SC23-1671; 1D23-2252

IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, ET AL.,

Petitioners,

v.

CORD BYRD, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, ET AL.,

Respondents.

On Petition for Discretionary Review from
the First District Court of Appeal

FLORIDA LEGISLATURE'S JURISDICTIONAL BRIEF

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STATEMENT OF THE ISSUES

This case concerns the constitutionality of the congressional district plan enacted by the Florida Legislature and signed into law by Governor DeSantis in April 2022 (the "Enacted Plan"). *See* Ch. 2022-265, Laws of Fla. Petitioners claim the Enacted Plan unconstitutionally "diminish[es]" the ability of black voters in North Florida to "elect representatives of their choice" as compared to the congressional district map imposed by this Court in 2015, which included a sprawling East-West district that stretched across eight counties from downtown Jacksonville to Gadsden County. A.6-7; Art. III, § 20(a), Fla. Const.

The trial court agreed with Petitioners and declared that the Enacted Plan violated the Florida Constitution. A.11. The en banc First District reversed, holding that Petitioners failed to prove their non-diminishment claim because they submitted no evidence of a "naturally occurring, geographically compact community" of black voters in North Florida whose voting power had been diminished by the Enacted Plan. A.29-31.

The Legislature opposes the petition for review, but notes the following additional issues it intends to raise on cross-review if the Court accepts jurisdiction:

1. Whether Petitioners were required to prove the existence of an alternative district configuration that complies with the state and federal constitutions in order to establish a non-diminishment violation.

2. If so, whether Petitioners satisfied their burden with either of the two alternative district configurations proffered to the trial court.

3. If Petitioners proved a non-diminishment violation, whether application of the non-diminishment provision to North Florida violates the Equal Protection Clause.

STATEMENT OF THE CASE AND FACTS

I. The Facts

A. Florida's Congressional Plan before the 2022 Redistricting Cycle

Florida's congressional elections in 2016, 2018, and 2020 were conducted under a plan imposed by this Court in 2015. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402–06 (Fla. 2015) ("*Apportionment VII*"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271–73 (Fla. 2015) ("*Apportionment VIII*"). That plan included a new "East-West" configuration of District 5 stretching from downtown Jacksonville to Gadsden County. *Id.* This Court ordered the Legislature to draw District 5 in an East-West configuration based on its conclusion that the "North-South" configuration of the district adopted by the Legislature in 2012 was intended to favor the Republican Party and incumbent Democrat Congresswoman Corrine Brown. *Apportionment VII*, 179 So. 3d at 403.

Because the plaintiffs in *Apportionment VII* asserted *political* gerrymandering claims against the 2012 iteration of District 5, this Court's decision did not address whether the East-West configuration

complied with the Equal Protection Clause's prohibition on *racial* gerrymandering.

B. The Enacted Plan

Early in the 2022 legislative session, it became apparent that the status of District 5 presented significant legal questions not present elsewhere in the map. The Governor sought an advisory opinion from this Court as to whether the Florida Constitution "requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations." *Adv. Op. to Gov. re: Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1107–08 (Fla. 2022) ("*Adv. Op. to Gov. 2022*"). In the absence of a complete factual record, this Court declined to issue an advisory opinion. *Id.* at 1108.

The Governor's constitutional concerns with the application of the non-diminishment provision to the North Florida congressional district ultimately led him to veto a congressional district plan passed during the 2022 regular session. A.59. The Legislature passed the Enacted Plan in a special session, and the Governor signed it into law.

II. The Case

A. Trial Court Proceedings

Petitioners sued to challenge the constitutionality of the Enacted Plan under article III, section 20. Petitioners' claims were eventually narrowed to a single theory: that the Enacted Plan diminishes the ability of black voters in the former District 5 to elect the congressperson of their choice. A.9.

In advance of the trial court's ruling below, the parties entered a stipulation agreeing to seek "pass-through" certification from the First District and a proposed appellate schedule that would "permit resolution by the Florida Supreme Court by December 31, 2023, to allow the Florida Legislature to take up any remedial map, if necessary, during the 2024 legislative session beginning on January 9, 2024 . . . ." A.55.

The trial court entered judgment for Petitioners on their non-diminishment claim. A.2. Respondents promptly appealed. A.53.

