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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,

Plaintiffs,

v.

CORD BYRD, in his official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' OPPOSITION TO THIRD-PARTIES' MOTION FOR PROTECTIVE ORDER

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INTRODUCTION

As the Florida Supreme Court held in the last redistricting cycle, "there is no unbending right for [map makers] to hide behind a broad assertion of [] 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." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) ("*Apportionment IV*"). The Governor and his staffs' broad assertions of privilege here invite this Court to violate that instruction.

Neither the Governor nor his Deputy Chief of Staff, J. Alex Kelly (the "Movants") deny that the Governor's Office[1] was deeply involved in fashioning Florida's current congressional redistricting plan (the "Enacted Plan"). Indeed, the Governor's Office drew most of the districts that were signed into law, after the Legislature announced in April 2022 that it would not draft a congressional plan and would instead wait for the Governor to submit one. As a result, Plaintiffs sought documents and communications from the Governor's Office related only to the development of redistricting plans at issue in this litigation. The Governor's Office responded by objecting to and refusing to produce *any* nonpublic documents, citing a laundry list of privileges in response to each of Plaintiffs' requests. The Governor's Office even objected to the production of its communications related to redistricting with *non-government*, *partisan* organizations like the Republican National Committee, claiming them to be universally privileged.

Movants do not have a blanket right to shield all documents and communications about redistricting from Plaintiffs. Far from it. In arguing otherwise, they attempt to invoke a privilege

[1] Plaintiffs served identical subpoenas for documents upon Governor DeSantis personally and upon the Executive Office of the Governor, which are referred to collectively here as the "Governor's Office."

that does not apply to them (legislative privilege) as well as one that has never been recognized in Florida state court (executive privilege). Neither privilege applies. But even if they did, neither would impose the type of absolute bar to discovery in this case that Movants claim. As the Florida Supreme Court held in the last redistricting cycle, the testimonial legislative privilege "is not absolute" and must yield where "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." *Apportionment IV*, 132 So. 3d at 138. The same logic necessarily applies to Movants' assertion of an executive privilege. In a case such as this, where Movants *drew the redistricting maps that are at issue in this case*, neither privilege can justify Movants' refusal to respond to Plaintiffs' narrow discovery requests seeking information that goes to the very heart of this case.

The Florida Supreme Court's ruling in *Apportionment IV* is of course binding on this Court. It is not the prerogative of this Court, as Movants argue, to overrule the state's highest court based on Movants' assertion that *Apportionment IV* was wrongly decided. It should go without saying that the Court's role is to uphold the Florida Constitution and follow Florida Supreme Court precedent. Under such precedent, Plaintiffs are entitled to the information they seek.

BACKGROUND

I. In the last redistricting cycle, the Florida Supreme Court held that plaintiffs were entitled to extensive discovery from map makers to prove their claims under the Fair Districts Amendments.

In *Apportionment IV*, the Florida Supreme Court heard and decided many of same the arguments Movants raise here. Because much of the Florida Supreme Court's reasoning in *Apportionment IV* depends on the requirements of the Fair Districts Amendments themselves, Plaintiffs begin with the Amendments at the heart of this case.

A. The Fair Districts Amendments put the redistricting "decision-making" process and map makers' intent squarely at issue.

In 2010, the people of Florida voted by an overwhelming margin of 62.9% to 37.1% to enact the Fair Districts Amendments to the Florida Constitution, which established stringent new standards to constrain Florida's map drawers in establishing the state's congressional districts. The Fair Districts Amendments' standards are enumerated within two "tiers" in Article III, Section 20 of the Florida Constitution. The "Tier I" standards provide that (1) no congressional plan "shall be drawn with the intent to favor or disfavor a political party or an incumbent;" and 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." Fla. Const. art. III, § 20(a). As the Florida Supreme Court has explained, "[t]he acceptability of partisan political gerrymandering in this state dramatically changed" after the people of Florida amended the Constitution with the Fair Districts Amendments. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 374 (Fla. 2015) ("*Apportionment VII*"). Under the Fair Districts Amendments, *any* partisan intent in the map drawing process is unlawful; "there is no acceptable level of improper intent" when it comes to redistricting. *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 617 (Fla. 2012) ("*Apportionment I*").

In the redistricting context, unlawful intent can be discerned from both direct and circumstantial evidence. *Apportionment VII*, 172 So. 3d at 388–89. As the Florida Supreme Court explained, "the actions and statements of . . . those directly involved in the map drawing process would be relevant on the issue of intent." *Id.* at 434. Circumstantial evidence of intent may also be shown by the "specific sequence of events" surrounding the passage of the redistricting plan. *Id.* at 389 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)).

In determining intent in the redistricting sphere, Florida courts have also "considered the role of the alternative plans," in determining what other plans could have been or were drawn. *Apportionment I*, 83 So. 3d at 641.

As the Florida Supreme Court summarized, intent claims under the Fair Districts Amendments cannot be fairly equated with cases "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." *Apportionment IV*, 132 So. 3d at 150 (cleaned up). "Instead, the decisionmaking process itself *is* the case." *Id.* (cleaned up).

B. *Apportionment IV* sets the standard for evaluating claims of legislative privilege in a case under the Fair Districts Amendments.

During the last redistricting cycle, when the Legislature drew the maps at issue, members of the Legislature filed a motion for a protective order to prevent the discovery of "legislative draft maps and supporting documents," as well as the depositions of legislators and legislative staff about the redistricting process. *Apportionment IV*, 132 So. 3d at 141. After the trial court ordered the Legislature to respond to plaintiffs' discovery requests, this specific issue found its way to the Florida Supreme Court, where the Court held that while a legislative privilege does exist in Florida, it is not an absolute privilege. *Id.* at 146. Specifically, the Florida Supreme Court articulated a "two step-process" for courts to consider "[w]hen the legislative privilege is asserted." *Id.* at 147.

"The first step is to determine whether the information sought falls within the scope of the privilege." *Id.* at 147. The Court emphasized that not all information or communications held by legislators would necessarily fall within the scope of legislative privilege, depending on the facts and circumstances of the case. *Id.* If a court determines the information sought does fall within the scope of legislative privilege, the court should proceed to the second step: It should "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." *Id.* at 147.

In *Apportionment IV*, the Florida Supreme Court expressly held that ensuring compliance with the Fair Districts Amendments was a compelling, competing interest that outweighed legislators' desire to be shielded from the discovery process. *Id.* at 148-49; *see also id.* at 138 (holding that "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"). As the Court explained, "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." *Id.* at 148. To that end, the Florida Supreme Court permitted all of the plaintiffs' discovery against the Legislature to proceed except for discovery into the subjective "thoughts or impressions of individual legislators or legislative staff." *Id.* at 151. After *Apportionment IV*, plaintiffs were permitted to and did obtain extensive discovery from the Legislature, including draft apportionment plans and communications, and depositions of map makers and their staff about the redistricting process. The information revealed during the discovery process was key to the Florida Supreme Court's eventual finding that the map makers violated the Fair Districts Amendments in Florida's last redistricting cycle. *See generally Apportionment VII,* 172 So. 3d at 363.

II. This redistricting cycle, the Governor's Office was intricately involved in the creation of Florida's new congressional plan.

From the beginning of this redistricting process, the Governor's Office played a central role in the creation and passage of Florida's newly enacted congressional plan. Throughout the

past year, however, the Governor's Office has shielded key information regarding its process, role, and intent in drawing the Enacted Plan.

In January 2022, after several months of holding interim redistricting committee hearings and workshopping proposed redistricting plans, the Legislature began its regular session and took up redistricting in earnest. In mid-January, the Governor's General Counsel, Ryan Newman, submitted the Governor's first public proposed redistricting plan—P000C0079—to the Legislature via the Legislature's redistricting website. While P000C0079 significantly deviated from the Legislature's then-existing redistricting proposals, it bears a striking resemblance to the final Enacted Plan. *See* Ex. 1. Plan P000C0079, much like the Enacted Plan, obliterated the Benchmark CD-5, cracking its Black population across several new congressional districts, and, also like the Enacted Plan, carefully re-arranged both Central Florida and Tampa Bay to ensure each region would lose a Democratic seat. *See id.* The day it was released, Dave Wasserman, the U.S. House editor of the nonpartisan Cook Political Report, called Plan P000C0079 "the most brutal gerrymander proposed by a Florida R yet."[2]

While the Legislature had previously emphasized in both its hearings and in memoranda that anyone submitting a redistricting plan to the Legislature should specifically "list every person, group, or organization they collaborated with on their map," to ensure transparency in the process, *see* Ex. 5, the Governor's Office failed to do so when submitting P000C0079 to the Legislature in January, *see* Ex. 2. As the Governor's Deputy Chief of Staff, Mr. Kelly, eventually admitted to the Legislature in the April special session, by January 2022, the Governor's Office had already hired

[2] *See* Steve Contoro, *DeSantis pushes Florida redistricting map that heavily favors Republicans*, CNN (Jan. 18, 2022), https://www.cnn.com/2022/01/18/politics/florida-redistricting-desantis/index.html.

political consultants to assist in drawing congressional redistricting plans.[3] At least one of those consultants, Adam Foltz, is a well-known Republican redistricting consultant who previously served as one of the "primary drafters" of Wisconsin's 2010-cycle legislative redistricting plan, which a federal three-judge panel later found was intended to "systematically dilute[] [the] voting strength of Democratic voters statewide." *Whitford v. Gill*, 218 F. Supp. 3d 837, 858 (W.D. Wis. 2016), *vacated on other grounds*, 138 S. Ct. 1916 (2018).

