denied*, 447 So.2d 885 (Fla.1984). In the context of a comprehensive taxation statute extending Florida's sales and use tax to the majority of services marketed in the state, courts cannot realistically require the legislature to dictate every conceivable application of the law down to the most minute detail. As we noted in *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d 1189, 1191 (Fla.1985), the *312 subordinate factors in complex areas such as taxation should be left to the appropriate agency having expertise and flexibility. Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation. *Id.*

We do not believe the legislature doomed the viability of chapter 87–6 by failing to define such terms as “advertising” and “market coverage.” The definition of advertising has a fixed and definite meaning within the industry. *See Griffin*, 239 So.2d at 582; *Conner v. Joe Hatton, Inc.*, 216 So.2d 209, 212 (Fla.1968). Moreover, further guidance can be gleaned from an examination of the SIC manual, which contains descriptions of taxed services, including such items as advertising agency services, outdoor advertising services, advertising representative services, and the like. Indeed, section 212.02(22) of the act specifically incorporates by reference the SIC manual in defining various types of services which touch on advertising. Ch. 87–6, § 7, Laws of Fla. As

for “market coverage,” newly created section 212.0595(4) (b) of the act expressly defines the term. Ch. 87–6, § 6, Laws of Fla. The fact that opponents of the act disagree with the appropriateness of the definition does not trigger a delegation problem. For like reasons, we reject the argument that other challenged terms are so ambiguous as to cause facial unconstitutionality.¹⁴

Turning to the argument that the statute unconstitutionally delegates power to the DOR in apportionment decisions concerning advertising, we find that [section 212.0595](#) sets out the apportionment mechanism with sufficient specificity and clarity to guide the DOR as to the legislature's intent. Thus, we find that the provision passes facial scrutiny. We qualify this conclusion, however, by stressing that determinations as to the validity of tax apportionment schemes and nexus requirements are fact specific and ultimately can only be adequately adjudicated as applied to specific situations and taxpayers.

Part VI. Single Subject Requirement

Several opponents of the act contend that the statute violates [article III, section 6 of the Florida Constitution](#), which provides that “[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” In essence, these parties argue that because chapter 87–6 is a single statute that attempts to create a comprehensive taxation scheme for services, the chapter runs directly afoul of our decision in *Gaulden v. Kirk*. In *Gaulden*, this Court examined the Florida Revenue Act of 1949, section 24 of which made the effective date of the act dependent upon the passage and vitality of two other separate acts. [47 So.2d at 567](#). In that case, Gaulden argued that this resulted in an integration of the separate laws, thereby triggering a violation of the single subject rule. This Court, however, rejected that argument, holding that “[t]he fact it is an act which was passed as part and parcel of a comprehensive tax program devised by the legislature in the exercise of its lawmaking power, makes it none the less a single law within the purview of Section 16, Article III” and adding that “the legislature could not perform its duties or measure up to its responsibilities if we were to give the narrow construction [of the single subject rule] suggested by counsel.” *Id.* at 575. The opinion also added the following dicta:

No *single* law could possibly be invented which would meet constitutional requirements and at the same time contain all the essential features of a comprehensive legislative program on any subject which affects the general welfare as vitally as does taxation. The legislature pursued the only available course since its program necessarily involved a consideration of the tax structure not only of the state but also its multiple political subdivisions and quasi-independent governmental *313 units within its borders in the interest of the welfare of its citizens as a whole. A legislative program of such magnitude may necessarily involve several subjects before the ultimate end effect can be accomplished. It was essential, therefore, in enacting its program that the legislature provide a separate law for each subject with which it dealt.

Id. (emphasis in original). Although we acknowledge that the instant act does seem to contravene this dicta, we point out that case law interpreting Florida's single subject rule has progressed since 1947 and that this Court has significantly refined the requirements necessary for a legislative enactment to satisfy the single subject requirement.

[27] The single subject rule has a two-fold purpose. First, it attempts to avoid surprise or fraud by ensuring that both the public and the legislators involved receive fair and reasonable notice of the contents of a proposed act. *Santos v. State*, 380 So.2d 1284 (Fla.1980); *Coldewey v. Board of Public Instruction*, 189 So.2d 878 (Fla.1966); *King Kole, Inc. v. Bryant*, 178 So.2d 2 (Fla.1965). Secondly, the limitation prevents hodgepodge, logrolling legislation. *E.g.*, *King Kole*, 178 So.2d at 4. As we recently stated in *Smith v. Department of Insurance*, 507 So.2d 1080, 1085 (Fla.1987), quoting *State v. Lee*, 356 So.2d 276, 282 (Fla.1978):

The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a “cloak” for dissimilar legislation having no necessary or appropriate connection with the subject matter.

[28] [29] Thus, as confirmed by our treatment in *Smith* of the Tort Reform and Insurance Act of 1986, the fact that the scope of a legislative enactment is broad and comprehensive is not fatal under the single subject rule so long as the matters included in the enactment have a natural or logical connection. *Smith*, at 1085. See also *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla.1981). In the case at bar, all the provisions contained within text of the statute have a logical and natural connection with the taxation of services in this state. Although at least one opponent has challenged section 201.15 of the act because it sets out an allocation scheme for the state treasury to use once it begins receiving revenues from the tax, we find this provision wholly instructional and necessarily incidental to the tax itself. Ch. 87–6, § 35, Laws of Fla. See *Smith*, at 1086 (provisions that are necessary incidents to or tend to make effective or promote the objects and purposes of the subject legislation do not violate the single subject rule). We do not find it to be the type of specific appropriation that would trigger a violation of the single subject rule. Accordingly, we do not find chapter 87–6 violative of the single subject rule.

Part VII. Contract Clause

The final contention that we shall address is the argument that the provisions contained in chapter 87–6 dealing with the construction industry violate article I, section 10 of the Florida Constitution. This provision provides that “[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.” Representatives of the construction industry argue that the interaction of section 5 of the act, which creates section 212.0594 of the Florida Statutes, and section 31 of the law act in concert to impair construction contracts in existence prior to the statute's enactment. See Ch. 87–6, §§ 5 & 31, Laws of Fla. We agree.

Newly created  sections 212.0594(6) and (8) of the Florida Statutes, contained in section 5 of the act, impose a tax upon prime contractors for both certain services that subcontractors supply and on the cost price of the construction that eventually results.¹⁵ The tax on the latter construction *314 is due at the time that either the contract for new construction is fulfilled or when the certificate of occupancy is issued, whichever occurs first. Ch. 87-6, § 5, Laws of Fla. (creating  § 212.0592(8), Fla.Stat.). Section 31 of the act, however, provides:

Notwithstanding any other provision of this act, in the case of written contracts which are signed prior to May 1, 1987, for constructing improvements to real property, prime contractors ... responsible for performing the contract shall not be required to remit any tax on services levied pursuant to  s. 212.059 or  s. 212.0594, Florida Statutes, provided that:

....

(4) The purchase of the service occurs before June 30, 1988.

Ch. 87-6, § 31, Laws of Fla.

Reading these two sections in pari materia, section 31 creates an exemption to the taxation provisions of section 5 for written construction contracts signed prior to May 1, 1987. Under section 31(4), however, this exemption expires if the contractor's performance under the contract is not fully rendered prior to June 30, 1988. Thus, if the contractor fails to complete construction and obtain a certificate of occupancy before that date, the general taxation provisions of  section 212.0594, Florida Statutes, are resurrected and applied to the contract even though it was signed prior to May 1, 1987.

The legislature filed the instant statute on April 23, 1987, and the Governor signed it into law on the following day. Once enacted into law, contractors were placed on notice that they should take their upcoming tax burden into consideration when entering into construction contracts after May 1, 1987. The act, however, does not limit its effect to this permissible burden. Instead, by retroactively placing a tax burden upon all construction contracts that are incomplete by June 30, 1988, and thereby adding an unknown, un contemplated cost, it retroactively burdens contracts that were in existence before

any party could have reasonably been on notice of the impending tax.

[30] [31] [32] Unquestionably, contract rights are ordinarily subject to the state's powers of taxation.

 *Straughn v. Camp*, 293 So.2d 689 (Fla.), appeal dismissed, 419 U.S. 891, 95 S.Ct. 168, 42 L.Ed.2d 135 (1974). It is equally indisputable, however, that rights existing under a valid contract enjoy protection under the Florida Constitution.

 *Green v. Quincy State Bank*, 368 So.2d 451 (Fla. 1st DCA 1979). We cannot accept the state's argument that the fact the instant tax may make certain contracts unprofitable does not constitute an impairment of contract. Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution.  *Dewberry v. Auto-Owners Insurance Co.*, 363 So.2d 1077 (Fla.1978). A statute which retroactively turns otherwise *315 profitable contracts into losing propositions is clearly such a prohibited enactment. Thus, it is our opinion that section 31(4) of the statute is facially unconstitutional.

In summation, we emphasize that an advisory opinion is for the benefit of the chief executive and, therefore, does not carry with it the mandate of the Court. Moreover, the scope of our advisory authority prevents us from considering either federal constitutional questions or the constitutionality of the statute as applied to specific factual scenarios and individual taxpayers. Nevertheless, it is our opinion that, with the exception of section 31(4), chapter 87-6 is facially constitutional.

Respectfully,

Parker Lee McDonald

Chief Justice

Ben F. Overton

Leander J. Shaw, Jr.

Gerald Kogan

Justices

A concurring and dissenting view by Justice GRIMES.

While I concur with all other aspects of the opinion, I believe that the tax on advertising represents an unconstitutional restraint on free speech.

Article I, section 4 of the Florida Constitution provides in part:

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

The scope of the protection accorded to speech under article I, section 4, is at least the same as that granted by the first amendment of the federal Constitution as interpreted by the United States Supreme Court. [Department of Education v. Lewis](#), 416 So.2d 455 (Fla.1982).

The fact that advertising usually involves commercial speech does not necessarily diminish the first amendment interests involved. [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). So long as advertisements are not misleading and concern a lawful activity, they are entitled to first amendment protection. [Central Hudson Gas & Electric Corp. v. Public Service Commission](#), 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Moreover, advertising is used to convey political and social views. As noted in [New York Times Co. v. Sullivan](#), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), advertisements are:

[A]n important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.

[Id.](#) at 266, 84 S.Ct. at 718.

The question then is whether the advertising tax represents a tax on the right to speak. The new law itself suggests the answer when it defines advertising as “the service of conveying the advertiser’s message,” i.e., the dissemination of information itself. [§ 212.0595\(10\)](#). Payment of the tax is a condition of speaking to the Florida public through the media.

The United States Supreme Court has at least implied that a nondiscriminatory sales tax on publications which is simply part of the larger taxing scheme would be constitutional. [Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue](#), 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). Thus, I believe that no constitutional infirmity results from the fact that the sales tax now covers newspapers and other periodicals. However, the tax on advertising is different. Even though there are services rendered in the preparation and distribution of advertising, the advertising upon which the tax is laid is not a service as such. The advertising that is actually “sold or used in Florida” is in the nature of intangible personal property—the content of a printed advertisement or broadcast commercial. Thus, while purporting to tax advertising as just another service, the tax has a discriminatory effect because it is uniquely directed towards the dissemination of information. As such, it is a tax on speech itself. The more one speaks, the more one pays to the state. This represents *316 an impermissible burden on the right of free speech.¹

I am also concerned that the way the law is drawn the tax is being imposed on the content of the advertising. In [Arkansas Writers' Project, Inc. v. Ragland](#), 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the United States Supreme Court struck down an Arkansas tax on the receipts from the sales of tangible personal property because it exempted certain items including newspapers and “religious, professional, trade and sports journals and/or publications printed and published within this State.” [Id.](#) 107 S.Ct. at 1724–25. The Court reasoned that the tax discriminated between members of the press because it did not apply evenly to all magazines. The Court held that the tax was particularly repugnant to first amendment principles because in order to determine whether a particular publication came within its exemption, it was necessary to examine its contents.

Under the new Florida law, religious and charitable organizations are not required to pay the advertising tax. The state argues that when these organizations purchase

advertising, they are exempt not because of the content of their speech but because of their status as exempt organizations. Yet, the unique character of such organizations necessarily involves the promulgation of particular messages. Moreover, the first amendment also prohibits the preference of one speaker over another. In [First National Bank of Boston v. Bellotti](#), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court said that the state is “constitutionally disqualified from dictating ... the speakers who may address a public issue.” [Id.](#) at 784–85, 98 S.Ct. at 1420. While that Court has recognized the right of the state to provide tax relief for religious institutions, see [Walz v. Tax Commission of New York](#), 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), such preferences have not ordinarily involved subjects impinging upon the first amendment. It may be, of course, that even if the exemption provided for religious and charitable organizations is held invalid, only the exemption will be lost rather than the entire tax on advertising.²

While I cannot fault the motivation of the legislature in seeking to raise additional revenue through the taxing of advertising, I do not believe that that portion of chapter 87–6 is constitutional.

Respectfully,

Stephen H. Grimes

Justice

The Honorable Bob Martinez
Governor of the State of Florida

The Capitol

Tallahassee, Florida 32301

Dear Governor Martinez:

You have asked the Justices of this Court, in essence, to advise you as to the constitutionality of Chapter 87–6, Laws of Florida. This is the first request for an advisory opinion since I have been a member of this Court, and it is with some unhappiness that for the reasons which follow, I must respectfully decline to render an opinion to your question.

The problems perceived by you growing out of this new legislation are not unique, except perhaps as to dimensions, and I can understand your desire to seek an expeditious answer. Unfortunately, in my judgment, you are asking for, at best, a placebo, to achieve a result that can only come from an adversarial proceeding between litigants in a court of law. Even though a majority of the Court has given you an opinion, you have not been given an ultimate answer. Surely as the night follows the day, all facets of your question will in due course, and hopefully with all deliberate speed, wend their weary way to this Court for final determination at the state level. At that time you will have your answer, and not just an advisory opinion, and the separation of powers between the *317 coordinate branches of government will have been respected.

I must say, without a great deal of pride, that the course this Court has followed with respect to similar requests for advice as to the constitutional validity vel non of a statute, has been checkered. Early on, in 1905, the Justices of this Court declined to respond to a request for advice from Governor M.B. Broward, stating:

Reduced to its last analysis, the purpose of your letter is not to have us construe any clause of the Constitution affecting your executive powers and duties, but to have us pass upon the constitutionality of an act of the Legislature

[Section 13 of article 4 of the Constitution](#) authorizes the justices of the Supreme Court, on the Governor's request, to interpret only some portion of the Constitution, and does not authorize the court, upon such request, to interpret or pass upon the constitutionality of statutes that affect the Governor's executive powers and duties. [Advisory Opinion to Governor](#), 39 Fla. 397, 22 South. 681. For the reasons stated, we must respectfully decline to give any opinion upon the questions propounded.

[Advisory Opinion to Governor](#), 50 Fla. 169, 39 So. 187 (Fla.1905).

Again, the Justices declined to render an advisory opinion to Governor Collins determining the constitutionality of an act of the legislature. [In re Advisory Opinion to the Governor](#), 113 So.2d 703 (Fla.1959). This advisory opinion is best remembered for Justice Drew's plaintive confession for his past sins in participating in advisory opinions construing or passing upon the constitutionality of statutes when, writing separately, he said:

On several occasions since my appointment to this Court I have participated in advisory opinions to you and your predecessors in office which construed or passed upon the constitutionality of certain statutes of this State. It is now my view that, in rendering such opinion, I exceeded my authority as a Justice of this Court.

The Constitution plainly authorizes the Justices of this Court to advise you “as to the interpretation of any portion of [the Florida] Constitution upon any question affecting [your] executive powers and duties.” From the adoption of the present Constitution until recent years the Justices of this Court have refused to advise the Governors of Florida as to their interpretation of or to pass upon the constitutionality of statutes of this State. It is my view that this Court should now return to that salutary principle epitomized in the conclusion of the *Advisory Opinion to the Governor*, 50 Fla. 169, 39 So. 187.

Id. at 706.

Before too many years had passed, the Justices answered a question from Governor Claude Kirk upholding the constitutionality of the 1970 general appropriation act. *In re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla.1970), Justice Drew, still a sitting Justice, remained true to his own counsel eleven years earlier. He refused to join with his brethren, citing his opinion *In re Opinion to the Governor*, 113 So.2d 703 (Fla.1959), and wrote separately these concluding remarks:

The critical language of the Constitution of 1968 under which your request is presented is identical to the language of the Constitution of 1885 under which the request of Governor Collins was made. The provisions of the 1968 Constitution relating to procedure for obtaining advisory opinions does not-in my judgment-in any way enlarge the powers of this Court with respect to this basic constitutional question.

Looking back over more than a decade I can only conclude that the passage of time has confirmed the wisdom of this Court expressed by the majority in the advisory opinion above referred to, and my own views quoted above.

Consistency compels me therefore to respectfully decline to render any opinion upon the questions propounded.

239 So.2d at 12.

This Court's most recent incursion into this bramble and thicket occurred *In re *318 Advisory Opinion to Governor*, 374 So.2d 959 (Fla.1979) with a sharply divided Court giving Governor Graham an opinion as to the constitutionality of a recently enacted statute. Justice Sundberg, writing separately, expressed my thoughts with his usual succinct eloquence:

Turning now to the reasons why I deem it inappropriate to render advice upon the constitutionality vel non of CS for SB 268. My reluctance to render such advice does not stem from a formalistic or technical posture, but from a real concern for the appropriate role to be exercised by the coordinate branches of government. The role of the judiciary in our form of government is unique in its accepted authority to declare acts of the coordinate branches invalid because they offend the terms or principles of our constitution. See  *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). This authority and responsibility to be the final arbiter of the constitutional validity of the acts of the legislative and executive branches is nothing less than awesome. While this Court should not, and does not, flinch from its obligation to exercise this power in an appropriate case, nevertheless, it is a power which should be exercised with circumspection.

A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context, a mode which has proven to be superior for framing the issues and testing the truth of competing claims.

I am not unmindful of the possible serious consequences of leaving unresolved an important question concerning the judicial structure of this state. I am more mindful, however, of the serious erosion to our system of separation of powers which I perceive will result from indiscriminately passing upon the constitutional validity of executive and legislative acts through the vehicle of an advisory opinion. Exigent circumstances always evoke the temptation to act, but it is in just such circumstances that we should be most careful to observe the principles of our constitution.

Id. at 971–72 (citations omitted, footnote omitted).

Article IV, section 1(c) of the Constitution of the State of Florida can be and is a very useful vehicle for the Chief

Executive of this State to ask for counsel from the Justices as to the interpretation of any portion of the Constitution upon any question affecting his executive powers and duties. Properly used it respects the separation of powers between the executive and judiciary, and facilitates the expeditious handling of matters affecting the duties of the office of the governor. On the other hand, asking the Justices to pass on the constitutionality of a statute, in reality, resolves nothing because the advisory opinion has no precedential effect and is binding on no one and, finally, the odds are overwhelming that the parties ultimately concerned with the constitutionality of that bit of legislation will properly resort to the courts for judicial determination of that question. Of course, my fundamental objection to the procedure utilized by you is answered by Justice Sundberg on the question of the separation of powers doctrine as quoted above.

I certainly cannot fault Your Excellency for requesting an advisory opinion, considering the lack of any clear direction from the Justices in this area and particularly the most recent responses from the Justices to your predecessors in office. By the same token, I assure you that in declining to respond to your request I am motivated solely by what I perceive to be my duties and responsibilities as a Justice of this Court.

Sincerely,

Raymond Ehrlich

Justice

The Honorable Bob Martinez
Governor of the State of Florida

The Capitol

Tallahassee, Florida 32301

***319** Dear Governor Martinez:

Although your request for an advisory opinion was put forth in some detail, it essentially asks only a single question: Is Chapter 87–6, Laws of Florida (1987), constitutional? For the reasons that follow, I must respectfully decline to offer an opinion on this question.

My reluctance to advise you in this matter rests on two grounds. First, I believe that acceding to your request in this context would further erode the separation of powers, which

is basic to our system of government; and second, I find that an advisory opinion cannot and will not assist in resolving, with any meaningful finality, the broader questions implicit in the concept of “constitutionality.” The true test of this statute will come, not in any non-binding advisory opinion, but in the scores of fact-specific controversies already being brought to this state's courts and to the federal courts.

Using the advisory power to judge the constitutionality of newly enacted legislation necessarily injects the judiciary into a role for which it is ill-suited. Under the majority's analysis, the justices of this Court may advise the governor concerning the validity of any statute, without limitation, because every statute potentially affects the governor's duty to faithfully execute the laws. Yet this is the antithesis of the judicial function. Traditionally the judiciary decides specific issues arising from specific facts. However, a non-binding advisory opinion upon the facial constitutionality of a newly enacted statute decides virtually nothing. Moreover, to review comprehensive and complex legislation, albeit one dimensionally, in such a broad and unfocused manner does not serve any appropriate interest. I do not believe the advisory power conferred by [article IV, section 1\(c\)](#), anticipates this kind of review.

Indeed, practical concerns, time-honored policies and constitutional principles all dictate that the validity of new enactments should be resolved only in the context of particular factual disputes. As Justice Sundberg stated when he declined to answer a question posed by Governor Bob Graham:

A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context, a mode which has proven to be superior for framing the issues and testing the truth of competing claims.

In re Advisory Opinion to the Governor, 374 So.2d 959, 971 (Fla.1979) (Sundberg, J., writing separately).

The wisdom underlying Justice Sundberg's analysis and the inability of an advisory opinion to resolve with any finality the questions you raise is amply illustrated by the majority's necessarily limited response.

The majority recognizes that it cannot, and does not, pass on federal constitutional questions. Yet in confronting freespeech issues, for instance, the majority relies almost entirely on its interpretation of federal case law, even though its inquiry is limited to *state* constitutional issues. This analysis, while it may seem to resolve a federal question, is not binding upon the federal courts and thus does not resolve the issues. Nor can the majority properly consider the troubling constitutional issues raised by the fact that, under chapter 87–6, the State of Florida will have a direct economic interest in convicting defendants. These federal issues necessarily will be left for another court to decide.

Most importantly, the majority opinion necessarily is limited only to *facial* constitutionality because no factual issues are before us. This is particularly important, in my view, since most issues that have been raised by the parties really deal with the question of the constitutionality of the enactment as it eventually may be applied.

I agree with Justice Sundberg when he wrote that

*320 [t]he role of the judiciary in our form of government is unique

in its accepted authority to declare acts of the coordinate branches invalid because they offend the terms or principles of our constitution. This authority and responsibility to be the final arbiter of the constitutional validity of the acts of the legislative and executive branches is nothing less than awesome. While this Court should not, and does not, flinch from its obligation to exercise this power in an appropriate case, nevertheless, it is a power which should be exercised with circumspection.

Id. (citation omitted, footnote omitted).

Respectfully,

Rosemary Barkett

Justice

All Citations

509 So.2d 292, 12 Fla. L. Weekly 240, 12 Fla. L. Weekly 375

Footnotes

- 1 We recognize that the legislature has now enacted chs. 87–72 & 87–101, Laws of Fla., amending ch. 87–6, Laws of Fla. Because only the first of these so-called “glitch bills” had been signed into law at the time of oral argument, we have not considered ch. 87–101 within the text of this advisory opinion.
- 2 This finding prevents us from addressing your concerns regarding questions arising under the supremacy clause of art. VI, the due process and equal protection clauses of the fourteenth amendment, the provisions of art. III relating to the judicial power of the federal courts, the commerce clause of art. I, and the provisions contained within the 1st, 5th, 6th, and 8th amendments to the United States Constitution. We point out, however, that, with the exception of the supremacy clause and the commerce clause, Florida's Constitution contains provisions similar to each of the above.
- 3 No tax is levied on legal services that are provided without charge. Therefore, legal services provided to indigents or those who cannot afford to pay their attorneys are not taxed. Ch. 87–6, § 7, Laws of Fla. (amending  § 212.02(21), Fla.Stat.) Likewise, because nonprofit entities and governments pay no taxes on any goods or services, they pay no tax on their purchase of legal services. Ch. 87–6, § 14, Laws of Fla.

(amending [§ 212.08\(6\)](#) & [\(7\)](#), Fla.Stat.). Additionally, because no employee wages or salaries in any business are taxed, ch. 87–6, § 3, Laws of Fla. (amending [§ 212.0592\(2\)](#), Fla.Stat.), exempts from taxation legal services provided to employers by their employees. Other exceptions apply to legal services as well.

4 See *supra* note 3.

5 The act's reference to the Standard Industrial Classifications Manual (SIC) refers to the 1972 edition as published by the Office of Management and Budget, Executive Office of the President, and as amended in the 1977 supplement. Ch. 87–6, § 7, Laws of Fla. (creating [§ 212.02\(24\)](#), Fla.Stat.).

6 We also note that representatives of the broadcasting industry argue that certain provisions of ch. 87–6 are so vague that they fail to satisfy the fair notice requirements of due process. Our resolution of the vagueness issue in the context of separation of powers renders a discussion of this due process contention unnecessary.

7 For a more detailed discussion of the nature of the sales and use tax on services, please see our discussion set forth under part IV, which deals with whether ch. 87–6 creates an income tax.

8 [Grosjean](#), 297 U.S. at 251, 56 S.Ct. at 449. As the Supreme Court later explained in [Minneapolis Star](#), 460 U.S. at 579–80, 103 S.Ct. at 1368–69, the Court had attached significance to the Louisiana legislature's motivations in *Grosjean*. In that case, the tax had been imposed largely in an attempt to silence certain selected newspapers that had been critical of Senator Huey Long.

9 Ink and paper used in publications were the only components of goods to be sold at retail that were taxed and the law exempted the first \$100,000 worth of ink and paper used in any given calendar year. [460 U.S. at 578](#), 103 S.Ct. at 1368.

10 For example, prior to the enactment of ch. 87–6, Laws of Fla., food ads printed in a newspaper were exempt from taxation while food ad inserts in newspapers were taxed. See Fla.Admin.Code Rule 12A–1.34 (1982). Likewise, political bumper stickers, leaflets, and brochures were taxed while political advertisements broadcast on television and radio were exempt. See [§ 212.08\(7\)\(d\) 2](#), Fla.Stat. (1985).

11 Opponents of the act also argue that the instant act violates [art. I, § 4 of the Florida Constitution](#) by containing unconstitutionally vague terminology and by failing to further the state's goal of increasing revenues. Our determination of the vagueness issue in our upcoming discussion of the separation of powers doctrine makes a discussion of vagueness unnecessary here. As for the amount of revenue the act will eventually raise or the regressive effect it may have on Florida's economy, those questions go to the wisdom of the act, upon which we will not second guess the legislature. *E.g.*, [Holley v. Adams](#), 238 So.2d 401 (Fla.1970); [Twomey v. Clausohm](#), 234 So.2d 338 (Fla.1970). We find the taxation of advertising revenues rationally related to the goal of raising revenue and our analysis must end upon such a determination.

12 The industry argues that the tax created double taxation by:

- (1) requiring prime contractors to pay sales taxes on the amount included within the price charged by the subcontractor, which may include goods, equipment, or services, upon which a sales tax has already been paid;
- (2) treating the prime contractor as the ultimate user of material, equipment, and supplies purchased for his own use on the project, but which are not incorporated into the project itself; and
- (3) by constituting a second income tax in addition to the corporate income tax which the prime contractor already pays.

13 Newly created [§ 212.0594\(6\)](#) requires the prime contractor to pay a tax on purchases from subcontractors that are not exempt under certain listed criteria contained therein. Ch. 87–6, § 5, Laws of Fla. [§ 212.0594\(8\)](#) requires the prime contractor to pay a tax on new construction services based on the cost price of the construction. This tax is due either when the construction contract is fulfilled or when the certificate of occupancy is issued, whichever occurs first. Ch. 87–6, § 5, Laws of Fla.

14 Although potential taxpayers have challenged on vagueness grounds the definition of such terms as “other than print or broadcast media,” “use,” and “fair,” we do not find such terms so unreasonably vague on their face as to justify invalidating the act. We do not believe that every such term used in the law must be statutorily defined.

- 15 Newly created [§ 212.0594](#) provides in pertinent part:
Construction services; special provisions.—Notwithstanding other provisions of this part to the contrary:
....
(6) The tax on purchases of construction services by prime contractors shall be based on the total consideration paid to the subcontractor. However, if the written proposal, contract, or interim or final invoice of the subcontractor specifically describes, itemizes and states the price paid by the subcontractor for the building materials purchased by the subcontractor and incorporated into the improvement in fulfillment of his responsibilities under the subcontract, the tax shall be based on the total consideration less the price of said building materials.
....
(8) There is hereby imposed a tax on the construction services any prime contractor provides with respect to new construction for himself or others. The tax shall be based upon the cost price to the prime contractor of the services he provides, without any deduction therefrom on account of the cost of materials or supplies used, labor costs, service costs, or transportation charges notwithstanding the provisions of [s. 212.02](#) defining “cost price.” However, the cost of building materials purchased by the prime contractor and incorporated into the new construction, and amounts paid to subcontractors upon which a sales tax has been paid, shall not be included in the cost price. The tax shall be due and payable as otherwise provided in this part at the time the contract for new construction is fulfilled or within 30 days after the certificate of occupancy is issued, whichever is sooner. The retail sale of new construction for which the prime contractor has paid tax pursuant to this subsection shall be exempt from the tax imposed by this section.
Ch. 87–6, § 5, Laws of Fla.
- 1 The Court in [Baltimore v. A.S. Abell Co.](#), 218 Md. 273, 145 A.2d 111 (App.1958), held a similar tax on advertising unconstitutional on first amendment grounds.
- 2 The new law contains a provision that if any exemption is declared facially unconstitutional, the legislature intends that the exemption be deemed inoperative. Ch. 87–72, § 2, Laws of Fla.

From: [Jason Torchinsky](#)
To: [Kelly, Alex](#)
Date: Thursday, January 13, 2022 11:17:46 AM
Attachments: [image001.png](#)

Jason Torchinsky
Partner
Cell: 202-302-6768
www.HoltzmanVogel.com

signature_1259719537



2300 N Street, NW, Suite 643A
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* * * * *

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From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: RE: Advisory Opinion - Cases
Date: Friday, January 14, 2022 11:08:00 AM
Attachments: [In re Executive Communication, 6 So. 925 \(Fla. 1887\).pdf](#)

Here's the 1887 advisory opinion with highlights.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Thursday, January 13, 2022 9:16 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: Advisory Opinion - Cases

Here are a few advisory opinion cases that may be a useful start. [REDACTED]
[REDACTED]) Have to run to a doctor's appointment, but see y'all soon!

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

23 Fla. 297
Supreme Court of Florida.

In re EXECUTIVE COMMUNICATION
CONCERNING POWERS OF LEGISLATURE. ¹

May 9, 1887.

West Headnotes (2)

- [1] **Constitutional Law** 🔑 **Constitutionality of Statutes or Acts of Other Branches in General**
F.S.A. Const. art. 4, § 13, which authorizes the governor to apply to the judges of the Supreme Court as to the interpretation of any portion of the constitution on any question affecting “his executive powers and duties,” does not authorize the judges to give an opinion as to what character of bills it would be unconstitutional for the legislature to pass, and the governor's duty to veto, as the duty of the governor to approve or disapprove bills is legislative in its character.

[9 Cases that cite this headnote](#)

- [2] **Courts** 🔑 **Questions Submitted by Legislature or Governor or Other Officer**
F.S.A. Const. art. 4, § 13, which authorizes the Governor to apply to the judges of the Supreme Court for the interpretation of the Constitution on any question affecting “his executive powers and duties,” does not authorize the judges to give an opinion as to what character of acts it would be unconstitutional for the Legislature to pass, as the governor's duty to approve or disapprove bills is legislative in its character.

[10 Cases that cite this headnote](#)

Opinion

****925** On May 9, 1887, the governor addressed the following communication to the justices of the supreme court:
***297** ‘EXECUTIVE OFFICE.

‘TALLAHASSEE, FLA., May 9, 1887.

