IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al., Petitioners, v. CORD BYRD, in his official capacity as Florida Secretary of State, the FLORIDA SENATE, and the FLORIDA HOUSE OF REPRESENTATIVES, Respondents.	Case No.: SC23-1671 L.T. No.: 1D23-2252 2022-ca-000666

PETITIONERS' TIME-SENSITIVE JURISDICTIONAL BRIEF

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STATEMENT OF ISSUES

Issue I. Whether the First DCA erred in holding that the Florida Supreme Court's decisions in *Apportionment I* and *Apportionment II* are not binding on lower courts.

Issue II. Whether the First DCA erred in interpreting the non-diminishment provision in Article III, Section 20(a) of the Florida Constitution to require proof of elements of a vote dilution claim before the district is entitled to protection from diminishment.

Issue III. Whether the First DCA erred in reversing the trial court's order holding that Florida's enacted congressional plan violates the Florida Constitution and enjoining its use.

STATEMENT OF THE CASE AND FACTS

This action challenges the constitutionality of Florida's 2022 enacted congressional reapportionment plan (the "Enacted Map") under Article III, Section 20(a) of the Florida Constitution. Although two separate judges of the Leon County Circuit Court held that the Enacted Map violates the Florida Constitution's non-diminishment provision under binding Florida Supreme Court precedent, the First DCA reversed the trial court by rewriting the non-diminishment standard altogether, upending over a decade of this Court's

precedent and the settled expectations of lawmakers and voters alike regarding Florida's constitutional requirements for redistricting.

A. Florida's Fifth Congressional District and the 2022 Redistricting Cycle

Article III, Section 20(a) states, in relevant part: "[Congressional] 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."[1] This provision prohibits both minority vote dilution *and* minority vote diminishment.

This litigation concerns the Enacted Map's elimination of Florida's prior Fifth Congressional District. In the last redistricting cycle, this Court ordered the district to be drawn in an East-West configuration from Tallahassee to Jacksonville. *League of Women Voters of Fla. v. Detzner* ("*Apportionment VII*"), 172 So. 3d 363, 403 (Fla. 2015). Once drawn, this Court held that the district (now known as Benchmark CD-5) complied with the Florida Constitution, including the state's non-diminishment provision. *League of Women*

[1] Article III, Section 21(a) contains an identical requirement for the state's legislative districts.

Voters of Fla. v. Detzner ("*Apportionment VIII*"), 179 So. 3d 258, 272-73 (Fla. 2015). The map adopted by this Court including Benchmark CD-5 was used in every congressional election in Florida from 2016 to 2020. A57.[2]

In advance of the 2022 redistricting cycle, the Governor sought an advisory opinion on whether "the Florida Constitution's non-diminishment standard" required the State to include a district which, like Benchmark CD-5, extended from Jacksonville to Tallahassee and allowed Black voters to elect candidates of their choice. The Governor's request explicitly acknowledged that existing Florida Supreme Court precedent "suggest[s] that the answer is 'yes.'" A59 n.7. This Court declined to issue an advisory opinion upsetting that precedent. *See id.*

Under pressure from the Governor, the Legislature adopted a "primary plan" which redrew Benchmark CD-5 from an East-West district to a Duval County-only district, and a "secondary plan" which retained Benchmark CD-5 if the primary plan was found to violate the Florida Constitution. After the Governor vetoed those plans, the

[2] Petitioner's appendix will be referred to as A___ (page).

Florida Legislature passed, and the Governor signed, a single plan which completely dismantled Benchmark CD-5. Plaintiffs challenged the Enacted Map the day it was signed into law.

B. The Present Litigation, the Parties' Joint Stipulation, and the Trial Court's Decision

Although Plaintiffs originally sued under multiple provisions of the Florida Constitution, the Parties ultimately reached a stipulation to streamline the issues in dispute. The Joint Stipulation limited the case to Plaintiffs' diminishment claim in North Florida, stipulated "to the facts relevant to Plaintiffs' diminishment claim" under the Florida Constitution, and preserved certain legal questions for the trial court's review. It also memorialized the Parties' commitment to a full and expedited appellate review of their dispute in time for a remedy to be implemented for the 2024 elections.

At the trial court hearing in August 2023, the Florida House and Senate conceded that the Enacted Map resulted in diminishment in violation of the Florida Constitution. In a written order, Judge Marsh found based on the Parties' undisputed facts and this Court's binding precedent that the Enacted Map violates Article III, Section 20(a) of

the Florida Constitution, rejected all of the Respondents' remaining affirmative defenses, and enjoined the Enacted Map.