Shortly after the Governor's Office submitted this first plan to the Legislature, senior Florida House and Senate members observed that the Governor's planned elimination of Benchmark CD-5 would violate the Fair Districts Amendments. A few days later, the Governor asked the Florida Supreme Court to render an advisory opinion on whether the Fair District Amendments required map drawers to retain a Black opportunity seat in North Florida, seeking permission to eliminate the district. *See* Ex. 7. On February 10, the Florida Supreme Court declined to issue an advisory opinion. *See Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106 (Fla. 2022).

A week later, the Governor's General Counsel, Ryan Newman, submitted the Governor's second public proposed redistricting plan—P000C0094—to the Legislature via the Legislature's redistricting website. The Governor's counsel again failed to identify which persons had been involved in drawing the plan, which retained the core problematic features of its predecessor. *See* Ex. 3. The Governor's Office also sent an ambassador, Robert Popper of Judicial Watch, to attempt to convince the Legislature to abandon the Black-performing Benchmark CD-5.[4] The House and

[3] *See* Mary Ellen Klas, *Florida legislators make no changes to DeSantis redistricting map*, Tampa Bay Times (Apr. 22, 2022).
[4] *See* Mary Ellen Klas, *Florida GOP in conflict: DeSantis' redistricting expert doesn't convince House panel*, Miami Herald (Feb. 18, 2022).

Senate responded by continuing to pass versions of their own congressional redistricting plans that retained Benchmark CD-5—plans that Governor DeSantis repeatedly threatened to veto.

In March 2022, the Legislature attempted to appease Governor DeSantis in passing Plan 8019 (the "Legislature's Plan"), which made CD-5 more compact and would have preserved at least *some* opportunity for Black voters to elect their candidate of choice in North Florida. The Governor vetoed the Legislature's Plan three weeks later. The Governor's veto memorandum identified only CD-5, and no other district, as the reason for the veto. *See* Mot. Ex. 6.

In advance of the special session, House Speaker Sprowls and Senate President Simpson announced that the Legislature would not draw new maps and that the Legislature would instead consider a congressional plan from the Governor's Office. *See* Ex. 6. The intent of the special session, they explained, "is to provide the Governor's Office opportunities to present [a plan] before House and Senate redistricting committees." *Id.* Two days later Mr. Kelly uploaded Plan P000C0109—the plan which would soon be enacted into law—to the Florida Redistricting Website. Mr. Kelly, like the Governor's General Counsel, again refused to identify any persons who had assisted or been consulted in drawing the plan. *See* Ex. 4. Mr. Kelly also released a PowerPoint, which offered only barebones information about the plan, such as number of county splits, compactness scores, and images of the plan. *See* Mot. Ex. 7.

Though the Governor had identified only CD-5 in North Florida as his reason for vetoing the Legislature's Plan, the Governor's new plan modified 18 districts from the Legislature's Plan statewide. The Governor's final plan closely resembled the plans the Governor had proposed in January and February in its elimination of a Black-performing district in North Florida, and its careful arrangement of Central Florida and Tampa Bay to eliminate Democratic seats in both regions.

During the special session, Mr. Kelly appeared before the House and Senate redistricting committees to present the Governor's plan.[5] Mr. Kelly's presentation to both committees raised more questions than it answered. For one, Mr. Kelly stated that the Governor's Office had not done a functional analysis on any of the districts, despite the Florida Supreme Court's clear requirement from the last redistricting cycle that map makers should do so to ensure they are complying with the Fair Districts Amendments. Second, Mr. Kelly repeatedly stated that he had not considered race in drawing any of the districts, only to repeatedly backtrack or caveat that statement in response to targeted questions about specific districts. Third, Mr. Kelly acknowledged that political consultants had previously assisted the Governor's Office in drawing Florida's new redistricting plans, without offering any further explanation or detail about their role or efforts. And despite repeated requests from legislators that Mr. Kelly testify to the committees under oath, Mr. Kelly did not do so, and thus none of his statements about the plan are sworn testimony.

Many legislators viewed Mr. Kelly's statements with incredulity. As one legislator remarked during Mr. Kelly's presentation, it was hard to believe "that his cleanup of the Legislature's map randomly resulted in a partisan makeup of 20 Republican seats and 8 Democratic seats . . . it's an Easter miracle." National political commentors agreed. As the website FiveThirtyEight described, the plan was "a dream map for partisan Republicans, single-handedly adding four new Republicans to the U.S. House of Representatives [which is] about as big of a

[5] A link to the video of Mr. Kelly's presentation to the House and Senate, cited here and throughout this response, can be found at Attachment 7 to Movants' motion. Plaintiffs have ordered an official transcript of Mr. Kelly's presentation; they will provide that transcript to the Court as soon as it is available.

Republican bias that Florida's congressional map could have — and darn close to the most egregiously partisan map in the country."[6]

The Legislature ultimately passed the plan on a party-line vote. Several months after the plan became law, Governor DeSantis appeared at the Florida GOP's statewide summit, which he closed off to most national media. Audio captured from the event nevertheless showed that Governor DeSantis used the opportunity to brag about his redistricting plan, which he predicted would elect 20 Republicans out of 28 seats.

III. Plaintiffs' document requests seek information concerning the Governor's Office's process, role, and intent in creating the Enacted Plan.

On July 26, consistent with Florida Rules of Civil Procedure 1.351, Plaintiffs served Defendants with their notice of intent to serve subpoenas duces tecum upon Governor Ron DeSantis in his personal capacity and on the Executive Office of the Governor. The subpoenas sought targeted information related only to redistricting, such as:

- Information relating to Plan P000C0079, P000C0094, and P000C0109
- Data used or considered in formulating the proposed plans
- Communications regarding the Fair Districts Amendments
- Communications with the RNC or other Republican organizations concerning congressional redistricting

See Mot. Ex. 1. None of the Defendants in this case (the Secretary, the House, or the Senate) objected to Plaintiffs' notice of intent to serve the subpoena under Rule 1.351. Before Plaintiffs could officially serve the subpoena, Governor DeSantis and the Executive Office of the Governor (nonparties) proceeded to object to Plaintiffs' notice of intent to serve the subpoena. Governor DeSantis and the Executive Office of the Governor objected to every category of documents Plaintiffs sought on the basis of privilege, invoking attorney-client privilege, attorney work

[6] *See* Nathaniel Rakich, *The Extreme Bias of Florida's New Congressional Map*, FiveThirtyEight (Apr. 21, 2022).

product doctrine, legislative privilege, executive privilege, and executive-communication privilege. *See* Mot. Ex. 2. Their response demonstrated that they did not intend to produce a single document to Plaintiffs.[7]

Once Governor DeSantis and the Executive Office of the Governor objected to the document subpoena, Plaintiffs proceeded, in accordance with the rules, to issue a subpoena duces tecum with a deposition. *See, e.g.*, *Patrowicz v. Wolff*, 110 So. 3d 973, 974 (Fla. 2d DCA 2013) (citing Rule 1.351(c) and holding that if a *non-party* objects to a document subpoena rather than a party, the party must issue a deposition subpoena). This was necessary because Governor DeSantis and the Executive Office of the Governor are not named parties to this litigation. *See id.* Had one of the party Defendants objected to Plaintiffs' notice of intent to serve the subpoena for documents, rather than a nonparty, Plaintiffs could have come directly to this Court to issue a ruling on those objections. *See* Fla. R. Civ. P. 1.351(b), (d); *see also* Committee's Note to 2007 Amendment to Fla. R. Civ. P. 1.351 (explaining that only "[s]ubdivisions (b) and (d) were amended to permit a party seeking nonparty discovery to have *other parties'* objections resolved by the court" (emphasis added)). Plaintiffs' counsel explained their understanding of the rules in a telephone conference with the Governor's counsel on August 17, at which time Plaintiffs' counsel explained that their primary interest at this time is in the requested documents, not a deposition.

After conferring with the Governor's counsel on a briefing schedule, Plaintiffs reissued the deposition subpoena for an agreed upon later date, allowing the recipients time to brief their

[7] Because Rule 1.351 does not contemplate that a nonparty will object to a notice of intent to serve a subpoena, after conferring with Governor's counsel, Plaintiffs officially issued their subpoena to Governor DeSantis and the Executive Office of the Governor to comply with the rules of civil procedure; Governor DeSantis and the Executive Office of the Governor promptly reissued the same objections they had raised to Plaintiffs' notice.

objections.[8] The Governor and Mr. Kelly filed the instant motion for a protective order on September 6, invoking both legislative and executive privilege.