B. First District Proceedings

The parties jointly requested the First District to certify the case for immediate resolution by this Court under its "pass-through" jurisdiction. A.53-54. The parties explained that the Legislature was

set to convene on January 9, 2024, and that there was " 'insufficient time for [the First District] to provide a first-tier review prior to the issues being heard by [this Court]' if the appeal was going to be resolved in time for the 2024 election." *See* A.55 (quoting *Am. Civil Liberties Union of Fla. v. Hood,* 881 So. 2d 664, 666 (Fla. 1st DCA 2004)). Rather than certifying the case, the First District ordered initial hearing en banc.

On December 1, the First District issued its decision reversing the trial court by an 8-2 margin. A majority opinion for seven judges held that the non-diminishment provision requires plaintiffs to establish that they are part of a "geographically compact" and "naturally occurring" community that has "achieved some cohesive voting power under a legally enforceable district." A.30-31. Plaintiffs who establish this "benchmark" can prove a non-diminishment claim with evidence showing that their community's voting power has decreased under a new districting enactment. *Id.*

Petitioners here failed to prove their non-diminishment claim, the First District held, because there was no evidence that former District 5 contained a "naturally occurring" and "geographically

compact community" as a "proper benchmark or baseline from which to assess an alleged diminishment in voting power." *Id.*

ARGUMENT

I. This Court should deny the petition for review.

This Court has jurisdiction, as the First District's decision expressly construes article III, section 20(a) of the Florida Constitution. *See* Art. V, § 3(b)(3), Fla. Const. But this case presents a poor candidate for discretionary review. The First District's decision does not expressly and directly conflict with this Court's precedents or address a recurring legal question that has divided the lower courts. The Legislature's imminent regular session also counsels against discretionary review and the unwelcome prospect of extending uncertainty regarding the Enacted Plan's validity into the approaching election cycle.

Petitioners' jurisdictional brief is largely devoted to arguments criticizing the merits of the First District's decision and that court's application of this Court's precedents to the facts and legal arguments presented in this case. Pet.Br.6-11. Their brief scarcely addresses the second critical question in discretionary cases: assuming jurisdiction exists, why should the Court grant review?

The Secretary's separate jurisdictional brief addresses the merits of the First District's decision. The Legislature supplements those arguments with additional reasons why this Court should decline review.

A. The First District's decision does not expressly and directly conflict with this Court's precedents.

The Florida Constitution authorizes this Court to review a decision of a district court that "expressly and directly conflicts with a decision of . . . the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. Petitioners claim the First District's decision expressly and directly conflicts with several of this Court's redistricting decisions. Pet.Br.6-11. But each of these decisions is either factually distinguishable or addresses altogether different legal questions. Although this Court has discretionary jurisdiction on other grounds, the absence of express and direct conflict undermines Petitioners' arguments for the necessity of this Court's review.

The constitutional standard of "express and direct conflict" is "a strict standard that requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite 'substantially the same controlling

facts.' " *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021) (quoting *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)). Because the facts in the second situation are "of the utmost importance," there can be no conflict on this basis "when the cases are easily distinguishable." *Id.* (quoting *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975)).

The First District's decision does not announce a conflicting rule of law and is factually distinguishable from this Court's prior redistricting decisions. Petitioners claim the decision on review expressly and directly conflicts with this Court's decisions in *Apportionment I*[1], *II*[2], *VII*, and *VIII* from the last redistricting cycle and with *In re Senate Joint Resolution of Legislative Apportionment 100*, 334 So. 3d 1282 (Fla. 2022) ("*Apportionment 2022*"). Pet.Br.6-11. Petitioners' assertion of express and direct conflict fails, as none of the cited decisions involved a challenge to the validity of a putative benchmark district or determined what constitutes a legally

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[1] *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597 (Fla. 2012)
[2] *In re Senate Joint Resol. of Legis. Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012)

sufficient benchmark district. *Cf.* A.30-31 (holding that Petitioners "failed to prove a proper benchmark or baseline from which to assess an alleged diminishment in voting power"). Nor did those decisions evaluate the Equal Protection Clause's impact on a non-diminishment claim directed to an egregiously non-compact, court-imposed benchmark district.[3] *Cf.* A.32-40 (Osterhaus, C.J., concurring in result "for federal equal protection-related reasons"). And this Court's decision in *Apportionment 2022* expressly stated that it "should not be taken as expressing any views on the questions raised" in the Governor's request for an advisory opinion regarding whether the non-diminishment provision requires the retention of a district like former District 5. 334 So. 3d at 1289 n.7; *see also Adv. Op. to Gov. 2022*, 333 So. 3d at 1108 (seeking guidance on questions including "what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice

[3] At most, *Apportionment I* expressly *declined* to interpret the non-diminishment provision in a manner that could "run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment." 83 So. 3d at 627.

has been diminished"). Petitioners have therefore failed to identify any express and direct conflict.