‘To the Honorable the Justices of the Supreme Court of the State of Florida: If, in your judgment, it is a case in which your opinion can be properly required, I have the honor to ask your interpretation of section 21 of article 3 of the constitution, as to what character of bills, if any, the legislature, at its present session, is by said section denied the power to pass, and which, when submitted to me, it will be my duty, for that reason, to disapprove, though said bills may be otherwise unobjectionable.

‘Very respectfully,

E. A. PERRY.’

The justices responded as follows:

***298** ‘SUPREME COURT ROOM, STATE OF FLORIDA.

‘TALLAHASSEE, FLA., May 10, 1887.

‘Hon. Edward A. Perry, governor of the State of Florida- Sir: Your communication was received to-day, and has been considered by us. The question asked by you involves the construction of section 13, art. 4, of the constitution. The section is as follows: ‘The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing.’ Unlike the constitutions of some of the other states of the Union, which authorize the governor, or either branch of the legislature, to require to opinion of the justices of the supreme court, our constitution restricts such right to the governor alone. It further restricts the right of the governor to require such opinions on questions ‘affecting his executive powers and duties.’ Is the opinion you desire one relating to your ‘executive powers and duties?’ The exact legal meaning of the word ‘executive’ has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution, before the duty of executing it can exist. Any duty imposed by the constitution on the governor with reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and, when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is ***299**

legislative, and is performed by you as a part of the lawmaking power, and not as the law-executing power. We are of the opinion that the question affects a legislative duty imposed by the constitution; and, believing that a compliance on our part with your request is unauthorized by the constitution, we, with great respect for your excellency, beg to be excused from expressing opinions on the question submitted.

Very respectfully,

‘GEO. G. McWHORTER, Chief Justice.’

All Citations

23 Fla. 297, 6 So. 925

Footnotes

1 From 23 Fla. 297.

End of Document

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From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: RE: Advisory Opinion - Cases
Date: Friday, January 14, 2022 11:10:00 AM
Attachments: [In re Advisory Opinion to the Governor, 509 So. 2d 292 \(Fla. 1987\).pdf](#)
[Advisory Opinion to Governor, 27 So. 2d 409 \(Fla. 1946\).pdf](#)
[Advisory Opinion to the Governor, 55 So. 460 \(Fla. 1911\).pdf](#)

And here are three advisory opinions with highlights that touch on a federal question.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 11:09 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

Here's the 1887 advisory opinion with highlights.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Thursday, January 13, 2022 9:16 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: Advisory Opinion - Cases

Here are a few advisory opinion cases that may be a useful start. [REDACTED]

[REDACTED] Have to run to a doctor's appointment, but see y'all soon!

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Lee County v. Brown](#), Fla.App. 2 Dist., June 9, 2006

509 So.2d 292
Supreme Court of Florida.

In re ADVISORY OPINION TO THE
GOVERNOR, Request of May 12, 1987.

No. 70533.

|
July 14, 1987.

Synopsis

The Governor requested advice of the Supreme Court as to facial validity of statute imposing sales and use tax on services. The Supreme Court held that: (1) imposition of tax on legal services did not unconstitutionally burden right to legal counsel or right to access to court; (2) requirement that all persons who purchase advertising out of state for consumption in Florida report to state did not constitute unconstitutional registration requirement; but (3) provision imposing sales and use tax on written construction contracts signed prior to enactment of statute if contractors failed to complete performance prior to future date violated state constitutional prohibition against impairment of contracts.

Question answered.

Grimes, J., concurred in part and dissented in part and filed opinion.

Ehrlich and Barkett, JJ., declined to answer question and filed opinions.

West Headnotes (32)

[1] **Courts** Questions submitted by Legislature or Governor or other officer

Supreme Court may not render advisory opinion regarding governor's statutory, as opposed to his constitutional, powers and duties. *West's F.S.A. Const. Art. 4, § 1(c)*.

[2] **Courts** Questions submitted by Legislature or Governor or other officer

Supreme Court had authority to render advisory opinion as to constitutionality of statute imposing tax on sales or use of services, in light of potentially chaotic impact on governor's constitutional duties as fiscal manager which could be caused by finding statute invalid. *West's F.S.A. Const. Art. 4, § 1(c)*; Laws 1987, ch. 87-6, § 1 et seq.

[3] **Courts** Operation and effect in general

Advisory opinions are merely legal opinions of individual justices, offered for governor's guidance in performance of his or her constitutional duties, and do not constitute decisions of Florida Supreme Court and thus are not binding in any future judicial proceedings. *West's F.S.A. Const. Art. 4, § 1(c)*.

[4] **Courts** Questions submitted by Legislature or Governor or other officer

Advisory opinion of Florida Supreme Court to governor is limited in scope to questions arising under Florida Constitution when validity of state statute affects duties of governor, and court may not consider federal issues. *West's F.S.A. Const. Art. 4, § 1(c)*.

[5] **Taxation** Validity of Acts and Ordinances

Imposition of tax on legal services did not facially constitute unconstitutional burden on right to legal counsel under State Constitution, where statute exempted from taxation pro bono legal services and government counsel appointed for indigents. *West's F.S.A. Const. Art. 1, § 16*; *West's F.S.A. §§ 212.02(21)*, 212.08(6, 7), 212.0592.

1 Cases that cite this headnote

[6] **Criminal Law** Consultation with counsel; privacy

Right to counsel is violated only when access to attorney is impeded or where attorney's ability to consult with, advise, or defend his client is hindered. West's F.S.A. Const. Art. 1, § 16; U.S.C.A. Const.Amend. 6.

[7] **Constitutional Law** 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Imposition of tax on legal services did not facially violate state constitutional right of access to courts, where statute exempted from taxation pro bono legal services and government counsel appointed for indigents. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 212.02(21), 212.08(6, 7), 212.0592.

1 Cases that cite this headnote

[8] **Constitutional Law** 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Imposition of tax on legal services was not "sale of justice" prohibited by State Constitution, where tax imposed detached, incidental burden upon court access and was not levied in exchange for access to courts or to purchase justice. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 212.02(21), 212.08(6, 7), 212.0592.

1 Cases that cite this headnote

[9] **Clerks of Courts** 🔑 Filing papers

Constitutional Law 🔑 Costs and fees; indigency

State can directly assess fees and costs for access to court system only when fees and costs are directly related to administration of justice, but fees collected cannot be used for general revenue purposes. West's F.S.A. Const. Art. 1, § 21.

[10] **Constitutional Law** 🔑 Sales and use taxes

Taxation 🔑 Validity of Acts and Ordinances

Imposition of sale or use tax on legal services did not facially violate equal protection guarantees

of State Constitution, even though exemptions were granted for legal services provided to indigents, government, nonprofit entities, and employers. West's F.S.A. Const. Art. 1, § 2;

West's F.S.A. § 212.059.

[11] **Constitutional Law** 🔑 Taxation

State is accorded wide range of discretion when classifying for taxation purposes provided that classification is reasonable, nonarbitrary, and rests on some ground of difference having fair and substantial relation to object of legislation. West's F.S.A. Const. Art. 1, § 2.

3 Cases that cite this headnote

[12] **Taxation** 🔑 Power to Impose

Classification of item as essential or nonessential for tax purposes has no constitutional significance; government can tax essential goods and services such as food, medicine, gasoline, or electricity if it chooses to do so.

[13] **Taxation** 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not facially discriminate against advertising industry as a whole by placing upon it disproportionate tax burden, where taxation of advertising was expected to account for 4.7% of all revenues derived from new tax, and revenues derived from taxation of advertising services was projected to account for 1.4% of total tax revenues. West's F.S.A. § 212.01 et seq.

[14] **Taxation** 🔑 Validity of Acts and Ordinances

Requirement in statute imposing sales and use tax on services that all persons who purchase advertising out of state for consumption in Florida report to state, self-accrue the tax, and then remit tax directly to state did not constitute unconstitutional registration requirement. West's F.S.A. §§ 212.0595(6), 212.06(2)(k), 212.11(1).

1 Cases that cite this headnote

[15] Taxation 🔑 Power to Impose

Advertisers and the press are not immune from ordinary, nondiscriminatory taxes of general application. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 🔑 Advertising**Constitutional Law** 🔑 Taxation**Taxation** 🔑 Validity of Acts and Ordinances

Imposition of sales and use tax on services did not violate constitutional right of free speech due to taxation of advertisers and the press, where tax was one of general application which did not single out advertisers or the press for special taxation. West's F.S.A. § 212.01 et seq.; U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[17] Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not unconstitutionally discriminate between publications based on content, even though statute exempted sales and leases to religious, scientific, educational, and other nonprofit institutions when transactions were in furtherance of their customary nonprofit functions. West's F.S.A. § 212.08(6, 7), (7) (d) 2, (o) 1; U.S.C.A. Const.Amend. 1.

[18] Taxation 🔑 Validity of Acts and Ordinances

Exemption of government entities from sales and use tax on services did not unconstitutionally discriminate between publications based on content. West's F.S.A. § 212.08(6); West's F.S.A. Const. Art. 1, § 4; U.S.C.A. Const.Amend. 1.

[19] Taxation 🔑 Validity of Acts and Ordinances

Exemption of religious institutions from sales and use tax on services did not unconstitutionally

discriminate between publications based on content. West's F.S.A. § 212.06(9); West's F.S.A. Const. Art. 1, § 10; U.S.C.A. Const.Amend. 1.

[20] Taxation 🔑 Nature of Tax

Statute imposing sales and use tax on services was not "income tax" in violation of state constitutional prohibition against imposition of taxes in excess of any similar tax levied by United States or any state, where tax was levied upon privilege of engaging in occupation or business of selling services and was measured by gross receipts derived therefrom; act imposes tax on sale of services, not upon income; tax exempted services that employees rendered to their employers and services that partners supply to their partnerships; tax was wholly transactional in nature; and act allowed prevailing plaintiffs to recover applicable sales or use tax due on legal fees from defendant.

West's F.S.A. Const. Art. 7, § 5; West's F.S.A. §§ 57.071(3), 212.059, 212.0592(2, 4), 212.0594(3).

[21] Taxation 🔑 Double Taxation

No unconstitutional double taxation occurs where there are two taxpayers and two separate taxable transactions or privileges.

1 Cases that cite this headnote

[22] Taxation 🔑 Double Taxation

Even though prime contractors were required to collect and remit taxes for their purchases from subcontractors and their eventual sales to ultimate purchasers under statute imposing sales and use tax on services, permitting of taxes did not constitute unconstitutional double taxation, where effect was due to separate taxable transactions. West's F.S.A. § 212.0594(6, 8); West's F.S.A. Const. Art. 7, § 5.

1 Cases that cite this headnote

[23] Constitutional Law 🔑 To Executive, in General

State constitutional provision prohibiting any person belonging to one branch of government from exercising powers appertaining to other branches prohibits legislature from assigning its constitutional duties to administrative agencies within executive branch. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[24] Constitutional Law 🔑 Standards for guidance

Statutes granting enforcement power to executive agencies must clearly set out adequate standards to guide agency in execution of powers delegated and must define powers with sufficient clarity to preclude agency from acting through whim, favoritism, or unbridled discretion. West's F.S.A. Const. Art. 2, § 3.

2 Cases that cite this headnote

[25] Constitutional Law 🔑 Rule making

Legislature may validly delegate to agency officials authority to promulgate subordinate rules within proscribed limits and to determine facts to which established policies of legislation are to apply so long as agency is not delegated authority to determine what law shall be. West's F.S.A. Const. Art. 2, § 3.

2 Cases that cite this headnote

[26] Constitutional Law 🔑 Taxation and public finance

Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not unconstitutionally shift to Department of Revenue power to define taxable services or to make apportionment decisions, where statute incorporated by reference manual defining types of services touching on advertising, “market

coverage” was expressly defined in statute, and statute set out apportionment mechanism with sufficient specificity and clarity to guide Department as to legislature's intent. West's F.S.A. Const. Art. 2, § 3; West's F.S.A. §§ 212.02(22), 212.0595, 212.0595(4)(b).

3 Cases that cite this headnote

[27] Statutes 🔑 Purpose of single-subject rule

Single subject rule attempts to avoid surprise or fraud by insuring that public and legislators involved received fair and reasonable notice of contents of proposed act, and is intended to prevent hodgepodge, log-rolling legislation. West's F.S.A. Const. Art. 3, § 6.

1 Cases that cite this headnote

[28] Statutes 🔑 Acts Relating to One or More Subjects; Single-Subject Rule

Fact that scope of legislative enactment is broad and comprehensive is not fatal under single subject rule so long as matters included in enactment have natural or logical connection. West's F.S.A. Const. Art. 3, § 6.

1 Cases that cite this headnote

[29] Statutes 🔑 Taxation

Taxation 🔑 Validity of Acts and Ordinances

Statute imposing sales and use tax on services did not violate single subject rule in State Constitution, even though statute created comprehensive taxation scheme for services. West's F.S.A. § 212.01 et seq.; West's F.S.A. Const. Art. 3, § 6.

2 Cases that cite this headnote

[30] Taxation 🔑 Nature of Property

Contract rights are ordinarily subject to state's powers of taxation.

[31] Constitutional Law  **Obligation of Contract**

Any legislative action which diminishes value of contract is repugnant to and inhibited by State Constitution. *West's F.S.A. Const. Art. 1, § 10.*

[4 Cases that cite this headnote](#)

[32] Constitutional Law  **Taxation**

Statute imposing sales and use tax on written construction contracts signed prior to enactment of statute if contractor failed to complete performance prior to future date violated state constitutional prohibition against laws impairing obligation of contracts.  *West's F.S.A. §§ 212.0592(8)*,  *212.0594*,  *212.0594(6, 8)*; Laws 1987, ch. 87-6, §§ 31, 31(4); *West's F.S.A. Const. Art. 1, § 10.*

[2 Cases that cite this headnote](#)

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Opinion

The Honorable Bob Martinez
Governor of Florida

The Capitol

Tallahassee, Florida 32301

Dear Governor Martinez:

We have the honor of acknowledging your communication of May 12, 1987, requesting our advice, pursuant to [article IV, section 1\(c\) of the Florida Constitution](#) and [rule 9.500 of the Florida Rules of Appellate Procedure](#), as to the interpretation of a portion of the Constitution affecting your fiscal duties as Governor.

Omitting the formal parts, your letter reads as follows:

“Pursuant to [Article IV, Section 1\(c\) of the Constitution of the State of Florida](#), your opinion is requested as to the interpretation of my executive duties and responsibilities as chief executive under [Article VII, Section 1\(d\)](#) and [Article IV, Section 1\(a\)](#), of the Constitution of the State of Florida.

“[Article VII, Section 1\(d\)](#) requires that ‘provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period’ and [Article IV, Section 1\(a\)](#) relates to my general obligations as chief executive, in particular, my duty to insure ‘that the laws be faithfully executed.’ In furtherance of those constitutional mandates, I am required to submit to the Legislature a recommended budget which contains sufficient revenues to meet my recommended appropriations, Chapter 216, Florida Statutes, and to amend my recommendations if it comes to my attention that revenue sources are insufficient to fund the appropriations, [Section 216.168, Florida Statutes](#).

“Upon my election to office, I became acutely aware that in order to meet the requirements of this fast growing State, a new revenue source must be found to address pressing and compelling correctional, educational, health and

other infrastructure needs. Pursuant to my constitutional and statutory authority and responsibilities, I, therefore, recommended to the Legislature a budget which contained projected revenues from a tax to be imposed on the sale or use of services in this State and recommended that such tax be implemented by the enactment of appropriate legislation. The Legislature responded by enacting into law Chapter 87–6, Laws of Florida (1987).

“Chapter 87–6 imposes a general tax on the sale or use of services consumed or enjoyed in the state. Services that are sold in the state but are consumed or enjoyed outside the state generally are not taxed under Chapter 87–6. A sale of service is deemed to occur in the state when more than 50 percent of the service is performed within the state based on costs of performance. A use of a service is deemed to occur in the state when the sale of the service takes place outside the state and the service is consumed or enjoyed within the state. The structure of the tax on the sale or use of services imposed by Chapter 87–6 thus follows the traditional pattern of Florida’s sales and use taxes on tangible personal property, which imposes a tax on the use of property that is purchased outside the state but is subsequently used or consumed within the state.

“Moreover, the tax on the sale and use of services imposed by Chapter 87–6 in many cases is apportioned to the extent that the service is enjoyed (consumed) in the state. The preexisting provision of Chapter 212 [[Florida Statute 212.06\(7\)](#)] that effectively provides a credit for sales and use taxes paid to other states has been extended by Chapter 87–6 to taxes imposed on services by other states. Hence, Florida’s use tax on services will not apply insofar as the sale or use of such services in other states has lawfully been taxed by such other state.

“At the time I recommended a tax on the sale or use of services, there was no doubt in my mind that the tax was appropriate and valid. Indeed, I continue in that belief today. Since the enactment of Chapter 87–6, Laws of Florida, however, debate has raged as to the constitutional validity of the new tax. Numerous lawsuits attacking the statute have been filed or threatened.

“The challenges to the validity of Chapter 87–6 which have already been asserted or suggested can be categorized as follows:

(1) Due process—Whether a general tax on the sale or use of services consumed or enjoyed in the state,

including legal services, impermissibly burdens the right to legal counsel and access to the courts in violation of the due process clauses of [Article 1, Section 9 of the Florida Constitution](#) and the 14th Amendment to the U.S. Constitution.

(2) Equal protection—Whether a general tax on the sale or use of services consumed or enjoyed in the state, which exempts some users of a service, denies equal protection of the laws in violation of [Article I, Sections 2 and 9 of the Florida Constitution](#) and the 14th Amendment to the U.S. Constitution.

(3) Access to courts—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, impermissibly restricts access to and use of the state or federal courts in violation of [Article I, Section 21 of the Florida Constitution](#), Article III of the U.S. Constitution and the 5th, 6th and 14th Amendments to the U.S. Constitution.

(4) Free speech, press and association—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including advertising services, violates the freedom of speech, press or association of advertisers or of media in which the advertising is carried in violation of [Article I, Section 4 of the Florida Constitution](#) and the 1st and 14th Amendments to the U.S. Constitution.

(5) Income tax—Whether a general tax on the sale or use of services consumed or enjoyed in the state is an income tax prohibited by [Article VII, Section 5 of the Florida Constitution](#).

(6) Commerce clause—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including advertising services, where the tax is apportioned and a credit is provided for a tax imposed by another state, violates the Commerce Clause of Article I of the U.S. Constitution.

(7) Miscellaneous constitutional challenges—These challenges do not neatly fit into the above categories and are listed below:

(a) Separation of powers—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, violates the separation of powers requirement of [Article II, Section 3 of the Florida Constitution](#).

(b) Supremacy clause—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, in connection with litigation before the federal courts, violates the Supremacy Clause contained in Article VI of the U.S. Constitution.

(c) Single subject—Whether Chapter 87–6 violates the single subject requirement *299 of Article III, Section 6 of the Florida Constitution.

(d) Right to counsel—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, breaches the attorney/client privilege and, thus, impermissibly burdens the right to counsel under both Article I, Section 16 of the Florida Constitution and the 6th and 14th Amendments of the U.S. Constitution.

(e) Exercise of rights—Whether a general tax on the sale or use of services consumed or enjoyed in the state, including legal services, impermissibly burdens the exercise of rights secured by the 5th, 6th, and 8th Amendments to the U.S. Constitution.

“The Justices of this Court have considered federal constitutional questions in past advisory opinions insofar as those issues have impacted upon a governor's duties. *Advisory Opinion to the Governor*, [157 Fla. 885], 27 So.2d 409 (1946); *In re Advisory Opinion to the Governor*, 150 So.2d 721 (1963).

“The uncertainty created by the pending and threatened litigation assailing the constitutionality of the statute has created doubt as to my constitutional duties and responsibilities. The Justices of this Court have determined that the Governor's duty to insure sufficient revenue sources to meet projected expenditures under Article VII, Section 1(d) and his duty to insure the laws are faithfully executed under Article IV, Section 1(a), are proper foundations upon which to base a request for an advisory opinion involving the validity of a new revenue source. See *In re Advisory Opinion to the Governor*, 243 So.2d 573 (1971), wherein this Court responded to the request of Governor Askew as to whether his corporate income tax proposal violated Article VII, Section 5 of the Constitution of the State of Florida.

“Specifically, I am in doubt as to whether under the fiscal responsibilities imposed on me by the Constitution and implementing legislation, it will be necessary for

me to submit an amended budget to the Legislature for consideration which eliminates as a revenue source taxes collected on the sale or use of services under Chapter 87–6, Laws of Florida.

“It is recognized that in advising me as to my constitutional duties under Article VII, Section 1(d) it will be necessary to determine the constitutional validity *vel non* of Chapter 87–6, Laws of Florida. The Justices of this Court have on other occasions responded to a request for an interpretation of the Governor's constitutional duties even though doing so required a determination of the constitutionality *vel non* of a legislative enactment, *In re Advisory Opinion of the Governor Civil Rights*, 306 So.2d 520 (1975) and *In re Advisory Opinion to the Governor*, 374 So.2d 959 (1979). In *In re Advisory Opinion to the Governor*, Governor Graham requested an opinion respecting his duty to appoint members of the judiciary pursuant to newly enacted legislation creating the Fifth District Court of Appeal and various other judicial positions. The Justices determined to answer Governor Graham's inquiry because ‘[t]o allow these questions to be raised by others after realignment of districts and appointment of judges, could be chaotic’ 374 So.2d at 962.

“The consequences of this revenue source being invalidated are staggering. If judicial determination is delayed and the statute invalidated, it is foreseeable that no corrective action could be taken during the 1987–88 budget year so as to balance the budget. Moreover, if the taxes are collected and the statute or portions of it are invalidated, the liabilities created by refund claims would be severely disruptive of the state's finances.

“This is not simply a problem of preventing increases in state agency programs. Without the funds generated by the tax on the sale or use of services, there will be a shortfall of \$232.2 million in funding a continuation budget. Thus, statewide programs would have to be cut and essential services curtailed.

*300 “The impact will be felt at all levels of government. For example, at least \$53.5 million of the funds raised by this revenue source will flow to local governments under the terms of current law, Section 218.61, Florida Statutes. Uncertainty as to the ability to expend these and other funds will wreak havoc with local government capital outlay, not to mention the required capital improvement elements of the Local Government Comprehensive Plans.

“By virtue of the foregoing, I respectfully request the opinion of the Justices of the Supreme Court on the following question affecting my executive duties and responsibilities:

“Did the Legislature by enacting Chapter 87–6, Laws of Florida, validly create revenue sources from the tax imposed on the sale or use of services consumed or enjoyed in this State as enumerated therein or did it fail in that effort which will require me to propose a supplemental budget which either reduces state expenditures or attempts to identify and propose alternative sources of revenue so that the budget of this State will be in balance as dictated by  [Article VII, Section 1\(d\), Florida Constitution](#)?”

Upon receiving your letter, the Justices, pursuant to [article IV, section 1\(c\), Florida Constitution](#), and [Florida Rule of Appellate Procedure 9.500\(b\)\(1\)](#) entered an interlocutory order stating:

“His Excellency, the Governor of Florida, has requested the opinion of the justices of this Court on the following question:

“Did the Legislature by enacting Chapter 87–6, Laws of Florida, validly create revenue sources from the tax imposed on the sale or use of services consumed or enjoyed in this State as enumerated therein or did it fail in that effort which will require me to propose a supplemental budget which either reduces state expenditures or attempts to identify and propose alternative sources of revenue so that the budget of this State will be in balance as dictated by  [Article VII, Section 1\(d\), Florida Constitution](#)?”

“The full text of the Governor's letter is attached hereto as an exhibit and made a part hereof.

“It is the decision of the Court that this request is answerable under the above-noted section of the Constitution and we exercise our discretion to do so.

“It is, therefore, the order of the Court that those interested parties who contend that the aforesaid statute is unconstitutional shall file their briefs on or before May 29, 1987, and serve a copy thereof on the Governor and the Attorney General. Those parties supporting the constitutionality of the statute shall file their briefs on or before June 8, 1987, and serve a copy thereof on those

parties who have filed a brief attacking the constitutionality of the tax. Reply briefs shall be filed on or before June 18, 1987. Oral argument is scheduled for 9:00 a.m. on Monday, June 22, 1987. All parties who have filed a brief shall have the opportunity of presenting oral argument. The amount of time allocated to each party will be determined after the filing of the briefs.

“It is so ordered.”

Pursuant to this order, both proponents and opponents of chapter 87–6, Laws of Florida, filed briefs and this Court heard oral argument.

As a threshold matter, many of the parties who have filed briefs or appeared to argue their positions before this Court have called upon us to reconsider issuing an advisory opinion in this matter. The proponents of this view make two principal arguments in support of their position. First, they argue that you have asked this Court to rule on the validity of a statute and that such an opinion is beyond the Court's advisory power under [article IV, section 1\(c\) of the Florida Constitution](#). Second, they argue that the issuance of an advisory opinion would be unwise because the Court has no facts or record upon which to base its ruling and because an advisory opinion could prejudice the effective resolution of future disputes between various taxpayers and the state. For the *301 reasons that follow, however, we adhere to our decision to render an advisory opinion.

[Article IV, section 1\(c\) of the Florida Constitution](#) provides in pertinent part that “[t]he governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties.” As reflected in your letter of May 12, 1987, set out above, [article IV, section 1\(a\) of the Florida Constitution](#) sets out the general obligations of the chief executive. Among these general obligations is the duty to ensure that the laws of the state are faithfully executed. A number of implicit fiscal responsibilities are inherently contained within this broad proviso of authority. Moreover,  [article VII, section 1\(d\), Florida Constitution](#), requires that the state raise sufficient revenue to balance Florida's budget for each fiscal period. This provision also impacts your fiscal responsibilities in a significant manner.

[1] [2] We agree with those who contend that [article IV, section 1\(c\), Florida Constitution](#), does not generally

empower this Court to issue advisory opinions concerning the validity of statutes enacted by the legislature. Thus, we are without power to render an advisory opinion regarding your statutory, as opposed to your constitutional, powers and duties. *In re Advisory Opinion to the Governor*, 225 So.2d 512, 514 (Fla.1969). Nor does this provision generally authorize this Court to resolve questions concerning the legal rights and obligations of private parties. As we noted in *In re Advisory Opinion to the Governor*, 113 So.2d 703, 705 (1959):

This Court has many times declined to pass upon the constitutionality of a statute in rendering advisory opinions, particularly where such a test can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel. This policy is the product of the historical recognition of the presumed constitutionality of an act of the Legislature until such presumption is set at rest by a court of competent jurisdiction in a proper adversarial proceeding.

Nevertheless, this Court has previously held that when a legislative enactment severely impacts the fiscal stability of the state, the enactment necessarily affects the chief executive's fiscal duties under the Florida Constitution. For example, in *In re Advisory Opinion to the Governor*, 243 So.2d 573, 576 (1971), this Court stated that due to the major impact that legislation creating a corporate income tax would have on the state, Governor Askew's fiscal duties under [article IV, section 1\(a\)](#), and  [article VII, section 1\(d\) of the Florida Constitution](#) were necessarily affected. Thus, the Court found it appropriate to issue an advisory opinion concerning the constitutionality of such an enactment. We noted similar considerations when we examined the constitutionality of the 1970 General Appropriations Bill in *In re Opinion to the Governor*, 239 So.2d 1, 8–9 (Fla.1970), in which we stated that “in view of the great public interest in maintaining the fiscal stability of state government, we have decided to answer your request.” Therefore, in light of the potentially chaotic impact upon your constitutional duties as fiscal manager of Florida which could be caused by finding chapter

87–6 invalid, we find that sufficient authority exists to answer your inquiry.

[3] Turning to the question of whether we should issue an advisory opinion on the tax law in question, we address the concerns of those opposing such an opinion by stressing its limited scope. First of all, advisory opinions are merely legal opinions of the individual justices, offered for the Governor's guidance in the performance of his or her constitutional duties. The opinions expressed in these advisory opinions do not constitute decisions of the Florida Supreme Court and, therefore, are not binding in any future judicial proceedings.

 *In re Advisory Opinion of Governor Civil Rights*, 306 So.2d 520, 523 (Fla.1975); *Amos v. Gunn*, 84 Fla. 285, 321, 94 So. 615, 627 (1922). Moreover, because by nature an advisory opinion is rendered without the benefit of a record or a specific factual scenario, when such an opinion discusses *302 the constitutionality of a statute it is necessarily limited to the facial constitutionality of the enactment. Thus, in the case of the instant tax on the sales and use of services, any interested parties are free to initiate lawsuits to challenge the tax and are free to argue that this advisory opinion has either been wrongly decided or that the act is unconstitutional as applied to their particular situations. Our examination of chapter 87–6 is, therefore, limited to its facial validity and we will not address the validity of the law as applied to any particular set of facts.¹

[4] Significantly, we also find that the express language contained in [article IV, section 1\(c\), Florida Constitution](#), precludes us from addressing federal constitutional issues as they relate to chapter 87–6 in this opinion. Although we understand your concern that a decision not to address these federal issues would reduce the adequacy of our advice to you, we find that the express language contained in [article IV, section 1\(c\)](#) authorizing us only to issue advisory opinions concerning your duties and powers under “any portion of this constitution” inescapably limits the scope of our opinion to questions arising under the Florida Constitution when the validity of a state statute affects your duties.² Moreover, we must acknowledge another practical justification for declining to address federal questions in this advisory opinion. Although this Court is the final arbiter of questions arising under the Florida Constitution, the United States Supreme Court is the final arbiter of federal constitutional law. Thus, this Court cannot address federal questions as authoritatively as it can state constitutional questions.

Part I. Taxation of Legal Services

[5] We shall address the various challenges to the act roughly in the order set forth in your letter of May 12, 1987. Turning first to the imposition of the tax on legal services, we find that it does not facially constitute an unconstitutional burden on the right to legal counsel. [Article I, section 16 of the Florida Constitution](#) sets forth the rights of persons accused of crimes, one of which is the right to legal counsel. Opponents of the instant act argue that the right to counsel is a “preservative right” that safeguards many other constitutional rights and that, therefore, any burden on the exercise of that right is constitutionally impermissible. We do not, however, believe that this tax, on its face, burdens the constitutional right of access to counsel.

[6] The right to counsel is violated only when access to an attorney is impeded or where the attorney's ability to consult with, advise, or defend his client is hindered. *See* [United States v. Cronin](#), 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The instant tax does not appear to have such an effect. Although the act does tax legal services under its general provisions, the act also exempts from taxation pro bono legal services and government counsel appointed for indigents.³ Because of this exception, ***303** the act only taxes those who can afford to retain counsel and pay the tax. This exemption distinguishes the instant tax on legal services from the poll tax declared unconstitutional in [Harper v. Virginia State Board of Elections](#), 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). In *Harper*, every voter, regardless of financial ability, had to pay a \$1.50 tax as a prerequisite to voting. Under such a system, an indigent person would be denied his right to vote should he or she be unable to pay the tax. The instant exemption prevents such a result.

[7] For similar reasons, we also reject the contention that the act facially violates the constitutional right of access to the courts. [Article I, section 21 of the Florida Constitution](#) guarantees that the “courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” Because those persons who cannot afford to pay legal fees will pay no tax, the act does not appear to bar any person from seeking redress for any injury in the courts. The imposition of the instant tax should, at least theoretically, no more violate this provision than would any other rise in the cost of legal fees.

[8] [9] Nor should the instant tax in any way constitute a “sale of justice.” [Art. I, § 21, Fla. Const.](#) Clearly, the state can directly assess fees and costs for access to the court system only when such fees and costs are directly related to the administration of justice. Any such fees collected cannot be used for general revenue purposes. [Farabee v. Board of Trustees, Lee County Law Library](#), 254 So.2d 1 (Fla.1971). The instant act, however, does not impose a direct charge for the privilege of utilizing the courts. At most, the taxation of legal fees imposes a detached, incidental burden upon court access and it is not levied in exchange for access to the courts or to purchase justice.