LEGAL STANDARD

"[T]he party asserting privilege has the burden to prove such a privilege should apply." *Avatar Prop. & Cas. Ins. Co. v. Simmons*, 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020). "Where a claim of privilege is asserted, the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the [] privilege." *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068 (Fla. 2011).

ARGUMENT

The Court should reject Movants' claims of legislative and executive privilege. The Governor, as a member of Florida's executive branch, may not invoke legislative privilege. But even if Movants could assert legislative privilege, much of the information sought by Plaintiffs falls outside the scope of legislative privilege entirely, and nearly all the remainder of Plaintiffs' requests must be produced due to the compelling interest in vindicating the Fair Districts Amendments, which the Florida Supreme Court has already held is a compelling interest which outweighs the government's interest in privacy over its communications. Executive privilege also does not shield Movants' documents. Such a privilege has never been recognized under Florida law. Even if this Court were to take the dramatic step of recognizing a new privilege, it should find that only certain information—those related to the Governor's constitutionally mandated duties—falls within the scope of executive privilege. Most importantly, it should hold, consistent with *Apportionment IV*, that executive privilege is qualified in a manner similar to the legislative

[8] Out of an abundance of caution, at that time the Plaintiffs issued a subpoena to Mr. Kelly in addition to Governor DeSantis and the Executive Office of the Governor.

privilege, such that the compelling interest of upholding the Fair Districts Amendments outweighs the public interest that otherwise might support an executive privilege.

I. Legislative privilege does not shield Movants' documents and communications concerning congressional redistricting.

No Florida court has ever suggested Florida's Governor may invoke a legislative privilege, for good reason. As the Governor himself has argued, his role in approving and vetoing legislation is an executive power, not a legislative one. But even if the Movants could invoke legislative privilege here, this Court would be bound by *Apportionment IV*'s holding that the privilege is qualified and must yield to the compelling interest of ensuring compliance with the Fair Districts Amendments.

A. Movants cannot properly assert legislative privilege.

Florida's legislative privilege cannot be invoked by the executive branch. Florida courts have applied Florida's qualified legislative privilege only to legislators and legislative staff. *See Apportionment IV*, 132 So. 3d at 145 (holding "that state legislators and legislative staff members" possess a qualified legislative privilege); *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 525 (Fla. 1st DCA 2012) (holding a qualified legislative privilege "may be asserted by legislative staff members as well as the legislators themselves"). This makes sense given the purpose of legislative privilege, which, as Movants' motion acknowledges, helps ensure the separation of powers between the branches. *See* Mot. at 3-4.

Because no Florida court has held that the Governor may invoke the qualified legislative privilege, the Governor invokes his general power to "approve or veto legislation" as a basis for invoking the legislative privilege. *See* Mot. at 4. But this is not a legislative power; it is an executive power. The Governor and the Legislature have said so themselves. In fact, earlier this year, in a brief to the Florida Supreme Court, the Governor *insisted* that his role in approving or

vetoing congressional redistricting plans was *not* a legislative power, and that any precedent from the 19th century suggesting otherwise ignored Florida's separation of powers. *See* Ex. 7 at 3. Specifically, the Governor wrote:

> 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.

Id. (emphasis added) (citing *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 non[-]appropriations and appropriations bills."). In the same litigation, the Legislature agreed the Governor's role in approving or vetoing congressional redistricting legislation was purely an executive power, not a legislative one. As the House and Senate wrote, "[t]he power to approve or veto legislation is an executive power of the Governor notwithstanding its placement in Article III." Ex. 8 at 6.

The Governor argues that he is "a component part of the lawmaking power," Mot. at 5, but the privilege the Governor has attempted to invoke is not a generalized lawmaking privilege; it is a *legislative* privilege. For the reasons the Governor and the Legislature have already aptly explained to the Florida Supreme Court, his role in the lawmaking process at most utilizes his executive powers, not legislative ones.[9] Furthermore, as explained below, *see infra* at 23-24, many

[9] This is not a novel proposition; other state courts have found that the Governor's role in the lawmaking process does not confer the Governor with legislative powers. *See, e.g., In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (holding the Texas Governor's "powers to veto legislation and

of the Governor's actions with regard to redistricting during the 2020 cycle did not reflect an exercise of executive power at all, but rather were unrelated to his constitutionally mandated duties.

Finally, the Governor's invocation of *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015), which suggests that the Governor can invoke legislative privilege in *federal court* on the basis of *federal common law*, is inapt. Mot. at 4-5. *Hubbard*, a case arising out of the Northern District of Alabama, expressly invoked *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951), and federal common law to find that Alabama's Governor could invoke a qualified legislative privilege in a First Amendment retaliation case. But as the Florida Supreme Court made clear in *Apportionment IV*, federal courts interpreting the scope of federal legislative privilege through federal common law cannot purport to say what evidentiary privileges apply under state law in state court. *See Apportionment IV*, 132 So. 3d at 152 (explaining that, while "federal courts have long recognized the existence of a federal legislative privilege based on the [] United States Constitution and through federal common law," "neither [] applies to an action in state court based on a specific prohibition in the state constitution"); *see also id.* at 148 (distinguishing and disclaiming reliance on *Tenney*). Since *Apportionment IV*, courts in this district have similarly held that litigants cannot invoke "federal common law" or "citations to federal cases" in support of claims of legislative privilege. *State v. City of Weston*, 316 So. 3d 398 (Fla. 1st DCA), *reh'g denied* (May 17, 2021), *review granted sub nom. Fried v. State*, No. SC21-917, 2021 WL 4099525 (Fla. Sept. 9, 2021). "Those do not apply here." *Id.*

At most, then, *Hubbard* provides guidance on whether a Governor may invoke a privilege on the basis of federal common law, not whether a Governor can invoke legislative privilege as a

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call special legislative sessions" mean that the Governor can "express[] his view on legislative priorities," but that those powers remain executive, not legislative, in nature).

matter of the separation of powers in Florida state court. In any event, multiple federal courts have criticized *Hubbard*'s reasoning and declined to follow it. This includes a decision from a federal court in the Western District of Texas earlier this year, which described *Hubbard* as an "outlier" in the field in its treatment of legislative privilege, holding in that case that legislative privilege did *not* apply to the executive branch. *See La Union Del Pueblo Entero v. Abbott*, No. SA-21-CV-00844-XR, 2022 WL 1667687, at *4 (W.D. Tex. May 25, 2022) (citing cases explicitly rejecting *Hubbard* and explaining that "expanding the [legislative] privilege to protect state legislators' communications with the executive branch is inconsistent with the purposes of the privilege: to protect the legislative branch from 'intimidation' by the executive and judicial branches").

As the Governor himself has already conceded, his power to approve and veto congressional redistricting legislation in Florida is an executive power, not a legislative one. For that reason, this Court should find that the Governor and his office cannot assert legislative privilege to shield information about their participation in the congressional redistricting process.

B. Even if Movants can invoke legislative privilege, *Apportionment IV* entitles Plaintiffs to the discovery they seek.

Even if the Court were to become the first in Florida to find that the Governor can invoke the legislative privilege, it would still be bound by *Apportionment IV*'s two-step test in evaluating claims of legislative privilege. As discussed below, even if the qualified legislative privilege applied here, Plaintiffs would nevertheless be entitled to obtain the documents and communications they seek from the Governor.

1. Certain information Plaintiffs seek falls entirely outside the legislative privilege.

The first step in weighing a claim of legislative privilege is to determine whether the information sought even falls within the scope of the privilege. *Apportionment IV*, 132 So. 3d at 147. Many of the documents and communications that Plaintiffs seek do not fall within this scope and thus cannot be protected by the privilege at all. Many of Plaintiffs' requests, for example, explicitly seek communications with third parties outside the Governor's Office or Legislature, such as with partisan Republican organizations.[10] These communications *cannot* be protected by legislative privilege, even if they reveal subjective thoughts and impressions by the Governor's Office or Legislature. *See, e.g.*, Oct. 3, 2012 Order Granting in Part and Denying in Part Legis. Defs.' Mot. for a Protective Order at 6, No. 2012-CA-490, *League of Women Voters v. Detzner* (holding that information "shared with third persons who are not within the legislative branch" are not protected by the legislative privilege); *Apportionment IV*, 132 So. 3d at 154 (approving the circuit court's discovery order in its entirety).

This basic principle—that information shared with third parties cannot be protected by legislative privilege—is recognized in virtually every jurisdiction that recognizes legislative privilege. *See, e.g.*, *La Union Del Pueblo Entero*, 2022 WL 1667687, at *3 (holding "the legislative privilege was waived when the State Legislators communicated with parties outside the legislature, such as party leaders and lobbyists"); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (holding communications exchanged or shared between legislators and non-parties and outsiders, such as

[10] Requests 3, 9, and 10 explicitly seek communications with third parties. But any one of Plaintiffs' ten requests may encompass communications with outsiders. Plaintiffs have no way of knowing which communications exist in advance, and thus mention these Requests only as examples.

lobbyists and the Democratic Congressional Campaign Committee, were not protected by the legislative privilege); *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (explaining, to the extent "that any legislator, legislative aide, or staff member had conversations or communications with any outsider (*e.g.* party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications").