B. The First District's decision addresses issues that are unlikely to recur.

This Court often exercises its discretion to address recurring legal questions that have divided the lower courts. *See*, *e.g.*, *Agency for Health Care Admin. v. Ybor Med. Injury & Accident Clinic, Inc.*, 334 So. 3d 596, 597 n.1 (Fla. 2022) (retaining jurisdiction to decide conflict issue because "issue will likely recur yet evade review"). The nature of redistricting litigation and the unique facts of this case present the opposite circumstance: the First District's decision addresses issues that are unlikely to recur and do not warrant this Court's exercise of discretionary jurisdiction.

No other Florida court has addressed the unique scenario presented to the First District: whether a court-imposed map connecting far-flung communities of minority voters from different regions of the state into a single congressional district in which those voters comprise less than a majority of voters can constitute a valid "benchmark" district under Florida's non-diminishment provision. A.6, 30-31. No other litigation is currently pending on this question.

And the Enacted Plan contains no other districts that remotely resemble District 5,[4] making it unlikely the Legislature will need to address this question during the state's next redistricting cycle.

C. Review would extend uncertainty over the Enacted Plan's validity beyond the 2024 election cycle.

Finally, this Court should decline review to provide finality to Florida's 2020 congressional redistricting process *now* rather than extending uncertainty over the validity of the Enacted Plan into the 2024 election cycle or beyond.

The Legislature will convene on January 9, 2024, for its 60-day regular session. Art. III, § 3(b), Fla. Const. On April 8, 2024, the Florida Department of State will begin accepting qualifying documents for candidates seeking to run for Congress. Subsequent statutory deadlines for the printing and mailing of primary election ballots will arrive in quick succession thereafter. Congressional districts must be finalized well in advance of the deadlines for

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[4] For good reason, District 5 (once styled District 3) has the unique distinction of having been the subject of extensive litigation in each of the last four decennial redistricting cycles. *See Apportionment VII*, 172 So. 3d at 372; *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307–09 (S.D. Fla. 2002); *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996).

printing and mailing ballots to provide certainty to voters, potential candidates, and elections officials.

In recognition of these time constraints, the parties' stipulation before the trial court provided for an expedited appellate timeline that would "permit resolution by the Florida Supreme Court by December 31, 2023." A.55. Resolution by December 31 would have afforded the Legislature an opportunity to enact a remedial map, if necessary, during the 2024 regular session. *Id.* As explained in the parties' joint request for pass-through certification, there was " 'insufficient time for [the First District] to provide a first-tier review prior to the issues being heard by [this Court]' if the appeal was going to be resolved in time for the 2024 election." A.55 (quoting *Hood,* 881 So. 2d at 666). The First District declined pass-through certification but ordered an expedited schedule for briefing and en banc argument that resulted in a decision before the December 31 deadline.

Given the current legislative and elections calendars, a second round of appellate review would revive uncertainty over the validity of the Enacted Plan. Even expedited proceedings before this Court would likely extend deep into the Legislature's regular session, which is scheduled to conclude on March 8, 2024, or beyond. By way of

comparison, this Court accepted review of the case that resulted in *Apportionment VII* in October 2014 and held oral argument in March 2015. The Court's decision—in July 2015—emphasized the "time-sensitive nature of these proceedings" with "candidate qualifying for the 2016 congressional elections now less than a year away." *Apportionment VII*, 172 So. 3d at 372. This Court therefore relinquished jurisdiction to the trial court "for a limited period of 100 days" to oversee remedial proceedings. *Id.* at 417. The corresponding deadlines for the 2024 elections are plainly far closer than they were in 2015.

The parties' stipulation contemplated one round of appellate review concluding before the commencement of the regular session. The Legislature has honored its commitments in the stipulation by agreeing to seek pass-through jurisdiction, agreeing to expedited briefing and argument before the First District, and agreeing to expedited jurisdictional briefing before this Court. Petitioners have received the only mandatory appellate review to which they are legally entitled under the Florida Constitution. *See Martin v. State*, 747 So. 2d 386 (Fla. 2000) (noting that "the district courts now constitute the courts of last resort for the vast majority of litigants").

CONCLUSION

This Court should deny review.

Respectfully submitted,

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I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and because the word count from the word-processing system used to prepare this document is 2,495.

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