[10] [11] We also find that the tax on legal fees does not facially violate the equal protection guarantee of [article I, section 2 of the Florida Constitution](#). Moreover, legal services are taxed under the general taxing provision of the act and are not targeted for a separate discriminatory tax. *See* ch. 87–6, § 1, Laws of Fla. (creating [§ 212.059, Fla.Stat.](#)). Thus, the strict judicial scrutiny required for enactments which impinge upon fundamental rights or discriminate against certain taxpayers is not triggered. The individual exemptions provided for certain types of legal services do not alter the act's overall character.⁴ Although the state must adhere to the principles of due process and equal protection when exercising its taxing power, those principles do not impose an ironclad rule of equality. The state must be allowed the flexibility and variety appropriate to taxation schemes. [Kahn v. Shevin](#), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). Accordingly, the state is accorded a wide range of discretion when classifying for taxation purposes, provided that the classification is reasonable, nonarbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation. *State ex rel. Vars v. Knott*, 135 Fla. 206, 184 So. 752 (1938), *appeal dismissed*, 308 U.S. 506, 60 S.Ct. 72, 84 L.Ed.2d 433 (1939), *vacated on other grounds*, 308 U.S. 507, 60 S.Ct. 72, 84 L.Ed. 434 (1939). We cannot say that the distinctions which the act draws are arbitrary. Rather, the exemptions granted for legal services provided to indigents, government, nonprofit entities, and employers are necessary for consistency with the overall act. Likewise, the exemptions are necessary in order to satisfy either constitutional requirements or social policy considerations. Accordingly, we find that the taxation scheme as it applies to legal services is reasonable and rationally related to the legitimate state purposes of raising revenue

without doing violence to either the Constitution or important social policies.

We do wish to express our concern, however, about the method set forth in [section 212.0592\(27\)\(a\)](#) for determining when taxes on legal services will be paid in criminal ***304** cases. [Section 212.0592\(27\)\(a\)](#) creates an exemption for:

Legal services rendered by an attorney to a client to the extent that the right to counsel is guaranteed pursuant to either the Sixth Amendment to the United States Constitution or [Article I, Section 16 of the Florida Constitution](#) is applicable to such legal services. However, this exemption shall only be applicable if the criminal charges brought in this case are dismissed or the client is ultimately adjudicated not guilty by a court of competent jurisdiction. This exemption shall only be granted pursuant to a refund of taxes previously paid on such services.

Ch. 87–6, § 3, Laws of Fla. Accordingly, the legislature has created a system under which, in order to be eligible for a refund, the suspect must actually be charged with criminal activity and wholly exonerated on all charges. Some question the appropriateness of giving the state a direct financial interest in whether a suspect is charged and convicted. Although we do not believe that this aspect of the tax is facially unconstitutional, such equal protection questions are fact specific and the true test of this provision will come if individual defendants should challenge the limiting language in the second sentence of subsection (27)(a) as applied to them. Nevertheless, though some may believe that basing taxation decisions upon whether one is charged and convicted for a crime is extremely unwise, it is not within the province of this or any other court to base a determination of statutory validity on our view of the particular enactment's wisdom absent a violation of constitutional guaranties. [State v. Yu](#), 400 So.2d 762 (Fla.1981), *appeal dismissed*, [Wall v. Florida](#), 454 U.S. 1134, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982); [Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State](#), 392 So.2d 1296 (Fla.1980).

Part II. Due Process and Equal Protection

Opponents of chapter 87–6 have expressed a number of other due process and equal protection concerns regarding the statute at bar. Of course, as we noted above, due process and equal protection concerns are inherently fact specific and, therefore, cannot be comprehensively addressed in this opinion. Representatives of three groups of businesses, however, have lodged facial challenges to the act on due process and equal protection grounds. We believe some, but not all, of these challenges are amenable to adequate analysis in this advisory opinion and we shall, therefore, examine each in turn.

A. Exemption 35

Representatives of the data processing industry charge that the exemption contained in the newly created [section 212.0592\(35\) of the Florida Statutes](#) (exemption 35) violates equal protection because it fails to treat all persons and businesses similarly circumstanced alike. Ch. 87–6, § 3, Laws of Fla. Exemption 35 exempts from taxation certain service corporations that perform data processing services for financial institutions described in group 61 of the Standard Industrial Classification Manual (SIC).⁵ In order to qualify for the exemption, the service corporation must meet several criteria, including that it be organized pursuant to section 545.74 of the rules of the Federal Home Loan Bank Board, that its capital stock be purchased only by savings and loan associations operating within the state, and that those savings and loans or savings banks satisfy certain percentage ownership requirements. Ch. 87–6, § 3, Laws of Fla.

Two data processing businesses that do not satisfy these criteria advance the equal protection argument that this exemption arbitrarily distinguishes between data processing services owned by savings and loans and those owned by other entities. ***305** This is the type of issue that should not be addressed in an advisory opinion. A decision on this claim has little or no adverse fiscal impact on the Governor's functions. Moreover, addressing the propriety of exemption 35 would amount to an adjudication of the legal rights and obligations of private parties. Hence, this issue should be resolved by private litigation of the directly affected parties.

B. Newspapers and Advertisers

[12] Representatives of the advertising industry and the press argue that the act violates equal protection principals by reclassifying the sales of newspapers and advertising as nonessential goods and singling out the sale of those items for discriminatory taxation. We note first that the classification of an item as essential or nonessential has no constitutional significance. The government can tax essential goods and services, such as food, medicine, gasoline, or electricity if it chooses to do so. See *Puget Sound Power & Light Co. v. City of Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934) (approving a license tax on electricity). Therefore, whether the act classifies advertising and newspapers as essential or nonessential is wholly irrelevant.

Nor do we view chapter 87–6 as singling out either advertisers or the press for discriminatory treatment. Advertising is taxed under the same general taxation provision of the act that imposes a tax on all other nonexempt services. Ch. 87–6, § 1, Laws of Fla. (creating § 212.059, Fla.Stat.). Although newly created section 212.0595 of the Florida Statutes sets out a number of special provisions relating to the collection and apportionment of the tax as applied to the advertising industry, these rules do not themselves impose any additional tax obligations. Rather, they simply set out the specific clarifying rules that the peculiar nature of modern interstate advertising necessitates.

[13] We also disagree that the act facially discriminates against the advertising industry as a whole by placing upon it a disproportionate tax burden. As the state points out, the taxation of advertising is expected to account for only 4.7% of all revenues derived from the new sales and use tax on services. The revenues derived from the taxation of advertising services is projected to account for only 1.4% of the total tax revenues derived from chapter 212 of the Florida Statutes during the 1987–88 fiscal year. We cannot say that, on its face, this smacks of discrimination.

Opponents of the tax on advertising also argue that the act violates due process by failing to fairly apportion the tax for interstate advertisers and by attempting to tax advertisers who have no significant nexus to Florida. Questions such as this, however, are wholly fact specific and we cannot answer them by a facial examination of the statute based on hypothetical fact patterns. Thus, this type of due process

challenge must await a specific “as applied” challenge in an adversarial setting.⁶

C. The Construction Industry

Representatives of the construction industry argue that the act violates due process because it fails to define “essential services” for purposes of tax exemption and because the exemptions listed in newly created section 212.0592 are unconstitutionally arbitrary. Ch. 87–6, § 3, Laws of Fla. Because, as we stated above, the essential nature of an item bears no relation to its taxability, we find any purported vagueness in the definition of “essential services” to be wholly irrelevant. Moreover, as counsel for the legislature pointed out during oral argument, the legislative process is a political one. Many of the exemptions that opponents of the act single out as examples of arbitrariness were enacted in order either to minimize the regressive nature of tax or to address the specific concerns of organizations that the general taxing mechanism affected. Thus, we cannot say that the exemptions listed in section 212.0592 are unconstitutionally arbitrary or unreasonable.

Part III. Freedom of Speech and Press

Opponents of the statute have raised various arguments pursuant to the freedom of speech and press guarantees of article I, section 4 of the Florida Constitution. We shall address each argument separately.

A. Registration Requirements of Chapter 87–6

[14] Addressing first the requirement that all persons who purchase advertising out-of-state for consumption in Florida report to the state, self-accrue the tax, and then remit the tax directly to the state, we reject the argument that these requirements constitute an unconstitutional registration requirement. See ch. 87–6, §§ 6 (creating § 212.0595(6), Fla.Stat.), 12 (amending § 212.06(2)(k), Fla.Stat.), & 16 (amending § 212.11(1), Fla.Stat.), Laws of Fla. Although opponents of these requirements contend that *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), prohibits such registration, we cannot agree. *Tally* involved an

ordinance forbidding the distribution of all handbills that did not contain the name of the printer, author or manufacturer, and distributor. Although the City of Los Angeles urged that it had carefully aimed the law solely at identifying those responsible for fraud, false advertising, and libel, the United States Supreme Court disagreed.  *Id.* at 63–64, 80 S.Ct. at 538–39.

While *Tally* did stress the historical importance of anonymity, it struck down the ordinance solely due to its overreaching nature. Unlike the ordinance at issue in *Tally*, however, we do not view the instant disclosure requirement to be unduly intrusive on its face. Realism dictates that the state have some method of enforcing the instant tax. Prohibiting the state from requiring a given group of taxpayers to identify taxable transactions would place an unreasonable and unrealistic burden on the Department of Revenue (DOR) and would no doubt result in an uneven and haphazard enforcement of the tax code. We believe that, on its face, the registration provisions contained in chapter 87–6 are drawn in a sufficiently limited manner to pass constitutional muster. The DOR should, however, exercise caution in promulgating regulations pursuant to this statutory authority to ensure that its provisions remain limited to furthering the state's interest in identifying taxable transactions.

B. Content-based Taxation and the Taxation of Fundamental Rights

[15] [16] Opponents of the tax also argue that chapter 87–6 constitutes a direct tax on the exercise of the constitutional right to free speech. As we pointed out during our previous discussion of the equal protection concerns of advertisers and the press, however, this tax on the sale and use of services is one of general application and does not single out advertisers or the press for special taxation. Moreover, as will be discussed in more detail later, the tax is levied upon those in the business of trafficking in first amendment expression rather than upon the exercise of the right to free speech itself.⁷ It is beyond question that advertisers and the press are not immune from ordinary, nondiscriminatory taxes of general application.  *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, —, 107 S.Ct. 1722, 1725, 95 L.Ed.2d 209 (1987);  *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369, 75 L.Ed.2d 295 (1983);  *Grosjean v.*

American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936). Therefore, we reject the argument that the instant tax is directly and discriminatory aimed at the exercise of the constitutional right of free speech.

Opponents of the act also argue, however, that the instant tax targets the press *307 and discriminates based on the content of the speech involved. Proponents of this view cite to *Arkansas Writers' Project, Inc.*, *Minneapolis Star*, and *Grosjean* in support of this view. We find, however, significant contrasts between chapter 87–6 and those tax schemes struck down in these three cases. Indeed, rather than support the opponents' arguments, we believe that these three cases support the facial constitutionality of the statute.

In *Grosjean*, Louisiana enacted a license tax that only applied to publications within the state of Louisiana with a circulation of more than 20,000 copies per week. Due to the narrow scope of the statute, the law taxed only thirteen newspapers out of the more than 124 publishers in the state.  *Minneapolis Star*, 460 U.S. at 579, 103 S.Ct. at 1368. In striking down the law, the United States Supreme Court rejected the state's argument that the law imposed a license tax for the privilege of selling or charging for advertising. Instead, the Court found the law to be a deliberate and calculated effort, in the guise of a tax, to penalize certain publishers and to limit the circulation of a selected group of newspapers.⁸

Over four decades later, in *Minneapolis Star*, the Supreme Court struck down a “use tax” on the cost of ink and paper products consumed in the production of publications.  460 U.S. at 577, 103 S.Ct. at 1367. In a situation similar to that encountered in *Grosjean*, the use tax in *Minneapolis Star* was drawn so narrowly that it applied only to fourteen out of the 388 paid circulation newspapers in Minnesota.⁹ Attaching significance to the fact that Minnesota had deliberately chosen not to apply its general sales and use tax to newspapers and had, instead, enacted a separate special tax applicable only to the press, the Court struck down the special use tax as facially discriminatory. In doing so, the Court made the following observation:

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group

of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

....

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing business generally....

 460 U.S. at 585–86, 103 S.Ct. at 1371–72. Of perhaps even greater significance to the situation before this Court, the Supreme Court specifically rejected one newspaper's argument that a generally applicable sales tax would be unconstitutional, concluding that “our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible.”

 460 U.S. at 587 n. 9, 103 S.Ct. at 1373 n. 9.

This latter conclusion was reemphasized in  *Arkansas Writers' Project*, 481 U.S. at —, 107 S.Ct. at 1727. In *Arkansas Writers' Project*, the Supreme Court found that the Arkansas sales tax selectively taxed some magazines and not others based solely on content. Accordingly, the Court struck down the tax law, which exempted from taxation “religious, professional, *308 trade and sports journals and/or publications printed and published within ... [Arkansas] when sold through regular subscriptions” as unconstitutionally discriminative of publications based on content.  *Id.* at — & —, 107 S.Ct. at 1724 & 1729. The Court, however, reemphasized that genuinely nondiscriminatory taxes on newspaper receipts are constitutionally permissible.

We find the instant tax to be facially consistent with both the letter and the spirit of these three cases. Unlike the statute considered in *Grosjean* and *Minneapolis Star*, chapter 87–6 does not impact only a select few advertisers or publications. Moreover, not only does it apply to the overall industries, it is part of the same general sales tax provision that will apply to all other nonexempt businesses involved in the sale or use of services in Florida. Thus, the instant tax is wholly dissimilar to the use tax on ink and paper considered in *Minneapolis Star*. Indeed, the instant tax does exactly what the Supreme Court approved and criticized Minnesota for failing to do, i.e., extend the general sales tax to the press.

Nor do we believe the instant tax to be similar to the tax struck down in *Arkansas Writers' Project*. Newly created  section 212.08(7)(o) 1 of the Florida Statutes exempts sales and leases to religious, scientific, educational, and other nonprofit institutions from the sales tax when those transactions are in the furtherance of their customary nonprofit functions. Ch. 87–6, § 14, Laws of Fla. This exemption, among other things, leaves intact the preexisting comprehensive exemption for the use, sale and distribution of religious publications.  § 212.06(9), Fla.Stat. (Supp.1986). Moreover, the general sales tax exemption for government, nonprofit institutions, and religious organizations predates chapter 87–6, which merely extends this exemption to cover the newly taxed services. See  § 212.08(6) &  (7), Fla.Stat. (1985).

[17] We disagree with opponents of the law that the act unconstitutionally discriminates between publications based on content. Notably, prior to the enactment of chapter 87–6, some commercial advertisements were exempt from taxation of the sale and use of goods while others were not.¹⁰ Additionally, magazines sold at newsstands were taxed while newspapers were not. Thus, in at least some ways, the instant enactment serves to eliminate content-based discrimination rather than create it. Moreover, the institutions exempted from taxation under  section 212.08(7)(o) 1 are not exempted solely from the taxation of publications and advertisements which they purchase and disseminate. Rather, they are exempted from taxation for *all* their transactions that would otherwise be taxable under a sales and use tax on goods and services. Therefore, unlike the tax law at issue in *Arkansas Writers' Project*, the instant law does not require an evaluation of a publication's content in order to determine its status for taxation purposes.

[18] [19] In the case of the exemption granted to government entities, contained under  section 212.08(6), Florida Statutes, as amended by the act, we find that both law and common sense require this provision. The federal government is constitutionally immune from taxation. Also, taxing the state government or its subdivisions to raise revenues to fund the operation of state government would be nonsensical and circuitous. In the case of religious institutions, the exemption is wholly consistent with the sort of “benevolent neutrality” that is constitutionally required.  *Corporation of the Presiding Bishop of the Church of Jesus*

Christ of Latter-Day Saints v. Amos, —U.S. —, —, 107 S.Ct. 2862, 2867, 97 L.Ed.2d 273 (1987); *Walz v. Tax Commission*, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). We believe that the instant exemption from taxation as applied to religious *309 institutions serves the “permissible legislative purpose [of alleviating] significant governmental interference with the ability of religious organizations to define and carry out religious missions” without advancing religion through state activities and influence. *Corporation of the Presiding Bishop*, 483 U.S. at —, 107 S.Ct. at 2868. Nor are we persuaded that the tax exemption for a select few types of motion picture productions makes the rest of the media selected targets of discriminatory taxation. Thus, the press' tax burden is not discriminatorily based on content and the strict scrutiny test is not triggered. We believe these exemptions set forth in the act are, at the very least, rationally related to the furtherance of important social policies and, therefore, constitutionally permissible.

In light of the above, we do not find that chapter 87–6 facially violates the freedom of speech and press guarantees contained in article I, section 4 of the Florida Constitution.¹¹

Part IV. Chapter 87–6 as an Income Tax

Those opponents of the sales and use tax on services contained in chapter 87–6 who believe the enactment constitutes an income tax argue that the tax treats the right to work and earn a livelihood by engaging in the business of selling services as a taxable privilege and that, therefore, the act constitutes the type of tax prohibited by article VII, section 5, Florida Constitution. We find this analysis to be oversimplistic.

We first note that this Court has previously upheld the imposition of a gross receipts tax on businesses. In *Gaulden v. Kirk*, 47 So.2d 567 (Fla.1950), the legislature had enacted, as part of the Florida Revenue Act of 1949, a tax upon persons engaging in the business of renting, leasing, or letting any living quarters, sleeping accommodation, or housing accommodation. 47 So.2d at 570. The tax was based on a percentage of the gross rentals charged for the accommodations. Gaulden operated a facility taxed under this provision and the Palm Beach County sheriff arrested him for refusing to pay the tax. This Court upheld the tax, finding the enactment to constitute a valid gross receipts tax

on the privilege of engaging in the business of renting such accommodations. *Id.* at 576.

Four years later, in *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla.), cert. denied, 348 U.S. 865, 75 S.Ct. 87, 99 L.Ed. 681 (1954), this Court addressed the constitutionality of a tax on the daily gross receipts from gambling operations at dog racing tracks. Although the Court struck down the tax due to its arbitrary classification scheme, the Court rejected the argument that the tax amounted to an unconstitutional income tax, finding instead that the enactment constituted an excise tax upon the privilege of operating dog racing tracks in Florida. *Id.* at 886. The Court found the legislature's desire to base the tax on the amount of revenues collected to be both reasonable and constitutionally permissible. *Id.* at 887.

[20] We can see no meaningful difference between the taxes upheld in *Gaulden* and *Volusia County Kennel Club* and the tax before us now. As were the taxes approved in these two cases, the instant tax is levied upon the privilege of engaging in the occupation or business of selling services and is measured by the gross receipts derived therefrom. *See also City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744 (1932) (gross receipts tax on the privilege of selling electricity did not constitute *310 an income tax). By its express language, the act imposes an excise tax upon the sale and use of services in Florida, not upon income. Ch. 87–6, § 1, Laws of Fla. Moreover, the tax has none of the vestiges of an ordinary income tax. First, it exempts from taxation the services that employees render to their employers and the services that partners supply to their partnerships. Ch. 87–6, § 3, Laws of Fla. (creating § 212.0592(2) & (4), Fla.Stat.). This provision effectively eliminates typical wages and salaries from taxation. Thus, the tax base that the instant act creates is inconsistent with the tax base of a traditional income tax. Moreover, the tax is wholly transactional in nature and makes no reference to profit or net income, a factor this Court found significant in analyzing the tax scheme considered in *Amos*, 106 Fla. at 878, 143 So. at 747. Indeed, at least one of the act's opponents acknowledge that this Court would have to recede from both *Volusia County Kennel Club* and *Gaulden* in order to conclude that chapter 87–6 constitutes a facially unconstitutional income tax. Even assuming we could so recede from precedent in an advisory opinion, no such action would be warranted.

We agree with the opponents of the act that the true economic impact of a tax is what ultimately determines its nature. *Owens v. Fosdick*, 153 Fla. 17, 13 So.2d 700 (1943); *State ex rel. McKay v. Keller*, 140 Fla. 346, 191 So. 542 (1939). For the reasons stated above, however, we do not believe that chapter 87–6 has the realistic economic effect of creating an income tax. The act's treatment of prime contractors as the final consumer of new construction does not alter this conclusion.

See ch. 87–6, § 5, Laws of Fla. (creating § 212.0594(3), Fla.Stat.). As to the argument that the act imposes an income tax upon the class of injured Floridians seeking judicial redress for lost earnings, we point out that section 42 of the act allows prevailing plaintiffs to recover any applicable sales or use tax due on legal fees from the defendant. Ch. 87–6, § 42, Laws of Fla. (amending § 57.071(3), Fla.Stat.). We believe that this provision effectively rebuts this facial challenge to the act.

[21] [22] Finally, representatives of the construction industry argue that the act subjects prime contractors to double taxation.¹² Although the effect of chapter 87–6 at various levels in the stream of commerce may be a pyramiding of taxes, no unconstitutional double taxation occurs where there are two taxpayers and two separate taxable transactions or privileges. *Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822 (Fla.1964); *American Video Corp. v. Lewis*, 389 So.2d 1059 (Fla. 1st DCA 1980). Despite the industry's arguments to the contrary, and although the prime contractor collects and remits taxes for both his purchases from the subcontractors and his eventual sale to the ultimate purchaser, the pyramiding of taxes complained of appears to occur due to separate taxable transactions. We do not believe that the case law discouraging double taxation was intended to address such a situation.¹³

In short, we do not view the instant tax on services to be fundamentally different in nature from the sales tax on goods, an enactment long recognized as a constitutional tax on the privilege of engaging in a *311 business or occupation. *Ryder Truck Rental*, 170 So.2d at 825.

Part V. Separation of Powers

[23] Opponents of the instant tax law argue that chapter 87–6 violates article II, section 3 of the Florida Constitution, which mandates that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other

branches unless expressly provided herein.” Among other things, this provision prohibits the legislature from assigning its constitutional duties to administrative agencies within the executive branch such as the DOR. *Florida State Board of Architecture v. Wasserman*, 377 So.2d 653 (Fla.1979). This nondelegation of duties doctrine places strict limitations on administrative agencies. In particular:

Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla.1978).

[24] [25] Pursuant to this doctrine, statutes granting enforcement power to executive agencies such as the DOR must clearly set out adequate standards to guide the agency in the execution of the powers delegated and must define those powers with sufficient clarity to preclude the agency from acting through whim, favoritism, or unbridled discretion. *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla.1977); *Flesch v. Metropolitan Dade County*, 240 So.2d 504 (Fla. 3d DCA 1970), cert. denied, 244 So.2d 432 (Fla.1971). The legislature, however, may validly delegate to agency officials the authority to promulgate subordinate rules within proscribed limits and to determine the facts to which established policies of legislation are to apply so long as the agency is not delegated the authority to determine what the law shall be. *Sarasota County v. Barg*, 302 So.2d 737 (Fla.1974); *Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co.*, 285 So.2d 386 (Fla.1973). The crucial inquiry in the case at hand is whether the statute is so couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, who or what is to be taxed. See *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981, 987 (Fla.1981); *Barg*, 302 So.2d at 742.

Opponents of the act charge that the legislature violates the nondelegation doctrine by granting the DOR authority to determine what is to be taxed. Specifically, the opponents allege that the legislature unconstitutionally shifted to the DOR the power to define such crucial definitions as “advertising,” “market coverage,” “fair,” and the like. They also contend that the legislature cannot constitutionally delegate the power to make apportionment decisions and to determine in which state the benefits of a service are enjoyed.

[26] We do not believe that the instant act so lacks guidelines that neither the DOR nor the courts can determine which services the legislature intended to tax. The specificity with which the legislature must set out statutory standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards. The same conditions that may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation for the guidance of administrative agencies impractical or undesirable. *State, Department of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970); *Burgess v. Florida Department of Commerce*, 436 So.2d 356 (Fla. 1st DCA 1983), *review denied*, 447 So.2d 885 (Fla.1984). In the context of a comprehensive taxation statute extending Florida's sales and use tax to the majority of services marketed in the state, courts cannot realistically require the legislature to dictate every conceivable application of the law down to the most minute detail. As we noted in *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d 1189, 1191 (Fla.1985), the *312 subordinate factors in complex areas such as taxation should be left to the appropriate agency having expertise and flexibility. Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation. *Id.*

We do not believe the legislature doomed the viability of chapter 87–6 by failing to define such terms as “advertising” and “market coverage.” The definition of advertising has a fixed and definite meaning within the industry. *See Griffin*, 239 So.2d at 582; *Conner v. Joe Hatton, Inc.*, 216 So.2d 209, 212 (Fla.1968). Moreover, further guidance can be gleaned from an examination of the SIC manual, which contains descriptions of taxed services, including such items as advertising agency services, outdoor advertising services, advertising representative services, and the like. Indeed, section 212.02(22) of the act specifically incorporates by reference the SIC manual in defining various types of services which touch on advertising. Ch. 87–6, § 7, Laws of Fla. As

for “market coverage,” newly created section 212.0595(4) (b) of the act expressly defines the term. Ch. 87–6, § 6, Laws of Fla. The fact that opponents of the act disagree with the appropriateness of the definition does not trigger a delegation problem. For like reasons, we reject the argument that other challenged terms are so ambiguous as to cause facial unconstitutionality.¹⁴

Turning to the argument that the statute unconstitutionally delegates power to the DOR in apportionment decisions concerning advertising, we find that [section 212.0595](#) sets out the apportionment mechanism with sufficient specificity and clarity to guide the DOR as to the legislature's intent. Thus, we find that the provision passes facial scrutiny. We qualify this conclusion, however, by stressing that determinations as to the validity of tax apportionment schemes and nexus requirements are fact specific and ultimately can only be adequately adjudicated as applied to specific situations and taxpayers.

Part VI. Single Subject Requirement

Several opponents of the act contend that the statute violates [article III, section 6 of the Florida Constitution](#), which provides that “[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” In essence, these parties argue that because chapter 87–6 is a single statute that attempts to create a comprehensive taxation scheme for services, the chapter runs directly afoul of our decision in *Gaulden v. Kirk*. In *Gaulden*, this Court examined the Florida Revenue Act of 1949, section 24 of which made the effective date of the act dependent upon the passage and vitality of two other separate acts. [47 So.2d at 567](#). In that case, Gaulden argued that this resulted in an integration of the separate laws, thereby triggering a violation of the single subject rule. This Court, however, rejected that argument, holding that “[t]he fact it is an act which was passed as part and parcel of a comprehensive tax program devised by the legislature in the exercise of its lawmaking power, makes it none the less a single law within the purview of Section 16, Article III” and adding that “the legislature could not perform its duties or measure up to its responsibilities if we were to give the narrow construction [of the single subject rule] suggested by counsel.” *Id.* at 575. The opinion also added the following dicta:

No *single* law could possibly be invented which would meet constitutional requirements and at the same time contain all the essential features of a comprehensive legislative program on any subject which affects the general welfare as vitally as does taxation. The legislature pursued the only available course since its program necessarily involved a consideration of the tax structure not only of the state but also its multiple political subdivisions and quasi-independent governmental *313 units within its borders in the interest of the welfare of its citizens as a whole. A legislative program of such magnitude may necessarily involve several subjects before the ultimate end effect can be accomplished. It was essential, therefore, in enacting its program that the legislature provide a separate law for each subject with which it dealt.

Id. (emphasis in original). Although we acknowledge that the instant act does seem to contravene this dicta, we point out that case law interpreting Florida's single subject rule has progressed since 1947 and that this Court has significantly refined the requirements necessary for a legislative enactment to satisfy the single subject requirement.

[27] The single subject rule has a two-fold purpose. First, it attempts to avoid surprise or fraud by ensuring that both the public and the legislators involved receive fair and reasonable notice of the contents of a proposed act. *Santos v. State*, 380 So.2d 1284 (Fla.1980); *Coldewey v. Board of Public Instruction*, 189 So.2d 878 (Fla.1966); *King Kole, Inc. v. Bryant*, 178 So.2d 2 (Fla.1965). Secondly, the limitation prevents hodgepodge, logrolling legislation. *E.g.*, *King Kole*, 178 So.2d at 4. As we recently stated in *Smith v. Department of Insurance*, 507 So.2d 1080, 1085 (Fla.1987), quoting *State v. Lee*, 356 So.2d 276, 282 (Fla.1978):

The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a “cloak” for dissimilar legislation having no necessary or appropriate connection with the subject matter.

[28] [29] Thus, as confirmed by our treatment in *Smith* of the Tort Reform and Insurance Act of 1986, the fact that the scope of a legislative enactment is broad and comprehensive is not fatal under the single subject rule so long as the matters included in the enactment have a natural or logical connection. *Smith*, at 1085. See also *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla.1981). In the case at bar, all the provisions contained within text of the statute have a logical and natural connection with the taxation of services in this state. Although at least one opponent has challenged section 201.15 of the act because it sets out an allocation scheme for the state treasury to use once it begins receiving revenues from the tax, we find this provision wholly instructional and necessarily incidental to the tax itself. Ch. 87–6, § 35, Laws of Fla. See *Smith*, at 1086 (provisions that are necessary incidents to or tend to make effective or promote the objects and purposes of the subject legislation do not violate the single subject rule). We do not find it to be the type of specific appropriation that would trigger a violation of the single subject rule. Accordingly, we do not find chapter 87–6 violative of the single subject rule.

Part VII. Contract Clause

The final contention that we shall address is the argument that the provisions contained in chapter 87–6 dealing with the construction industry violate article I, section 10 of the Florida Constitution. This provision provides that “[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.” Representatives of the construction industry argue that the interaction of section 5 of the act, which creates section 212.0594 of the Florida Statutes, and section 31 of the law act in concert to impair construction contracts in existence prior to the statute's enactment. See Ch. 87–6, §§ 5 & 31, Laws of Fla. We agree.

Newly created  sections 212.0594(6) and (8) of the Florida Statutes, contained in section 5 of the act, impose a tax upon prime contractors for both certain services that subcontractors supply and on the cost price of the construction that eventually results.¹⁵ The tax on the latter construction *314 is due at the time that either the contract for new construction is fulfilled or when the certificate of occupancy is issued, whichever occurs first. Ch. 87-6, § 5, Laws of Fla. (creating  § 212.0592(8), Fla.Stat.). Section 31 of the act, however, provides:

Notwithstanding any other provision of this act, in the case of written contracts which are signed prior to May 1, 1987, for constructing improvements to real property, prime contractors ... responsible for performing the contract shall not be required to remit any tax on services levied pursuant to  s. 212.059 or  s. 212.0594, Florida Statutes, provided that:

....

(4) The purchase of the service occurs before June 30, 1988.

Ch. 87-6, § 31, Laws of Fla.

Reading these two sections in pari materia, section 31 creates an exemption to the taxation provisions of section 5 for written construction contracts signed prior to May 1, 1987. Under section 31(4), however, this exemption expires if the contractor's performance under the contract is not fully rendered prior to June 30, 1988. Thus, if the contractor fails to complete construction and obtain a certificate of occupancy before that date, the general taxation provisions of  section 212.0594, Florida Statutes, are resurrected and applied to the contract even though it was signed prior to May 1, 1987.

The legislature filed the instant statute on April 23, 1987, and the Governor signed it into law on the following day. Once enacted into law, contractors were placed on notice that they should take their upcoming tax burden into consideration when entering into construction contracts after May 1, 1987. The act, however, does not limit its effect to this permissible burden. Instead, by retroactively placing a tax burden upon all construction contracts that are incomplete by June 30, 1988, and thereby adding an unknown, un contemplated cost, it retroactively burdens contracts that were in existence before

any party could have reasonably been on notice of the impending tax.

[30] [31] [32] Unquestionably, contract rights are ordinarily subject to the state's powers of taxation.

 *Straughn v. Camp*, 293 So.2d 689 (Fla.), appeal dismissed, 419 U.S. 891, 95 S.Ct. 168, 42 L.Ed.2d 135 (1974). It is equally indisputable, however, that rights existing under a valid contract enjoy protection under the Florida Constitution.