The same rule should apply to all "consultants" who assisted in the redistricting process. As one court aptly described, "[w]hile legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view . . . . [A] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *ACORN (N.Y. Ass'n of Cmty. Orgs. for Reform Now) v. Cnty. of Nassau*, No. CV05-2301(JFB)(WDW), 2007 WL 2815810, at *6 (E.D.N.Y. Sept. 25, 2007). Thus, "to the extent that Non–Parties relied on reports or recommendations generated by outside consultants to draft the [] Map, they waived their legislative privilege as to these documents." *Comm. for a Fair and Balanced Map*, 2011 WL 4837508, at *10.

Plaintiffs are already aware that one such consultant exists for the Governor—Adam Foltz—a political operative whom the Governor's Deputy Chief of Staff acknowledged was retained in January 2022 to assist the Governor in drawing maps. Communications between the Governor's Office and Foltz, as well as any other outside consultant, are plainly discoverable. They are also highly relevant to Plaintiffs' claims. In the last redistricting cycle, for example, the Florida Supreme Court found that discovery revealing the Legislature's discussions with redistricting consultants was highly probative of unlawful partisan intent. *Apportionment VII*, 172 So. 3d at 379-86.

In the end, even if the Court were to accept the Movants' request for the unprecedented expansion of legislative privilege by concluding that the Governor *can* invoke the legislative privilege and *can* assert privilege over communications with outside consultants and information shared with them, the Court would still have to apply Step 2 of the *Apportionment IV* test, as it must for any information deemed to fall within the scope of the privilege, and weigh the purpose of the privilege against Plaintiffs' and the public's competing interest in carrying out the purpose of the Fair Districts Amendments.

2. The compelling interest in upholding the Fair Districts Amendments should give way to discovery on nearly all of Plaintiffs' remaining requests.

In *Apportionment IV*, Plaintiffs generally sought the discovery of "draft maps and supporting documents," as well the depositions of legislators and legislative staff about the redistricting process. *Apportionment IV*, 132 So. 3d at 141. After weighing the purpose of the legislative privilege and the competing, compelling interest in upholding the Fair Districts Amendments, the Florida Supreme Court permitted all plaintiffs' discovery to proceed, except for discovery that would reveal the subjective "thoughts or impressions of individual legislators or legislative staff." *Id.* at 151; *see also id.* at 154 (holding "legislators and legislative staff members may assert a claim of legislative privilege . . . 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"). This analytical framework is binding and must be applied here. Indeed, the framework was the result of a *year* of litigation; it would waste judicial resources and severely prejudice Plaintiffs' ability to obtain relief in time for the 2024 elections if, in disregard of the binding effect of the Florida Supreme Court's decisions, this standard were relitigated. In the last redistricting cycle, to make the determination

as to whether documents contained legislators' subjective thoughts and impressions, the Florida Supreme Court and the circuit court instructed the defendants to submit any disputed documents over which they claimed privilege for in camera review. *Id.* at 142. This Court should order the same here.

C. Movants' arguments against *Apportionment IV* have no force in this Court.

This Court has no power to overrule decisions of the Florida Supreme Court. *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling."); *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (holding "[t]he trial court is bound by the decisions of [the Florida Supreme] Court just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court"). Nevertheless, Movants argue that *Apportionment IV* should be "overruled," relying extensively on *Apportionment IV*'s dissent. Mot. at 7. But this Court is not the place for Movants to pursue that agenda. *Apportionment IV* is still good law, in this circuit, and in every circuit in Florida. *See, e.g.*, *City of Weston*, 2021 WL 1326331 (1st DCA Apr. 9, 2021) (relying on *Apportionment IV* for the proposition that "state legislators' testimonial privilege in their exercise of official functions is limited. The privilege must yield where improper intent is a proper legal inquiry.").

Nor is it accurate or plausible, as Movants suggest, that *Apportionment IV*'s legislative privilege holding was dependent on the plaintiffs' pre-existing discovery of communications between the legislature and political operatives. *See* Mot. at 6. While it is true that the plaintiffs in the last redistricting cycle uncovered such communications, the circuit court's October 2012 order compelling discovery from the Legislature, which the Florida Supreme Court affirmed in its entirety, *Apportionment IV*, 132 So. 3d at 154, was decided before plaintiffs had obtained most of their discovery from third parties.

Nothing in *Apportionment IV* depends on discovery of third-party communications; rather, *Apportionment IV* sets forth a general two-step test that "courts must engage" "when the legislative privilege is asserted." *Id.* at 147. The first inquiry, "whether the information sought falls within the scope of the privilege," *id.*, is in no way dependent on what *other* information the Plaintiffs have otherwise discovered. The second inquiry, whether "the purposes underlying the privilege . . . are outweighed by a compelling, competing interest," *id.*, does of course turn on the general nature of the case—such as whether it vindicates private rights or public rights, or whether intent is central to the case—but it cannot plausibly turn on whether plaintiffs have pre-existing evidence of improper intent. Otherwise, the test would swallow itself.

Most importantly, however, this argument ignores that the Fair Districts Amendments can be violated even if Movants or the Legislature had no communications about redistricting with outside partisan entities. The Fair Districts Amendments prohibit partisan intent in map drawing; communications with partisan organizations about redistricting is just one way to show improper intent. Partisan intent might also be shown through purely internal communications, or by circumstances which give rise to partisan intent absent explicit communications.

Movants' final argument against disclosure ignores the reality of this redistricting cycle and the consequences of the Governor's Office's extensive participation in drawing the state's congressional districts. Authorizing discovery against Movants in this case does not necessarily mean that in all cases moving forward, that "*anyone* could simply file a complaint and, without more, proceed to depose Florida's Governor, as well as his staff . . . whenever new districts are established." Mot. at 6. In future redistricting cycles, if the Governor's Office does not draw the state's redistricting plan, there may be no reason for plaintiffs to seek documents or communications from the Governor's Office at all. Indeed, no one sought discovery from

Governor Rick Scott in the last redistricting cycle. Further, in future redistricting cycles, if the Governor's Office has no role in drawing redistricting plans, a court may find that the purposes of privilege outweigh the public interest in obtaining the Governor's Office's documents. But the Governor's uniquely intensive participation in this redistricting cycle—and his office's publicly-acknowledged role in directly drawing a majority of Florida's 28 congressional districts—means discovery into the Governor's role in the congressional district process is especially important in this case. *See supra* at 6-10. Indeed, if Plaintiffs cannot seek discovery from the Governor's Office in this case, it is not clear when any plaintiff in any case could.

II. Executive privilege does not shield Movants' documents and communications concerning congressional redistricting.

As Movants admit, Florida has never recognized an executive privilege. Nevertheless, they invoke an alleged executive privilege as to nearly all of Plaintiffs' discovery requests. *See* Mot. Ex. 2 (responses to RFPs 2-10). Even if this Court were to accept Movants' invitation to invent an entirely new privilege, it cannot hold that an executive privilege is absolute without running headlong into the Florida Supreme Court's express precedent holding that the legislative branch's privilege is not absolute. *See Apportionment IV*, 132 So. 3d at 146 ("[W]e emphasize that the legislative privilege is not absolute."). Any executive privilege, if it does exist, would be a qualified one, and it would give way in a case raising a sufficient compelling, competing interest, as the Florida Supreme Court has already held that ensuring compliance with the Fair Districts Amendments is.

A. Florida law does not recognize executive privilege, nor should it.

Florida has never recognized an executive privilege in its nearly 200 years of existence. Movants acknowledge as much, *see* Mot. at 8, and do not cite a single Florida authority for the proposition that an executive privilege exists or is merited.

This Court should not accept Movants' invitation to invent an entirely new privilege. "The only privileges recognized under Florida law are those established by the Florida Evidence Code, any other statute, the federal or Florida constitutions, and the Florida Supreme Court pursuant to its rule making authority." *Guerrier v. State*, 811 So. 2d 852, 854 (5th DCA 2022); *see also Apportionment IV*, 132 So. 3d at 144 ("Florida law recognizes only privileges set forth by statute or in the state or federal constitutions."). Movants assert in a conclusory fashion that executive privilege "is rooted in the Florida Constitution's text and structure," but provide no justification actually tied to the provisions of the Florida Constitution. Instead, Movants point primarily to *United States v. Nixon*, 418 U.S. 683 (1974), which established a *qualified* federal executive privilege based on the federal constitution and the unique role and responsibilities of the President. *See id.* at 705. While Movants also point to a handful of states that have adopted an executive privilege pursuant to their state constitution, *see* Mot. at 8, another state has expressly declined to recognize an executive privilege, even though its constitution contains an express separation of powers provision. *See Babets v. Sec'y of the Exec. Off. of Hum. Servs.*, 526 N.E.2d 1261, 1264 (Mass. 1988). This Court should not take the dramatic step of creating a new executive privilege where the Governor's Office has existed for nearly 200 years without one.

