Filing # 143038402 E-Filed 02/01/2022 11:11:04 AM

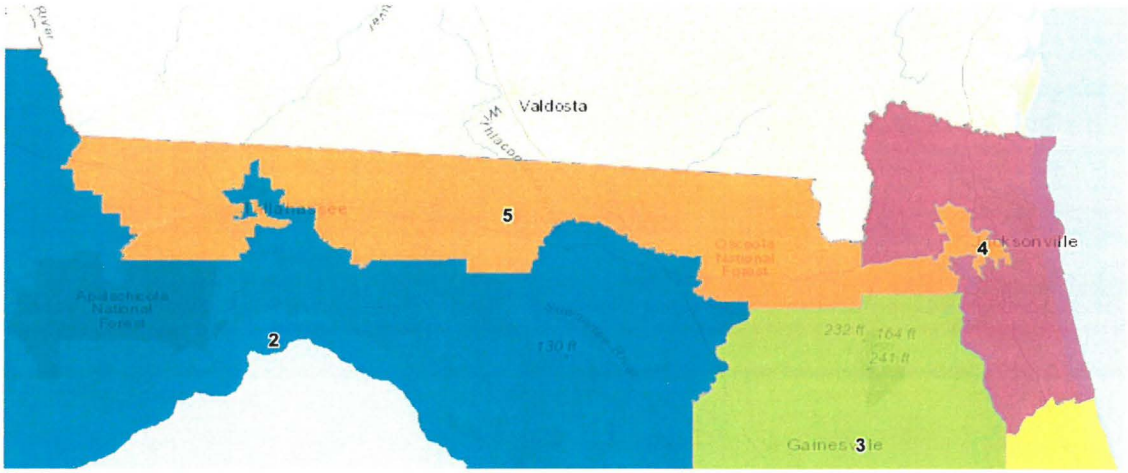
RON DESANTIS
GOVERNOR

February 1, 2022

Honorable Charles T. Canady
Chief Justice of the Florida Supreme Court
Florida Supreme Court, 500 S. Duval St.
Tallahassee, Florida 32399

Mr. Chief Justice and Justices of the Florida Supreme Court:

In the coming weeks, the Florida Legislature must present to me a bill that redraws Florida's congressional districts consistent with the most recent decennial census, *see* 2 U.S.C. §§ 2a–2c, and the one-person, one-vote requirement of the U.S. Constitution, *see Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). All maps that have been published by the Legislature and are currently under consideration retain, for the most part, the current Congressional District 5. The district stretches over 200 miles from East to West across eight counties without conforming to usual political or geographic boundaries, solely to connect a minority population center in Jacksonville with a separate and distinct minority population center in Leon and Gadsden Counties so that, together, these minority populations may elect a candidate of their choice. It is a narrow district that compresses to only three miles wide, North to South, when traversing a string of the northernmost precincts in Leon County so the district can connect with the minority population in western Leon County without including the non-minority population in eastern Leon County. Similarly, in Duval County, the district narrows to about a mile and a half in width. As of the 2020 Census, two counties, Duval to the East and Leon to the West, alone contribute 82.77% of the district's population. These counties are in two completely different regions of the State.



See FLSCOR, *Florida Congressional Districts 1982-2022*, ArcGIS Online, https://www.arcgis.com/home/item.html?id=db44457f19684fd99b19ce64f96ae787 (click "View") (last visited Feb. 1, 2022).

THE CAPITOL
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I seek this Court's opinion on whether Article III, Section 20(a) of 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 (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice.

This Court's constitutional power to render an advisory opinion is quite broad. Upon my request, this Court may opine as to "the interpretation of *any* portion of [the] constitution upon *any* question affecting the governor's executive powers and duties." Art. IV, § 1(c), Fla. Const. (emphasis added). The Florida Constitution provides that "[t]he supreme executive power shall be vested in a governor." Art. IV, § 1(a), Fla. Const. That executive power includes the "[e]xecutive approval and veto" power over bills the Florida Legislature presents to me, Art. III, § 8, Fla. Const.; the duty to "take care that the laws be faithfully executed," Art. IV, § 1(a), Fla. Const.; and the power of "direct supervision" over the "administration" of the Department of State, Art. IV, § 6, Fla. Const.; *see also* § 20.02(3), Fla. Stat. (providing that "[t]he administration of any executive branch department . . . placed under the direct supervision of an officer . . . appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor"); § 20.10, Fla. Stat. (creating the Department of State, which is headed by the Secretary of State, who is appointed by and serves at the pleasure of the Governor).