 *Green v. Quincy State Bank*, 368 So.2d 451 (Fla. 1st DCA 1979). We cannot accept the state's argument that the fact the instant tax may make certain contracts unprofitable does not constitute an impairment of contract. Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution.  *Dewberry v. Auto-Owners Insurance Co.*, 363 So.2d 1077 (Fla.1978). A statute which retroactively turns otherwise *315 profitable contracts into losing propositions is clearly such a prohibited enactment. Thus, it is our opinion that section 31(4) of the statute is facially unconstitutional.

In summation, we emphasize that an advisory opinion is for the benefit of the chief executive and, therefore, does not carry with it the mandate of the Court. Moreover, the scope of our advisory authority prevents us from considering either federal constitutional questions or the constitutionality of the statute as applied to specific factual scenarios and individual taxpayers. Nevertheless, it is our opinion that, with the exception of section 31(4), chapter 87-6 is facially constitutional.

Respectfully,

Parker Lee McDonald

Chief Justice

Ben F. Overton

Leander J. Shaw, Jr.

Gerald Kogan

Justices

A concurring and dissenting view by Justice GRIMES.

While I concur with all other aspects of the opinion, I believe that the tax on advertising represents an unconstitutional restraint on free speech.

Article I, section 4 of the Florida Constitution provides in part:

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

The scope of the protection accorded to speech under article I, section 4, is at least the same as that granted by the first amendment of the federal Constitution as interpreted by the United States Supreme Court. *Department of Education v. Lewis*, 416 So.2d 455 (Fla.1982).

The fact that advertising usually involves commercial speech does not necessarily diminish the first amendment interests involved. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). So long as advertisements are not misleading and concern a lawful activity, they are entitled to first amendment protection. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Moreover, advertising is used to convey political and social views. As noted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), advertisements are:

[A]n important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.

Id. at 266, 84 S.Ct. at 718.

The question then is whether the advertising tax represents a tax on the right to speak. The new law itself suggests the answer when it defines advertising as “the service of conveying the advertiser’s message,” i.e., the dissemination of information itself. *§ 212.0595(10)*. Payment of the tax is a condition of speaking to the Florida public through the media.

The United States Supreme Court has at least implied that a nondiscriminatory sales tax on publications which is simply part of the larger taxing scheme would be constitutional. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). Thus, I believe that no constitutional infirmity results from the fact that the sales tax now covers newspapers and other periodicals. However, the tax on advertising is different. Even though there are services rendered in the preparation and distribution of advertising, the advertising upon which the tax is laid is not a service as such. The advertising that is actually “sold or used in Florida” is in the nature of intangible personal property—the content of a printed advertisement or broadcast commercial. Thus, while purporting to tax advertising as just another service, the tax has a discriminatory effect because it is uniquely directed towards the dissemination of information. As such, it is a tax on speech itself. The more one speaks, the more one pays to the state. This represents *316 an impermissible burden on the right of free speech.¹

I am also concerned that the way the law is drawn the tax is being imposed on the content of the advertising. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the United States Supreme Court struck down an Arkansas tax on the receipts from the sales of tangible personal property because it exempted certain items including newspapers and “religious, professional, trade and sports journals and/or publications printed and published within this State.” *Id.* 107 S.Ct. at 1724–25. The Court reasoned that the tax discriminated between members of the press because it did not apply evenly to all magazines. The Court held that the tax was particularly repugnant to first amendment principles because in order to determine whether a particular publication came within its exemption, it was necessary to examine its contents.

Under the new Florida law, religious and charitable organizations are not required to pay the advertising tax. The state argues that when these organizations purchase

advertising, they are exempt not because of the content of their speech but because of their status as exempt organizations. Yet, the unique character of such organizations necessarily involves the promulgation of particular messages. Moreover, the first amendment also prohibits the preference of one speaker over another. In [First National Bank of Boston v. Bellotti](#), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court said that the state is “constitutionally disqualified from dictating ... the speakers who may address a public issue.” [Id.](#) at 784–85, 98 S.Ct. at 1420. While that Court has recognized the right of the state to provide tax relief for religious institutions, see [Walz v. Tax Commission of New York](#), 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), such preferences have not ordinarily involved subjects impinging upon the first amendment. It may be, of course, that even if the exemption provided for religious and charitable organizations is held invalid, only the exemption will be lost rather than the entire tax on advertising.²

While I cannot fault the motivation of the legislature in seeking to raise additional revenue through the taxing of advertising, I do not believe that that portion of chapter 87–6 is constitutional.

Respectfully,

Stephen H. Grimes

Justice

The Honorable Bob Martinez
Governor of the State of Florida

The Capitol

Tallahassee, Florida 32301

Dear Governor Martinez:

You have asked the Justices of this Court, in essence, to advise you as to the constitutionality of Chapter 87–6, Laws of Florida. This is the first request for an advisory opinion since I have been a member of this Court, and it is with some unhappiness that for the reasons which follow, I must respectfully decline to render an opinion to your question.

The problems perceived by you growing out of this new legislation are not unique, except perhaps as to dimensions, and I can understand your desire to seek an expeditious answer. Unfortunately, in my judgment, you are asking for, at best, a placebo, to achieve a result that can only come from an adversarial proceeding between litigants in a court of law. Even though a majority of the Court has given you an opinion, you have not been given an ultimate answer. Surely as the night follows the day, all facets of your question will in due course, and hopefully with all deliberate speed, wend their weary way to this Court for final determination at the state level. At that time you will have your answer, and not just an advisory opinion, and the separation of powers between the *317 coordinate branches of government will have been respected.

I must say, without a great deal of pride, that the course this Court has followed with respect to similar requests for advice as to the constitutional validity vel non of a statute, has been checkered. Early on, in 1905, the Justices of this Court declined to respond to a request for advice from Governor M.B. Broward, stating:

Reduced to its last analysis, the purpose of your letter is not to have us construe any clause of the Constitution affecting your executive powers and duties, but to have us pass upon the constitutionality of an act of the Legislature

[Section 13 of article 4 of the Constitution](#) authorizes the justices of the Supreme Court, on the Governor's request, to interpret only some portion of the Constitution, and does not authorize the court, upon such request, to interpret or pass upon the constitutionality of statutes that affect the Governor's executive powers and duties. [Advisory Opinion to Governor](#), 39 Fla. 397, 22 South. 681. For the reasons stated, we must respectfully decline to give any opinion upon the questions propounded.

[Advisory Opinion to Governor](#), 50 Fla. 169, 39 So. 187 (Fla.1905).

Again, the Justices declined to render an advisory opinion to Governor Collins determining the constitutionality of an act of the legislature. [In re Advisory Opinion to the Governor](#), 113 So.2d 703 (Fla.1959). This advisory opinion is best remembered for Justice Drew's plaintive confession for his past sins in participating in advisory opinions construing or passing upon the constitutionality of statutes when, writing separately, he said:

On several occasions since my appointment to this Court I have participated in advisory opinions to you and your predecessors in office which construed or passed upon the constitutionality of certain statutes of this State. It is now my view that, in rendering such opinion, I exceeded my authority as a Justice of this Court.

The Constitution plainly authorizes the Justices of this Court to advise you “as to the interpretation of any portion of [the Florida] Constitution upon any question affecting [your] executive powers and duties.” From the adoption of the present Constitution until recent years the Justices of this Court have refused to advise the Governors of Florida as to their interpretation of or to pass upon the constitutionality of statutes of this State. It is my view that this Court should now return to that salutary principle epitomized in the conclusion of the *Advisory Opinion to the Governor*, 50 Fla. 169, 39 So. 187.

Id. at 706.

Before too many years had passed, the Justices answered a question from Governor Claude Kirk upholding the constitutionality of the 1970 general appropriation act. *In re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla.1970), Justice Drew, still a sitting Justice, remained true to his own counsel eleven years earlier. He refused to join with his brethren, citing his opinion *In re Opinion to the Governor*, 113 So.2d 703 (Fla.1959), and wrote separately these concluding remarks:

The critical language of the Constitution of 1968 under which your request is presented is identical to the language of the Constitution of 1885 under which the request of Governor Collins was made. The provisions of the 1968 Constitution relating to procedure for obtaining advisory opinions does not-in my judgment-in any way enlarge the powers of this Court with respect to this basic constitutional question.

Looking back over more than a decade I can only conclude that the passage of time has confirmed the wisdom of this Court expressed by the majority in the advisory opinion above referred to, and my own views quoted above.

Consistency compels me therefore to respectfully decline to render any opinion upon the questions propounded.

239 So.2d at 12.

This Court's most recent incursion into this bramble and thicket occurred *In re *318 Advisory Opinion to Governor*, 374 So.2d 959 (Fla.1979) with a sharply divided Court giving Governor Graham an opinion as to the constitutionality of a recently enacted statute. Justice Sundberg, writing separately, expressed my thoughts with his usual succinct eloquence:

Turning now to the reasons why I deem it inappropriate to render advice upon the constitutionality vel non of CS for SB 268. My reluctance to render such advice does not stem from a formalistic or technical posture, but from a real concern for the appropriate role to be exercised by the coordinate branches of government. The role of the judiciary in our form of government is unique in its accepted authority to declare acts of the coordinate branches invalid because they offend the terms or principles of our constitution. See  *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). This authority and responsibility to be the final arbiter of the constitutional validity of the acts of the legislative and executive branches is nothing less than awesome. While this Court should not, and does not, flinch from its obligation to exercise this power in an appropriate case, nevertheless, it is a power which should be exercised with circumspection.

A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context, a mode which has proven to be superior for framing the issues and testing the truth of competing claims.

I am not unmindful of the possible serious consequences of leaving unresolved an important question concerning the judicial structure of this state. I am more mindful, however, of the serious erosion to our system of separation of powers which I perceive will result from indiscriminately passing upon the constitutional validity of executive and legislative acts through the vehicle of an advisory opinion. Exigent circumstances always evoke the temptation to act, but it is in just such circumstances that we should be most careful to observe the principles of our constitution.

Id. at 971–72 (citations omitted, footnote omitted).

Article IV, section 1(c) of the Constitution of the State of Florida can be and is a very useful vehicle for the Chief

Executive of this State to ask for counsel from the Justices as to the interpretation of any portion of the Constitution upon any question affecting his executive powers and duties. Properly used it respects the separation of powers between the executive and judiciary, and facilitates the expeditious handling of matters affecting the duties of the office of the governor. On the other hand, asking the Justices to pass on the constitutionality of a statute, in reality, resolves nothing because the advisory opinion has no precedential effect and is binding on no one and, finally, the odds are overwhelming that the parties ultimately concerned with the constitutionality of that bit of legislation will properly resort to the courts for judicial determination of that question. Of course, my fundamental objection to the procedure utilized by you is answered by Justice Sundberg on the question of the separation of powers doctrine as quoted above.

I certainly cannot fault Your Excellency for requesting an advisory opinion, considering the lack of any clear direction from the Justices in this area and particularly the most recent responses from the Justices to your predecessors in office. By the same token, I assure you that in declining to respond to your request I am motivated solely by what I perceive to be my duties and responsibilities as a Justice of this Court.

Sincerely,

Raymond Ehrlich

Justice

The Honorable Bob Martinez
Governor of the State of Florida

The Capitol

Tallahassee, Florida 32301

***319** Dear Governor Martinez:

Although your request for an advisory opinion was put forth in some detail, it essentially asks only a single question: Is Chapter 87–6, Laws of Florida (1987), constitutional? For the reasons that follow, I must respectfully decline to offer an opinion on this question.

My reluctance to advise you in this matter rests on two grounds. First, I believe that acceding to your request in this context would further erode the separation of powers, which

is basic to our system of government; and second, I find that an advisory opinion cannot and will not assist in resolving, with any meaningful finality, the broader questions implicit in the concept of “constitutionality.” The true test of this statute will come, not in any non-binding advisory opinion, but in the scores of fact-specific controversies already being brought to this state's courts and to the federal courts.

Using the advisory power to judge the constitutionality of newly enacted legislation necessarily injects the judiciary into a role for which it is ill-suited. Under the majority's analysis, the justices of this Court may advise the governor concerning the validity of any statute, without limitation, because every statute potentially affects the governor's duty to faithfully execute the laws. Yet this is the antithesis of the judicial function. Traditionally the judiciary decides specific issues arising from specific facts. However, a non-binding advisory opinion upon the facial constitutionality of a newly enacted statute decides virtually nothing. Moreover, to review comprehensive and complex legislation, albeit one dimensionally, in such a broad and unfocused manner does not serve any appropriate interest. I do not believe the advisory power conferred by [article IV, section 1\(c\)](#), anticipates this kind of review.

Indeed, practical concerns, time-honored policies and constitutional principles all dictate that the validity of new enactments should be resolved only in the context of particular factual disputes. As Justice Sundberg stated when he declined to answer a question posed by Governor Bob Graham:

A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context, a mode which has proven to be superior for framing the issues and testing the truth of competing claims.

In re Advisory Opinion to the Governor, 374 So.2d 959, 971 (Fla.1979) (Sundberg, J., writing separately).

The wisdom underlying Justice Sundberg's analysis and the inability of an advisory opinion to resolve with any finality the questions you raise is amply illustrated by the majority's necessarily limited response.

The majority recognizes that it cannot, and does not, pass on federal constitutional questions. Yet in confronting freespeech issues, for instance, the majority relies almost entirely on its interpretation of federal case law, even though its inquiry is limited to *state* constitutional issues. This analysis, while it may seem to resolve a federal question, is not binding upon the federal courts and thus does not resolve the issues. Nor can the majority properly consider the troubling constitutional issues raised by the fact that, under chapter 87–6, the State of Florida will have a direct economic interest in convicting defendants. These federal issues necessarily will be left for another court to decide.

Most importantly, the majority opinion necessarily is limited only to *facial* constitutionality because no factual issues are before us. This is particularly important, in my view, since most issues that have been raised by the parties really deal with the question of the constitutionality of the enactment as it eventually may be applied.

I agree with Justice Sundberg when he wrote that

*320 [t]he role of the judiciary in our form of government is unique

in its accepted authority to declare acts of the coordinate branches invalid because they offend the terms or principles of our constitution. This authority and responsibility to be the final arbiter of the constitutional validity of the acts of the legislative and executive branches is nothing less than awesome. While this Court should not, and does not, flinch from its obligation to exercise this power in an appropriate case, nevertheless, it is a power which should be exercised with circumspection.

Id. (citation omitted, footnote omitted).

Respectfully,

Rosemary Barkett

Justice

All Citations

509 So.2d 292, 12 Fla. L. Weekly 240, 12 Fla. L. Weekly 375

Footnotes

- 1 We recognize that the legislature has now enacted chs. 87–72 & 87–101, Laws of Fla., amending ch. 87–6, Laws of Fla. Because only the first of these so-called “glitch bills” had been signed into law at the time of oral argument, we have not considered ch. 87–101 within the text of this advisory opinion.
- 2 This finding prevents us from addressing your concerns regarding questions arising under the supremacy clause of art. VI, the due process and equal protection clauses of the fourteenth amendment, the provisions of art. III relating to the judicial power of the federal courts, the commerce clause of art. I, and the provisions contained within the 1st, 5th, 6th, and 8th amendments to the United States Constitution. We point out, however, that, with the exception of the supremacy clause and the commerce clause, Florida's Constitution contains provisions similar to each of the above.
- 3 No tax is levied on legal services that are provided without charge. Therefore, legal services provided to indigents or those who cannot afford to pay their attorneys are not taxed. Ch. 87–6, § 7, Laws of Fla. (amending  § 212.02(21), Fla.Stat.) Likewise, because nonprofit entities and governments pay no taxes on any goods or services, they pay no tax on their purchase of legal services. Ch. 87–6, § 14, Laws of Fla.

(amending [§ 212.08\(6\)](#) & [\(7\)](#), Fla.Stat.). Additionally, because no employee wages or salaries in any business are taxed, ch. 87–6, § 3, Laws of Fla. (amending [§ 212.0592\(2\)](#), Fla.Stat.), exempts from taxation legal services provided to employers by their employees. Other exceptions apply to legal services as well.

4 See *supra* note 3.

5 The act's reference to the Standard Industrial Classifications Manual (SIC) refers to the 1972 edition as published by the Office of Management and Budget, Executive Office of the President, and as amended in the 1977 supplement. Ch. 87–6, § 7, Laws of Fla. (creating [§ 212.02\(24\)](#), Fla.Stat.).

6 We also note that representatives of the broadcasting industry argue that certain provisions of ch. 87–6 are so vague that they fail to satisfy the fair notice requirements of due process. Our resolution of the vagueness issue in the context of separation of powers renders a discussion of this due process contention unnecessary.

7 For a more detailed discussion of the nature of the sales and use tax on services, please see our discussion set forth under part IV, which deals with whether ch. 87–6 creates an income tax.

8 [Grosjean](#), 297 U.S. at 251, 56 S.Ct. at 449. As the Supreme Court later explained in [Minneapolis Star](#), 460 U.S. at 579–80, 103 S.Ct. at 1368–69, the Court had attached significance to the Louisiana legislature's motivations in *Grosjean*. In that case, the tax had been imposed largely in an attempt to silence certain selected newspapers that had been critical of Senator Huey Long.

9 Ink and paper used in publications were the only components of goods to be sold at retail that were taxed and the law exempted the first \$100,000 worth of ink and paper used in any given calendar year. [460 U.S. at 578](#), 103 S.Ct. at 1368.

10 For example, prior to the enactment of ch. 87–6, Laws of Fla., food ads printed in a newspaper were exempt from taxation while food ad inserts in newspapers were taxed. See Fla.Admin.Code Rule 12A–1.34 (1982). Likewise, political bumper stickers, leaflets, and brochures were taxed while political advertisements broadcast on television and radio were exempt. See [§ 212.08\(7\)\(d\) 2](#), Fla.Stat. (1985).

11 Opponents of the act also argue that the instant act violates [art. I, § 4 of the Florida Constitution](#) by containing unconstitutionally vague terminology and by failing to further the state's goal of increasing revenues. Our determination of the vagueness issue in our upcoming discussion of the separation of powers doctrine makes a discussion of vagueness unnecessary here. As for the amount of revenue the act will eventually raise or the regressive effect it may have on Florida's economy, those questions go to the wisdom of the act, upon which we will not second guess the legislature. *E.g.*, [Holley v. Adams](#), 238 So.2d 401 (Fla.1970); [Twomey v. Clausohm](#), 234 So.2d 338 (Fla.1970). We find the taxation of advertising revenues rationally related to the goal of raising revenue and our analysis must end upon such a determination.

12 The industry argues that the tax created double taxation by:

- (1) requiring prime contractors to pay sales taxes on the amount included within the price charged by the subcontractor, which may include goods, equipment, or services, upon which a sales tax has already been paid;
- (2) treating the prime contractor as the ultimate user of material, equipment, and supplies purchased for his own use on the project, but which are not incorporated into the project itself; and
- (3) by constituting a second income tax in addition to the corporate income tax which the prime contractor already pays.

13 Newly created [§ 212.0594\(6\)](#) requires the prime contractor to pay a tax on purchases from subcontractors that are not exempt under certain listed criteria contained therein. Ch. 87–6, § 5, Laws of Fla. [§ 212.0594\(8\)](#) requires the prime contractor to pay a tax on new construction services based on the cost price of the construction. This tax is due either when the construction contract is fulfilled or when the certificate of occupancy is issued, whichever occurs first. Ch. 87–6, § 5, Laws of Fla.

14 Although potential taxpayers have challenged on vagueness grounds the definition of such terms as “other than print or broadcast media,” “use,” and “fair,” we do not find such terms so unreasonably vague on their face as to justify invalidating the act. We do not believe that every such term used in the law must be statutorily defined.

- 15 Newly created [§ 212.0594](#) provides in pertinent part:
Construction services; special provisions.—Notwithstanding other provisions of this part to the contrary:
....
(6) The tax on purchases of construction services by prime contractors shall be based on the total consideration paid to the subcontractor. However, if the written proposal, contract, or interim or final invoice of the subcontractor specifically describes, itemizes and states the price paid by the subcontractor for the building materials purchased by the subcontractor and incorporated into the improvement in fulfillment of his responsibilities under the subcontract, the tax shall be based on the total consideration less the price of said building materials.
....
(8) There is hereby imposed a tax on the construction services any prime contractor provides with respect to new construction for himself or others. The tax shall be based upon the cost price to the prime contractor of the services he provides, without any deduction therefrom on account of the cost of materials or supplies used, labor costs, service costs, or transportation charges notwithstanding the provisions of [s. 212.02](#) defining “cost price.” However, the cost of building materials purchased by the prime contractor and incorporated into the new construction, and amounts paid to subcontractors upon which a sales tax has been paid, shall not be included in the cost price. The tax shall be due and payable as otherwise provided in this part at the time the contract for new construction is fulfilled or within 30 days after the certificate of occupancy is issued, whichever is sooner. The retail sale of new construction for which the prime contractor has paid tax pursuant to this subsection shall be exempt from the tax imposed by this section.
Ch. 87–6, § 5, Laws of Fla.
- 1 The Court in [Baltimore v. A.S. Abell Co.](#), 218 Md. 273, 145 A.2d 111 (App.1958), held a similar tax on advertising unconstitutional on first amendment grounds.
- 2 The new law contains a provision that if any exemption is declared facially unconstitutional, the legislature intends that the exemption be deemed inoperative. Ch. 87–72, § 2, Laws of Fla.

157 Fla. 885
Supreme Court of Florida, en Banc.

ADVISORY OPINION TO GOVERNOR.

Sept. 25, 1946.

West Headnotes (2)

- [1] **United States** 🔑 Vacancies; special elections
Under Seventeenth Amendment to federal Constitution the Governor would be authorized to issue a “writ of election” to fill vacancy caused by death of United States Senator, such writ being a written order from Governor directed to proper authority commanding it to hold a state-wide election on day certain as provided by law for purpose of electing a United States Senator for unexpired term of deceased senator. [U.S.C.A.Const. Amend. 17.](#)

[1 Cases that cite this headnote](#)

- [2] **United States** 🔑 Vacancies; special elections
Where United States Senator who was serving a term which was to expire the first Tuesday after first Monday of January, 1947, died 48 days prior to general election of 1946, Governor was authorized to fill the vacancy caused by the death by granting a commission for the unexpired term. [F.S.A. § 106.02](#); [F.S.A.Const. art. 4, § 7](#); [U.S.C.A.Const. Amend. 17.](#)

[1 Cases that cite this headnote](#)

Opinion

****409** Answers to questions propounded to the Supreme Court by the Governor.
“September 24, 1946

***886** Hon. Millard F. Caldwell

Governor

The Capitol

Tallahassee, Florida

Dear Governor:

We are in receipt of your letter of September 24, 1946, pursuant to [Section 13, Article IV of the Constitution](#) as follows:

“To the Honorable, the Chief Justice, and
Justices of the Supreme Court of Florida.

Gentlemen:

The incumbent United States Senator, Honorable Charles O. Andrews, died September 18, 1946, this being a day forty-eight days prior to the general election of 1946. At the time of his death Senator Andrews was serving a regular term which was to expire by operation of law the first Tuesday after the first Monday of January 1947.

[Amendment XVII, Constitution of the United States](#), so far as seems material to the questions confronting me under the Constitution of Florida, provides, that ‘When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.’

So far as I have been able to ascertain, the Florida Statutes providing for the filling of vacancies in office are [Sections 106.02 and 102.48, Florida Statutes, 1941, F.S.A. Section 106.02](#) provides, ‘Should a vacancy happen in the representation of this state in the senate of the congress of the United States, the governor shall issue writs of election to fill such vacancy at the next general election; and the governor may make temporary appointments until the vacancy is filled by election.’

***887** The pertinent portion of [Section 102.48](#) provides, ‘In the event of the death, resignation or removal of any person nominated for office in the primary election between such primary election and the ensuing general election or if for any cause there is a vacancy in any nomination or in any

office and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event the state executive committee, in the case of a vacancy in a state office or the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter; provided, however, that should a vacancy occur in any nomination for county office or in any county office less than thirty days before a general election, or should ****410** a vacancy occur in any nomination for a state office or in any state office less than forty-five days prior to a general election, then and in that event, the county executive committee or the state executive committee, depending upon the nature of the office for which a vacancy in nomination shall have occurred, shall fill such vacancy in nomination by selecting a nominee for such office and all such nominations whether by primary or by executive committee shall have the same force and effect and shall entitle the nominees to all the rights and privileges that would accrue to them if they had been nominated in the regular primary election.’

These statutes above quoted appear to be expressly delimited or restricted in their operation or scope by Sections 6 and 7, Article XVIII of the Constitution of Florida, which read as follows:

‘Section 6. The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution shall extend only to the first Tuesday after the first Monday in January next after the election and qualification of a successor.’

‘Section 7. In all cases of election to fill vacancies in office such election shall be for that part of the unexpired term ***888** commencing on the first Tuesday after the first Monday in January next after such election.’

[Section 7 of Article IV of the Constitution of Florida](#) provides: ‘when any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term.’

Because of the death of Senator Andrews a vacancy exists in the office of United States Senator and I am in grave doubt as to the powers and duties devolving upon me as Chief Executive in regard to such vacancy. Availing myself of the provisions of [Section 13 of Article IV of the Constitution](#)

of Florida, I respectfully request your written opinion upon questions affecting my Executive powers and duties under the Constitution as follows:

1. Whether I, as Chief Executive, have the power under the Constitution to fill such vacancy by granting a commission, there apparently being no mode provided by the Constitution or by the laws of Florida, for filling such vacancy otherwise?
2. If I have the power and duty to fill such vacancy by commission, shall the commission be granted for the whole unexpired term or shall the commission be granted to expire on the day of the General election of 1946 or until a successor shall have been duly elected and qualified?

Respectfully,

(signed) Millard F. Caldwell,

Governor”

[1] Under the quoted provision of the Federal Constitution you would be authorized, as Chief Executive, to issue a writ of election to fill the vacancy caused by the death of Senator Andrews. Such a writ may be defined as a written order from you, as Governor, directed to the proper authority, commanding it to hold a state-wise election on a day certain, as provided by law, for the purpose of electing a United States Senator for the un-expired term of Senator Andrews. Paine, Law of Elections, p. 355, par. 421; Oxford English Dictionary.

***889** The means provided by statute for filling vacancies is embraced in [Sections 106.02 and 102.48, Florida Statutes 1941, F.S.A. Section 106.02](#), is a repetition of the quoted part of the seventeenth amendment to the Federal Constitution, except for the latter clause which authorizes the Governor to make “temporary appointments until the vacancy is filled by election.” [Section 102.48](#) is the means provided for filling vacancies in nominations to, as well as vacancies in, county and state offices. Any attempt to read these sections in connection with other sections affecting the same subject matter results in hopeless confusion.

The proviso to [Section 102.48](#) has to do with filling vacancies in nominations to and actual vacancies in county offices that occur less than 30 days before the general election. It also has a like provision for filling similar vacancies in state offices that occur less than 45 days before the general election. We are here concerned with a ****411** vacancy in the office of United States Senator, a state office, occurring 48 days before

the general election of 1946, so the proviso has no application. The part of [Section 102.48](#) preceding the proviso authorizes the county executive committee to hold primary elections to fill vacancies in nominations and vacancies in county offices when they occur between the primary and the general election. A similar provision authorizes the state executive committee to fill vacancies in nominations to and vacancies in state offices occurring in the same manner when “no method is otherwise provided herein for filling such vacancy.”

In our view, this provision of the statute does not provide an adequate and effective means for filling the vacancy in the office brought in question. The reason for this conclusion is that the act contemplates one and perhaps a second primary. It would not be possible, within the period shown, to issue the writ of election, give the notice, call and hold one and possibly two primaries, as contemplated, and then have the name of the nominee placed on the general election ballot. It is not such a “special election” as is contemplated by [Section 98.08, Florida Statutes 1941](#), and no provision is made for the expense of such an election. Any election should be an intelligent *890 expression of the electorate, both as to men and measures involved, and that requires time for deliberation.

It is our view that [Section 7, Article IV of the Constitution](#), as quoted in your letter, clothes you with ample power and points the way for filling the vacancy in question. It is shown that, under facts presented, no other way is provided in the Constitution or by the statute for filling such a vacancy. If it had occurred months earlier, a different conclusion might have been reached. This interpretation does not clash with Section 6, Article XVIII of the Constitution, and, since we find no adequate means for filling the vacancy by election, any consideration of Section 7, Article XVIII, becomes unnecessary. We find nothing in [Section 98.08, Florida Statutes 1941](#), F.S.A., relating to Special Elections, or

[Section 114.01 et seq., Florida Statutes 1941](#), F.S.A., relating to vacancies, or any other section of the law relating to filling vacancies in Congress that militates against this view. It is further strengthened by the fact that a prompt method is provided for filling the vacancy, which is highly important at this time, and the fact that [Section 98.08\(3\)](#) relating to Special Elections contemplates the exercise of discretion on the part of the Governor in dealing with the question.

[2] You are, therefore, advised that, under [Section 7, Article IV of the Constitution](#), you are authorized to fill the vacancy in the office of United States Senator caused by the death of Senator Andrews by “granting a commission for the unexpired term”.

Respectfully yours,

ROY H. CHAPMAN

Chief Justice

GLENN TERRELL

ARMSTEAD BROWN

RIVERS BUFORD

ELWYN THOMAS

HAROLD L. SEBRING

Justices of Supreme Court of Florida.

All Citations

157 Fla. 885, 27 So.2d 409

61 Fla. 1
Supreme Court of Florida.

ADVISORY OPINION TO THE GOVERNOR.

May 20, 1911.

Synopsis

In banc. Advisory opinion to the Governor.

West Headnotes (3)

[1] **Constitutional Law** 🔑 Nature and Scope in General

The executive is the power which enforces the laws.

[2] **Courts** 🔑 Questions Submitted by Legislature or Governor or Other Officer

F.S.A. Const. art. 16, § 19, providing that the Legislature shall not act on any amendment of the Constitution of the United States unless it has been elected after such amendment is submitted, does not relate to any executive power or duty of the Governor, and Justices of the Supreme Court are not authorized to interpret such provisions on request of the Governor, under F.S.A. Const. art. 4, § 13.

3 Cases that cite this headnote

[3] **Courts** 🔑 Questions Submitted by Legislature or Governor or Other Officer

F.S.A. Const. art. 4, § 13, authorizes a justice of the Supreme Court to render an opinion to the Governor only interpreting a portion of the Constitution as it affects an executive power or duty of the Governor.

2 Cases that cite this headnote

Syllabus by the Court

Section 13 of article 4 of the state Constitution authorizes the Justices of the Supreme Court to render an opinion to the Governor only in interpreting a portion of the Constitution as it affects an executive power or duty of the Governor.

An 'executive duty' appertains to the execution of laws as they exist.

Section 19 of article 16 of the Constitution, providing that 'no convention nor Legislature of this state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states, unless such convention or Legislature shall have been elected after such amendment is submitted,' does not relate to or affect any executive power or duty of the Governor, and the Justices of the Supreme Court are not authorized to interpret such provision in an opinion thereon requested by the Governor under section 13 of article 4 of the Constitution.

Opinion

*2 **460 To His Excellency, Albert W. Gilchrist, Governor of Florida-sir:

The following communication from you has been received:

'State of Florida, Executive Department.

'Tallahassee, May 19, 1911.

'To the Honorable Chief Justice and Justices of the Supreme Court of Florida-Gentlemen:

'Under date of July 26, 1909, the Secretary of State of the United States formally transmitted to me a certified copy of a Resolution **461 of Congress, entitled 'Joint Resolution Proposing an Amendment to the Constitution of the United States,' with request that I cause the same to be submitted to the Legislature of this state for such action as may be had. The resolution thus transmitted is in words and figures as follows: "S. J. Res. 40.

"Sixty-First Congress of the United States of America.

"At the First Session.

“Begun and held at the city of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.

*3 “Joint Resolution.

“Proposing an Amendment to the Constitution of the United States.