While there is no basis for recognizing an executive privilege under Florida law, should this Court create new law by reaching a different conclusion, it should hold that any executive privilege may only be invoked where it concerns the Governor's constitutionally-mandated duties. Those duties include approving and vetoing bills, *see* Fla. Const. art. I, § 8, or requesting an advisory opinion from the Florida Supreme Court, *see* Fla. Const. art. III, § 1(c), but do not include drawing redistricting plans for the Legislature or lobbying for a particular legislative outcome. This framework makes sense in light of the purported purpose of the privilege, which Movants say

is to protect from "interference in [the Governor's] exercise of his constitutional powers and duties." Mot. at 9.

B. Even if Florida courts were to recognize executive privilege, such a privilege should be a qualified one.

Should this Court recognize an executive privilege, it should hold that any such privilege is not absolute, but qualified. This would be consistent with the Florida Supreme Court's decision in *Apportionment IV*, where the Court explained that legislative privilege "is not absolute where . . . 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." 132 So. 3d at 138.

Such qualification would also be consistent with the federal executive privilege, which is not absolute, but rather subject to a balancing test. *See Nixon*, 418 U.S. at 706-13. In *Nixon*, the U.S. Supreme Court held that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence." *Id.* at 713; *see also id.* at 706 ("To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of a workable government and gravely impair the role of the courts." (cleaned up)). As courts and the federal executive branch have recognized since the days of Thomas Jefferson and Aaron Burr, even the President of the United States is not immune from a subpoena for documents when he has material of central relevance to litigation.[11]

[11] *See* Cong. Res. Serv., *Compelling Presidential Compliance with a Judicial Subpoena* at 1-2 (May 4, 2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10130.

Of the handful of states that have recognized an executive privilege, Plaintiffs are not aware of any jurisdiction that provides an absolute executive privilege as a matter of state constitutional law. None of the states that Movants cites as recognizing an executive privilege has held that such a privilege is absolute. *See, e.g.*, *League of Women Voters v. Commonwealth*, 177 A.3d 1010, 1017 (Pa. 2017) ("[E]xecutive privilege is not absolute and must be demonstrated on a case-by-case basis."); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 484-85 (Ohio 2006) (recognizing only a qualified executive privilege and holding that privilege could be overcome where the requester demonstrates a particularized need for the information that outweighs the general interest in confidentiality); *Hamilton v. Verdow*, 414 A.2d 914, 924-25 (Md. 1980) ("Apart from diplomatic, military or sensitive security matters, the privilege is not an absolute one."); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978) (explaining that the executive privilege is "qualified").

Holding that the Governor possesses an executive privilege would put Florida in a minority of states; holding that the Governor possesses an absolute executive privilege, as Movants suggest, would put Florida alone among all other states.

C. In the limited instances where executive privilege applies here, the privilege should yield to Plaintiffs' compelling interest in the requested information.

Even if Movants may invoke a newly-recognized executive privilege, much of the information that Plaintiffs seek would still be discoverable. *Apportionment IV* indicated that in evaluating privilege claims, the court's "first step is to determine whether the information sought falls within the scope of the privilege." 132 So.3d at 147. Here, discovery requests not related to the Governor's exercise of his constitutionally-mandated duties should fall entirely outside the scope of executive privilege. These include, for example, requests regarding the Governor's Office's own drawing of redistricting plans or goals for such plans, or communications with third parties regarding proposed congressional plans, including but not limited to communications with

partisan organizations. As it pertains to communications with third parties in particular, just as legislative privilege is waived when information is shared with third parties, *see supra* at at 17-18, so too should executive privilege.

For any requests that do fall within the scope of executive privilege, the Florida Supreme Court has previously recognized that the compelling interest of upholding and enforcing the Fair Districts Amendments outweighs the government's interest in the privacy of the documents, and for the same reason that it requires legislative privilege to yield in a case such as this, it would similarly require any alleged executive privilege to yield. Specifically, in *Apportionment IV*, the Florida Supreme Court assessed claims of a qualified legislative privilege by "determin[ing] whether the purposes underlying the privilege . . . are outweighed by a compelling, competing interest." 132 So. 3d at 147. Here, as in *Apportionment IV*, "[t]he compelling, competing interest in this case is ensuring compliance with article III, section 20(a)" of the Florida Constitution. *Id.* "In order to fully effectuate the public interest in ensuring that the [map drawer] 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." *Id.* at 148.

Plaintiffs' requests for information to which Movants object here are directly relevant to the question of whether the Enacted Plan was drawn with unconstitutional intent. As Plaintiffs have already explained—and Movants do not contest—the Governor's Office was responsible for drawing more than half of the districts in the Enacted Plan. *See supra* at 8-9. And it was intricately involved in the redistricting process well before the special session, from attempting to have portions of the Fair Districts Amendments invalidated preemptively, to sending ambassadors to

the Legislature to convince members to eliminate existing Black-performing districts. *See supra* at 6-10.

The Florida Supreme Court has held that "[i]n the redistricting context, unlawful intent can be discerned from," among other sources, "the actions and statements of. . .those directly involved in the map drawing process," the "specific sequence of events" surrounding passage of the plan, and the role of "alternative plans." *Apportionment VII*, 172 So. 3d at 388-89. Plaintiffs are seeking precisely this type of information from Movants, including documents and communications relating to the Governor's actions surrounding the Fair District Amendments, Mot. Ex. 1 (RFP 1-2), documents and communications "relating to the drawing, consideration, or adoption of congressional districts for the 2020 congressional redistricting cycle," *id.* (RFP 3), documents and communications concerning the Enacted Plan and alternate plans, *id.* (RFP 4-6), and documents and communications with third parties related to the Enacted Plan and alternate plans, *id.* (RFP 7-10). Under these circumstances, the compelling interest in upholding the Fair Districts Amendments outweighs the concerns that might motivate an as-of-yet-undefined executive privilege.

Movants' arguments to the contrary have already been rejected by the Florida Supreme Court. First, while Movants argue that inquiries regarding the Enacted Plan "would have a chilling effect on the [Governor's Office] and the processes undertaken when promoting and supporting legislation," Mot. at 9, the Florida Supreme Court considered and rejected the same argument when it was advanced by the Legislature during the last redistricting cycle. It explained that "[t]o 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." *Apportionment IV*, 132 So. 3d at 151 (emphasis added).

Second, Movants suggest that the public interest in vindicating the Fair Districts Amendments should—inexplicably—have less weight because this is a civil case, rather than a criminal case. *See* Mot. at 9. Again, the Florida Supreme Court addressed this precise point during the last redistricting cycle. It emphasized that "cases concerning voting rights, although brought by private parties, seek to vindicate public rights and are, in this respect, akin to criminal prosecutions." *Apportionment IV*, 132 So. 3d at 150 (cleaned up). There is no doubt that "the vindication of an explicit constitutional prohibition against partisan political gerrymandering" is "a public interest that is . . . compelling." *Id.* at 147.

Finally, Movants claim executive privilege should shield discovery because there allegedly has "been no indicia of improper purpose as there was in the last decade's redistricting process." Mot. at 9. But what Plaintiffs have been able to observe from public statements and actions suggests otherwise. For one, the Governor spent the better half of a year attempting to eliminate a longstanding Black district. *See supra* at 6-10. Inquiring into Movants' motivations for doing so is thus plainly central to Plaintiffs' case. Second, Mr. Kelly has already admitted that the Governor's Office hired a political consultant to draw congressional maps, and the Enacted Plan, will, as Governor DeSantis admitted, be likely to elect *twenty* Republicans to Congress. *See supra* at 7, 10. Perhaps that is a coincidence. But perhaps not. As the Florida Supreme Court explained in allowing discovery to proceed against the Legislature in the last redistricting cycle, "the failure to permit factual inquiry and the development of a factual record in circuit court proceedings would allow [map drawers] to circumvent the constitutional standards." *Apportionment IV*, 132 So. 3d at

149 (quotation omitted). This Court should not allow the primary map drawers to evade such scrutiny and circumvent the constitutional standard this Court is sworn to uphold.

III. Plaintiffs are not seeking a deposition of Governor DeSantis at this time.

As explained *supra* at 10-11, Plaintiffs issued a subpoena duces tecum for a deposition at this juncture because doing so was required to compel the production of documents from a nonparty once the party Defendants did not object to the issuance of the subpoena. Plaintiffs were not intending to seek a deposition of the Governor himself, at least not before they obtain documents and communications from the Governor's Office. Moreover, Plaintiffs agree with Defendants that, at this stage in the litigation, the Governor—whom Plaintiffs concede is a high-ranking officer—has met his burden of production under Rule 1.280(h) through his affidavit, which entitles him to an order quashing the deposition.

