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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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Florida Cases

Federal Cases

Florida Rules of Court

Statutes and Laws

Constitutional Provisions

Florida Constitution

Federal Constitution

Other Authorities

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.

Respectfully submitted,

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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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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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