“*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, that the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution:

“‘Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.’

“J. G. Cannon,

“Speaker of the House of Representatives.

“J. S. Sherman,

“Vice President of the United States and President of the Senate.

“Attest:

“A. McDowell,

“Clerk of the House of Representatives.

“Charles G. Bennett,

“Secretary,

“By Henry H. Gilfry,

“Chief Clerk.

“I certify that this joint resolution originated in the Senate.

“Charles G. Bennett, Secretary,

“By Henry H. Gilfry, Chief Clerk.’

*4 ‘Section 19 of article 16 of the Constitution of the state of Florida provides as follows:

“No convention nor Legislature of this state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states, unless such convention or Legislature shall have been elected after such amendment is submitted.’

‘Under the operation of section 2 of article 7 of the state Constitution, one-half of the members of the State Senate composing the Legislature of Florida which convened in regular session on the 4th day of April, 1911, and is now convened in regular session, was elected to be such members of the State Senate at the general election held in this state in November, 1908; the election of such members having therefore been prior to the date when the said resolution was proposed by the Congress.

‘In the circumstances, I respectfully request the opinion of the Justices of the Supreme Court, under section 13 of article 4 of the state Constitution, as to whether it is my duty to submit the said resolution, for action, to the Legislature now in session, part of the members of which were elected prior to the proposal of the resolution by the Congress, or whether the same should be held for submission by the Governor to a Legislature all of whose members were elected subsequent to the proposal of the resolution by the Congress.

‘I have the honor to remain,

‘Very respectfully,

‘Albert W. Gilchrist, Governor.’

[1] Section 13 of article 4 of our Constitution provides that: ‘The Governor may, at any time, require the opinion of the Justices of the Supreme Court as to the interpretation *5 of any portion of this Constitution upon any question affecting his executive powers and duties, and the Justices shall render such opinion in writing.’ This Constitutional provision authorizes the Justices of the Supreme Court to render an opinion to the Governor only in interpreting a portion of the state Constitution as it affects an executive power or duty of the Governor.

[2] An executive duty appertains to the execution of laws as they exist. See [Advisory Opinion to the Governor, 23 Fla. 297, 6 South. 925](#). What makes it your official duty as Governor of Florida to submit a proposed amendment to the Constitution of the United States to the Legislature for its action thereon?

[3] We know of no provision of law imposing upon you, as Governor, any such duty or power; but the Congress of the United States, who initiates such proposed amendments, submits them for ratification to the Legislatures of the several states. In your communication you say that you have been requested by the Secretary of State of the United States to submit the proposed income tax amendment of the federal Constitution to the Legislature. You can comply with this request or not as you see proper to do, without any violation of any official duty. Whether it be submitted by you to the Legislature now in session or to some subsequent Legislature hereafter to be assembled does not involve a construction by us of section 19 of article 16 of our Florida Constitution, which reads as follows: 'No convention nor Legislature of this state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states, unless such convention or Legislature **462 shall have been elected after such amendment is submitted.' This provision of our organic law is directed solely to the legislative department of our government, in which you as the Chief Executive are in

no way concerned, as it does not involve any executive duty or function, and we are not authorized *6 in this manner to construe it or to give any opinion as to it.

Very respectfully,

J. B. WHITFIELD,

R. F. TAYLOR,

T. M. SHACKLEFORD,

R. S. COCKRELL,

W. A. HOCKER,

C. B. PARKHILL,

Justices of the Supreme Court.

All Citations

61 Fla. 1, 55 So. 460

From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: RE: Advisory Opinion - Cases
Date: Friday, January 14, 2022 1:10:00 PM
Attachments: [Owens v State, 316 So. 2d 537 \(Fla. 1975\).pdf](#)
[Chiles v Children A B C D E and F, 589 So. 2d 260 \(Fla. 1991\).pdf](#)
[Brown v Firestone, 382 So. 2d 654 \(Fla. 1980\).pdf](#)
[Opinion to the Governor, 239 So. 2d \(Fla. 1970\).pdf](#)

And here are four advisory opinions with highlights re. the executive power question.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 11:11 AM
To: 'MO Jazil' <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

And here are three advisory opinions with highlights that touch on a federal question.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 11:09 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

Here's the 1887 advisory opinion with highlights.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Thursday, January 13, 2022 9:16 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: Advisory Opinion - Cases

Here are a few advisory opinion cases that may be a useful start. [REDACTED]
[REDACTED] Have to run to a doctor's appointment, but see y'all soon!

--
Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

316 So.2d 537
Supreme Court of Florida.

Paul Eugene OWENS, Appellant,
v.
STATE of Florida, Appellee.

No. 45705.
|
July 10, 1975.

Synopsis

Defendant was convicted in the Circuit Court, Hillsborough County, Harry Lee Coe, III, J., of a capital felony. Defendant was sentenced and appealed. The District Court of Appeal, 294 So.2d 693, held that the statute requiring that a person convicted of a capital felony serve no less than 25 years before becoming eligible for parole is constitutional. On further appeal by the defendant, the Supreme Court, England, J., held that the statute is not unconstitutional as usurping parole authority alleged to be a function of the executive branch; in enacting the statute, the legislature was exercising power expressly reserved in creation of the Parole and Probation Commission.

Affirmed.

West Headnotes (3)

[1] **Pardon and Parole** 🔑 Authority or Duty to Grant Parole or Parole Consideration

Parole authority is only exercisable to extent it has been conferred. West's F.S.A.Const. art. 4, § 8(c); West's F.S.A. § 947.16(1).

3 Cases that cite this headnote

[2] **Constitutional Law** 🔑 To Executive, in General

Placement of legislative power in one subsection of constitutional article dealing with executive branch does not render the delegated power nugatory; the placement is functional, as with executive powers conferred in the judicial article

and legislative article. West's F.S.A.Const. art. 3, § 8; West's F.S.A. art. 4, § 8(c); art. 5, § 11.

2 Cases that cite this headnote

[3] **Constitutional Law** 🔑 Pardon and Parole
Pardon and Parole 🔑 Validity of Statutes

Statute providing that person convicted of capital felony shall serve no less than 25 years in prison before becoming eligible for parole is not unconstitutional as violating scheme for separation of powers or as usurping parole authority alleged to be function of executive branch; in so providing, legislature was exercising power expressly reserved in creation of Parole and Probation Commission.

West's F.S.A. §§ 775.082(1), 947.01 et seq., 947.16(1); West's F.S. 1971, § 794.01(1), Laws 1972, c. 72-724; West's F.S.A.Const. art. 4, § 8(c); art. 5, § 3(b)(1).

14 Cases that cite this headnote

Attorneys and Law Firms

*537 James A. Gardner, Public Defendant, and Ellen Condon, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Robert J. Landry, Asst. Atty. Gen., for appellee.

Opinion

ENGLAND, Justice.

This case is here on appeal from a decision of the Second District Court of Appeal, reported at 294 So.2d 693. Since the district court initially and directly passed on the validity of West's Section 775.082(1), Florida Statutes, we have jurisdiction for review.¹

Appellant pled guilty to a charge that he had raped a female under eleven years old in violation of West's Section 794.01(1), Florida Statutes, after which he was adjudicated guilty and sentenced to life imprisonment. In reviewing his conviction

and sentence, the district court upheld the constitutionality of [Section 775.082\(1\)](#), which provides that a person convicted of a capital felony shall serve no less than 25 years in prison before becoming eligible for parole.²

*538 [1] The only question presented for our review is the constitutional one passed on below. Appellant contends the law is invalid because the legislature has usurped parole authority, alleged to be a function of the executive branch of government. However the exercise of parole authority is characterized for separation of powers purposes, the authority is only exercisable to the extent it has been conferred. No parole authority has been conferred with respect to the first 25 years of incarceration of one convicted of a capital felony. For that reason, we disagree with appellant's suggestion that the law is invalid.³

[2] [3] The Florida Constitution (1968) expressly provides that the legislature may create a parole and probation commission having power to grant paroles.⁴ The legislature exercised this power in chapter 947, Florida Statutes (1973). Appellant contends, however, that having created a Parole

and Probation Commission with full parole powers for all criminal offenses, the legislature may not limit its powers by a statute outside that chapter which prescribes a minimum sentence for one class of crimes. The complete answer to appellant's contention is that the legislature expressly reserved this power in its creation of the Commission.⁵

For the reasons well expressed by the First District Court of Appeal,⁶ we reject appellant's contention and hold that this statute does not violate Florida's constitutional scheme for the separation of powers.⁷ Appellant's sentence to life imprisonment under [Section 775.082\(1\), Florida Statutes](#), is affirmed.

ADKINS, C.J., and ROBERTS, BOYD, McCAIN and OVERTON, JJ., concur.

All Citations

316 So.2d 537

Footnotes

- 1 Fla.Const. art. V, s 3(b)(1) (1972).
- 2 The same result on the same legal question was reached in [Owens v. State, 300 So.2d 70 \(1st Dist.Ct.App.Fla.\)](#), Appeal dismissed, [305 So.2d 203 \(Fla.1974\)](#), involving another individual whose trial resulted in conviction for the same offense.
- 3 We recently upheld the constitutionality of minimum prison time, as expressed in [Section 775.082\(1\)](#), against an identical separation of powers attack. [Dorminey v. State, 314 So.2d 134 \(Fla.1975\)](#).
- 4 Fla.Const. art. IV, [s 8\(c\)](#). Although article IV of the constitution deals with the executive branch, the placement of a legislative power in one subsection of that article does not render the delegated power nugatory. The placement is functional, as with executive powers conferred in the judicial article (art. V, s 11) and in the legislative article (art. III, [s 8](#)).
- 5 [Section 947.16\(1\), Fla.Stat. \(1973\)](#).
- 6 [Owens v. State, 300 So.2d 70, 72 \(1st Dist.Ct.App.Fla.\)](#) Appeal dismissed, [305 So.2d 203 \(Fla.1974\)](#). In presenting materials and arguments relative to modern penology's approach to the rehabilitation of criminals, appellant has really asked us to breach the separation of constitutional powers by usurping the acknowledged legislative function of prescribing punishments for crimes.
- 7 We have considered appellant's 'due process' argument and find it to be without merit.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Miami-Dade County v. City of Miami](#), Fla.App. 3 Dist., December 23, 2020589 So.2d 260
Supreme Court of Florida.Lawton CHILES, etc., et al., Appellants,
v.
CHILDREN A, B, C, D, E, AND F, etc., Appellees.No. 78792.
|
Oct. 29, 1991.**Synopsis**

Foster children sought declaration that provisions of statutory scheme establishing budget reduction procedures were unconstitutional. The Dade County Circuit Court, Henry G. Ferro, J., found provisions to be unconstitutional and enjoined executive branch commission from attempting to restructure Appropriations Act. State appealed. Upon certification of the issue by the District Court of Appeal, the Supreme Court, Barkett, J., held that: (1) statute authorizing executive branch commission to take steps to reduce state agency budgets to prevent deficit violated separation of powers doctrine, and (2) provision defining “state agency” to include judiciary also violated doctrine.

Affirmed.

Overton, J., concurred and filed opinion.

McDonald, J., dissented and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] Declaratory Judgment Statutes Relating to Particular Subjects

Foster children challenging state statutes establishing budget reduction procedures demonstrated existence of present ascertainable facts that were sufficient to permit trial court to afford declaratory relief. [West's F.S.A. §§ 86.101, 216.011\(1\)\(II\), 216.221.](#)

3 Cases that cite this headnote

[2] Constitutional Law Taxation and public finance**States** Appropriations

Statute authorizing executive branch commission to take affirmative steps to reduce approved state agency budgets to prevent deficit violated doctrine of separation of power by delegating legislative power to appropriate state funds, notwithstanding commission's attempt to characterize balancing budget through reduction process as not encompassing such legislative power. [West's F.S.A. Const. Art. 2, § 3; Art. 7, § 1\(c, d\); West's F.S.A. § 216.221.](#)

30 Cases that cite this headnote

[3] Constitutional Law Encroachment in general

Separation of powers doctrine prohibits any branch of state government from encroaching upon powers of another and prohibits any branch from delegating to another branch its constitutionally assigned power. [West's F.S.A. Const. Art. 2, § 3.](#)

29 Cases that cite this headnote

[4] Constitutional Law Delegation of Powers

Any attempt by legislature to abdicate its particular constitutional duty is void. [West's F.S.A. Const. Art. 2, § 3.](#)

1 Cases that cite this headnote

[5] States Making and requisites

Power to appropriate state funds, as well as power to reduce appropriations, is legislative function and is to be exercised only through duly enacted statutes. [West's F.S.A. Const. Art. 7, § 1\(c, d\).](#)

11 Cases that cite this headnote

[6] States 🔑 Appropriations

It is legislature's constitutional duty to determine and raise appropriate revenue to defray expenses of state. 📖 West's F.S.A. Const. Art. 7, § 1(d).

5 Cases that cite this headnote

[7] Constitutional Law 🔑 Encroachment on Judiciary

In context of statutory scheme establishing budget reduction procedures, provision defining "state agency" over which executive branch commission could exercise authority to include judicial branch violated doctrine of separation of powers. West's F.S.A. Const. Art. 2, § 3; Art. 5, § 1; 📖 West's F.S.A. § 216.011(1)(II).

32 Cases that cite this headnote

[8] Constitutional Law 🔑 Nature and scope in general

Legislature cannot, short of constitutional amendment, reallocate balance of power expressly delineated in constitution among three coequal branches. West's F.S.A. Const. Art. 2, § 3.

4 Cases that cite this headnote

[9] Constitutional Law 🔑 Executive Exercise of Statutory Authority as Encroaching on Judiciary

Judicial branch could not be subject in any manner to oversight by executive branch. West's F.S.A. Const. Art. 2, § 3; Art. 5, § 1.

10 Cases that cite this headnote

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Opinion

BARCKETT, Justice.

We have for review the order of the Eleventh Judicial Circuit, in and for Dade County, Florida, in which the court declared unconstitutional [sections 216.011\(1\)\(II\) and 216.221, Florida Statutes \(1989\)](#). The order was appealed to the Third District Court of Appeal which, without deciding the merits, certified the issue to this Court as a matter of great public importance requiring immediate resolution.¹ *Chiles v. Children A, B, C, D, E, and F*, No. 91–2530 (Fla. 3d DCA Oct. 21, 1991).

Appellees, six of Florida's foster children (hereinafter “children”), sought declaratory and injunctive relief against the State's Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Agriculture, Commissioner of Education, and all as members of the Administration Commission (hereinafter “Commission”).² The trial court granted the children's request and held [sections 216.011\(1\)\(II\) and 216.221, Florida Statutes \(1989\)](#), unconstitutional and enjoined the Commission from attempting to restructure the 1991 Appropriations Act pursuant to the budget reduction procedure established in chapter 216.

The state action that precipitated this case was the Governor's determination of an estimated \$621.7 million general revenue shortfall in the fiscal 1991–92 state budget. In September 1991, the Governor directed all “state agencies,” which by legislative definition in [section 216.011\(1\)\(II\), Florida Statutes \(1989\)](#), includes the judicial branch, to prepare revised financial plans that would reduce their current operating budgets. On October 22, 1991, the Administration Commission³ adopted the Governor's recommendations reducing the budgets established by the 1991 Appropriations Act, chapter 91–193, section 1, Laws of Florida.

[1] *263 Initially,⁴ the Commission challenges the appropriateness of the trial court order granting the children's request for declaratory relief.⁵ The purpose of declaratory relief is “to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations” and thus the declaratory judgment statute is to be construed liberally. [§ 86.101, Fla.Stat. \(1989\)](#). This Court has held that to “entertain a declaratory action regarding a statute's validity, there must be a bona fide need for such a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief.” [Martinez v. Scanlan, 582 So.2d](#)

[1167, 1170 \(Fla.1991\)](#). Additionally, this Court has upheld a grant of declaratory relief when the cause involved the public interest in the settlement of controversies in the operation of essential governmental functions and in the disbursement of public funds. See *Overman v. State Bd. of Control*, [62 So.2d 696 \(Fla.1952\)](#). We find the children have demonstrated the existence of present ascertainable facts which were sufficient to permit the trial court to afford declaratory relief.

[2] The central issue in this case is whether the legislature, in passing [section 216.221](#), violated the doctrine of separation of powers by assigning to the executive branch the broad discretionary authority to reapportion the state budget. [Section 216.221\(2\), Florida Statutes \(1989\)](#), provides in relevant part:

If, in the opinion of the Governor, after consultation with the revenue estimating conference, a deficit will occur in the General Revenue Fund, he shall so certify to the commission. *The commission may, by affirmative action, reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund.*

(Emphasis added.)

The principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution. See *Mistretta v. United States*, [488 U.S. 361, 380, 109 S.Ct. 647, 658–59, 102 L.Ed.2d 714 \(1989\)](#). The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty. *E.g., Ponder v. Graham*, [4 Fla. 23, 42–43 \(1851\)](#); see *The Federalist No. 47* (James Madison), *No. 51* (Alexander Hamilton or James Madison). As Montesquieu succinctly noted:

There would be an end of everything, were the same ... body ... to exercise those three powers, that of enacting laws, that of executing the public

resolutions, and of trying the causes of individuals.

Charles de Montesquieu, *L'Esprit des Lois* 70 (Robert M. Hutchins ed., William Benton 1952) (1748).

[3] The separation of powers doctrine is expressly codified in the Florida Constitution in [article II, section 3](#):

The powers of the state government shall be divided into legislative, executive and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of *264 the other branches unless expressly provided herein.*

(Emphasis added.) The doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. *See, e.g., Pepper v. Pepper*, 66 So.2d 280, 284 (Fla.1953). The second is that no branch may delegate to another branch its constitutionally assigned power. *See, e.g., Smith v. State*, 537 So.2d 982, 987 (Fla.1989). This case presents a separation of powers problem of the second type: a delegation of the legislative function.

Almost 300 years ago, in his *Second Treatise of Government*, John Locke explained the reasons for prohibiting such delegations of legislative authority:

The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other

men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, *the legislative can have no power to transfer their authority of making laws and place it in other hands.*

John Locke, *Two Treatises of Government* 193 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (emphasis added).⁶

[4] This Court has repeatedly held that, under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch. Any attempt by the legislature to abdicate its particular constitutional duty is void.  *Pursley v. City of Fort Myers*, 87 Fla. 428, 432, 100 So. 366, 367 (1924);  *Bailey v. Van Pelt*, 78 Fla. 337, 350, 82 So. 789, 793 (1919). As recently as 1978, in *Askew v. Cross Key Waterways*, 372 So.2d 913, 920–21 (Fla.1978), we reaffirmed that the legislature, under [article II, section 3](#) of our constitution, may not delegate its lawmaking function to another branch notwithstanding policy considerations or the fiscal operations of other states which do not have Florida's constitutional prohibitions against the delegation of powers. Thus we must ascertain whether [section 216.221\(2\)](#) delegates the legislative responsibility to establish law.

Article III, sections 1 and 7 assign to the legislature the responsibility for passage of all bills into law, regardless of their subject matter. Article III, section 8 sets forth the procedure for the executive power to approve or veto legislation of both nonappropriations and appropriations bills. Article IV, section 1(e) imposes a duty on the Governor to inform the legislature at least once in each regular session of the condition of the state. The Governor may also propose “reorganization of the executive department as will promote efficiency and economy, and recommend measures in the public interest.” *Id.* These provisions, read in pari materia, constitute the full constitutional allocation

of the executive and legislative responsibilities concerning legislation generally and appropriations bills specifically.

More specifically, the constitution provides that “[n]o money shall be drawn from the treasury except in pursuance of appropriation made *by law*,” [art. VII, § 1\(c\), Fla. Const.](#) (emphasis added), and that “[p]rovision *265 shall be made *by law* for raising sufficient revenue to defray the expenses of the state for each fiscal period.” [Art. VII, § 1\(d\), Fla. Const.](#) (emphasis added).

[5] Based on all these constitutional provisions, this Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes. [State ex rel. Davis v. Green](#), 95 Fla. 117, 127, 116 So. 66, 69 (1928). As we stated in *State ex rel. Kurz v. Lee*:

The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. *Such a provision secures to the Legislative (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.*

[121 Fla. 360, 384, 163 So. 859, 868 \(1935\)](#) (emphasis added). Furthermore, the power to *reduce* appropriations, like any other lawmaking, is a legislative function. See *Florida House of Representatives v. Martinez*, 555 So.2d 839, 845 (Fla.1990).

The Commission concedes that the power to legislate and to appropriate funds is initially vested in the legislature, but argues that the Governor has been made a part of the lawmaking process by the express provisions of [article](#)

[III, section 8 of the constitution](#). The article to which the Commission refers, however, is the provision which simply authorizes the Governor to *veto* legislation. We have previously made clear:

“[T]he veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. *It is not designed to alter or amend legislative intent.*”

[Martinez](#), 555 So.2d at 843 (quoting [Brown v. Firestone](#), 382 So.2d 654, 664 (Fla.1980)) (emphasis altered from original). Thus, it is well settled that the executive branch does not have the power to use the veto to restructure an appropriation. It follows that the legislature cannot provide by statute for the Governor and Cabinet to do at a later date what is forbidden by constitution during the initial appropriations process. Thus, although the constitution provides for executive branch participation in the lawmaking process through the exercise of the Governor's veto power, [article III, section 8](#) does not authorize the legislature to delegate to the executive branch its authority to make decisions regarding the purposes for which public funds may or may not be applied. *Lee; Green*.

The Commission nevertheless argues that the ability to balance the budget through the reduction process of chapter 216 does not encompass a delegation of legislative power. Rather, it contends that reducing the budget is not the same as “appropriating.”

We construe the power granted in [section 216.221\(2\)](#) as precisely the power to appropriate. The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government.⁷ Moreover, the constitutional efforts to set forth a deliberate veto and enforcement mechanism for the executive branch would seem an elaborate exercise in futility if the Governor and Cabinet, by stroke of the executive pen, could excise whole portions of the appropriations act and totally restructure legislative priorities. To permit the Commission to reduce specific appropriations in general appropriations bills would allow the legislature to abdicate its lawmaking function and would

enable another branch to amend the law without resort to the *266 constitutionally prescribed lawmaking process. This delegation strikes at the very core of the separation of powers doctrine, and for this reason section 216.221 must fail as unconstitutional.

The facts of the present case are analogous to the facts of a number of previous decisions invalidating legislative delegations under the doctrine of separation of powers. In *Askew v. Cross Key Waterways* this Court addressed the constitutionality of sections 380.051(1) and 380.05(2) (a) and (b), Florida Statutes (1975), empowering the Administration Commission, acting on recommendation of the Division of State Planning, to designate certain geographical areas as being of critical state concern and to promulgate regulations for coordinated development of those lands. We declared those sections unconstitutional under article II, section 3 “because they reposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection.” 372 So.2d at 919. We held that

until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State. Under this doctrine *fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks*, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Id. at 925 (emphasis added).

In *Orr v. Trask*, 464 So.2d 131, (Fla.1985), this Court invalidated the Governor's attempt to extinguish the term of office of the deputy commissioner of workers' compensation. The Governor purported to be acting pursuant to the 1983 General Appropriations Act which reduced the number of deputy commissioner positions from five to four. The issue was whether the proviso in the appropriations act furnished

legal authority for the Governor to truncate Trask's term of office. The Court concluded that it did not, holding that although “it was not necessary for the legislature to make the actual selection of the deputy positions to be abolished; it was ... necessary that the legislature furnish ascertainable minimal criteria and guidelines on how the selection was to be made.” *Id.* at 134–35. Thus, because the appropriations act did not furnish guidelines to the Governor as to the criteria to be used in reducing the number of deputy positions, the authorization for such reduction in the appropriations act violated the separation of powers doctrine in article II, section 3. *Id.*

In *Lewis v. Bank of Pasco County*, 346 So.2d 53, 54 (Fla.1976), the Court adopted in full the opinion of the Second Judicial Circuit declaring section 658.10(1), Florida Statutes (1975), unconstitutional. At issue in *Lewis* was a statute granting to the Comptroller the authority to release to the public and the news media otherwise confidential bank or trust company records. The trial court invalidated the statute under the doctrine of separation of powers as “ ‘attempting to grant to the ... [Comptroller] the power to say *what the law shall be.* ’ ” 346 So.2d at 56 (quoting *Sarasota County v. Barg*, 302 So.2d 737 (Fla.1974)). To quote the trial court:

As the statute is written, it makes a vast volume of private records, necessarily subject to governmental inspection confidential, but then gives the Comptroller unrestricted and unlimited power to exempt particular records and items of information from the operation of that provision of the statute making them confidential.

In other words, the Department [of Banking] is given power from day to day to say what is the law as to the confidential nature of any records of banks which the Department has the right to inspect or include in the reports of bank examinations.

The Constitution does not permit this delegation of legislative power.

Id. 346 So.2d at 55.

Each of the cases cited above, *Askew*, *Orr*, and *Lewis*, describes a situation in which there is inadequate legislative direction *267 to the executive branch to carry out the ultimate policy decision of the legislature. They left total discretion to executive branch officials. That is, the statutes did not indicate *which* land to designate as areas of critical state concern in *Askew*, or *which* position to cut in *Orr*, or

which confidential information could be released in *Lewis*. Likewise, in this case, [section 216.221](#) does not indicate which budgeting priorities to maintain or to cut from the original appropriation.

The Commission argues that [State ex rel. Caldwell v. Lee](#), 157 Fla. 773, 27 So.2d 84 (1946), supports the constitutionality of the delegation in the present case. We find *Caldwell* inapposite because that case dealt with the delegation of authority over “unneeded balances or surpluses” to be applied in accordance with specified legislative intent. In *Caldwell*, a prerequisite to the board’s⁸ use of the funds was that all legislative priorities and mandates established in the appropriations act had to be met before the board could act. In this case, no surpluses have been claimed to exist, and the facts indicate that entities of state government will not even be able to fulfill their legal responsibilities. Moreover, there is no express legislative policy that is being carried out. It is, in fact, the Commission which is setting policy.

[6] We note again that it is the legislature’s constitutional duty to determine and raise the appropriate revenue to defray the expenses of the state. [Art. VII, § 1\(d\), Fla. Const.](#) (“Provision shall be made *by law* for raising sufficient revenue to defray the expenses of the state for each fiscal period.”) (emphasis added). This provision directs the legislature—the only branch with the power to make *law*—and not the executive, to make appropriations for revenue. By its plain wording, [article VII, section 1\(d\)](#) does *not* authorize the Governor to reduce expenses or to reduce appropriations in order to balance the budget. Rather, quite clearly, it requires the legislature either to reduce the appropriations or to raise “sufficient revenue” to satisfy the appropriations it deems necessary to run the government.

Under any working system of government, one of the branches must be able to exercise the power of the purse, and in our system it is the legislature, as representative of the people and maker of laws, including laws pertaining to appropriations, to whom that power is constitutionally assigned. We do not today state that the Governor and Cabinet have no role to play in the budgetary process. For example, [section 216.292, Florida Statutes \(1989\)](#), provides for limited transfers within budget entities under specific circumstances.

Furthermore, the Governor is not without recourse if he or she determines that an appropriation has been erroneously or irresponsibly made such that sufficient revenue to defray the expenses of the state for the fiscal period in question will not be available. As we have observed, the Governor may, pursuant to [article III, section 8](#), veto a bill at the time of its passage or, in fulfillment of the duty to take care that the laws are faithfully executed under [article IV, section 1\(a\)](#), and in exercise of the authority granted under [article III, section 3\(c\)\(1\)](#), call the legislature into special session to balance the budget for the remainder of the fiscal period. The Governor and Cabinet, sitting as the Administration Commission, however, may not be assigned the task of redrafting the appropriations bill once it has passed the legislature and has been approved by the Governor, an avenue that [section 216.221](#) attempts to open for the Commission.

The constitution specifically provides for the legislature alone to have the power to appropriate state funds. More importantly, only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. The legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has provided.

Consequently, we find that [section 216.221](#) is an impermissible attempt by the legislature to abdicate a portion of its lawmaking *268 responsibility and to vest it in an executive entity. In the words of John Locke, the legislature has attempted to make *legislators*, not *laws*. As a result, the powers of both the legislative and executive branches are lodged in one body, the Administration Commission. This concentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand.

This is not to say that the legislature cannot permit another branch or agency to respond to a budget crisis caused by unexpected events between legislative sessions. The legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed in the event of a budget shortfall.⁹ Carefully crafted legislation establishing, among other things, the extent to which appropriations may be reduced, coupled with a recitation of reduction priorities and provisions for legislative oversight, might pass facial constitutional muster. What the legislature *cannot* do is delegate its policy-making responsibility.

[7] We likewise affirm the trial court's judgment finding that [section 216.011\(1\)\(II\)](#), Florida Statutes (1989), which defines the term "state agency" as used throughout chapter 216, is also unconstitutional. [Section 216.011\(1\)\(II\)](#) provides:

"State agency" or "agency" means any official, officer, commission, board authority, council, committee, or department of the executive branch, or the judicial branch, as herein defined, of state government.¹⁰

This section, on its face, flagrantly violates the doctrine of separation of powers. The inclusion of the judicial branch within the definition of "state agency," and hence the placing of the judiciary's fiscal affairs under the management of the executive branch, disregards the constitutional mandate of coordinate power-sharing. Under the constitution, the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power. [Art. V, § 1, Fla. Const.](#) In accordance with the constitution, it is the chief justice of the supreme court who is the chief administrative officer of the judicial system. [Art. V, § 2\(b\), Fla. Const.](#) Because [section 216.011\(1\)\(II\)](#) encompasses the judicial branch within its definition of "state agency," it violates the constitutional doctrine of separation of powers. Thus, all other sections of chapter 216 which, by operation of [section 216.011\(1\)\(II\)](#), subject the judicial branch to executive oversight, are also unconstitutional.

[8] [9] The legislature was obviously cognizant of separation of powers principles in drafting [section 216.011\(1\)\(II\)](#), as evidenced by the fact that the legislature itself is conspicuously absent from the definition of "state agency." Indeed, while [section 216.011\(1\)\(II\)](#) treats the judicial branch as a subordinate agency subject to executive authority, the legislative branch, throughout chapter 216, is expressly exempted from similar executive control. For example, [section 216.081\(2\), Florida Statutes \(1989\)](#), provides:

All of the data relative to the legislative branch shall be for information and guidance in estimating the total financial needs of the state for the ensuing biennium; *none of these estimates shall be subject to revision or review by the Governor*; and they *must* be included in his recommended budget.

(Emphasis added.) Apparently, the legislature recognized the threat to its own constitutional sovereignty and, in passing chapter 216, excluded itself from executive review. In doing so, the legislature has only succeeded in emphasizing the constitutional infirmity of attempting to relocate, by legislative fiat, the coequal powers of the judiciary within the executive branch. But the legislature cannot, short of constitutional amendment, reallocate the balance of power *269 expressly delineated in the constitution among the three coequal branches. The judicial branch cannot be subject in any manner to oversight by the executive branch. The submission of the judicial budget, like the legislature's, may be provided to the Governor for information and guidance, but cannot be subject to revision, reduction, or review by the Governor. Moreover, to maintain the independence of the judiciary, any reduction in the judicial budget mandated by the legislature must be made by the chief justice and cannot be delegated to the executive branch.

Finally, we note that even absent the constitutional infirmities of chapter 216, any substantial reductions of the judicial budget can raise constitutional concerns of the highest order. This Court has an independent duty and authority as a constitutionally coequal and coordinate branch of the government of the State of Florida to guarantee the rights of the people to have access to a functioning and efficient judicial system.¹¹ Article I, section 21 of the Florida Declaration of Rights provides that "[t]he courts *shall* be open to every person for redress of any injury, and justice *shall* be administered without sale, denial or delay." (Emphasis added.)

