In the Supreme Court of Florida

CASE NO. SC22-139

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.

BRIEF OF RON DESANTIS, GOVERNOR OF FLORIDA

Ryan Newman (FBN 1031451)
General Counsel
Joshua Pratt (FBN 119347)
Deputy General Counsel
Nicholas Meros (FBN 120270)
Deputy General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
400 S Monroe St
Tallahassee, FL 32399
(850) 717-9310
ryan.newman@eog.myflorida.com
joshua.pratt@eog.myflorida.com
nicholas.meros@eog.myflorida.com

Mohammad Jazil (FBN 72556)
Michael Beato (FBN 1017715)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
119 S Monroe St Ste 500
Tallahassee, FL 32301
(850) 270-5938
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com

Jason Torchinsky*
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
2300 N Street NW
Washington, DC 20037
(202) 737-8808
jtorchinsky@holtzmanvogel.com
**pro hac vice motion forthcoming*

Counsel for Governor Ron DeSantis

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ARGUMENT

This Court has jurisdiction to advise on the interpretation of the following phrase: "*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*." Art. III, § 20(a), Fla. Const. (emphasis added). Section 20(a)'s non-diminishment provision affects several of the Governor's executive powers and duties, namely his power to veto the congressional map presented to him, art. III, § 8, Fla. Const.; his duty to take care that the laws are faithfully executed, art. IV, § 1(a), Fla. Const.; and his power to directly supervise his Secretary of State in the administration of elections, art. IV, § 6, Fla. Const. Section 20(a)'s text is less than clear. There is a textual interpretation of this section, however, that avoids serious concerns under the U.S. Constitution. An advisory opinion confirming that interpretation would help the Governor ensure that the redrawing of congressional boundaries, which must occur every ten years, does not violate the Florida or U.S. Constitutions and is completed in a timely way to provide certainty

to candidates and voters before the qualifying period begins in June.[1] Unlike most other legislation, redistricting is not discretionary and must be completed in short order before the electoral process commences. The unique demands of redistricting justify the Court's exercise of jurisdiction.

I. THIS COURT HAS JURISDICTION TO PROVIDE AN ADVISORY OPINION TO THE GOVERNOR.

Article IV, section 1(c) of the Florida Constitution allows this Court to render an advisory opinion to the Governor concerning "the interpretation of any portion of th[e] constitution" that "affect[s]" his "executive powers and duties." The interpretation of section 20(a) informs, and thus affects, how the Governor will exercise his executive powers and duties with respect to congressional redistricting legislation. Specifically, when the Florida Legislature presents to the Governor a bill that redraws Florida's congressional districts, which it must under federal law, the Governor can veto the bill, approve the bill, or take no action. A veto nullifies the bill. Approval or inaction allows the bill to become law, at which point the

[1] *See* Qualifying Information, Fla. Div. of Elections, https://dos.myflorida.com/elections/candidates-committees/qualifying (last visited February 7, 2022).

Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and "direct[ly] supervis[e]" his "administration," particularly his Secretary of State, in carrying out the law, art. IV, § 6, Fla. Const. These executive powers and duties satisfy the jurisdictional prerequisites.

A. The Veto Is an Executive Power.

Article III, section 8 expressly vests the Governor with the "[*e*]*xecutive* approval and *veto*" power. (Emphasis added.) If the Governor believes that a bill is "contrary to the public interest," including that it is unconstitutional, he may veto the bill. *Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980). The exercise of that executive power to affect legislation does not convert it into a lawmaking power any more than the judiciary's exercise of judicial review converts the judicial power into a lawmaking power.

The Florida Constitution's structure underscores that the veto is an executive power. The Florida Constitution vests "[t]he legislative power of the state" in the Florida Legislature, art. III, § 1, Fla. Const.; "[t]he supreme executive power" in the Governor, art. IV, § 1(a), Fla. Const.; and "[t]he judicial power" in the state judiciary, art. V, § 1, Fla. Const. "No person belonging to one branch shall exercise any

powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. This separation of powers erects "high walls and clear distinctions" between each branch of government. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995).