In September 2023, as required by the Stipulation, the Parties jointly sought pass-through jurisdiction to this Court. The First DCA, however, denied the joint motion, instead choosing to hear the appeal en banc.

C. The Decision Below

On December 1, 2023, the First DCA issued its decision requiring, for the first time, a showing that the minority community at issue is a "geographically discrete and compact minority community of historically natural existence" for the diminishment provision to apply. A2. The decision held that this Court's prior *Apportionment I* and *II* decisions were without precedential effect, *see* A18, and it similarly waved away this Court's decisions regarding Benchmark CD-5 from *Apportionment VII* and *VIII*, *see* A20. Two judges of the First DCA dissented from the decision, concluding, "[t]he majority opinion effectively deletes the diminishment protections in article III, section 20(a)." A72.

ARGUMENT

As the dissent correctly noted, "[t]he majority opinion provides the Supreme Court with various bases for jurisdiction." A56. Indeed, this Court has jurisdiction over this appeal because the decision below (1) "expressly and directly conflicts with a decision . . . of the supreme court on the same question of law," (2) "expressly construes a provision of the state or federal constitution," and (3) expressly affects a class of constitutional or state officers." Fla. Const., art. V, §3(b)(3).

I. The decision of the First DCA expressly and directly conflicts with decisions from this Court.

This Court has jurisdiction over this appeal because the First DCA's decision purporting to interpret the non-diminishment provision expressly and directly conflicts with this Court's decisions in *Apportionment I*, *II*, *VII*, and *VIII* from the last redistricting cycle, as well as this Court's decision upholding the state legislative districts just last year. *See* Fla. Const., art. V, §3(b)(3) (explaining this Court has jurisdiction to review decisions that conflict with its precedent).

Nearly a decade ago, in *Apportionment I*, having "been charged with defining and applying the criteria of article III, section 21" of the

Florida Constitution, this Court carefully and thoroughly set forth its interpretation of the State's new legal standards for redistricting and applied them to the legal challenges raised in the case. *In re S. J. Res. of Legis. Apportionment 1176 ("Apportionment I")*, 83 So. 3d 597, 614 (Fla. 2012). In *Apportionment I*, the Court explained that the non-diminishment provision bars the Legislature from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. As the Court explained, the diminishment analysis requires a "functional analysis" to compare a minority group's electoral power in the newly-enacted plan against its voting strength in the prior plan. *Id.* at 625-26; *see also id.* at 624 ("The existing plan . . . serves as the 'benchmark' against which the 'effect' of voting changes is measured").[3]

This Court was particularly careful to distinguish the diminishment analysis, which tracks Section 5 of the Voting Rights

[3] This Court described the same factors that were relevant to a functional analysis in *Apportionment II*. *See In re S. J. Res. of Legis. Apportionment 2-B* ("*Apportionment II*"), 89 So. 3d 872, 882-83 & n.6 (Fla. 2012).

Act, from the vote dilution analysis, which tracks Section 2 of the Voting Rights Act, the latter of which requires analysis of the preconditions from *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See, e.g.*, *Apportionment I* at 619-20, 623-24; *see also id.* at 625 (holding that the non-diminishment provision is "an independent provision of the state constitution"). The First DCA, however, decided it need not follow this Court's decisions in *Apportionment I* and *II* because this Court had "not review[ed] a lower court's interpretation or application of the law" when rendering those decisions, and therefore "[t]he court's analysis in those decisions was akin to what a trial court does when it seeks to apply the law to a certain set of facts." A18. The First DCA did not pull any punches: "[W]e do not view the broad pronouncements—applied with varying degrees of clarity to the specific facts of the original proceeding—as binding in this direct appeal." *Id.*

Accordingly, the First DCA brazenly set about establishing its own standard, one sharply at odds with the standard established by *Apportionment I* and *II*. Rather than follow this Court's careful delineation between vote dilution and retrogression claims, the First DCA collapsed the two to create a new legal standard found nowhere

in the text of the Florida Constitution, the text of the VRA from which the Amendments were borrowed, federal precedent, or the precedent of this Court. And it did so despite this Court's applying *Apportionment I* and *II*'s understanding of the non-diminishment provision *as recently as last year* when it upheld the state's legislative districts in that facial review proceeding. *See In re S. J. Res. of Legis. Apportionment 100 ("Apportionment IX")*, 334 So. 3d 1282, 1289-90 (Fla. 2022).