We are not unmindful of the difficult conditions which precipitated the Commission's actions and we recognize that the Commission has acted in good faith in attempting to address the fiscal crisis which besets this state. We are,

however, called upon to rule based on legal principles which are enduring and cannot be bent to accomplish transient needs. Otherwise, we in the judiciary would be arrogating to ourselves, not merely the power of the legislature to make laws, but the power of the people to change the constitution. It would indeed be easier and more practical to permit the Commission to rewrite the appropriations bill. We are prohibited by our constitution from doing so.

Accordingly, we affirm the trial court's order holding [sections 216.011\(1\)\(II\) and 216.221, Florida Statutes \(1989\)](#), unconstitutional as a violation of the doctrine of separation of powers.

Any budgetary actions taken pursuant to these statutes subsequent to the injunctive relief granted by the trial judge cannot be implemented.

It is so ordered.

[SHAW, C.J., and GRIMES, KOGAN and HARDING, JJ.](#), concur.

[OVERTON, J.](#), concurs with an opinion.

[McDONALD, J.](#), dissents with an opinion.

NO MOTION FOR REHEARING WILL BE ALLOWED.

[OVERTON, Justice](#), concurring.

I fully concur in the majority opinion. I write only to emphasize that the reason [section 216.221\(2\), Florida Statutes \(1989\)](#), is unconstitutional is because it grants the Governor and Cabinet unlimited legislative policy-making discretion. Other states apparently have addressed the issue of budget adjustments in a constitutional manner without requiring a special legislative session. The extent of the Governor's and Cabinet's legislative policy-making authority granted by [section 216.221\(2\)](#) is illustrated by the total elimination of funds appropriated by the legislature for emergency housing for homeless families with children, as well as the elimination of a special appropriation for additional aid to dependent children. Each of these decisions is not a minor adjustment in the budget; they substantially affect legislative intent and effectively repeal legislative action.

As noted by Justice McDonald in his dissent, there clearly is a need to maintain a balanced budget, but this statute, and

the broad authority it gives to the Governor and the Cabinet, is not the only manner in which budget adjustments can be made. Former Speaker of the House Jon Mills, as an amicus curiae, citing a National Conference of State Legislatures study relating to [§270](#) legislative budget procedures in the fifty states,¹² noted that other states have addressed this problem in more restrictive ways without having to call the legislative body into session. While [section 216.221\(2\)](#) is unconstitutional, it does not mean that the legislature must reconvene every time there is a need for budget adjustments. I believe the legislature can establish a process with specific guidelines for making budget adjustments that is constitutional.

[McDONALD, Justice](#), dissenting.

[Section 216.221, Florida Statutes \(1989\)](#), involves a statutory scheme which permits the reasonable exercise of appropriately shared authority between the executive and legislative branches. The need to maintain a balanced budget is one which is strongly enconced in Florida's history; it is a protection for the public, and particularly for future generations, which must be guaranteed to the greatest extent possible. [Section 216.221](#) provides the framework for such protection and I believe it is constitutional. This section does not constitute an unconstitutional delegation of legislative power to the Commission, even as applied to reduce the amount of money released to the judicial branch of government.

The balanced budget measure of the Florida Constitution, article VII, section 1(d) is found in neither the legislative nor executive article of the Constitution. Hence, the Constitution imposes the obligation to operate within a balanced budget upon all entities and agencies of state government. One plain mandate of [article VII, section 1\(d\)](#) is to impose upon the legislature the initial requirement to adopt a balanced budget and provide sufficient funds to finance it. Nevertheless, the Constitution anticipates that a post-adoption budget deficit may occur and imposes correlative powers and responsibilities in the Governor to deal with a deficit in the absence of legislative action. More specifically, the Governor is vested with the "supreme executive power" of the state and is charged by the Constitution with the responsibility to "take care that the laws be faithfully executed." Art. IV, § 1(a), Fla. Const.

It cannot be denied that the balanced budget provision of the Florida Constitution is a state law of great weight and importance. It necessarily follows that the Governor, acting with the Commission, is both obligated and empowered by the Constitution itself to assure that the balanced budget mandate of the Constitution is faithfully executed. If the legislature were to refuse to adopt measures necessary to balance an unbalanced budget, the Governor would not be relieved of the constitutional obligation to employ the supreme executive power of the state to assure the budget was balanced. The mandates of the Constitution prevail over both the legislative and executive branches of government. In that regard [section 216.221\(1\)](#) is declarative of the constitutional power and responsibility reposed in the Governor.

The present controversy is not one involving the unwelcome intrusion of one branch on another. In [State v. Lee, 157 Fla. 773, 27 So.2d 84 \(1946\)](#), we held that a law allowing for the transfer of funds among budget entities was not an unlawful exercise of legislative power by the executive. A transfer from fund to fund or program to program is certainly more a matter of quasi-legislative action than is the reduction of an appropriation which by law is a maximum appropriation. There must be a guard standing at the door to prevent the

expenditure of funds which are not on hand and are not forthcoming. The legislation under attack recognizes this.

My colleagues declare [section 216.221](#) unconstitutional because they perceive the Commission as performing a legislative function or doing so with inadequate guidance. Although neither the Governor nor the Attorney General complains, I have some residual doubts that the Commission should be involved, but have no doubt that the Governor has a constitutional obligation to preclude the expenditure of funds *271 in excess of revenue. Should the statute fall, he still has this constitutional mandate to assure that no more money is spent than is taken in. Thus, I see little to gain by striking down [section 216.221](#).

For budgetary purposes alone, I believe it permissible to define the judicial branch as a state agency and subject to all of the laws relative to the budget process.

I would reverse the decision under review and find the statutes under review constitutional.

All Citations

589 So.2d 260

Footnotes

- 1 We have jurisdiction pursuant to [article V, section 3\(b\)\(5\)](#) of the Florida Constitution.
- 2 The Administration Commission is created pursuant to [section 14.202, Florida Statutes \(1989\)](#), as part of the Executive Office of the Governor and is composed of the Governor and Cabinet.
- 3 The vote was by a majority that did not include the Secretary of State or the Commissioner of Education.
- 4 The Commission has waived its original argument that venue was improperly laid in Dade County “in order that the Court may address the more significant issues posed by this case.” We note in passing that the “sword-wielder” exception would not apply to the facts of this case. [Florida Public Serv. Comm’n v. Triple “A” Enters., Inc., 387 So.2d 940 \(Fla.1980\)](#); [Carlile v. Game & Fresh Water Fish Comm’n, 354 So.2d 362 \(Fla.1977\)](#).
- 5 The Commission does not contend that the children lack standing to challenge the statute in their capacity as taxpayers. This Court has long held that a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature’s taxing and spending power without having to demonstrate a special injury. [Brown v. Firestone, 382 So.2d 654 \(Fla.1980\)](#); [Department of Admin. v. Horne, 269 So.2d 659 \(Fla.1972\)](#); see [Rosenhouse v. 1950 Spring Term Grand Jury, 56 So.2d 445 \(Fla.1952\)](#); [Yon v. Orange County, 43 So.2d 177 \(Fla.1949\)](#); [State ex rel. Hill v. Cone, 140 Fla. 1, 191 So. 50 \(1939\)](#). The budget reductions ordered pursuant to [section 216.221, Florida Statutes \(1989\)](#), go to the very heart of the

legislature's taxing and spending power, and thus the children have standing to invoke this constitutional challenge.

6 As Justice Scalia has set forth in more modern garb in discussing the federal separation of powers:

The Constitution.... as its name suggests ... is a prescribed structure, a framework, for the conduct of government. In designing that structure, the framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document.

Mistretta v. United States, 488 U.S. 361, 426, 109 S.Ct. 647, 682 (1989) (Scalia, J., dissenting).

7 As noted in several amicus briefs, some of the Commission's reductions totally eliminate legislatively established programs. For example, the Emergency Financial Assistance for Housing Programs mandated by the legislature to address this state's housing needs would be *completely* abolished.

8 The Board of Commissioners of State Institutions was the delegatee in that case.

9 We reject the Commission's assertion that [section 216.221](#) contains sufficient guidelines.

10  [Section 216.011\(1\)\(s\), Florida Statutes \(1989\)](#), defines "judicial branch" to include "the various officers, courts, commissions, or other units of the judicial branch of state government supported in whole or in part by appropriations made by the Legislature."

11 We recognize that there may be items placed in the judicial budget that, although they serve important governmental functions, are not absolutely essential to the constitutional duties of the judiciary.

12 National Conference of State Legislatures, Fiscal Affairs Program, *Legislative Budget Procedures in the 50 States: A Guide to Appropriations and Budget Processes* (1988).

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Miami-Dade County v. City of Miami](#), Fla.App. 3 Dist.,
December 23, 2020

382 So.2d 654
Supreme Court of Florida.

J. Hyatt BROWN, etc., et al., Petitioners,
v.
George FIRESTONE, etc., et al., Respondents.

No. 57959.
|
March 13, 1980.

Synopsis

By petition for writ of mandamus, citizens and taxpayers questioned constitutional validity of a number of gubernatorial vetoes of provisions of the General Appropriations Act. The Supreme Court, Sundberg, J., held that: (1) certain legislative provisions were invalid, others valid; (2) certain gubernatorial vetoes were valid, others invalid; (3) the governor cannot counterclaim that his action in vetoing qualification or restriction in general appropriations bill was prompted by an unconstitutional legislative act; and (4) a declaratory judgment action is the proper method of challenging constitutionality of provisions in General Appropriations Act.

Ordered in accordance with opinion.

Adkins, J., filed a specially concurring opinion.

West Headnotes (22)

[1] **Constitutional Law**  Particular
Constitutional Provisions in General

In certain instances, party will not have standing unless he can show “special injuries,” but citizens and taxpayers assailing constitutionality of governor's actions in vetoing bill known as General Appropriations Act of 1979 had standing to sue. Laws 1979, c. 79–212; [West's F.S.A.Const. art. 3, § 8\(a\)](#); art. 5, § 3(b)(5).

9 Cases that cite this headnote

[2] **Mandamus**  Specific Acts

Where challenged vetoes by governor cast doubt upon expenditure of substantial amounts of public funds, and uncertainty hampered state's ability to finance ongoing state projects, court would exercise its discretion to consider petition for mandamus. Laws 1979, c. 79–212; [West's F.S.A.Const. art. 3, § 8\(a\)](#); art. 5, § 3(b)(5).

4 Cases that cite this headnote

[3] **States**  Appropriations

Legislature is vested with authority to enact appropriations and reasonably direct their use, and, in furtherance of latter power, legislature may attach qualifications or restrictions to use of appropriated funds. [West's F.S.A.Const. art. 3, §§ 6, 12](#); Laws 1979, c. 79–212.

4 Cases that cite this headnote

[4] **States**  Making and requisites

Constitutional limitation that laws making appropriations shall contain provisions on no other subject was intended as corollary to provision mandating that every law shall embrace but one subject and matter properly connected therewith, and thus general appropriations bill must deal only with appropriations and matters properly connected therewith. [West's F.S.A.Const. art. 3, §§ 6, 12](#); Laws 1979, c. 79–212.

6 Cases that cite this headnote

[5] **States**  Making and requisites

Purposes of “one subject” requirement that laws making appropriations contain provisions on no other subject were to prevent “logrolling” in appropriations bills and to ensure integrity of legislative process in substantive lawmaking. [West's F.S.A.Const. art. 3, §§ 6, 12](#).

6 Cases that cite this headnote

[6] **States**  Making and requisites

Although general appropriations bill may make allocations of state funds for previously authorized purpose in amounts different from those previously allocated, or substitute adequate specific appropriations for prior continuing appropriations, appropriations bill must not change or amend existing law on subjects other than appropriations, and appropriations bill provision may be qualified or restricted only if it directly and rationally relates to purpose of appropriation and if its qualification or restriction is major motivating fact behind enactment of the appropriation; disapproving  *Thomas v. Askew*, 270 So.2d 707, to extent irreconcilable. West's F.S.A.Const. art. 3, § 12; Laws 1979, c. 79–212.

12 Cases that cite this headnote

[7] **Statutes**  Approval or Veto by Executive

Governor's veto power is intended to be negative power, or power to nullify or at least suspend legislative intent, and it was not designed to alter or amend legislative intent. West's F.S.A.Const. art. 3, §§ 8, 8(a); Const.1885, art. 4, § 18.

2 Cases that cite this headnote

[8] **Statutes**  Necessity for approval and authority to veto

Overriding concern behind constitutional provision for executive veto power over appropriations was to control expenditure of funds unless governor is willing to foresake the funds appropriated along with the legislative direction. West's F.S.A.Const. art. 3, § 8(a); Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

4 Cases that cite this headnote

[9] **Statutes**  Disapproval of portion; line-item veto

Within purview of constitutional provision for executive veto over appropriations, “specific appropriation” is smallest identifiable fund to which qualification or restriction is or can be directly and logically related, and usually where qualification or restriction includes setting

apart identifiable sum of money, such fund will be considered “specific appropriation,” since it will most likely be smallest identifiable fund to which qualification logically relates. West's F.S.A.Const. art. 3, § 8(a); Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

8 Cases that cite this headnote

[10] **Statutes**  Disapproval of portion; line-item veto

Under Constitution, governor may exercise his veto power for any reason whatsoever, but may not exercise veto power in unconstitutional manner, and thus must veto either entire bill, or, in case of general appropriations bill veto any specific appropriation, and if he seeks to veto any qualification or restriction in general appropriations bill, he must also veto appropriation to which it relates. West's F.S.A.Const. art. 3, § 8(a); Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

3 Cases that cite this headnote

[11] **States**  Making and requisites

In appropriations bill, proviso concerning inmate population at correctional institution was not constitutionally valid qualification but, rather, was designed to further legislative objective unrelated to funding of all major institutions. West's F.S.A.Const. art. 3, § 12; Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

1 Cases that cite this headnote

[12] **Statutes**  Disapproval of portion; line-item veto

Although proviso, in general appropriations bill provision for funding of institutions, concerned inmate population at institution and thus was not constitutionally valid qualification, governor's veto of such proviso was similarly invalid, in that, by vetoing qualification without also vetoing appropriation to major institutions, governor contravened his constitutional veto power. West's F.S.A.Const. art. 3, §§ 8(a), 12; Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

5 Cases that cite this headnote

[13] States 🔑 Making and requisites

If general appropriations bill proviso, which seemed merely to direct expenditure to presumably extant “teaching hospital program,” was simply allocation of funds to existing program, it was valid qualification, but if proviso envisioned construction of new teaching hospital, it was invalid, in that creation of such capital outlay project was not rationally related to expenses of already existing medical center. *West's F.S.A.Const. art. 3, § 12*; Laws 1979, c. 79–212.

5 Cases that cite this headnote

[14] Statutes 🔑 Disapproval of portion; line-item veto

Where smallest identifiable fund, in general appropriations bill, to which qualification logically and directly related was specified sum in each fiscal year of biennium, qualification itself was specific appropriation which governor could rightfully veto. *West's F.S.A.Const. art. 3, § 8(a)*; Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

7 Cases that cite this headnote

[15] States 🔑 Making and requisites

Where qualification of appropriation in general appropriations bill authorized expenditure of deficiency funds upon approval of Department of Administration, qualification was invalid as contravening statute permitting release of deficiency funds only upon approval of governor and three other members of administration commission; qualification was invalid as suspending pro tanto the operation of substantive law and statute. *West's F.S.A. §§ 216.231, 216.231(1)*; *West's F.S.A.Const. art. 3, § 12*; Laws 1979, c. 79–212.

[16] Statutes 🔑 Approval or Veto by Executive

Where sum of money mentioned in proviso in general appropriations bill did not comprise specific appropriation but rather was a contingent transfer of monies from deficiency fund, and effect of veto would be not to nullify provision but to alter it, veto was invalid. *West's F.S.A.Const. art. 3, § 8(a)*; Laws 1979, c. 79–212.

2 Cases that cite this headnote

[17] States 🔑 Making and requisites

Where establishment of priorities was directly and rationally related to appropriation for capital park improvements, qualification implementing purpose of appropriation and in fact being probably major motivating factor behind structuring of the appropriation, qualification was valid legislative qualification. *West's F.S.A.Const. art. 3, § 12*; Laws 1979, c. 79–212.

1 Cases that cite this headnote

[18] Statutes 🔑 Disapproval of portion; line-item veto

Legislative qualification in appropriations bill, whereby priorities were established, was validly vetoed by governor, in the smallest identifiable fund to which qualification related was specific sum contained within it and thus qualification comprised specific appropriation. *West's F.S.A.Const. art. 3, § 8(a)*; Const.1885, art. 4, § 18; Laws 1979, c. 79–212.

5 Cases that cite this headnote

[19] Education 🔑 Administration of finances

Public education capital outlay funds may be used to purchase library books and scientific equipment. *West's F.S.A.Const. art. 12, § 9(a)(2)*;  *West's F.S.A. §§ 235.011(10)*,  235.435(3) (d).

[20] Constitutional Law 🔑 Legislative construction

Relatively contemporaneous construction of Constitution by legislature is strongly presumed

to be correct. West's F.S.A.Const. art. 12, §§ 9, 9(a)(2); West's F.S.A. §§ 235.011(10), 235.435(3)(d).

5 Cases that cite this headnote

[21] **Mandamus** — Defenses and grounds of opposition in general

Mandamus — Interest as citizens or taxpayers

Any person, as citizen and taxpayer, may bring suit and have stricken the gubernatorial veto of qualification or restriction in general appropriations bill, even if qualification or restriction is clearly unconstitutional, unless governor can successfully demonstrate that qualification or restriction itself constitutes specific appropriation within constitutional intentment, and governor cannot counterclaim that his action was prompted by unconstitutional act; in this context, mandamus action should be limited to narrow issues of law which do not require extensive fact-finding. West's F.S.A.Const. art. 3, §§ 8(a), 12; Laws 1979, c. 79–212.

5 Cases that cite this headnote

[22] **Declaratory Judgment** — Right to declaratory relief in general

Any person as citizen and taxpayer may bring declaratory judgment action to challenge constitutionality of provisions in general appropriations act. West's F.S.A.Const. art. 3, §§ 8(a), 12; Laws 1979, c. 79–212.

2 Cases that cite this headnote

Attorneys and Law Firms

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No. 1

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John K. Aurell, Gen. Counsel, Tallahassee, for Governor Graham.

Chesterfield Smith and Bill McBride of Holland & Knight, Tampa, Larry Levy of Dickinson, Levy & Taylor, James R. Eddy, Pompano Beach, Donald H. Reed, Jr., Boca Raton, and Ralph Turlington, Commissioner of Education, Tallahassee, for amici curiae.

Opinion

SUNDBERG, Justice.

By petition for writ of mandamus, Messrs. J. Hyatt Brown, Herbert F. Morgan, S. Curtis Kiser, and Ralph H. Haben, Jr., as citizens and taxpayers, question the constitutional validity of a number of Governor Bob Graham's vetoes of provisions of chapter 79-212, Laws of Florida, known as the General Appropriations Act of 1979. Nominal respondents are George Firestone, Secretary of State, and Gerald Lewis, Comptroller of the State of Florida. Governor Graham was added as party respondent on November 1, 1979. Petitioners seek a judicial determination invalidating the Governor's vetoes, and the issuance of an order requiring the Secretary of State to expunge the vetoes from the official records of the state and preventing the Comptroller from disbursing state funds based on such vetoes. Jurisdiction is asserted under [article V, section 3\(b\)\(5\), Florida Constitution](#).

After receiving the Governor's budget recommendations and conducting hearings, drafting bills and conferring through a conference committee, the Florida Legislature adopted by vote of each house Senate Bill 1297, now enacted into law as chapter 79-212. On June 28, 1979, the Governor filed with the Secretary of State his official message approving the General Appropriations Act subject to certain vetoes made under authority of [article III, section 8, Florida Constitution](#). The vetoes here under consideration and the provisions in the Appropriations Act to which they presumably relate follow, numbered 1 through 6:

Appropriations Act, p. 33

Department of Corrections

Major Institutions

Provided that the department shall phase back the inmate count at Glades Correctional Institution to the design capacity of 609 inmates prior to June 30, 1980. Except, however, that should the statewide inmate population exceed maximum capacity then Glades Correctional Institution may exceed design capacity.

250	Salaries and Benefits	Positions	6,288	6,459
	From General Revenue Fund.....		72,614,708	74,029,307
	From Correctional Work Programs Trust Fund	3,343,857	
	From Grants and Donations Trust Fund	969,465	
	From Operating Trust Fund	84,700	

***658** Governor's Veto Message, p. 6

On page 33 after item 249, under the heading, Major Institutions, is a proviso which deals with the prison population at Glades Correctional Institution. Since this proviso relates to an executive management issue and is on a subject other than appropriations, which is contrary to [Article III, Section 12 of the State Constitution](#), this proviso, on page 33 after item 249, under the heading, Major Institutions, which reads as follows, is hereby vetoed:

“Provided that the department shall phase back the inmate count at Glades Correctional Institution to the design capacity of 609 inmates prior to June 30, 1980. Except, however, that should the statewide inmate population exceed maximum capacity then Glades Correctional Institution may exceed design capacity.”

No. 2

Appropriations Act, p. 69

University of South Florida Medical Center:

Fiscal Year	Fiscal Year
1979-1980	1980-1981

ITEM

University of South Florida
Medical Center

380	Salaries and Benefits	Positions	540	555
	From General Revenue Fund.....		10,993,669	11,662,212

	From Operation and Maintenance Trust Fund.....	48,213	43,412
381	Other Personal Services.....		
	From General Revenue Fund.....	810,843	923,353
	From Medical Center—Professional Medical.....		
	Liability Self Insurance Trust Fund.....	25,000	25,000
	From Operation and Maintenance Trust Fund.....	53,278	56,208
382	Expenses.....		
	From General Revenue Fund.....	4,514,259	4,681,139
	From Medical Center—Professional Medical.....		
	Liability Self Insurance Trust Fund.....	168,500	168,500
	From Operation and Maintenance Trust Fund.....	609,049	658,621
383	Operating Capital Outlay.....		
	From General Revenue Fund.....	793,190	827,285
	From Operation and Maintenance Trust Fund.....	73,805	150,168

Provided, however, \$2,613,142 appropriated in item 382 in each fiscal year of the biennium is for the purpose of the teaching hospital program.

Governor's Veto Message, p. 12

not be necessary. Therefore, the proviso following item 383, on page 69, which constitutes an appropriation, and reads as follows, is hereby vetoed:

Included in item 382 on page 69 is \$2,613,142 for each year of the biennium from the General Revenue Fund for the teaching hospital program. This is set out in the proviso following item 383. At the time of establishment of the USF Medical School, it was understood by all concerned that a full program of medical education could be achieved by reliance on the facilities available in the Tampa Bay community hospitals and the establishment of a state supported teaching hospital would

“Provided, however, \$2,613,142 appropriated in item 382 in each fiscal year of the biennium is for the purpose of the teaching hospital program.”

No. 3

Appropriations Act, p. 152

Division of Corporation

Corporations, Division of

1131	Salaries and Benefits	Positions	108	108
	From General Revenue Fund.....		957,613	978,882

Provided, that in addition to the funds appropriated in item 1131 for salaries and benefits for the Bureau of Uniform Commercial Code, if HB 1643 or SB 1256 is enacted into law, the Bureau of Uniform Commercial Code is specifically authorized to utilize up to \$100,000 of the deficiency fund upon approval of the Department of Administration. Such deficiency funds may be used to supplement the positions provided by this bill and shall be approved by the Department of Administration, upon a showing of need by the director of the Division of Corporations based upon the following schedule: For every additional 5,000 Uniform Commercial Code documents filed in fiscal year 1980-81 above those documents filed in fiscal year 1979-80, one additional position.

1132	Other Personal Services		
	From General Revenue Fund.....	35,000	35,000
1133	Expenses		
	From General Revenue Fund.....	273,770	276,672
1134	Operating Capital Outlay		
	From General Revenue Fund.....	65,574	45,441
1135	Data Processing Services		
	From Genreal Revenue Fund.....	677,051	608,101

***659** Governor's Veto Message, pp. 14-15

On page 152 following item 1131 is a proviso which reserves the use of \$100,000 of the Deficiency Appropriation to the Department of State Division of Corporations. This proviso is contrary to [Section 216.231, Florida Statutes](#), which provides procedures for the release of Deficiency Funds upon approval of the Governor and three other members of the Administration Commission. My budget recommendation provided for a Deficiency Fund of \$1,461,130; however, the legislature only appropriated \$400,000. It would not be prudent to reserve a portion of this deficiency appropriation and further limit the ability of

the Administration Commission to respond to agency needs. If the Division's workload should increase as is anticipated by the proviso, a deficiency request could be submitted to the Administration Commission for review on its own merits. Therefore, this proviso, on page 152 following item 1131, which reads as follows, is hereby vetoed:

“Provided, that in addition to the funds appropriated in Item 1131 for Salaries and Benefits for the Bureau of Uniform Commercial Code, if House Bill 1643 or Senate Bill 1256 is enacted into law, the Bureau

of Uniform Commercial Code is specifically authorized to utilize up to \$100,000 of the Deficiency Fund upon approval of the Department of Administration. Such deficiency funds may be used to supplement the portions provided by this bill and shall be approved by the Department of Administration, upon a showing of need by the Director of the

Division of Corporations based upon the following schedule: for every additional 5,000 Uniform Commercial Code documents filed in Fiscal Year 1980-81 above those documents filed in Fiscal Year 1979-80, one additional position.”

No. 4

Appropriations Act, p. 186

Division of Recreation and Parks

Natural Resources, Department of Recreation and Parks, Division of

6G	Fixed Capital Outlay Park Development		
	From Land Acquisition Trust Fund.....	8,000,000	6,250,000

Provided, however, from funds appropriated in item 6G the following park projects for 1979-80 totaling \$2,020,000, Cedar Key, Lake Rousseau, Manatee Springs, Kingsley Planation, Wekiwa Springs, Bill Baggs, Hugh Taylor and the Barnacle, shall be considered as first priority projects by the Department of Natural Resources.

6H	Fixed Capital Outlay Beach Front/Destin, FL		
	From General Revenue Fund.....	4,000,000	

6I	Fixed Capital Outlay Big Lagoon/Pedido Key Development		
	From General Revenue Fund.....	1,000,000	1,000,000
	From Land Acquisition Trust Fund.....	750,000	750,000

7	Fixed Capital Outlay Land Acquisition		
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From Land Acquisition Trust Fund..... 10,250,000 8,000,000

*660 Governor's Veto Message, p. 17

After Item 6G on page 186 is a proviso which earmarks \$2,020,000 funding provided in a larger lump sum for Park Development for use at specific parks. I am not supportive of a funding plan which singles out a group of parks for special consideration. Therefore, the proviso on page 186 after item 6G which reads as follows, is hereby vetoed:

following park projects for 1979-80 totaling \$2,020,000, Cedar Key, Lake Rousseau, Manatee Springs, Kingsley Plantation, Wekiwa Springs, Bill Baggs, Hugh Taylor and the Barnacle, Shall be considered as first priority projects by the Department of Natural Resources.”

“Provided, however, from funds appropriated in item 6G the

No. 5 Appropriations Act, pp. 191-192

OB Fixed Capital Outlay to Boards of Trustees of the Community Colleges From Public Education Capital Outlay and Debt Service Trust Fund

..... 27,192,240 2,573,035

From the funds appropriated in item OB \$4,953,577 shall be allocated to the Boards of Trustees at Palm Beach Community College to construct the North Campus of Palm Beach Community College. In accordance with [Section 235.221, Florida Statutes](#), Brevard Community College shall be advanced funded in an amount equal to the difference of their prorated entitlement and \$1,000,000 to meet the matching requirement in item OJ.

Item OB, page 192, paragraph 3, proviso language, appropriates \$2,500,000 for Community College scientific equipment and/or library books each year of the biennium. These items are of an operating nature and violate the constitutional intent of this fund. Therefore the proviso language following item OB, page 192, paragraph 3, which reads as follows, is hereby vetoed:

From the cumulative total allocated to the Board of Trustees of the 28 community colleges there is to be provided \$2,500,000 in the 1979-80 fiscal year and \$2,500,000 in the

“From the cumulative total allocated to the Board of Trustees of the 28 community colleges there is to be provided \$2,500,000 in the 1979-80 fiscal year and \$2,500,000 in the 1980-81 fiscal year for library books and/or scientific and technical equipment. These funds shall be allocated based on the FTE's assigned to each college.”

*661 1980-81 fiscal year for library books and/or scientific and technical equipment. These funds shall be allocated based on the FTE's assigned to each college.
The remaining funds appropriated in item OB shall be allocated and expended pursuant to [Section 235.435, Florida Statutes](#).

Governor's Veto Message, p. 21

No. 6 Appropriations Act, pp. 192-193

OC Fixed Capital Outlay to Boards of Regents of the State University System From Public Education Capital Outlay and Debt Service Trust

Fund30,936,021 28,730,637

From the cumulative total allocated to the Board of Regents of the State University System, \$10,000,000 shall be provided in the 1979-80 fiscal year and \$10,000,000 shall be provided in the 1980-81 fiscal year for library books.

From the above projects, exclusive of library books, the Board may allocate savings from lower than estimated project costs to emergency repairs, renovation, minor projects, building component replacement and handicap corrections.

Governor's Veto Message, p. 21

Item OC, page 193, paragraph 2, of the proviso language appropriates \$10,000,000 each year for library books. With concern, I have approved \$10,000,000 for university library books in 1979-80, due to a large reduction in the appropriation for books in the E & G budget. In 1980-81, the operating appropriation is much larger and can be increased as necessary. Remaining is the fact that this item is of an operating nature and violates the constitutional intent of this fund. Therefore, the part of the proviso following item OC, page 193, paragraph 2, which appropriates \$10,000,000 for library books for the 1980-81 fiscal year and which reads as follows, is hereby vetoed:

“From the cumulative total allocated to the Board of Regents of the state university system, . . . \$10,000,000 shall be provided in the 1980-81 fiscal year for library books.”

Petitioners maintain that by vetoing the above provisos and not the appropriations to which they relate, Governor Graham contravened his veto power under article III, section 8(a), which states:

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill. In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also *662 vetoing the appropriation to which it relates.

The Governor responds that his vetoes numbered two, four, five and six are constitutional because the provisos are in fact “specific appropriations” within the intendment of article III, section 8(a). He defends vetoes numbered one and three on the grounds that those provisos are not proper qualifications or restrictions but rather an unconstitutional attempt by the legislature to enact law on other subjects in an appropriations bill, or an attempt to repeal or suspend existing law in an appropriations bill, contrary to article III, section 12, Florida Constitution, which provides:

Laws making appropriations for salaries of public officers and other

current expenses of the state shall contain provisions on no other subject.

[1] The parties do not contest either standing or jurisdiction to bring this action. Regarding standing, this Court has long been committed to the rule that a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy.¹ Petitioners here assail the constitutionality of the Governor's actions as citizens and taxpayers. They claim no special or extraordinary injury.² While it appears that their stake in the outcome of this controversy rests on an extremely slender reed, there is nevertheless recent authority supporting petitioners' assertion of standing. In [Department of Administration v. Horne, 269 So.2d 659 \(Fla.1972\)](#), we held that a citizen and taxpayer could mount a constitutional attack upon the legislature's taxing and spending power without having to demonstrate a special injury. Because this dispute implicates the relationship between gubernatorial veto power and the legislature's taxing and spending authority, we believe that *Department of Administration v. Horne* confers standing to sue upon petitioners.

[2] As to the propriety of entertaining this cause as a matter of original jurisdiction, the Court on two recent occasions has held mandamus to be a proper vehicle to challenge the constitutionality of provisions in a general appropriations act. In [Dickinson v. Stone, 251 So.2d 268 \(Fla.1971\)](#), we invalidated a portion of a general appropriations act which sought to transfer certain duties from one executive department to another because the provision involved a subject other than appropriations, contrary to [article III, section 12, Florida Constitution](#). In [Division of Bond Finance v. Smathers, 337 So.2d 805 \(Fla.1976\)](#), then Governor Askew, doubtful of his authority to veto what he perceived to be an unconstitutional proviso, brought an action in mandamus as chairman of the Governing Board of the Division of Bond Finance to expunge the unconstitutional language from the general appropriations act. We granted a peremptory writ of mandamus and found the proviso unconstitutional without considering the propriety of the governor's veto. In both cases we held mandamus to be the appropriate remedy because the functions of government would have been adversely affected without an immediate determination. In view of these recent authorities we are obliged to conclude that the case now before us also requires an immediate determination. The challenged vetoes have cast doubt upon the expenditure of

substantial amounts of public funds. Because this lingering uncertainty hampers the state's ability to finance ongoing state projects, the Court will exercise its discretion to consider this case.