The high walls separating executive and legislative powers are apparent in the lawmaking process. The Florida Constitution gives specific, precise powers to the legislative and executive branches with respect to the lawmaking process. As this Court has noted, "[a]rticle III, sections 1 and 7 assign to the legislature the responsibility for passage of all bills into law, regardless of their subject matter," and "[a]rticle III, section 8 sets forth the procedure for the executive power to approve or veto legislation." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). "These provisions" constitute the "constitutional allocation of the executive and legislative responsibilities concerning legislation generally." *Id.*

The Florida Constitution thus gives to the Governor the *executive* power in the legislative sphere, and that executive power includes the veto. *See id.* ("Article III, section 8 sets forth the procedure for the *executive power* to approve or *veto legislation of* both *nonappropriations* and appropriations *bills*." (emphasis added));

Brown, 382 So. 2d at 672 ("We hold further that *the vetoes* identified herein as 2, 4, 5 and 6 a*re valid as being within the purview of the executive power* granted by article III, section 8(a)." (emphasis added)); *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" because "[t]he placement is functional, as with executive powers conferred in the judicial article . . . and in the legislative article.").

The veto is a "negative power, the power to nullify, or at least suspend, legislative intent." *Brown*, 382 So. 2d at 664. It is the "[p]rimary . . . executive check[] on unfettered legislative power" and gives the Governor a "stronger bargaining position from which to seek revision or amendment of bills" and a means to "counteract legislative action which he considers to be contrary to the public interest." *Id.* As such, in the lawmaking process, "the constitutional authority of the legislative department is in part delimited by the scope of executive authority"—as exercised by the veto power. *Id.* at 663.

By contrast, the Legislature does not have the power to veto bills—it has the power to bicamerally "pass" and "present" them, and

to "re-enact" a vetoed bill by supermajority vote. *See* art. III, §§ 7–8, Fla. Const. So it cannot be said that in exercising the power to "veto" a bill that the Governor is exercising a power that otherwise belongs to the Legislature. It is quintessentially an executive power.

Only when the Governor exceeds his veto power by effectively amending legislative text (as opposed to nullifying it) does the Governor improperly intrude on the legislative power. For example, in the line-item-veto context, this Court has held that a Governor unconstitutionally engages in legislative action when he reduces or modifies an appropriation. *See Brown*, 382 So. 2d at 666; *Fla. House of Representatives v. Martinez*, 555 So. 2d 839, 844 (Fla. 1990).

In sum, the Governor's exercise of the veto power to affect the lawmaking process does not make the veto a legislative power. As Justice Ellis explained in 1922, "[e]ach branch of the government necessarily . . . 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). If that were so, then it follows that a "court acts in a legislative capacity when it

declares an act of the legislature to be unconstitutional." *Id.* Because the veto is an executive power, this Court has jurisdiction.[2]

B. The Governor's Other Executive Powers and Duties Also Support Jurisdiction.

If the Governor approves or takes no action on the Florida Legislature's redrawn districts, the districts become law, and the Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and in so doing, must "direct[ly] supervis[e]" his "administration," namely the Secretary of State, art. IV, § 6, Fla. Const. In *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, this Court explained that the "Governor's question about the meaning of Amendment 4," the Florida Constitution's voting restoration amendment, "affect[ed]" his "take care" duties and

[2] In 1887, this Court declined to issue an advisory opinion on a former Governor's use of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). This Court concluded that it could not render an advisory opinion because it considered the veto to be a legislative power. *Id.* This Court is not required to follow its advisory opinions, *see In re Advisory Op. of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), and for all the reasons explained, this Court should give little weight to the 1887 response. In fact, fifty years later, a "majority of th[is] Court" stated that it was "of the opinion that the duty imposed on the Governor" to veto legislation "is executive rather than legislative as may be presumed from dicta in *In Re Executive Communication*." *Advisory Opinion to the Governor*, 12 So. 2d 583, 584 (Fla. 1943).

his "duty to provide the Department of State with necessary direction regarding the implementation of voter registration laws." 288 So. 3d 1070, 1076 (Fla. 2020). So too here.

Section 20(a)'s non-diminishment provision affects the Governor's take care duties and his duty to provide the Secretary of State with necessary direction regarding the implementation of redistricting maps. The Secretary, of course, serves at the pleasure of the Governor. *See* §§ 20.02(3), 20.10, Fla. Stat. As the "chief election officer of the state," § 97.012, Fla. Stat., the Secretary must administer future elections under any new congressional map. To administer such elections, among other things, the Secretary must "[o]btain and maintain uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and must certify "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," including congressional candidates, § 99.061(6), Fla. Stat.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE AN ADVISORY OPINION.