Rule 1.280(h), however, also states that the order quashing the deposition may later be vacated or modified if, after additional discovery, Plaintiffs can show they have "exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." Because discovery is in its earliest stages, Plaintiffs cannot yet make this showing. If Plaintiffs can make this showing at a later date, Plaintiffs will seek a modification of the order.[12]

CONCLUSION

Accordingly, this Court should grant in part and deny in part Movants' motion to quash and for protection from subpoena duces tecum for deposition. Specifically, the Court should hold that Movants cannot assert legislative privilege and that executive privilege is not recognized under

[12] Plaintiffs note that Movants invoked the apex doctrine only as to the Governor, not Mr. Kelly. Mot. at 10. The apex doctrine thus should not preclude Mr. Kelly's deposition.

Florida law. If the Court determines that Movants may assert either privilege, the Court should nevertheless order Movants to produce responsive documents, segregating any documents over which privilege is asserted for in camera review. Finally, the Court should grant Movants' motion to quash the deposition of the Governor himself because Plaintiffs do not intend to take his deposition at this time, recognizing that the Court's order may be modified at a later date pursuant to Rule 1.280(h).

Dated: October 3, 2022

Respectfully submitted,

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Counsel for Plaintiffs

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 3, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

/s/ Frederick S. Wermuth
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Florida Bar No. 0184111

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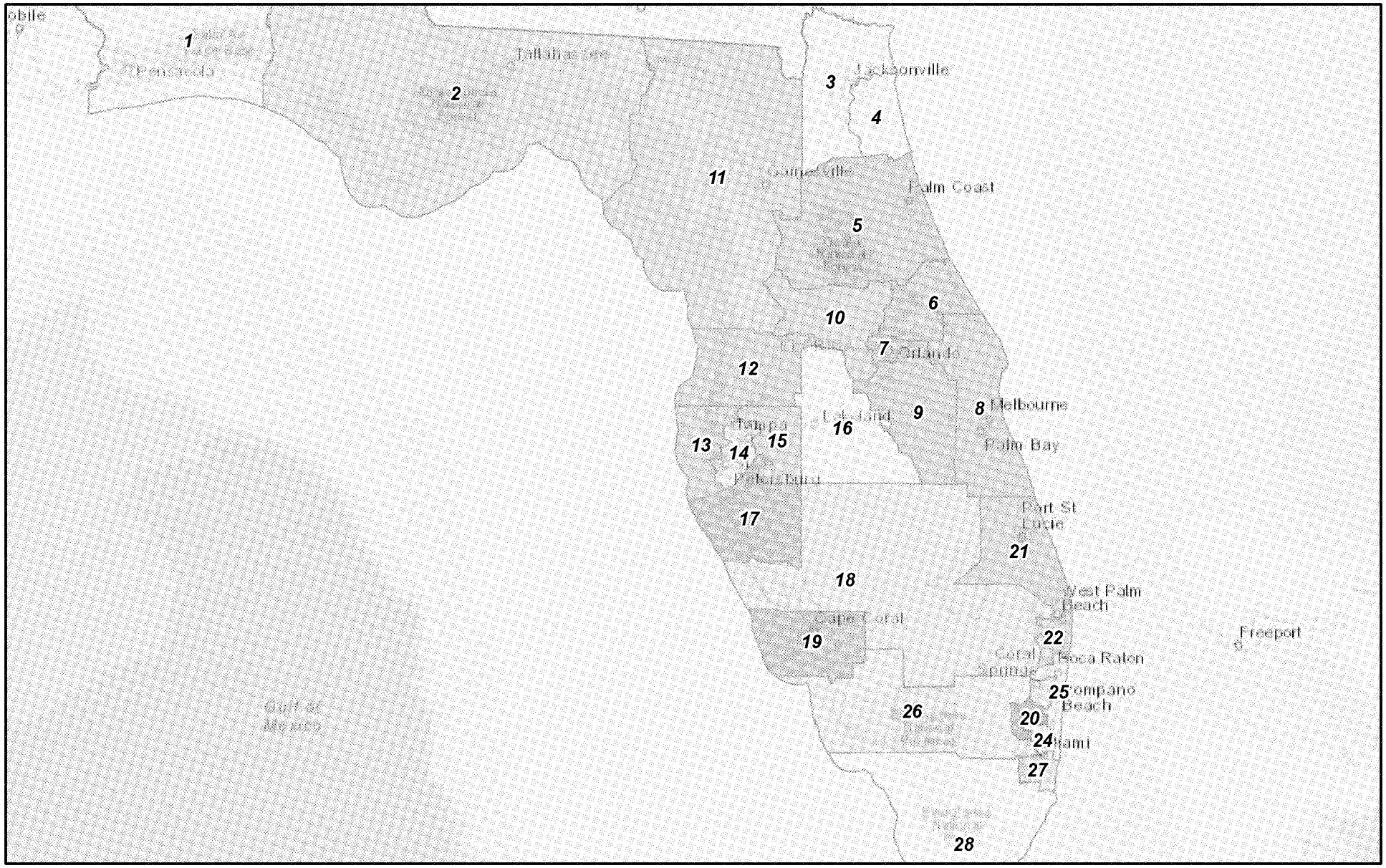
Counsel for the Florida House of Representatives

EXHIBIT INDEX

Exhibit 1

P000C079



September 21, 2022

1:4,622,324

0 35 70 140 mi

0 55 110 220 km

Esri, HERE, Garmin, FAO, NOAA, USGS, EPA, NPS

Exhibit 2

Please Provide Completed Form To:
help@floridaredistricting.gov

House Committee on Redistricting
402 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

Senate Committee on Reapportionment
2000 The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100

*Field is required.

Prefix _____ *First Name Ryan *Last Name Newman Suffix _____

Organization Name (if applicable) Executive Office of the Governor

*Your Address The Capitol *City Tallahassee *State FL *Zip 32399

*Your County Leon Your Email _____

*Your Phone Number (850)717-9368

---

*Have you received compensation or anything of value (travel, meals, lodging, etc.) from any groups or organizations that have an interest in redistricting as part of, or in exchange for, your comments, suggestions, or map?

☐ YES ☑ NO

If YES, please list what you received and who provided it to you below:

List the name of every person(s), group(s), or organization(s) you collaborated with on your comment, suggestion, or submitted map below:

By submitting this form, I acknowledge and agree to the following terms and conditions:

☑ YES, I understand that my comments, suggestions, or map submission may be displayed on www.FloridaRedistricting.gov or other public websites maintained by the Florida Legislature.

☑ YES, I understand that my communications with the Florida Legislature, including this form and any submitted materials, are subject to public records laws in Florida.

☑ YES, I understand that I may be contacted by a member of the legislature or their staff to answer questions about my comments, suggestions, or map submission.

☑ YES, I understand that similar to other pieces of legislation, input and ideas from members of the public must be proposed by Legislators in order to become part of bills or amendments.

The Florida Legislature acknowledges the importance of transparency throughout the entire redistricting process. By engaging in the redistricting process – through comments, suggestions, or map submissions – it is possible your detailed communications and submissions may be included, reviewed, and examined in all steps of the legislative process until, and even after, new district maps are enacted into law.

*Your Signature

01/16/2022
*Date

Please provide detailed comments regarding your suggestion. Florida's redistricting plans must be drawn and approved in alignment with Florida's constitutional standards and federal law.

*If you are submitting a map, please select the Plan Type and provide the unique Plan Number included in your Submission Receipt email: eb777f1c4c7145c99db98e546c7d972c

Plan Type: ☑ Congressional ☐ State House ☐ State Senate

*If you are submitting comments or suggestions about a plan already published at www.FloridaRedistricting.gov, please provide the name of the plan: N/A

Details:

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Organization Name (if applicable) Executive Office of the Governor

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*Your County Leon Your Email _____

*Your Phone Number (850)717-9368

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*Your Signature

02/14/2022
*Date

Please provide detailed comments regarding your suggestion. Florida's redistricting plans must be drawn and approved in alignment with Florida's constitutional standards and federal law.

*If you are submitting a map, please select the Plan Type and provide the unique Plan Number included in your Submission Receipt email: dc87480fd0124f4d992d31a9ae131751

Plan Type: ☑ Congressional ☐ State House ☐ State Senate

*If you are submitting comments or suggestions about a plan already published at www.FloridaRedistricting.gov, please provide the name of the plan: N/A

Details:

Exhibit 4

Please Provide Completed Form To:
help@floridaredistricting.gov

House Committee on Redistricting
402 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

Senate Committee on Reapportionment
2000 The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100

*Field is required.

Prefix_____ *First Name J. Alex *Last Name Kelly Suffix_____

Organization Name (if applicable) Executive Office of the Governor

*Your Address The Capitol *City Tallahassee *State FL *Zip 32399

*Your County Leon Your Email_____

*Your Phone Number (850) 717-9310

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*Have you received compensation or anything of value (travel, meals, lodging, etc.) from any groups or organizations that have an interest in redistricting as part of, or in exchange for, your comments, suggestions, or map?