We feel compelled to comment upon the peculiar posture in which this controversy presents itself. The legislature requests us to declare certain acts of the executive branch (that is, the vetoes) unconstitutional, to which the governor in effect counterclaims that his actions were prompted by unconstitutional actions of the legislative *663 branch. In such a setting the question arises: to which side of the dispute does the Court first direct its attention, the legislative or the executive? If the Court looks first to the legislative provision vetoed by the governor and finds it unconstitutional, the propriety of the governor's veto becomes immaterial.³ If, on the other hand, the Court looks first to the propriety of the governor's veto and holds it to be constitutional, the validity of the legislative provision becomes immaterial. Thus in some instances the outcome of the case will be decided by which side of the issue is focused upon first. While this procedure may yield an equitable result in certain cases, it utterly fails to resolve the essence of the dispute now before us. Our task here is to define and delimit the relationship between the gubernatorial veto power and the legislature's authority to enact general appropriation law. Because the two concepts are so finely interwoven, and because the legislative and executive branches of government appear genuinely to be in doubt as to their respective constitutional authority in this area, we will consider the validity of both the vetoes and the legislative provisos to which they relate. We chart this course in the hopes that our efforts will serve to illuminate and clarify the intrinsic elements of this complex problem.

The dynamics of political power do not work in a vacuum. The scope of authority of each branch of government is to a large extent shaped and given meaning by the grant of and limitation upon the power of the coordinate branches. So it is that in the area of gubernatorial veto power and the enactment of general appropriation law, the constitutional authority of the legislative department is in part delimited by the scope of executive authority. Our first task, therefore, will be to outline and compare the general scope of authority conferred upon each branch of government in this field. From that comparison workable principles will emerge to govern the resolution of the specific issues before us today. We begin with the legislature.

[3] [4] The Florida Legislature is vested with authority to enact appropriations and reasonably to direct their use. In furtherance of the latter power, the legislature may attach qualifications or restrictions to the use of appropriated funds. In re Advisory Opinion to the Governor, 239 So.2d 1, 9 (Fla.1970). The authority to enact appropriations is tempered by the limitation in article III, section 12, Florida Constitution, that laws making appropriations shall contain provisions on no other subject. Section 12 was intended as a corollary to article III, section 6, which mandates that every law shall embrace but one subject and matter properly connected therewith.⁴ Hence a general appropriations bill must deal only with appropriations and matters properly connected therewith. See In re Advisory Opinion to the Governor;  Green v. Rawls, 122 So.2d 10 (Fla.1960);  Lee v. Dowda, 155 Fla. 68, 19 So.2d 570 (1944).

[5] Two major considerations underlie the “one subject” requirement of article III, section 12. The first is the need to prevent “logrolling” in appropriations bills. Logrolling is

a practice under which the legislature could include in a single act matters important to the people and desired by the Governor and other matters opposed by the Governor or harmful to the welfare of the state, with the result that in order to obtain the constructive or desired matter the Governor had to accept the unwanted portion. The veto power of the *664 chief executive was thereby severely limited if not destroyed and one of the intended checks on the authority of the legislature was able to be negated in practice.

 Green v. Rawls, 122 So.2d at 13. The second reason behind the one subject requirement is to ensure the integrity of the legislative process in substantive lawmaking. The enactment of laws providing for general appropriations involves different considerations and indeed different procedures than does the enactment of laws on other subjects. Our state constitution demands that each bill dealing with substantive matters be scrutinized separately through a comprehensive process which will ensure that all considerations prompting

legislative action are fully aired. Provisions on substantive topics should not be ensconced in an appropriations bill in order to logroll or to circumvent the legislative process normally applicable to such action. Similarly, general appropriations bills should not be cluttered with extraneous matters which might cloud the legislative mind when it should be focused solely upon appropriations matters.

[6] Two principles logically follow from the above analysis. First, an appropriations bill must not change or amend existing law on subjects other than appropriations. This is, of course, subject to our statement in In re Advisory Opinion to the Governor, 239 So.2d at 10, that a general appropriations bill may make “allocations of State funds for a previously authorized purpose in amounts different from those previously allocated or (substitute) adequate specific appropriations for prior continuing appropriations.”⁵ Were we to sanction a rule permitting an appropriations bill to change existing law, the legislature would in many instances be able to logroll, and in every instance the integrity of the legislative process would be compromised.

Second, article III, section 12, will countenance a qualification or restriction only if it directly and rationally relates to the purpose of an appropriation and, indeed, if the qualification or restriction is a major motivating factor behind enactment of the appropriation. That is to say, has the legislature in the appropriations process determined that the appropriation is worthwhile or advisable only if contingent upon a certain event or fact, or is the qualification or restriction being used merely as a device to further a legislative objective unrelated to the fund appropriated? This test possesses the dispositive virtue of permitting the legislature reasonably to direct appropriation use without hampering the gubernatorial veto power or abusing the legislative process.

We now turn to the executive role in the appropriations field. Primary among executive checks on unfettered legislative power is the veto. It enables the governor to counteract legislative action which he considers to be contrary to the public interest, or if the veto is overridden, it provides him with assurance that the proposed measure is supported by a supermajority of the people's representatives. The veto power also places the governor in a stronger bargaining position from which to seek revision or amendment of bills he finds objectionable.

[7] But the veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent. For example, when the legislature designates under the Department of Education \$5,000,000 for salaries, the governor cannot veto the appropriation for salaries and utilize the money for another purpose; the veto must, in effect, destroy the fund. Otherwise, the governor could legislate by altering the purpose for which the money *665 was allocated. He could “create” another purpose to which to apply the appropriation.

The 1968 revision to our Florida Constitution modified the governor's theretofore existing power to veto provisions in a general appropriations bill. Article IV, section 18 of the 1885 Constitution stated that:

Sec. 18. The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto.

The corresponding section in the present constitution is [article III, section 8\(a\)](#), which provides:

13. Corrections, Division of
a. General office
1. Salaries—including salary of \$12,000 per

annum for the director and salaries of 25

employees.....	\$ 143,580	\$ 143,580
2. Expenses.....	53,739	53,779

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill. In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

Legislative history clearly indicates that the revision contained in [section 8\(a\)](#) was prompted by this Court's decision in [Green v. Rawls, 122 So.2d 10 \(Fla.1960\)](#). By examining the facts and precise holding of that case, we will be able to discern the reasons why the framers of the 1968 Constitution felt it necessary to revise article IV, section 18 of the 1885 Constitution.

The general appropriations bill at issue in Green contained the following items:

3. Operating capital outlay.....	12,816	7,100
4. Special—discharge pay of inmates in an amount not exceeding \$15 per inmate and transportation at not exceeding \$25 per inmate, as provided by law.....	78,900	85,850
Subtotal (a).....	\$ 289,035	\$ 290,309

(Underscoring added.)

23. Forestry, Florida Board of

a. Salaries—including salary of \$10,000 per

annum for the state forester and salaries of

890 employees in 1959/60 and 891 employees

in 1960/61.....	\$ 1,014,794	\$ 1,005,004
b. Expenses.....	952,013	921,542
c. Operating capital outlay.....	466,704	216,774
Total of Item No. 23.....	\$ 2,433,511	\$ 2,143,320

(Underscoring added.)

The governor vetoed the underscoring portion of item 13(a) (1) which reads “of \$12,000 per annum” and the underscoring portion of item 23(a) which reads “of \$10,000 per annum,” leaving undisturbed the remainder of items 13 and 23. The governor vetoed the *666 provisions because he felt that the salaries so fixed were inadequate for the positions involved, and that with the quoted language removed from each item the Budget Commission could fix a larger salary for each employee. Suit was brought to challenge the validity of the governor's vetoes on the grounds that the language stricken

did not constitute “items” under article IV, section 18 of the 1885 Constitution.

Circuit Judge Hugh Taylor, acting in his capacity as chancellor in equity, surveyed the constitutional history of this area and concluded that the constitution envisioned that a general appropriations bill be composed of distinct items so as to permit the governor to fully exercise his veto power. He recognized, however, that a single “item” could be either general or quite specific depending upon the degree of particularization employed by the legislature. The

determination of what constituted an item under article IV, section 18, would therefore depend upon the overall character of the appropriation.

Dealing specifically only with the first vetoed provision, Judge Taylor found that the item which properly could be vetoed was the \$143,580 for salaries for Division of Corrections personnel. He regarded the language stricken by the governor as essentially a restriction of \$12,000 from the \$143,580 for the payment of the director's salary. Because the governor's vetoes extended to only part of an item, Judge Taylor held them to be unconstitutional.

Of considerably greater importance to Judge Taylor than the semantic distinction above was the effect of the challenged vetoes:

The power of the Governor to disapprove items of an appropriation bill is intended as a corollary to his power to veto all of other bills. It is the power to annul, to render invalid, to make void that "item" of appropriation which is disapproved. By common understanding, as well as by technical usage, the power to veto an appropriation means the power to prevent the expenditure of a certain part of the public funds for a certain purpose. To give effect to the veto in this case would not destroy any appropriation or render invalid any contemplated expenditure of public money. . . . In practical operation the action of the Governor is not to veto any item of the appropriation bill. It is to amend the bill to take money which the Legislature said should be used for one purpose and use it for another to use money appropriated by the Legislature for the payment of 25 employees (other than the Director) for the purpose of increasing the salary of the Director beyond that which the Legislature expressly fixed as the amount of his salary. This is not a proper function of the veto power.

Rawls v. Green, No. 16,571 (Cir.Ct.Fla. Aug. 31, 1959).

Obviously, then, the creative use of the gubernatorial veto was the primary motivating factor behind Judge Taylor's final judgment. The legislature had indicated its intent to allocate no more than \$12,000 to the director. By vetoing the intent but retaining the appropriation, the executive veto revised the appropriations bill to permit a higher salary for the director. Legislative intent was not nullified, it was altered.

On appeal the Supreme Court of Florida disagreed with the chancellor's conclusions. The Court identified the \$12,000 to the director as an item which could be separately vetoed. Moreover, the Court held that the governor's veto did not affect the amount of the salary appropriation.

[8] The stage was thus set for the convening of the Constitutional Revision Commission to consider revisions to the 1885 Constitution. We believe the conclusion to be inescapable, and the minutes of the commission hearings so indicate, that the intent of the framers of the 1968 Constitution in revising article IV, section 18 of the Constitution of 1885 was to supersede this Court's decision in *Green v. Rawls* and thereby to reinstate Judge Taylor's analysis of the proper relationship between the executive veto power and legislative authority to enact *667 appropriations.⁶ Equally clear is the fact that the framers' overriding concern was to prevent the creative exercise of the gubernatorial veto. Legislative intent was to control the expenditure of funds unless the governor was willing to forsake the funds appropriated along with the legislative direction. The following colloquy between Representative Reed and Judge Hugh Taylor, by then a member of the Revision Commission, is taken from the minutes of a Commission hearing. Judge Taylor explains the significance of *Green v. Rawls* and how language offered as an amendment to [section 8\(a\)](#) by Commissioner O'Neill would change the effect of that decision:

MR. TAYLOR: Well, are you familiar with the decision that predicated Mr. O'Neill's amendment?

MR. REED: The Rawls decision?

MR. TAYLOR: The Rawls decision, in which the appropriation read something like this: "For the Forestry Department, including a salary of X dollars for the state forester, a million dollars," when the veto did not cover the million dollars, it merely covered the X salary for

the state forester, so that the result was that the gross appropriation was not changed up or down one cent, but the use to which that appropriation could be put was changed. And the courts held that that was within the scope of the governor's power to veto an item in the appropriation bill. And as I understand it, Mr. O'Neill's idea was to eliminate that power on the part of the governor.

MR. REED: Well, I don't think, Judge, it certainly isn't my intention to allow, for instance, a legislative intent, whatever that is, direction, within the appropriations bill, to be stricken, and allow a particular appropriation for that item to remain.

MR. TAYLOR: Well, isn't that exactly what happened in the Rawls case?

MR. REED: Yes, sir, at the Supreme Court level, it did. I believe at your level it was the decision

MR. TAYLOR: But at my level that got washed out pretty quick.

16 Minutes to Constitution Revision Commission 209-210.

Notably, the language offered by Mr. O'Neill forms the basis of what is now [section 8\(a\)](#). The revision of [section 8\(a\)](#) was further refined by the legislature through the addition of the final phrase thereof.

In essence, the framers “upped the ante” on the governor. By revising article IV, section 18 of the 1885 Constitution, and most importantly by adding the qualification or restriction language of the last phrase of [8\(a\)](#), the framers sought to make more difficult the governor's decision whether to veto a particular provision. If the legislature makes a specific appropriation, even if it be substantial, and if the legislature attaches a rationally and directly related qualification or restriction to that appropriation, then [section 8\(a\)](#) requires the governor to make the hard choice whether to give up the appropriation entirely or to follow the legislative direction for its use. This is by no means a revolutionary concept, for the veto power necessarily contemplates that in some cases salutary aspects of a legislative act will be sacrificed because the overall effect of the act is contrary to the public interest.

Petitioners make much of the change in language from that in article IV, section 18, which stated that the governor could veto any “item,” to the language of [article III, section 8\(a\)](#), which provides that the governor may veto any “specific appropriation.” We perceive this to be a

matter more of a change in terminology rather than one of fundamental importance. The framers of [section 8\(a\)](#) were not overly concerned with how large or how small a “specific appropriation” could be. Judge Taylor recognized in *Green*, and the minutes of the Commission so reflect, that the form of a specific appropriation will to a large extent be determined by the manner in which the legislature *668 structures an appropriations bill. Once again, the principal motivation behind revision of article IV, section 18, was to prevent the governor from altering legislative intent by requiring him to veto both a qualification or restriction and the appropriation to which it relates.

[9] Whether seeking to define “line item” or “specific appropriation,” the concept embodied in those terms is essentially the same. A specific appropriation is an identifiable, integrated fund which the legislature has allocated for a specified purpose. It is necessarily a fluid concept which to some extent will vary as the contours of a general appropriations bill change. Thus, if the legislature deems it expedient to allocate \$50,000,000 to the Department of Corrections without breaking the allocation down to its components, then that lump sum would be a specific appropriation under [article III, section 8\(a\)](#). Conversely, if the legislature allocated \$1,000,000 of the \$50,000,000 to maintenance of the corrections system, then that would be considered a specific appropriation. In each instance the legislature has designated an identifiable, integrated fund for a specified purpose. The fact that in one case the designation is broad and in the other specific is a matter of legislative judgment as to the requirements of each funding project.

In the context of a qualification or restriction, a specific appropriation is the smallest identifiable fund to which a qualification or restriction is or can be directly and logically related. In practical effect this means that in most cases where a qualification or restriction includes the setting apart of an identifiable sum of money, that fund will be considered a specific appropriation, since it will most likely be the smallest identifiable fund to which the qualification logically relates.

The implications are obvious. If the legislature deems it wise to appropriate a specific fund in a qualification or restriction, then the governor will be able to veto that qualification as a specific appropriation, just as he could have done had the legislature listed the fund as a separate line item. The fund mentioned in the qualification or restriction will of course also be nullified. This construction elevates substance to its rightful place over form. On the other hand, a qualification

or restriction containing no express identifiable fund, if it logically relates even to a substantial specific appropriation, cannot be vetoed without the governor also vetoing the appropriation to which it relates. This affords the legislature substantial leverage, yet there is an internal check working upon the legislature in this regard. The fashioning of a substantial lump sum appropriation in order to avoid an executive veto would in some instances ill-serve legislative objectives, for it would merely give the governor greater latitude in directing expenditure of the money appropriated.

[10] As noted previously, Governor Graham claims in part, as did Governor Askew in *Division of Bond Finance v. Smathers*, supra, that he has power to veto an unconstitutional qualification or restriction in an appropriations bill without vetoing the specific appropriation to which it relates. This cannot be. Under the Florida Constitution, the governor may exercise his veto power for any reason whatsoever. The governor must, however, exercise the veto power in a constitutional manner. He may, consistent with [article III, section 8\(a\)](#), either veto an entire bill, or in the case of a general appropriations bill, he may veto any specific appropriation. If he seeks to veto any qualification or restriction in a general appropriations bill, however, he must also veto the appropriation to which it relates. An attempted exercise of the veto power in any other manner is absolutely forbidden regardless of the motivation. The governor cannot act unconstitutionally to remedy a perceived unconstitutional act of the legislature.

Armed with these basic principles, we proceed into the vortex of the present controversy, namely, Governor Graham's challenged vetoes. We will first consider the validity of each of the legislative provisos, and then turn our attention to the propriety of the Governor's vetoes.

*669 1. Glades Correctional Institution

Legislative Action

[11] We conclude that the proviso concerning inmate population at Glades Correctional Institution is not a valid qualification. The appropriation to which this qualification most logically relates is the aggregate sum for major institutions, that is, items 250-254. The purpose of the appropriation is to fund the salaries, expenses and capital outlay for the major penal institutions in the State of Florida. The proviso is not rationally related to that end, nor does it implement, advance or enhance the purpose of the appropriation. Rather, it is designed to further a legislative

objective (the phasing back of the inmate population at Glades) unrelated to the funding of all the major institutions.

Gubernatorial Action

[12] We similarly conclude that the Governor's veto of this proviso is invalid. Since there is no identifiable fund within the qualification, the Governor cannot claim that the qualification itself constitutes a specific appropriation. By vetoing the qualification without also vetoing the appropriation to major institutions, the Governor contravened his power under [article III, section 8\(a\)](#).

2. University of South Florida Medical Center

Legislative Action

[13] In his veto message, infra at p. 658, Governor Graham indicates that the intent of this proviso is to authorize the establishment of a new state supported teaching hospital. The proviso itself, however, seems merely to direct the expenditure of \$2,613,142 to the presumably extant "teaching hospital program." The record fails to disclose which interpretation is correct. If the proviso is simply an allocation of funds to an existing program, then it is a valid qualification. It is rationally related to the purpose of the appropriation (the funding of the expenses of the South Florida Medical Center), and it is reasonable to assume that the qualification was a major motivating factor behind the structuring of item 382. If, on the other hand, the proviso envisions the construction of a new teaching hospital, it is clearly invalid, for the creation of such a capital outlay project is not rationally related to the expenses of an already existing medical center.

Gubernatorial Action

[14] Regardless, Governor Graham's veto of the qualification was proper. The smallest identifiable fund to which the qualification logically and directly relates is \$2,613,142 in each fiscal year of the biennium. Thus the qualification itself is a specific appropriation which the Governor could rightfully veto. This means, of course, that the expense appropriation in item 382 is reduced by \$2,613,142 in each fiscal year. By his veto the Governor has "render(ed) invalid (a) contemplated expenditure of public money," in the vernacular of Judge Taylor.

3. Division of Corporations, UCC Filings

Legislative Action

[15] The purpose of this qualification is to fund the salaries for additional personnel to be provided to the Division of Corporations upon the happening of certain contingencies. It enjoys a direct and rational relationship to the appropriation in item 1131 for the positions and salaries in the Division. But the qualification is invalid nonetheless. By its express terms it authorizes expenditure of deficiency funds upon the approval of the Department of Administration. This is in direct contravention of [section 216.231, Florida Statutes \(1979\)](#), which permits the release of deficiency funds only upon approval of the governor and three other members of the Administration Commission.⁷ Because the qualification *670 suspends pro tanto the operation of substantive law in [section 216.231](#), it cannot stand.

Gubernatorial Action

[16] The \$100,000 mentioned in this proviso does not comprise a specific appropriation. It is not an identifiable fund allocated for a specified purpose, but rather a contingent transfer of monies from the deficiency fund to item 1131. Were the Governor permitted to veto this language, there would be no reduction of money in either the deficiency fund or item 1131. Legislative intent would not be nullified, it would be altered.

4. Division of Recreation and Parks

Legislative Action

[17] We believe this to be a valid legislative qualification. The establishment of priorities is directly and rationally related to the appropriation for capital park improvements. The qualification implements the purpose of the appropriation, and in fact was probably a major motivating factor behind the structuring of the appropriation.

Gubernatorial Action

[18] By the same token, we believe the Governor's veto to be constitutional. The smallest identifiable fund to which the qualification relates is the \$2,020,000 contained within it, thus the qualification comprises a specific appropriation. The Governor's veto reduces the funds in item 6G by \$2,020,000.

5. and 6. Library Books and/or Scientific Equipment for Community Colleges and State University System

Legislative Action

[19] [20] The proviso in 5 purports to appropriate \$2,500,000 in each fiscal year of the biennium for library books and/or scientific equipment out of the cumulative total allocated to the Board of Trustees of the Community Colleges, while the proviso in 6 appropriates \$10,000,000 each fiscal year for library books out of the total allocated to the Board of Regents of the state university system. The issue is whether these restrictions are unconstitutional because they are operating expenditures not permitted under the capital project language of [article XII, section 9\(a\)\(2\) of the Florida Constitution](#).

[Article XII, section 9\(a\)\(2\), Florida Constitution](#), requires that the revenues derived from gross receipts taxes be placed in a trust fund known as the "Public Education Capital Outlay and Debt Service Trust Fund" (PECO). The provision states that PECO funds are to be used for, inter alia, "direct payment of the cost or any part of the cost of any capital project for the state system theretofore authorized by the legislature." Governor Graham submits that the term "capital project" in this section includes only expenditures for the acquisition, construction and capital maintenance of real property, and therefore does not contemplate the expenditure of PECO funds for library books and scientific equipment.

We disagree with the Governor's interpretation and hold that PECO funds may be used to purchase library books and scientific equipment. While there are no decisions construing the term, the legislature has defined "capital project"

in implementing [article XII, section 9\(a\)\(2\)](#).  [Section 235.011\(10\), Florida Statutes \(1979\)](#), states that "'(c)apital project' means sums of money appropriated to the Public Education Capital Outlay and Debt Service Trust Fund for the state system of public education." In addition,

 *671 [section 235.435\(3\) \(d\), Florida Statutes \(1979\)](#), specifically lists library books and equipment as a proper PECO expenditure. Although it is the intent of the people we must effectuate in construing a constitutional provision, the legislature's view of its constitutional authority is highly persuasive. [Gallant v. Stephens, 358 So.2d 536 \(Fla.1978\)](#). We also note that the legislature enacted  [section 235.435\(3\)\(d\)](#) in 1977, only three years after adoption of the constitutional amendment to [article XII, section 9](#). A relatively contemporaneous construction of the constitution by the legislature is strongly presumed to be correct.  [Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So.2d 665 \(Fla.1970\)](#).

Ironically, this analysis is in accord with the executive branch's own interpretation of [article XII, section 9\(a\)\(2\)](#). Section 6A-2.205(5), Florida Code of Administrative Rules (1979), lists equipment and furnishings for new and existing educational facilities and supplies with at least a one-year life expectancy as appropriate capital outlay expenditures. See also section 6A-206(1)(b)2. In addition to these rules, the Department of Education publishes a manual entitled Financial and Program Cost Accounting and Reporting for Florida Schools, in which library books are listed as the first entry under "Capital Outlay," account number 600.

Gubernatorial Veto

Be that as it may, the restrictions in both 5 and 6 clearly constitute specific appropriations which the Governor could properly veto. The smallest identifiable sum to which the restriction in 5 relates is \$2,500,000, and in 6, \$10,000,000. Thus, the total allocation to the community colleges will be reduced by \$2,500,000 in each fiscal year of the biennium, and the total allocation to the state university system will be reduced by \$10,000,000.

We close with the admonition that it would be a serious mistake to interpret our acceptance of jurisdiction in this cause as a general willingness to thrust the Court into the political arena and referee on a biennial basis the assertions of power of the executive and legislative branches in relation to the appropriations act. Mandamus is an extremely limited basis for jurisdiction which traditionally has been, and will continue to be, employed sparingly.  [Shevin ex rel. State v. Public Service Comm'n, 333 So.2d 9 \(Fla.1976\)](#); [Heath v. Beckett, 327 So.2d 3 \(Fla.1976\)](#); [Dickinson v. Stone, 251 So.2d 268 \(Fla.1971\)](#). Hence future attempts to invoke this Court's jurisdiction on similar grounds will be viewed with great circumspection.

[21] To that end we outline the proper shape which similar litigation should assume in the future. Any person, as citizen and taxpayer, may bring suit and have stricken a gubernatorial veto of a qualification or restriction in a general appropriations bill, even if the qualification or restriction is clearly unconstitutional, unless the governor can successfully demonstrate that the qualification or restriction itself constitutes a specific appropriation within the intentment of [article III, section 8\(a\)](#). In such a proceeding no issue may be raised as to the constitutionality of the qualification or restriction. That is, the governor cannot counterclaim that his action was prompted by an unconstitutional legislative act. In

this context a mandamus action should be limited to narrow issues of law which do not require extensive fact-finding.

[22] On the executive side of the ledger, any person, as citizen and taxpayer, may bring a declaratory judgment action to challenge the constitutionality of provisions in a general appropriations act. As exemplified in the discussion of the proviso relating to the South Florida Medical Center, the absence of a record is a major obstacle to a comprehensive resolution of a complex issue in this case. A declaratory judgment suit in circuit court will obviate this problem by enabling the parties to develop a full record upon which the court can base an intelligent decision.

Accordingly, we hold that the proviso language here at issue which is attached to the appropriations identified herein as 1 and 3 is null and void because it violates [article *672 III, section 12, Florida Constitution](#). We hold further that the vetoes identified herein as 2, 4, 5 and 6 are valid as being within the purview of the executive power granted by [article III, section 8\(a\)](#), and that the appropriations bill is reduced by the amount of the specific appropriations to which those vetoes relate.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

ADKINS, J., concurs specially with an opinion.

ADKINS, Justice, concurring specially.

I concur with that portion of the opinion which outlines the general veto power of the governor.

However, when the governor vetoes a provision which has been unconstitutionally included in a general appropriations bill by the legislature, the Court should declare the improperly included provision to be unconstitutional and void. Then, it would not be necessary for the Court to consider the issue of the constitutional validity of the governor's veto.

In  [Lee v. Dowda, 155 Fla. 68, 19 So.2d 570 \(1944\)](#), the Court considered a challenge to the validity of the governor's veto of a section of the 1943 General Appropriations Act. The propriety of the veto was justified to the Court on the ground that the legislature had unconstitutionally included the vetoed provision in the general appropriations bill. Interestingly,

the constitutional provision with which the vetoed provision conflicted in *Lee v. Dowda* was the identical provision which is now known as [article III, section 12](#):

Article III, Section 30: Laws making appropriations for the salaries of public officers and other current expenses of the State shall contain provisions on no other subject.

The Court held the provision to be unconstitutional and declined to reach the issue of the constitutional validity of the governor's veto stating:

We have carefully considered the able arguments of counsel for the respective parties, including the citations of the decisions in other states as set forth in their briefs, but we find nothing that would lead us to depart from the plain language of section 30 of article III of our Constitution and our previous opinions so clearly construing it. Our conclusion is that under said section 30 of Article III, the inclusion of section 14 in the general appropriation act of 1943 was not authorized, and that said section was unconstitutional and void. Therefore the plaintiffs in the court below were not and are not injured by

the Governor's veto of a section which was already void. (emphasis added).

Id. at 573.

Similarly, in *Division of Bond Finance v. Smathers*, 337 So.2d 805 (Fla.1976), the Court considered a challenge to the constitutionality of a proviso of the 1976 General Appropriations Act as well as the validity of the governor's veto of the same proviso. Upon a finding that the proviso was unconstitutional, the Court said:

We need not consider the issue of the constitutional validity of the Governor's veto because we hold the proviso to be unconstitutional.

Id. at 807. See also *Dickinson v. Stone*, 251 So.2d 268 (Fla.1971), where the Court even without a gubernatorial veto held that unconstitutional proviso language in the General Appropriations Act of 1971 should be expunged.

When the legislature includes in the general appropriations bill a provision which the Constitution does not permit, the Court should declare the provision unconstitutional and void. It is not, in such circumstances, necessary for the Court to consider the constitutional validity of the governor's veto of the provision.

All Citations

382 So.2d 654

Footnotes

- 1  [Renard v. Dade County](#), 261 So.2d 832 (Fla.1972); [Smith v. Ervin](#), 64 So.2d 166 (Fla.1953).
- 2 In certain instances a party will not have standing unless he can show a "special injury."  [Rickman v. Whitehurst](#), 73 Fla. 152, 74 So. 205 (1917).
- 3 This was the effect of our holding in [Division of Bond Finance v. Smathers](#), 337 So.2d 805 (Fla.1976). See also  [Lee v. Dowda](#), 155 Fla. 68, 19 So.2d 570 (1944).
- 4 Art. III, s 6:

Laws. Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida:".

5 We recognize that our decision in  [Thomas v. Askew, 270 So.2d 707 \(Fla.1972\)](#), could be interpreted as affording the legislature greater latitude than the above rule would permit. Stripped of its overly broad language, however, Thomas can be reconciled with our decision today. In Thomas we did nothing more than uphold that part of the 1972 General Appropriations Act which allocated "State funds for a previously authorized purpose in (an) amounts different from (that) previously allocated." To the extent that the language in Thomas cannot be reconciled with this decision, it is hereby expressly disapproved.

6 It is of no small significance that Judge Taylor was a member of the Constitutional Revision Commission and instrumental in revision of article IV, section 18.

7 [s 216.231\(1\), Fla.Stat. \(1979\)](#):

Any appropriation to the department which is classified as "emergency," or "deficiency," may be released only with the approval of the Governor and three other members of the Administration Commission. The state agency desiring the use of any such appropriation shall submit to the department application therefor in writing setting forth the facts from which the alleged need arises. The commission shall, at a public hearing, review such application promptly and approve or disapprove the same as the circumstances may warrant. All actions of the commission shall be reported to the legislative appropriation committees, and the committees may advise the commission relative to the release of such funds.

(Footnotes omitted.)

239 So.2d 1
Supreme Court of Florida.

In re Advisory OPINION TO THE GOVERNOR.

No. 39823.
|
July 1, 1970.

Synopsis

A question was propounded by the Governor to the Justices of the Supreme Court relating to the validity of the 1970 General Appropriations Act and other matters. The Justices of the Supreme Court were of the opinion that 1970 General Appropriations Act, against general attack, was valid and within orbit of legislative power, and that Governor was authorized to countersign warrants based on Act and presented to him in due course.

Questions answered.

Drew, J., declined to render any opinion upon questions propounded.

West Headnotes (14)

[1] **Statutes** 🔑 Government property, facilities, and funds

Provisions in general appropriations bill on any subject other than “appropriations for salaries of public officers and other current expenses of the state” and matters reasonably related thereto are invalid and are not law. 📄 F.S.A.Const. art. 7, § 1(c).

2 Cases that cite this headnote

[2] **Statutes** 🔑 Disapproval of portion; line-item veto

Legislature may not validly so draft general appropriations bill as to unduly and unreasonably preclude exercise of executive power to “veto any specific appropriation in a general appropriation bill”. F.S.A.Const. art. 3, § 8.

2 Cases that cite this headnote

[3] **Constitutional Law** 🔑 Particular Issues and Applications

Court should be slow to restrict legislative judgment in making appropriations but should not permit circumventing by legislature of powers of Governor including his power of veto. F.S.A.Const. art. 3, § 6.

1 Cases that cite this headnote

[4] **Constitutional Law** 🔑 Nature and scope in general

States 🔑 Appropriations

1970 General Appropriations Act, against general attack, was valid and within orbit of legislative power.

[5] **States** 🔑 Operation and effect

Appropriations may constitutionally be made contingent upon matters or events reasonably related to subject of appropriation, but may not be made to depend upon entirely unrelated events.