This Court should exercise its discretionary jurisdiction because of its "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*") (citations omitted). Unlike most other legislation, the State must create new congressional maps. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969); 2 U.S.C. §§ 2a–2c. The process must also be completed before the candidate qualifying period begins. The redistricting process should therefore proceed under a correct understanding of the law. The failure to do so could result in confusion and chaos in the administration of the state's congressional elections. To avoid that result, a timely advisory opinion on this matter of great public importance is both necessary and appropriate. *Apportionment VIII*, 179 So. 3d at 262; *see also In re Advisory Op. to Governor Request of June 29, 1979*, 374 So. 2d 959, 962 (Fla. 1979) (providing opinion to prevent the "confusion surrounding [an] important enactment").

The Governor does not seek the Court's opinion on the constitutionality of any proposed legislation or map. To the contrary, the Governor requests guidance on the meaning of section 20(a)'s minority-voting-protection provision, including whether it requires a district in northern Florida that stretches hundreds of miles to

connect a black population in Jacksonville with a black population in Gadsden and Leon Counties so that they can elect a candidate of their choice, even though not a majority.

Section 20(a) can be broken into two parts with brackets added for the sake of clarity:

> 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.**]**

Art. III, § 20(a), Fla. Const. The first bracketed clause contains the "non-vote-dilution provision," and the second contains the "non-diminishment provision." This Court has explained that section 20(a)'s non-vote-dilution provision mirrors § 2 of the Voting Rights Act and should be interpreted consistent with § 2 case law, and that section 20(a)'s non-diminishment provision mirrors § 5 of the Voting Rights Act and should be interpreted consistent with § 5 case law. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 619–27 (Fla. 2012) ("*Apportionment I*").

Still, section 20(a)'s vote-diminishment provision remains unclear. The text neither says what "diminish" means nor does it

clarify whose "ability to elect representatives of their choice" is protected from diminishment. The dictionary defines "diminish" as "to make less or cause to appear less," *id.* at 702 (Canady, J., concurring in part and dissenting in part) (quoting *Diminish*, Webster's Third International Dictionary (1993)). But make less than what? Measured how? And if the previous congressional map serves as a baseline, *id.* at 624, must that baseline itself be constitutionally valid before the vote-diminishment standard applies?

Untangling these questions must begin with the text and, more specifically, the phrase "ability to elect representatives of *their* choice." The word "their," as used in section 20(a), refers back to "racial or language minorities" in section 20(a)'s non-vote-dilution provision—the first bracketed clause. Cases construing § 2 of the Voting Rights Act inform any understanding of the first clause, *id.* at 619–24, and the federal cases make clear that § 2 of the Voting Rights Act applies only to "a minority group" that is "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Thornburg v. Gingles*, 478 U.S. 30, 50

(1986).[3] Taken together, "their" must then mean "racial or language minorities" within a reasonably cohesive geographic area. *See id.* It follows that under section 20(a)'s non-diminishment provision—the second bracketed clause—districts cannot be drawn to diminish racial or language minorities' ability to elect representatives of these geographically cohesive districts.

By giving meaning to section 20(a)'s text, we seek confirmation that such a reading comports with the rules of construction this Court now uses.[4] Among other things, we seek confirmation that the Governor's understanding of the word "their" comports with the harmonious-reading canon. Per the Governor's reading of Section 20(a), the non-vote-dilution provision allows minority groups to form

[3] In particular, this Court has explained that section 20(a)'s non-vote-dilution provision matches § 2 of the Voting Rights Act, *Apportionment I*, 83 So. 3d at 619–24, and § 2 claims are only applicable to districts where (1) the "minority group" is "sufficiently large and geographically compact to constitute a majority," (2) the minority group is "politically cohesive," and (3) the majority "votes sufficiently as a bloc." *Gingles*, 478 U.S. at 50–51.