Once presented with a congressional redistricting bill, I must decide whether to approve or veto it, and even if I take no action and the law goes into effect, I must nevertheless take care that the Constitution and laws of the State of Florida are faithfully executed. The Secretary of State, whom I direct and oversee, is the chief election officer of the State, § 97.012, Fla. Stat., and is responsible for, among many things, "[o]btain[ing] and maintain[ing] uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and certifying "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," § 99.061(6), Fla. Stat. The Department of State will also be responsible for defending any legal challenges to the new congressional redistricting map. In deciding whether to exercise my veto power once the Legislature's congressional redistricting bill is presented to me, and how best to faithfully implement the law if enacted, I now seek your "opinion . . . as to the interpretation of [a] portion of [the] constitution" that applies to the congressional redistricting process. Art. IV, § 1(c), Fla. Const. Such an opinion is both necessary and appropriate in this instance.

First, the once-in-a-decade congressional redistricting process is a unique circumstance: it is required by the U.S. Constitution, and it must be completed before upcoming congressional elections. With the qualifying period for election to the U.S. House of Representatives quickly approaching, the voters and candidates have a pressing need for certainty regarding the meaning of the State's non-diminishment standard. *See* § 99.061(9), Fla. Stat.; https://dos.myflorida.com /elections/candidates-committees/qualifying/. In contrast, most legislation is neither constitutionally mandated nor of the sort where prolonged uncertainty regarding the meaning of such text may adversely affect the State's elections. *See League of Women Voters of Fla. v.*

Detzner, 172 So. 3d 363, 372 (Fla. 2015) ("*Apportionment VII*") ("We emphasize the time-sensitive nature of these proceedings, with candidate qualifying for the 2016 congressional elections now less than a year away . . . ."). I make my request in the spirit of seeking as much guidance as possible from you consistent with "[t]his Court['s] . . . obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*Apportionment VIII*") (citation and internal quotation marks omitted).

Second, I am aware that on one occasion well over a century ago, the members of this Court declined to opine on a constitutional question in aid of my predecessor's exercise of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). Notwithstanding that the Florida Constitution assigns to the Executive the power to approve or veto legislation, *see* Art. III, § 8, Fla. Const., this Court concluded that "any act which is an essential prerequisite" to the enactment of a law "is legislative" and is performed by the Executive "as a part of the lawmaking power." *In re Exec. Commc'n*, 6 So. at 925. This reasoning, which you are not bound to follow, *see In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), conflicts with the separation of powers enshrined in Article II, Section 3 of the Florida Constitution, and I respectfully request that you give the 1887 response no weight.

In particular, the Florida Constitution vests the State's legislative power in the Florida Legislature. *See* Art. III, § 1, Fla. Const. It follows, therefore, that the Governor's exercise of what the Constitution characterizes as the power of "[e]xecutive approval and veto," Art. III, § 8, Fla. Const., is not a legislative power. Rather, the veto power is an executive check on the legislative power; "[e]ach branch of the government necessarily at times, either by express provision of the Constitution or in the orderly administration of the state's affairs, comes in contact with one or the other branch, but such contact in n[o]wise merges the functions of one into that of the other." *Amos v. Gunn*, 94 So. 615, 627–28 (Fla. 1922) (Ellis, J., on pet. for reh'g). This Court's more recent opinions thus acknowledge that the exercise of the veto is an executive power.[1]

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[1] *See, e.g.*, *Chiles v. Child. A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) ("Article III, section 8 sets forth the procedure for the executive power to approve or veto legislation of both nonappropriations and appropriations bills."); *Brown v. Firestone*, 382 So. 2d 654, 672 (Fla. 1980) ("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)[.]"); *Owens v. State*, 316 So. 2d 537, 538 n.4 (Fla. 1975) ("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, [§] 11) and in the legislative article (art. III, [§] 8)."); *In re Advisory Opinion to the Governor*, 239 So. 2d 1, 9 (Fla. 1970) ("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.'" (quoting Art. III, § 8(a), Fla. Const.)); *see also Green v. Rawls*, 122 So. 2d 10, 13 (Fla. 1960) ("[U]nder our tripartite division of the powers of government, and the checks and balances designed to be accomplished thereby, the chief executive must have the power and the opportunity to veto

Third, the question affecting my executive powers and duties concerns Article III, Section 20(a) of the Florida Constitution, which provides that:

> 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.

Art. III, § 20(a), Fla. Const. (emphasis added). I limit my request to the phrase "diminish their ability to elect representatives of their choice"—the State's non-diminishment standard. Except where it may be necessary to inform your interpretation of the Florida Constitution, I do not ask for your opinion on any issues of federal law. *Cf. In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 620-21 (Fla. 2012) ("*Apportionment I*") (recognizing that the non-diminishment standard borrows from § 5 of the Voting Rights Act but "nonetheless recogniz[ing] our independent constitutional obligation to interpret our own state constitutional provisions").