☐ YES ☑ NO

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☑ YES, I understand that I may be contacted by a member of the legislature or their staff to answer questions about my comments, suggestions, or map submission.

☑ YES, I understand that similar to other pieces of legislation, input and ideas from members of the public must be proposed by Legislators in order to become part of bills or amendments.

The Florida Legislature acknowledges the importance of transparency throughout the entire redistricting process. By engaging in the redistricting process – through comments, suggestions, or map submissions – it is possible your detailed communications and submissions may be included, reviewed, and examined in all steps of the legislative process until, and even after, new district maps are enacted into law.

*Your Signature

04/13/2022
*Date

Please provide detailed comments regarding your suggestion. Florida's redistricting plans must be drawn and approved in alignment with Florida's constitutional standards and federal law.

*If you are submitting a map, please select the Plan Type and provide the unique Plan Number included in your Submission Receipt email: 5e7474585fc04e7a9670fc3f9b4fffce

Plan Type: ☑ Congressional ☐ State House ☐ State Senate

*If you are submitting comments or suggestions about a plan already published at www.FloridaRedistricting.gov, please provide the name of the plan: N/A

Details:

Exhibit 5

THE FLORIDA SENATE

COMMITTEE ON REAPPORTIONMENT

Location
2000 The Capitol

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5855

Senator Ray Wesley Rodrigues, *Chair*

Professional Staff: Jay Ferrin, *Staff Director*

Senate's Website: *www.flsenate.gov*

MEMORANDUM

To: All Senators
From: Ray Rodrigues
Subject: Misleading Committee Appearance Forms
Date: November 22, 2021

As you are all aware, Florida's Constitution includes strict guidelines for what information the Legislature can and cannot consider when drawing new state legislative and congressional districts. In order to ensure a redistricting process in keeping with constitutional standards and to guard against the partisan infiltration that occurred during the 2012 redistricting cycle, the Senate has implemented specific protocols for public testimony and map submission.

Individuals providing testimony are asked to indicate whether they are appearing without compensation or sponsorship, are a registered lobbyist, or have received something of value for their appearance. Additionally, those submitting maps are asked to list every person, group, or organization they collaborated with on their map, comment, or suggestion. And finally, those submitting maps must acknowledge that their communications and submissions may be included, reviewed, and examined in all steps of the legislative process until, and even after, new district maps are enacted into law.

It has come to my attention through reporting in the Miami Herald that Mr. Nicholas Warren, who has submitted maps and testified in both select subcommittees, is a staff attorney of the ACLU, an entity with an interest in redistricting, as evidenced by litigation filed in other states. Mr. Warren failed to disclose this information on the committee appearance form and also on the redistricting suggestion form he filed when submitting maps to the joint website.

As a reminder, staff are directed not to review or consider publicly submitted comments or suggestions unless and until a Senator asks them to do so in writing. I am bringing Mr. Warren's affiliation with the ACLU to your attention as you consider whether or not to incorporate his suggestions or maps in any future directives to staff. In the past, it is this kind of misrepresentation during public testimony that has directly led to the court invalidating legislatively produced maps.

Exhibit 6

THE FLORIDA SENATE

Location

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100

Senate's Website: *www.flsenate.gov*

MEMORANDUM

To: All Senators
From: Ray Rodrigues
Subject: Congressional Map Submission from Governor DeSantis
Date: April 13, 2022

As the President indicated earlier this week, the Office of the Governor has drafted a proposed congressional map for our consideration during next week's special session. This proposal comes following meaningful discussions with our Senate legal counsel. Tuesday afternoon, the Governor's staff briefed me on their submission. You can find the Governor's map here, and I have attached the legal memorandum that accompanied the submission.

The Governor's staff has agreed to provide the same briefing before the Senate Committee on Reapportionment on Tuesday, April 19, at 1:30 p.m. in 412 Knott.

After thoroughly reviewing the Governor's submission and a discussion with our legal counsel, I have determined that the Governor's map reflects standards the Senate can support. As such, I intend to introduce the map as a bill for consideration during the special session. I have asked Senate Counsel Dan Nordby to prepare a legal memorandum outlining his analysis of the Governor's submission, which we will provide for your review.

I would like to thank Governor DeSantis and his staff who have worked very hard to produce a congressional map that incorporates many of the features of the map that previously passed the Senate with bipartisan support. As we have stated from the beginning, the goal is to produce a congressional map for our state that gains majority votes on the House and Senate floors, is signed by the Governor and becomes law according to the consensus process outlined in our constitution.
Thank you for your attention to this important issue. I wish you a restful weekend as we celebrate Easter and Passover with family and friends, and I look forward to seeing you next week.

Exhibit 7

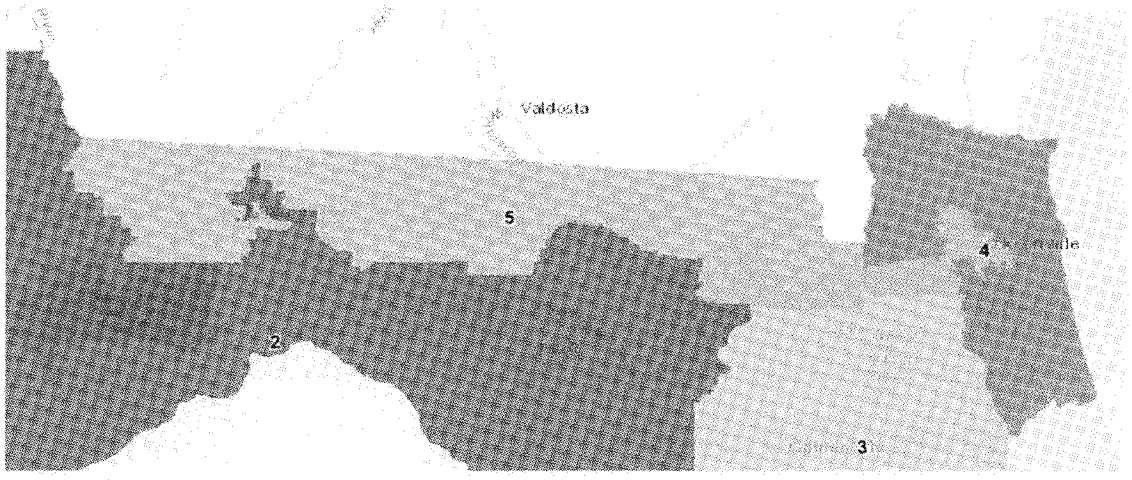
RON DESANTIS
GOVERNOR

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
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

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?

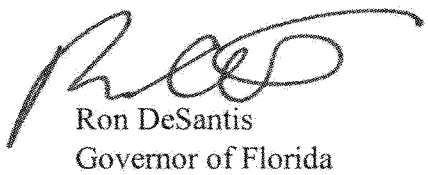
Relatedly, to make sense of the non-diminishment standard, I ask for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished. This Court has said that the "existing plan of a covered 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

Exhibit 8

Case No. SC22-139

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE GOVERNOR RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

FLORIDA LEGISLATURE'S JURISDICTIONAL BRIEF

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Counsel for the Florida House of Representatives

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STATEMENT OF THE CASE AND FACTS

Governor DeSantis has requested an advisory opinion from this Court regarding the interpretation of the non-diminishment standard in Article III, section 20(a), of the Florida Constitution. This original proceeding was initiated by correspondence from the Governor dated February 1, 2022. The following day, this Court issued an order soliciting briefs from interested persons addressing: 1) whether the Governor's request is within the purview of Article IV, section (1)(c), of the Florida Constitution; and 2) if so, whether the Court should exercise its discretion to provide an opinion in response to the request.

The Florida Senate and Florida House of Representatives (the "Legislature") file this brief in response to the Court's order.

ARGUMENT

This Court has jurisdiction to address the Governor's request. The Governor seeks an opinion as to the interpretation of Article III, section 20(a), of the Florida Constitution on questions affecting the Governor's executive powers and duties, including the power of "executive approval and veto" over bills presented by the Legislature and the executive duty to "take care that the laws be faithfully

executed." Art. III, § 8; Art. IV, § 1(a), Fla. Const. This request falls within the broad purview of Article IV, section 1(c), which authorizes the Governor to "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* the governor's executive powers and duties." (emphasis added).

If the Court agrees that it has jurisdiction, it should provide a written opinion in response to the Governor's request. The redistricting process—and this redistricting process in particular—presents unique circumstances making it especially appropriate for this Court to provide an advisory opinion as to the interpretation of relevant provisions of the Florida Constitution. Unlike most legislation, a bill establishing the congressional districts of the state in accordance with the most recent decennial census is required by the federal constitution. The time-sensitive nature of redistricting, which must be finalized in advance of the qualifying period for candidates seeking to run for office, also counsels in favor of this Court providing certainty with an opinion interpreting the Florida Constitution's non-diminishment standard in the context presented within the Governor's request.