5 Cases that cite this headnote

[6] **States** 🔑 Mode of action in general

Appropriation to university might be made contingent upon registration of minimum number of students who could benefit from appropriation or contingent upon state revenues reaching certain level.

2 Cases that cite this headnote

[7] **States** 🔑 Mode of action in general

There is no constitutional impediment to appropriation being made contingent upon another bill, reasonably related to appropriation and where there is direct and relative interdependence between them, becoming law.

6 Cases that cite this headnote

[8] **Statutes** 🔑 Conditions or contingencies

Where appropriation was made contingent upon enactment of specified senate bill “or similar legislation,” and such legislation was not enacted, appropriation did not take effect.

[9] **States** 🔑 Operation and effect

Committee substitute for specified house bill was sufficiently closely related to bill that appropriation made contingent upon enactment of bill “or substantially equivalent legislation” was effective.

[2 Cases that cite this headnote](#)

[10] **States** 🔑 Mode of action in general

There is no constitutional impediment to general appropriations bill making allocations of state funds for previously authorized purpose in amounts different from those previously allocated for substituting adequate specific appropriations for prior continuing appropriations.

[4 Cases that cite this headnote](#)

[11] **Constitutional Law** 🔑 Necessity of Determination

Where factual situation which was condition precedent to any action under provision of bill relating to purchase by state of revenue certificates not sold on open market within maximum legal rate might never occur, Supreme Court would not make determination as to its validity.

[1 Cases that cite this headnote](#)

[12] **Statutes** 🔑 Government property, facilities, and funds

Any invalidity of provision of house bill relating to purchase by state of revenue certificates not sold on open market within maximum legal rate would not affect remainder of statute.

[13] **States** 🔑 Mode of action in general

Qualifications and restrictions imposed by legislature upon appropriations may not go to extent of changing other substantive law, but may limit or qualify use to which monies appropriated may be put, and may specify reasonable conditions precedent to their use, even though this may leave some governmental activities underfinanced in opinion of officers of other departments of government. *F.S.A.Const. art. 3, § 8.*

[2 Cases that cite this headnote](#)

[14] **States** 🔑 Operation and effect

Governor was authorized to countersign warrants based on 1970 General Appropriations Act and presented to him in due course.

Opinion

*2 PER CURIAM:

Honorable Claude R. Kirk,

Governor of Florida

The Capitol

Tallahassee, Florida.

Dear Governor:—

We have the honor to acknowledge your communication of June 15th, 1970, requesting our advice pursuant to [Section 1\(c\), Article IV, Constitution of Florida](#), relating to certain executive powers and duties.

Omitting the formal parts, your letter reads as follows:—

‘According to the provisions of [Section 1\(c\), Article IV, Constitution of Florida](#), the Governor is authorized to request the opinion of the Justices of the Supreme Court, as to the interpretation *3 of any portion of the Constitution upon any question affecting the Governor’s executive powers and duties.

‘Under [Section 1\(a\), Article IV](#), the Governor is mandated to take care that the laws be faithfully executed. Under [Section 4\(e\)](#), it is the duty of a Governor to countersign all warrants disbursing state funds. In specific regard to taxation, appropriations and state expenses, [Section 1\(d\), Article VII, Constitution of Florida](#), provides, ‘Provisions shall be made by law for raising sufficient revenue to defray the expenses of the State for each fiscal period.’

‘Under the provisions of [Section 31 of Chapter 69—106, Laws of Florida](#), referred to as the Governmental Reorganization Act, and now found in [Section 216.211\(1\)](#).

‘It shall be the duty of Governor, as Chief Budget Officer, to insure that revenues collected will be sufficient to meet the appropriations and that no deficit shall occur in any State Fund. If in the opinion of the Governor, a deficit will occur, he shall so certify to the Commission, and the Commission may, by affirmative action, reduce all State agency operating budgets and releases a sufficient amount to prevent a deficit in any fund.’

‘Therefore, in order to properly and effectively discharge my constitutional and statutory duties and responsibilities, it will be necessary to call upon this Honorable Court for the proper construction to be placed upon [House Bill 5210](#). Moreover, it is in furtherance of these executive powers and duties that I feel compelled to request the opinion of this Honorable Court as to whether I can properly discharge these executive powers and duties in accordance with the constitutional mandate. The facts giving rise to my inquiry and the doubt which I have regarding the exercise of these powers and duties are hereinafter set forth.

During the Regular Session commencing April 7, 1970, the Legislature enacted [House Bill 5210](#) and entitled:

“An Act making appropriations; providing moneys for the annual period beginning July 1, 1970, and ending June 30, 1971, to pay salaries, other expenses, capital outlay—buildings and improvements, and for other specified purposes of the various agencies of state government; providing an effective date.’

‘On Friday, June 5, the Legislature adjourned sine die, and on Monday, June 8, [House Bill 5210](#) was presented to the Governor for action. On Tuesday, June 9, 1970, I vetoed [House Bill 5210](#), together with [House Bill 4358](#), the latter bill relating to a formula for the distribution of minimum foundation program funds. A copy of my veto messages are attached for this Court’s review. As the Court will observe, I expressed a great concern about the constitutionality of the General Appropriation Act, insofar as it contained provisions on subjects other than appropriations for salaries for public officers and other current expenses of the State. [Section 12, Article III, Constitution of Florida](#), provides as follows:

“Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.’

‘In addition, [Section 6, Article III](#), supra, provides, in part, as follows:

“Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection *4 or paragraph of a subsection * * *’

‘It is my understanding that the history behind [Section 12](#) and [6](#) have been discussed in many court decisions in this and other states. I am advised that the purpose behind the people adopting [Section 6](#) was to require that the titles of acts be sufficiently informative so as to obviate surprise or fraud that would spring from hidden provisions not indicated in the title. (See note 24 in [Section 6, Article III](#), supra, Volume 25A, Florida Statutes Annotated) The purpose behind the people adopting [Section 12](#), supra, formerly appearing as [Section 30, Article III, Constitution of 1885](#), is set forth in this Court’s

decision in  *Lee v. Dowda*, 19 So.2d 570, at page 571 as follows:

“It is manifest that the Constitution considered this matter of appropriation Laws so important that it required they should be freed from all log rolling, by putting into such bills riders dealing with any other subject whatsoever, so that the attention of the Legislature should be concentrated upon the wisdom of and the necessity for the several items of appropriations made by and enumerated in the bill, and so also that the public could rest assured that when an appropriation bill was up for consideration in the Legislature nothing would be considered but the appropriations, and that this important matter should not be prejudiced by the injection into the appropriation bill of any other matters, regardless of their inherent merits or demerits.’

(See also *Amos v. Moseley*, 74 Fla. 555, 777, 619, (1918);  *State v. Lee*, 121 Fla. 316, 163 So. 859, (1935);  *Green v. Rawls*, 122 So.2d 10 (1960))

‘When reviewing House Bill 5210, in light of [Section 6 and 12](#), supra, and in light of the decisions, of this Court, it would appear to me that House Bill 5210 is unconstitutional, such unconstitutionality arising from the fact that the title does not sufficiently express and embrace the matters contained in the body of the bill; the bill embracing more than one subject not properly connected therewith; and the bill, being an appropriations bill, containing provisions on subjects other than salaries and current expenses of the State.

‘A listing of these provisions is attached to this request. Specific examples are hereinafter discussed. On pages 17 and 17a, item 188 appears, and is set forth in part as follows:

“*Grants and Aids*

From General Revenue Fund

Minimum Foundation

Program K—12 \$575,096,786

County School Sales Tax 33,476,120

County Capital Outlay

and Debt Service

Recalculation 651,696

Educational Research &

Development Program 1,200,000

State Textbook Program

Purchase of Textbooks 8,211,281

Exceptional Child Summer

Institutes 40,000

Driver Education (a) 4,200,000

Educational Leadership

Training Act 50,000

General Scholarships 930,000

Nursing Scholarships	176,000
Seminole Indian Scholarships	4,800
Children of Deceased Veterans	11,000
Exceptional Child Scholarships	213,750
Board of Regents Scholarships	1,520,000
Extended School Year Pilot Programs	400,299
Gifted Education Program	260,000

“(a) Provided, however, \$2,100,000 of this appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.

From Trust Funds

County Capital Outlay and Debt Service Trust Fund	25,747,714
Interest State School Trust Fund—MFP K-12	1,000,000
Educational Aid Trust Fund—Aid to Counties	40,083,055
National School Lunch Trust Fund	12,138,218
Student Financial Aid Trust Fund—Loans	900,000
Grants and Donations Trust Fund	5,000
Ex-Confederate Soldiers and Sailors Endowment Trust Fund—Scholarships	4,000

Teachers of Mentally

Retarded—Scholarships

94,000

“None of the appropriations in item 188 shall become effective unless CS for HB 4358 or substantially equivalent legislation becomes law.

*5 ‘This Court’s attention is directed to the underlined phrase, ‘None of the appropriations in item 188 shall become effective unless CS for HB 4358 or substantially equivalent legislation becomes law.’ In order for the Governor to be able to veto this language, he must also veto the Entire item 188, inasmuch as under [Section 8, Article III](#), the Governor may not veto ‘any qualification or restriction without also vetoing the appropriation to which it relates’. The appropriation to which the quoted language hereinabove relates is the entire item 188. Therefore, the Governor would have to veto all of item 188 in order to remove this objectionable language; unless, however, the foregoing quoted language is not a ‘qualification or restriction,’ but is in fact and law, a provision on another subject as prohibited by [Section 12](#), supra, in which case such language would not be subject to veto, but would fall based upon the fact that it violates [Section 12](#), as discussed in the aforementioned decisions by this Court; and also based upon the fact that the subject matter embraced within House Bill 4358 is nowhere mentioned in the title to House Bill 5210, nor is it in any way connected with the appropriations bill except by indirect reference in item 188.

‘It might also be observed that the purported ‘qualifications and restrictions’ upon item 188 is not merely limited to the foregoing quoted language, but must also include the provisions of House Bill 4358. If this language and House Bill 4358 were in fact and law a valid ‘qualification or restriction’ upon item 188, then it should have been included in the General Appropriations bill; the fact that House Bill 4358 was enacted as a separate piece of legislation clearly reflects that the Legislature considered the provisions thereof to be concerned with subjects other than appropriations for salaries and expenses. The inclusion of a reference to House Bill 4358 in item 188 and the enactment of House Bill 4358 as a separate piece of legislation appears to be an attempt to circumvent the spirit and intent of [Section 12, Article III](#), supra, and would encourage the doing of an act by indirection which would otherwise be prohibited directly. The foregoing quoted language in item 188 appears to be a classic example of the ‘logrolling’ evil which [Section 12](#) and [Section 8](#), supra, were designed to prevent. The Chief Executive is required to accept House Bill 4358, the provisions of which are

completely unknown to him, since they are not even included in the appropriations act, and if he does not accept House Bill 4358, none of the moneys appropriated by item 188 for education can be used. The foregoing quoted language, strangely enough, constitutes a condition precedent and a condition subsequent. Before item 188 can become effective, House Bill 4358 must become law—this is the happening of the event upon which the use of item 188 is conditioned; yet, there has been a specific appropriation made by item 188 and the so-called estate or rights have been vested, but are defeated upon the occurring of a future event, namely, the veto by the Governor of House Bill 4358.

‘Compounding the situation is the fact that the Governor must act on House Bill 5210 or any appropriations bill which might contain a similar condition, within a certain time period after he receives it; conceivably, that time period, whether it be 7 or 15 days, can expire before the Governor has constitutionally been presented *6 with the bill upon which the appropriation is conditioned. There are enumerable unforeseen situations that could develop as a result of permitting such conditional language to appear in appropriations bills; and I have merely set forth those that come to mind at the moment. I might also observe that House Bill 4358, a copy of which is attached, is an amendment of the minimum foundation program formula. However, if this Court will examine item 188, it will find that this item deals with appropriations totally unrelated to the minimum foundation program, such as Seminole Indian Scholarships, Nursing Scholarships, Children of Deceased Veterans, Exceptional Child Scholarships, Driver Education, etc. Yet, the Legislature has attached the conditional language as outlined above to the Entire item 188, and has required that the Governor either accept House Bill 4358 or the entire item 188 is not effective; regardless of the fact that there are specific appropriations contained within item 188 that are totally unrelated to House Bill 4358.

‘Another example of the invalidity of House Bill 5210 is the fact that it contains provisions which purport to amend, supercede or repeal other provisions in the general law which amendment or repeal is neither mentioned in the title nor is related to appropriation for salaries and current expenses of the State. For example, the language appearing immediately following items 130 and 131 of the Appropriation Act apparently amends the powers and duties of the Division of

Commercial Development, as set forth in [Section 288.03](#), et. seq., *Florida Statutes*, although no reference is made in items 130 and 131 to [Section 288.03](#); the aforementioned language appears to be provisions on subjects other than appropriations and conflicts with [Sections 6 and 12 of Article III](#), supra.

‘An example of the danger of including purported amendments to the general law is reflected by the language immediately preceding item 172 on page 15 of the General Appropriations Act relating to the Department of Education.

The phrase, ‘in lieu of [Section 236.071\(1\)](#), [236.074](#), [236.075](#) and [231.53 F.S.](#)’ is apparently intended to permit the expenditure of the funds appropriated to the Department of Education in the manner provided in the appropriation act, notwithstanding the aforementioned sections. Not only does this appear to conflict with [Sections 6 and 12 of Article III](#), supra, it purports to make reference to a section that was repealed during the last special session of the Legislature in 1969 (see Chapter 69—1735, *Laws of Florida*, repealing [Section 236.071](#), *F.S.*, supra). Although reference to a repealed section may, in this instance, be harmless, it does illustrate the inherent dangers of attempting to amend or repeal or modify provisions of the general law in an appropriation bill and in a manner not consistent with the Constitution.

‘Another example of the type of provisions which are of doubtful validity, and which render the appropriation act itself doubtful is found in the language appearing immediately after item 195 on pages 18 and 18(a) of the appropriations act. This language purports to amend the duties and responsibilities of the Division of Vocational Rehabilitation, formerly set forth in Chapter 229, *Florida Statutes*. Again, this language appears to be in direct conflict with [Sections 6 and 12 of Article III](#), supra, in that it is not reflected in the title and relates to subject matter other than salaries and expenses of the State; moreover, these provisions do not appear to constitute ‘qualifications or restrictions’ within the meaning of [Section 8, Article III](#), supra.

‘The following language in [Section 8](#) on page 73 of House Bill 5210 purports to amend the duties and responsibilities *7 of the State Board of Administration as follows:

‘It is the intent of the Legislature that if these revenue certificates cannot be sold on the open market within the

maximum legal rate authorized by law then the State Board of Administration shall purchase \$12,600,000.00 of these certificates at the maximum interest rate permitted by law as investments for any funds under its control which are authorized to invest in securities of this type.’

‘Not only is this language in apparent conflict with [Section 6 and 12 of Article III](#), supra, but additionally, this language appears to conflict with [Section 122.47](#), *Florida Statutes*, and [Section 215.44—53](#), *Florida Statutes*, as well as [Section 9, Article 12, Florida Constitution](#), in that it constitutes an effort on the part of the Legislature to control the exercise of discretion by the State Board of Administration, notwithstanding the aforementioned provisions to the apparent contrary.

‘One further set of examples is called to the Court’s attention. In the latter part of the appropriation act, there are provisions to the effect that, ‘no monies appropriated in this act,’ or, ‘no monies appropriated in item 1—871’ may be expended or used for certain purposes. I do not disagree with the intent of some of these provisions. In fact, I heartily support the purposes they are designed to serve. Yet, they are provisions on subjects other than appropriations for salaries or current expenses of the State, within the meaning of [Section 12](#), supra, and appear also to perpetuate ‘log-rolling.’ If these provisions were determined to be ‘qualifications or restrictions’ within the meaning of [Section 8, Article III](#), supra, I would be forced to veto an entire appropriations act in order to remove these ‘qualifications or restrictions’ if I found them to be objectionable. This places any Governor in the untenable position of forcing him to accept provisions which might be objectionable, or veto the entire appropriation act. This would seem to defeat the intent of the anti-logrolling provisions contained in the Constitution. Moreover, I do not believe that these provisions should be classified as ‘qualifications or restrictions’, but rather should be treated as provisions on subjects other than appropriations and more properly confined to separate pieces of legislation subject to veto by the Governor if he chooses to exercise such veto.

‘The provisions of [Section 6, 8 and 12 of Article III](#), supra, must be construed in such a manner as to permit the veto power of any Governor to be meaningful; the veto is always subject to the check and balance of the overriding action of the House and Senate. The significant point is that a Governor must be presented with an appropriations bill which gives him the opportunity to exercise the power of veto and does not perpetuate the evil of logrolling. The present bill contains

many doubtful provisions which raise serious questions as to the validity not only of the provisions but of the very act itself, the determination of which is necessary and vital to the discharge of my executive powers and duties under the Constitution. I feel that it is my duty as Governor of the State of Florida, and Chief Budget Officer, to request an advisory opinion from this Court regarding these provisions and regarding this act, which opinion I respectfully submit would also serve to avoid a multiplicity of suits which might otherwise cripple the orderly financing and administration of State government. In support of this Court's jurisdiction to entertain my request, I respectfully call this Court's attention to its decision in: In *The Matter of Executive Communication of February 19, 1872*, 14 Fla. 283; In *The Matter of Executive Communication of February 29, 1872*, 14 Fla. 285; and In *Re Advisory Opinion to The Governor*, 63 So.2d 321 (1953).

*8 'In view of the foregoing, I therefore have the honor to request your written opinion on substantially the following questions:

"1. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), does House Bill 5210, the General Appropriations Act, enacted during the 1970 Regular Session of the Legislature constitute a valid appropriation authorizing the countersigning of warrants by the Governor and the faithful execution thereof?"

"2. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), do the items or appropriations contained in House Bill 5210, as hereinabove and hereinafter referred to, constitute valid appropriation authorizing the countersigning of warrants by the Governor and the faithful execution thereof?"

"3. If the answer to Question 2 is in the affirmative, are the sections, clauses and phrases appearing in connection with those items described in Question 2 properly included within a General

Appropriations Bill in light of [Section 6, 8 and 12 of Article III](#)?"

'This Court's attention is invited to a recent decision rendered by the Circuit Court of the Twelfth Judicial Circuit of Florida in *Smith v. Kirk, et al.*, Case No. 11,195, July 15, 1969, construing language contained in the General Appropriations Act (in light of [Section 12, Article III, supra](#)) and declaring such language similar to the examples hereinabove and hereinafter described, to be unconstitutional. (copy attached) It is my understanding that this decision was not appealed.

'It should be clearly emphasized that many of the provisions which are contained in the General Appropriations Act and to which I have directed this Court's attention deal with matters which I approve of but which should be embodied in our general law by way of separate specific enactments; but, it is, nevertheless, my duty to call this Court's attention not only to provisions which I find to be objectionable but to provisions which I would generally approve and which have also been improperly included within a General Appropriations Bill. What must be resolved are not merely permissible limits of subjects within the General Appropriation Act but, more significant, the preservation of the duties and responsibilities of the independent branches of government.

'In view of the fact that House Bill 5210 will become effective on July 1, it is respectfully requested that the court waive the ten-day rule and render its opinion as soon as possible. Your assistance in resolving these vital questions is greatly appreciated.'

The import of your request is to have this Court pass upon the constitutionality vel non of the 1970 General Appropriations Bill referred to in your letter as House Bill 5210, recently identified as Chapter 70—95, Laws of Florida 1970. You also referred to Committee Substitute to House Bill 4358, now known as Chapter 70—90, Laws of Florida 1970, and to Senate Bill 1554 which apparently was not enacted into law.

This Court was not always in agreement under the Constitution of 1885 as to whether or not such a question could be answered. Compare [Advisory Opinion to Governor Dan McCarty](#), 63 So.2d 321, and [Advisory Opinion to Governor Collins](#), 113 So.2d 703. However, it is noteworthy that in the 1968 constitutional revision, authority and

direction were given this Court to permit interested persons to be heard, subject to the Rules of the Court which was followed by the implementation of our Rule F.A.R. 2.1(h) providing for such participation. Pursuant to such authority interested persons, including members of the Legislature, have presented both sides of this controversy by the filing of briefs. Because of the foregoing, *9 and in view of the great public interest in maintaining the fiscal stability of state government, we have decided to answer your request.

At the outset, our attention is directed to provisions of the Constitution that:

‘No money shall be drawn from the treasury except in pursuant to appropriation made by law.’  [Sec. 1\(c\), Article VII](#).

‘Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.’ [Sec. 12, Article III](#).

‘* * * The Governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.’ [Sec. 8, Article III](#).

In your executive communication you point out a large number of matters which you feel raise questions as to the constitutional validity of House Bill 5210 (Chapter 70—95) as a whole.

[1] Provisions in a General Appropriations Bill on any subject other than ‘appropriations for salaries of public officers and other current expenses of the State’ and matters reasonably related thereto are invalid and are not law. See  [Sec. 1\(c\), Article VII](#), supra.

[2] [3] The Legislature may not validly so draft a general appropriations bill as to unduly and unreasonably preclude the exercise of the executive power to ‘veto any specific appropriation in a general appropriation bill’. In the early history of the State, it was customary for such bills to fix in minute detail each authorized expenditure. In later years appropriations to state offices and for state activities have been in larger sums and have been more flexible as to how these funds may be expended. While the Court should be slow to restrict the legislative judgment in making appropriations, they should not permit the Circumventing by the Legislature of the proper powers of the Governor, including his power of veto.

[4] Our examination of House Bill 5210, in the light of your comments, does not reveal that the Legislature has, in this instance, exceeded its constitutional powers in this regard. There are, in this bill, over nine hundred ‘items’. Many of these items embrace numerous ‘specific appropriations’. For example ‘Item 188’, which will be discussed in more detail later, has twenty-five ‘specific appropriations’. Any of these could have been reached by individual veto. See [Sec. 8, Article III](#), supra.

[5] [6] [7] Appropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events. For example, an appropriation to a university might be contingent upon the registration of a minimum number of students who could benefit from the appropriation or contingent upon the state revenues reaching a certain level. There is no constitutional impediment to an appropriation being made contingent upon another bill, reasonably related to the appropriation and where there is a direct and relative interdependence between them, becoming law.

You make specific reference to ‘Item 188’ of House Bill 5210. Under this ‘item’ twenty-five specific dollar-amounts are listed. As respects one of these sums, it is ‘Provided, however, \$2,100,000 of this appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.’ As regards the entire ‘Item 188’, it is provided ‘None of the appropriations in Item 188 shall become effective unless Committee Substitute for House Bill 4358 or substantially equivalent legislation becomes law.’ We are advised and take judicial notice that Committee Substitute for House Bill 4358, now known as Chapter 70—94, Laws of Florida, has now become law, thus meeting the contingency and any question because of such contingency has therefore become moot.

*10 [8] The proviso involving Senate Bill 1554 above quoted appears in the following context—

‘(a) Provided, however, \$2,100,000 of this Appropriation is contingent upon Senate Bill 1554 or similar legislation becoming law.’ (Italics supplied.)

While it contained no appropriation, Senate Bill 1554—which did not pass—would have increased the tax on driver’s licenses ‘for the purpose of financing the driver education program in the secondary schools’. The specific appropriation

which was Made contingent upon the enactment of Senate Bill 1554 related to driver education in the amount of \$4,200,000. This is the type of qualification authorized by [Sec. 8\(a\) of Article III of the Constitution of Florida](#), and since Senate Bill 1554 did not become law the appropriation for driver education aforementioned must stand reduced from \$4,200,000 to \$2,100,000.

[9] Committee Substitute for House Bill 4358 amends several sections of the law relating to the overall educational program and particularly the minimum foundation provisions. Item 188 appropriates more than half a billion dollars, much of which is needed to meet the funds to be spent pursuant to Committee Substitute for House Bill 4358. If Committee Substitute for House Bill 4358 had not become law much of the appropriation in Item 188 would Not have been expendable. While it might have been wiser for the Legislature to have appropriated funds sufficient to meet the school needs without Committee Substitute for House Bill 4358 and then make a contingent appropriation of additional funds to meet the increased needs resulting from Committee Substitute for House Bill 4358, if enacted, it is clear that the relationship between Committee Substitute for House Bill 4358 and later Item 188 is so close that the proviso under scrutiny is within the legislative prerogative.

[10] You point out that Item 172 of House Bill 5210 is ‘in lieu of [Sections 236.071\(1\), 236.071, 236.075 and 231.53, F.S.](#)’ We find no constitutional impediment to a General Appropriations Bill making allocations of State funds for a previously authorized purpose in amounts different from those previously allocated or substituting adequate specific appropriations for prior continuing appropriations. Whether an appropriations bill can, by appropriating a lesser amount, reduce a continuing appropriation provided in preexisting law is a question neither properly presented nor decided here.

[Section 8](#) of House Bill 5210 is in part as follows—

‘It is the intent of the Legislature that if these revenue certificates cannot be sold on the open market within the maximum legal rate authorized by law then the State Board of Administration shall purchase \$12,600,000.00 of these certificates at the maximum interest rate permitted by law as investments for any funds under its

control which are authorized to invest in securities of this type.’

[11] [12] You suggest that this provision is invalid. Since the factual situation which is a condition precedent to any action under this provision may never occur, any present inquiry as to its validity is premature. To the extent that this provision in House Bill 5210 may affect the validity of the entire bill, it is our opinion that it does not. If held invalid in an adversary proceeding by a court of competent jurisdiction it is readily severable from the rest of the statute.

[13] You call attention to several provisions of House Bill 5210 relating to the expenditure of various items of money appropriated. The Constitution expressly recognizes the power of the Legislature to make appropriations subject to qualifications and restrictions. See [Sec. 8 of Article III](#). Such qualifications and restrictions may not go to the extent of changing other substantive law, but they may limit or qualify the use to which the moneys appropriated may be put and may specify reasonable conditions precedent to their *11 use, even though this may leave some governmental activities underfinanced in the opinion of officers of other departments of government.

It would be inappropriate for us, at this time, to undertake to analyze all the provisions of House Bill 5210 and discuss in detail all qualifications and restrictions upon appropriations found in this law. Much of your communication consists of pointing out dangers which you fear may arise from future efforts on the part of the Legislature to unduly restrict the Chief Executive in the exercise of the power of veto and in so drafting appropriation bills as to make them instruments of ‘logrolling’ contrary to the intent of [Secs. 6, 8 and 12, Article III](#). We have carefully considered these observations and, while they may well be of academic interest, we do not find such comments to require a judicial interpretation at this time.

We now turn to your specific question as distinguished from your general discussion of House Bill 5210:—

‘1. In light of the provisions of [Sections 6, 8 and 12 of Article III, Constitution of Florida](#), does House Bill 5210, the General Appropriations Act, enacted during the 1970 Regular

Session of the Legislature constitute a valid appropriation authorizing the countersigning of warrants by the Governor and the faithful execution thereof?’

[14] We do not find anything in your communication that would vitiate the 1970 General Appropriations Act and, while there may be some items which would have appropriately been a subject of your line item veto, we do not find any impediment created by your executive communication that would prevent your disbursing funds in accordance with the said Appropriations Bill, and except, unless and until some particular item is voided by a court of competent jurisdiction, you would be authorized to countersign warrants based thereon and presented to you in due course.

The other matters and things about which you have inquired are answered to the extent of our authority to do so in the body of this communication.

In summary, we advise you that:

(1) In our opinion, the 1970 General Appropriations Act, against a general attack, is valid and within the orbit of legislative power and against such a general attack a court of competent jurisdiction should and would hold it to be so.

(2) That the Legislature does not have the power nor the right under the Constitution of this State to make law in an appropriations bill on other subjects, unless the other subjects are so relevant to, interwoven with, and interdependent upon, the appropriations so as to jointly constitute a complete legislative expression on the subject.

Respectfully,

RICHARD W. ERVIN

Chief Justice

B. K. ROBERTS

CAMPBELL THORNAL

VASSAR B. CARLTON

JAMES C. ADKINS, JR.

JOSEPH A. BOYD

Justices

*12 The Honorable Claude R. Kirk, Jr.

Governor of the State of Florida

The Capitol

Tallahassee, Florida

My dear Sir:

An answer to your request for an advisory opinion concerning the Appropriations Act of 1970, in its last analysis, would require me to say whether the whole act was constitutionally valid or invalid. Whatever may be my individual views on the encompassing question of constitutionality, eleven years ago in majority of this Court in *In Re: Advisory Opinion to the Governor, 113 So.2d 703*, declined to answer a request for an advisory opinion from the then Governor Collins for the reason that this Court was without authority to render an advisory opinion to the Governor determining the constitutional validity vel non of an act of the Legislature. At that time in a separate opinion to Governor Collins, I stated (*113 So.2d 706*):

‘On several occasions since my appointment to this Court I have participated in advisory opinions to you and your predecessors in office which construed or passed upon the constitutionality of certain statutes of this State. It is now my view that, in rendering such opinions, I exceeded my authority as a Justice of this Court.

‘The Constitution plainly authorizes the Justices of this Court to advise you ‘as to the interpretation of any portion of (the Florida) Constitution upon any question affecting (your) executive powers and duties.’ From the adoption of the present Constitution until recent years the Justices of this Court have refused to advise the Governors of Florida as to their interpretation of or to pass upon the constitutionality of statutes of this State. It is my view that this Court should now return to that salutary principle epitomized in the conclusion of the *Advisory Opinion to the Governor, 50 Fla. 169, 39 So. 187*, where the then Justices said:

‘Reduced to its last analysis, the purpose of your letter is not to have us construe any clause of the Constitution affecting your executive powers and duties, but to have us pass upon the constitutionality of an act of the Legislature.

“Section 13 of article 4 of the Constitution authorizes the justices of the Supreme Court, on the Governor's request, to interpret only some portion of the Constitution, and does not authorize the Court, upon such request, to interpret or pass upon the constitutionality of statutes that affect the Governor's executive powers and duties. Advisory [Opinion to Governor](#), 39 Fla. 397, 22 So. 681. For the reasons stated, we must respectfully decline to give any opinion upon the questions propounded.”

The critical language of the Constitution of 1968 under which your request is presented is identical to the language of the Constitution of 1885 under which the request of Governor Collins was made. The provisions of the 1968 Constitution relating to procedure for obtaining advisory opinions does not—in my judgment—in any way enlarge the powers of this Court with respect to this basic constitutional question.

Looking back over more than a decade I can only conclude that the passage of time has confirmed the wisdom of this Court expressed by the majority in the advisory opinion above referred to, and my own views quoted above.

Consistency compels me therefore to respectfully decline to render any opinion upon the questions propounded.

Respectfully,

E. HARRIS DREW

Justice.

EHD:gr

All Citations

239 So.2d 1

End of Document

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From: [Pratt, Joshua](#)
To: [MO Jazil](#)
Cc: [Meros, Nicholas](#)
Subject: RE: Advisory Opinion - Cases
Date: Friday, January 14, 2022 1:11:00 PM

*Correction. 1 advisory opinion and 3 non-advisory opinions.

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 1:10 PM
To: 'MO Jazil' <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

And here are four advisory opinions with highlights re. the executive power question.

--

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Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 11:11 AM
To: 'MO Jazil' <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

And here are three advisory opinions with highlights that touch on a federal question.

--

Joshua E. Pratt
Deputy General Counsel
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Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Friday, January 14, 2022 11:09 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Advisory Opinion - Cases

Here's the 1887 advisory opinion with highlights.

--

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Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

From: Pratt, Joshua
Sent: Thursday, January 13, 2022 9:16 AM
To: MO Jazil <mjazil@holtzmanvogel.com>
Cc: Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
Subject: Advisory Opinion - Cases

Here are a few advisory opinion cases that may be a useful start. [REDACTED]
[REDACTED] Have to run to a doctor's appointment, but see y'all soon!

--

Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.