Specifically, I ask whether the Florida Constitution's non-diminishment standard mandates a sprawling congressional district in northern Florida that stretches hundreds of miles from East to West solely to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties (with few in between) so that they may elect candidates of their choice, even without a majority. This Court has previously suggested that the answer is "yes." *Apportionment VIII*, 179 So. 3d at 271 ("Although District 5 was required to be drawn from East to West, no specific configuration was mandated in *Apportionment VII*," and this Court did not "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 2015, this Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando. The Court held that the North-South version had been unconstitutionally tainted by partisan and other improper influences and that such a configuration was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Apportionment VII*, 172 So. 3d at 403. Consequently, the Court adopted the East-West configuration that exists today. *Id.* at 405–06. In so doing, this Court acknowledged that this configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), but nevertheless concluded that it was "visually less 'unusual' and 'bizarre' than the meandering North-South version," *id.*, and that it would not "diminish the ability of black voters to elect a candidate of their choice," *id.* at 405. This Court indicated that the non-compact shape of the East-West district was nevertheless necessary because of "geography" and "other constitutional

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legislative action, subject to the power of the legislature to override the executive veto by the vote of a specified number of the legislature.").

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 406 (citation omitted).

This Court's prior guidance, however, pre-dates relevant decisions from the U.S. Supreme Court. In 2017, the U.S. Supreme Court made clear that where "racial considerations predominate[] over others, the design of the district must withstand strict scrutiny." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). To satisfy this test, and thus pass muster under the Fourteenth Amendment to the U.S. Constitution, a state must "prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* (citations omitted). While the U.S. Supreme Court "has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act," a state must show "that it had 'a strong basis in evidence'" to conclude that the Act required race-based sorting of voters. *Id.* (citation omitted). In *Cooper*, North Carolina did not meet its burden when arguing that compliance with § 2 of the Voting Rights Act served as a compelling reason. *Id.* at 1469–72. Specifically, North Carolina could not satisfy § 2's threshold conditions: (1) that the "minority group" was "sufficiently large and geographically compact to constitute a majority" in a reasonably compact legislative district, (2) that the minority group was "politically cohesive," and (3) that the district's majority group voted "sufficiently as a bloc" to "defeat the minority's preferred candidate." *Id.* at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

If this Court advises that the non-diminishment standard does not specifically require that an East-West district be drawn to connect minority voters in Jacksonville with minority voters in Leon and Gadsden Counties, I nevertheless request guidance on what the non-diminishment standard does require. Specifically, I ask whether the Florida Constitution's non-diminishment standard requires that congressional districts be drawn to connect minority populations from distant and distinct geographic areas if doing so would provide the assembled minority group sufficient voting strength (although not a majority of the proposed district) to elect a candidate of its choice. Or, conversely, does the non-diminishment standard merely require that a minority population in a reasonably cohesive geographic area, where the population is not a majority but is nevertheless large enough to elect candidates of its choice, continue to be able to elect such candidates?

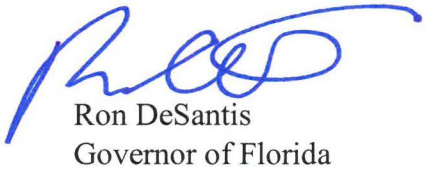
Relatedly, to make sense of the non-diminishment standard, I ask for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished. This Court has said that the "existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured.'" *Apportionment I*, 83 So. 3d at 624 (citation omitted). But is that so even if the district in the existing plan was designed solely to cobble together enough minority voters from distant and distinct geographic areas to elect candidates of their choice despite not constituting a majority? Or must the benchmark be confined to the minority population in a reasonably cohesive geographic area?

Florida's non-diminishment standard—like the Voting Rights Act's non-diminishment standard—is a potent, race-based solution to a race-based problem. I ask for your opinion to help me be sufficiently conscious of race to comply with the Florida Constitution's anti-diminishment provision but avoid being so conscious of race that my actions could violate the U.S. and Florida Constitutions.

Because the U.S. Supreme Court's decisions inform, but do not definitively resolve, issues of state law, I ask for you to exercise your "independent constitutional obligation" to interpret Florida law, *id.* at 621, and to guide me in exercising my executive powers as Governor. *See* Art. III, § 8, Fla. Const.; Art. IV, § 1(a), Fla. Const. I respectfully request your assistance as expeditiously as possible given that March 11, 2022, is the last day of the legislative session and candidates for the U.S. House of Representatives will need to qualify under a new map in June.

Thank you for your consideration.

Respectfully submitted,



Ron DeSantis
Governor of Florida