[4] *See Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) (stating that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56, 167 (2012).

geographically compact districts where appropriate consistent with two other preconditions (political cohesion of the minority group and bloc voting of the majority group). *See Gingles*, 478 at 50–51. The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477–80 (1997) (explaining the difference between § 2 and § 5 of the Voting Rights Act). Florida's non-vote-dilution provision therefore goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

But this Court has never squarely addressed whether the word "their" constrains the universe of districts to which the non-diminishment provision applies. *Apportionment I*, 83 So. 3d at 625.[5] That failure raises serious concerns under the U.S. Constitution.

[5] Giving effect to the word "their" would also be consistent with this Court's prior redistricting cases. The cases note that "[e]very word of the Florida Constitution should be given its intended meaning and effect." *Apportionment I*, 83 So. 3d at 614 (referencing *In re Apportionment Law–1972*, 263 So. 2d 797, 807 (Fla. 1972)). And the cases even suggest that the *Gingles* preconditions have some import for the second bracketed clause in section 20(a)—the non-diminishment provision. *See Apportionment VIII*, 179 So. 3d at 286 n.11 ("The *Gingles* preconditions are relevant not only to a Section 2

Decided after this Court's decisions in *Apportionments I-VIII*, the U.S. Supreme Court recently held that a "State may not use race as the predominant factor in drawing district lines" unless the State first proves "that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (cleaned up). This showing of compelling interest and narrow tailoring must find a "strong basis in evidence." *Id.* After all, governmental actions based on race are presumptively unconstitutional. *See id.*; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Reading section 20(a)'s non-diminishment provision as applying only to minorities groups in geographically cohesive districts in section 20(a)'s non-vote-dilution provision would avoid significant concerns under the U.S. Constitution and would give Florida's congressional maps the best chance of surviving strict scrutiny. As in *Cooper*, such a reading would find a tether in the first *Gingles* factor, which is used for purposes of § 2 of the Voting Rights Act, and

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vote dilution analysis, but also to a Section 5 diminishment analysis.").

the U.S. Supreme Court has assumed that compliance with § 2 would satisfy strict scrutiny. *See Cooper*, 137 S. Ct. at 1469–72.

Any reading of state law should avoid conflicts with the U.S. Constitution. Florida courts, including this Court, utilize the well-established doctrine of constitutional avoidance: "when two constructions" of state law "are possible, one of which is of questionable constitutionality," the law "must be construed so as to avoid any violation of" the "Florida and *the United States Constitutions*." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116, 120 (Fla. 2006) (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983)) (emphasis added).

In light of the constitutional text and relevant interpretive canon, the best reading of section 20(a)'s non-diminishment standard is that it prevents diminishment of a reasonably cohesive racial or language minority's population. Confirming this interpretation now in an advisory opinion will avoid potential confusion and chaos later.

III. CONCLUSION.

For the foregoing reasons, this Court should provide the requested advisory opinion to the Governor.

Respectfully submitted on this 7th day of February, 2022.

/s/ Mohammad Jazil

Ryan Newman (FBN 1031451)
General Counsel
Joshua Pratt (FBN 119347)
Deputy General Counsel
Nicholas Meros (FBN 120270)
Deputy General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
400 S Monroe St
Tallahassee, FL 32399-0001
(850) 717-9310
ryan.newman@eog.myflorida.com
joshua.pratt@eog.myflorida.com
nicholas.meros@eog.myflorida.com

Mohammad Jazil (FBN 72556)
Michael Beato (FBN 1017715)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
119 S Monroe St Ste 500
Tallahassee, FL 32301-1591
(850) 270-5938
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com

Jason Torchinsky (Va. BN 47481)*
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
2300 N Street NW
Washington, DC 20037
jtorchinsky@holtzmanvogel.com

Counsel for Governor Ron DeSantis

*pro hac vice motion forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2022, undersigned electronically filed this Brief on Jurisdiction with the Florida Supreme Court using the Florida Courts E-filing Portal. The foregoing documents have been furnished on all parties required to be served.

/s/ Mohammad Jazil
Mohammad Jazil (FBN 72556)

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.045(b) and this Court's February 2, 2022 order. This brief is 15 pages long and contains 3,476 words as counted by Word, excluding the parts of the brief exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E).

/s/ Mohammad Jazil
Mohammad Jazil (FBN 72556)