No longer a comparative analysis of a minority group's voting power from an existing redistricting plan to the new one, under the First DCA's new non-diminishment standard, plaintiffs are required to establish new threshold preconditions previously alien to this Court's jurisprudence. Specifically, minority voters must show that "they are part of a 'geographically compact' community," and that "the naturally occurring community of which they are a part achieved some cohesive voting power under a legally enforceable district." A31. "[A] challenger cannot simply point to the existence of a Black performing district, without more, and have that serve as a benchmark for a diminishment claim." A30-31. Instead, "[t]he baseline or benchmark from which to measure diminishment starts

with a naturally occurring, geographically compact community with inherent voting power." A29. This test plainly conflicts with this Court's test for non-diminishment in *Apportionment I*, *II,* and *IX*. The First DCA's failure to apply binding precedent should be immediately corrected. *See Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty.").

Even if the First DCA were correct that this Court's opinions in those cases are not binding on them—an erroneous theory that no party argued below—the First DCA's interpretation of the non-diminishment provision also necessarily conflicts with this Court's decisions in *Apportionment VII* and *VIII*, two merits-based, as-applied challenges to Florida's congressional districts, that adopt the same interpretation of the non-diminishment provision elucidated in *Apportionment I* and *II*. *See, e.g.*, *Apportionment VIII*, 179 So. 3d at 286 n.11 (explaining non-diminishment standard is solely focused on the electoral power of the minority group); *id.*, 179 So. 3d at 272-73 (expressly holding that Benchmark CD-5 complied with the non-diminishment provision under the interpretation of the provision developed in *Apportionment I* and *VII*).

In sum, the First DCA expressly contravened and cast aside this Court's decisions interpreting the Fair Districts Amendments and established a new test that cannot be reconciled with multiple decisions of this Court. The Court should assert jurisdiction to correct the First DCA's brazen attempt to ignore this Court's precedent.

II. The decision of the First DCA expressly construes provisions of the Florida Constitution.

As explained above, the First DCA's decision in this case expressly rests on its (erroneous) interpretation of the non-diminishment provision of the Florida Constitution, which the First DCA claimed to be a matter of first impression. *See, e.g.*, A22 ("We are left still having to address the meaning of a minority group's 'ability to elect representatives of their choice' in this case of first impression."). That interpretation was necessary to its ruling. *See* A31 (reversing because plaintiffs failed to provide evidence to meet the First DCA's new legal standard). Accordingly, the Court also has jurisdiction over this appeal because it involves an (erroneous) interpretation of the Florida Constitution.

III. The decision of the First DCA expressly affects constitutional or state officers.

This Court also has jurisdiction because the First DCA's decision expressly affects legislators, quintessential constitutional officers, *see Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); Fla. Const., art. III, § 1. Specifically, the lower court's decision involved the duties with which legislators must comply when undertaking redistricting and whether legislators failed to comply with those duties when they enacted the State's current congressional plan, triggering an independent basis for jurisdiction, *see Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

IV. The Parties' negotiated stipulation does not permit Respondents to oppose this Court's discretionary review.

In advance of trial on Petitioners' partisan intent and diminishment claims, the Parties entered into a Joint Stipulation. In exchange for Petitioners' agreement to voluntarily dismiss their partisan gerrymandering claims, Respondents agreed, among other things, to full and expedited appellate proceedings so that appellate proceedings and delay would not prevent Petitioners from obtaining relief for the 2024 congressional cycle. Although the Parties hoped to come directly to this Court (and submitted a Joint Motion for

Certification to the First DCA), the Stipulation also contemplated that, "[i]n the event the First District denies certification, the Parties agree to work in good faith to propose an expedited schedule to allow for resolution of *all appellate proceedings* in time for the Florida Legislature to take up any remedial plan, if necessary, during the 2024 regular legislative session" (emphasis added). Of course, agreement to expedited proceedings also inherently and necessarily implies agreement for the issue to be heard and resolved in the first place—something Respondents have now walked away from.

Petitioners made a substantial concession in exchange for a full and expedited appellate process. This Court should reject Respondents' forthcoming attempt to avoid this Court's review of a decision that sharply undermines this Court's precedent and authority.

CONCLUSION

Petitioners respectfully request this Court take jurisdiction without delay and decide this appeal no later than March 2024 such that a remedy, if necessary, may be implemented in time for the 2024 elections consistent with the Parties' Stipulation.

Dated: December 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2023, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on the parties listed below:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(A), the undersigned certifies that this Brief on Jurisdiction complies with the word limit and contains 2,279 words.

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