Finally, the legal question presented by the Governor—whether the non-diminishment standard requires distant and distinct minority populations located in entirely different regions of the State to be combined in a congressional district—is narrow in scope. Judicial guidance on that narrow question at this stage of the redistricting process will provide needed resolution of a question of significant importance to the enactment and executive approval of a congressional redistricting plan for the State of Florida, and may obviate the need for judicial involvement at later stages of that process.

I. THIS COURT HAS JURISDICTION BECAUSE THE GOVERNOR'S REQUEST IS WITHIN THE SCOPE OF ARTICLE IV, SECTION 1(C) OF THE FLORIDA CONSTITUTION.

The Florida Constitution authorizes the Governor to "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 the governor's executive powers and duties." Art. IV, § 1(c), Fla. Const. The Governor's request here falls within the scope of this constitutional provision because it seeks the Court's opinion as to the interpretation of the non-diminishment standard in Article III,

section 20(a) on questions affecting the Governor's executive powers and duties—the executive power to approve or veto bills passed by the Legislature and the executive duty to "take care that the laws be faithfully executed." This Court therefore has jurisdiction to provide an opinion in response to the Governor's request.

A. The Governor's request seeks an advisory opinion as to the interpretation of a portion of the Florida Constitution.

The Governor's constitutional authority to request an advisory opinion extends to matters involving "the interpretation of any portion" of the Florida Constitution. Art. IV, § 1(c), Fla. Const. The request here satisfies that requirement, as it seeks this Court's opinion as to the interpretation of the non-diminishment standard contained in Article III, section 20(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. (emphasis added)

The constitutional term "the interpretation of any portion of this constitution" plainly includes the interpretation of Article III, section

20(a). The phrase "any portion of" is not naturally read as a limiting modifier. *Cf. Adv. Op. to Gov. re Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070, 1080 (Fla. 2020) (adopting a "natural reading" of the phrase "all terms of" and rejecting interpretation that would render constitutional language superfluous).

B. The Governor's request seeks this Court's interpretation of Article III, section 20(a), upon questions affecting his executive powers and duties.

To fall within the purview of Article IV, section 1(c), a governor's request for an advisory opinion must also involve the interpretation of the Florida Constitution "upon any question affecting the governor's executive powers and duties." This clause, too, includes the expansive modifier "any" rather than different language requiring a limiting construction.

The Governor's request identifies how this Court's interpretation of the non-diminishment standard in Article III, section 20(a), affects the exercise of his executive powers and duties. Specifically, the Governor's power of executive approval and veto and his "take care" duty would both be affected by this Court's interpretation of the non-diminishment standard.

Every bill passed by the legislature—including the congressional redistricting bill—must be presented to the Governor for approval or veto. Art. III, § 8(a), Fla. Const. The power to approve or veto legislation is an executive power of the Governor notwithstanding its placement in Article III. *See Chiles v. Children 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 . . . ."); *Adv. Op. to Governor*, 12 So. 2d 583, 584 (Fla. 1943) (concluding that the Governor's veto power "is executive rather than legislative" and characterizing the contrary conclusion in *In re Executive Communication*, 6 So. 925 (Fla. 1887), as "dicta"). This Court's interpretation of the non-diminishment standard in Article III, section 20(a) will affect the Governor's exercise of that executive power when a congressional redistricting bill is presented to him. The mandatory nature of congressional redistricting and the time constraints under which it occurs—both of which are discussed more fully below—only reinforce the nexus between a clear and correct understanding of the non-diminishment standard and the Governor's exercise of his executive powers and duties.

II. IF THE COURT AGREES THAT IT HAS JURISDICTION, IT SHOULD PROVIDE AN OPINION IN RESPONSE TO THE GOVERNOR'S REQUEST.

As discussed above, this Court has jurisdiction because the Governor has posed a question within the scope of Article IV, section 1(c) of the Florida Constitution. This Court should[1] answer that question and provide an interpretation of the non-diminishment standard contained in Article III, section 20(a), as it relates to the narrow circumstances presented in the Governor's request. Two

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[1] The second question presented in this Court's order dated February 2, 2022, is whether, if the Governor's request is within the purview of Article IV, section 1(c), "the Court should exercise its discretion" to provide an opinion in response to the request. The Legislature notes that some sources categorize the Court's advisory opinion jurisdiction as non-discretionary. *See* Anstead et al., *The Operation & Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 488 (2005) (stating that "jurisdiction is mandatory; the Court must hear the case and issue an opinion."). *See also* Fla. R. App. P. 9.500(b) (providing for initial determination as to whether the request is within the scope of Article IV, section (1)(c), followed by briefing/argument from interested persons and filing of the justices' opinions, with the governor "advised forthwith in writing."); *but see Voting Restoration Amendment*, 288 So. 3d at 1074 (stating that court had "agreed to exercise our discretion to provide an advisory opinion").

The Legislature provides this response to explain why, to the extent the Court's jurisdiction is discretionary, it should exercise that discretion by providing an interpretation of the non-diminishment standard under the circumstances presented in the Governor's request.

unique aspects of redistricting legislation make it particularly appropriate for this Court to provide the certainty that only it can offer regarding the interpretation of the Florida Constitution: 1) redistricting legislation is required by the federal constitution; and 2) redistricting legislation is time-sensitive. The narrow scope of the Governor's questions and the need for judicial guidance also weigh in favor of an opinion responding to the Governor's request.

First, the United States Constitution requires the legislature to pass a congressional redistricting bill. Art. I, § 2, U.S. Const. Unlike nearly every other bill passed by the legislature, the congressional redistricting process is not optional; it must occur every 10 years. This Court's advice is needed, and should be provided, to ensure the Governor can promptly act upon this constitutionally mandated legislation.

Second, congressional redistricting legislation is time-sensitive due to its occurrence in the year of an election. In 2022, congressional candidates in Florida must file qualifying documents with Florida's Secretary of State by noon on June 17, which is just over four months from the date of this filing. *See* § 99.061(1), Fla. Stat. After candidate qualifying, there are a number of other

deadlines that occur in quick succession until the primary and general elections. For example, supervisors of elections must send vote-by-mail ballots to military and overseas voters no fewer than 45 days before the primary and general elections, which will occur on August 23 and November 8, 2022. 52 U.S.C. § 20302(a)(8); § 101.62(4)(a), Fla. Stat. Because of these imminent deadlines and elections, any potential for delay and uncertainty for candidates and voters is harmful to the public interest.[2] *See generally Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). An advisory opinion from this Court will aid the Governor in expeditiously fulfilling his executive powers and duties in the redistricting process.

The narrow scope of the question presented by the Governor also weighs in favor of this Court's exercise of jurisdiction. Under the non-diminishment standard, districts may not be drawn to "diminish" the ability of racial minorities to elect representatives of their choice. Art. III, § 20(a), Fla. Const.; *accord In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla.

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[2] For that reason, the Florida Constitution provides for immediate and automatic review of state legislative redistricting plans under Article III, section 16.

2012) ("[T]he Legislature cannot eliminate majority-minority districts or weaken other historically performing districts where doing so would actually diminish a minority group's ability to elect its preferred candidates."); *id.* at 702 (Canady, C.J., concurring in part and dissenting in part) (noting that "diminish" means "to make less or cause to appear less" (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 634 (1993)).

The Governor's question concerns the limited circumstance of a district that combines distant and distinct minority populations that reside in different regions of the State—here, the African-American populations in Duval County to the East and Gadsden and Leon Counties to the West. The east-to-west district configuration connects these populations through a five-county corridor that runs approximately 140 miles and contains comparatively little of the district's minority population. An answer by this Court would therefore address an important but narrow question that can appropriately be resolved in a proceeding of this nature.

Finally, an answer to the Governor's question would provide needed judicial guidance. As noted in the Governor's letter, all maps proposed in the Legislature retain some form of the east-to-west

congressional district that extends from Gadsden County to Duval County. These maps combine distant and distinct minority populations in different regions of the State in order to avoid diminishment in the ability of minority voters in the existing, benchmark district to elect representatives of their choice. In contrast, the Governor's letter posits that, in light of more recent decisions such as *Cooper v. Harris*, 137 S. Ct. 1455 (2017), the non-diminishment standard may not be interpreted to extend so far as to require these distant and distinct minority populations to be combined in a district that joins different regions of the State. The Court's resolution of this question would facilitate the prompt approval of a congressional redistricting plan, which will provide voters and candidates with needed certainty, and might obviate judicial involvement in redistricting at later stages under even more pressing time constraints.

The Florida Senate and Florida House of Representatives, like the Governor, desire to pass a congressional plan consistent with the requirements of the Florida Constitution and other applicable laws. This Court's opinion on the interpretation of the non-diminishment provision, as applicable to the congressional district and the narrow

circumstances identified in the Governor's request, would inform the appropriate exercise of the Governor's executive powers and duties with respect to congressional redistricting.

CONCLUSION

This Court should determine that the Governor's request is within the scope of Article IV, section 1(c), and should provide an opinion in response to the Governor's request.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been filed via the E-Filing Portal and served via electronic service on February 7, 2022, to:

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CERTIFICATE OF COMPLIANCE

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 2,239.

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