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 RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

INTERESTED PERSON BRIEF OF REP. SHEILA CHERFILUS-MCCORMICK, MEMBER OF CONGRESS, FLORIDA CONGRESSIONAL DISTRICT 20

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STATEMENT OF INTERESTED PERSON

Sheila Cherfilus-McCormis is a Member of Congress representing Florida Congressional District 20. She is an African American citizen whose election occurred in a congressional district that enabled the political power of Black Floridians to be used to ensure sufficient voting strength to elect a candidate of their choice. She is a candidate for reelection to the U.S. House of Representatives in 2022. She has a personal and representative interest in Florida's Congressional redistricting. The proposed congressional redistricting map offered by the Governor alters districts in ways that significantly diminish the participation of minority voters across Florida. The proposed alterations to Congressional District 5 are not alone in diminishing the ability of minority voters to elect representatives of their choice. The proposed realignment of voters in Congressional District 20, representing Broward and Palm Beach Counties, significantly diminishes the participation of minority voters in a matter that dilutes their voting strength to elect a member of their choice in violation of the United States Constitution. As such, Rep. Cherfilus-McCormick's interest in this matter is not speculative. She

can assist the Court in the disposition of this case. Her participation is consistent with this Court's February 2, 2022 briefing schedule.

STATEMENT OF THE ISSUE

Does the Florida Supreme Court lack jurisdiction to issue an advisory opinion in a matter that is fundamentally a federal question: Does the congressional map proposed by the Governor discriminate against Florida Black voters and violate the rights of Black voters under the Voting Rights Act of 1965 (VRA) and the Fourteenth and Fifteenth Amendments to the United States Constitution?

SUMMARY OF THE ARGUMENT

The Florida Supreme Court lacks jurisdiction to issue an advisory opinion in a matter that is fundamentally a federal question: Does the congressional map proposed by the Governor discriminate against Florida Black voters and violate the rights of Black voters under the Voting Rights Act of 1965 (VRA) and the Fourteenth and Fifteenth Amendments to the United States Constitution?

Additionally, the Governor prematurely and without authority requested an advisory opinion this Court is without jurisdiction to issue. The text of the Constitution, the doctrine of Separation of

Powers, this Court's own precedent, and jurisprudential concerns counsel against accepting jurisdiction for the advisory opinion. The Governor's request should be declined.

ARGUMENT

I. The Court lacks jurisdiction to issue an advisory opinion in a matter that is fundamentally a federal question: Does the congressional map proposed by the Governor discriminate against Florida Black voters and violate the rights of Black voters under the Voting Rights Act of 1965 (VRA) and the Fourteenth and Fifteenth Amendments to the United States Constitution?

The Governor's proposed redistricting map offered for Court approval is designed on its face to pack and dilute Black voters into congressional districts in a manner that reduces the number of Black members of Congress in Florida from four to two. The proposed plan affects Congressional District 20, just as it does Congressional District 5, by diminishing the ability of minority voters to utilize their voting strength to elect a candidate of their choice.

As is apparent from the content of the Governor's letter, a motivating factor in the Governor's proposed congressional map is a discriminatory purpose. It was drafted at least in part to reduce the political power of Black Floridians by limiting their ability to influence

congressional elections to just two districts from four of the 27 districts. The Governor's proposed map will produce discriminatory results for Black Floridians—a fact that the Governor and his staff were aware of when drafting the map. Accordingly, the Governor's proposed map is blatantly unconstitutional because race is admittedly the predominant motive in the Governor's drawing of Congressional Districts that is not narrowly tailored to comply with Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301.

The intentional or apparent racial discrimination in the Governor's proposed congressional map, if passed, would violate the Fourteenth Amendment to the U.S. Constitution. The equal protection clause of the Fourteenth Amendment forbids states from enacting laws that for which a racially discriminatory intent or purpose is a motivating factor and that produce discriminatory results. This includes laws that use race to gain political or partisan advantage.

The Fifteenth Amendment to the U.S. Constitution promises that the "right of citizens of the United States to vote shall not be denied or abridged…on account of race, color, or previous condition

of servitude." In addition to that self-executing right, the Amendment gives the "power to enforce this article by appropriate legislation." As history and precedent has shown, the first century of congressional enforcement of the Amendment failed to fulfill the promise of the Fifteenth Amendment. Early enforcement acts were inconsistently applied and repealed with the rise of the infamous "Jim Crow" laws that diminished and sometimes removed the equal protection of the laws to Black citizens. Another series of enforcement statutes in the 1950s and 1960s depended upon individual lawsuits filed by the Department of Justice. As a result, individual states were deviously creative in "contriving new rules" to continue violating the Fifteenth Amendment "in the face of adverse federal court decrees." *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Congress responded to widespread violations of the Fifteenth Amendment by enacting the Voting Rights Act. In *Katzenbach*, the U.S. Supreme Court held that the Fifteenth Amendment served as a valid constitutional basis for the Voting Rights Act of 1965.

But, as history has shown, having the right to vote does not guarantee that people share equally in political influence. How well

and how equitably our representational process works depends in part on drawing the boundary lines of political units. Establishing district lines historically is political matter. Districting maps that discriminate based on race or ethnicity trigger strict constitutional and VRA scrutiny. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court found that "the legacy of official discrimination … acted in concert with the multimember scheme to impair the ability of "cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice."

The Court held in *Gingles* that a successful claim under Section 2 of the VRA requires evidence that an affected minority group is sufficiently large to elect a representative of its choice, that the minority group is politically cohesive, and white majority voters cast their ballots sufficiently as a bloc to usually defeat the preferred candidates of the minority group.

The U.S. Supreme Court explained that boundary lines cannot be drawn in a way that dilutes the political power of minorities. Nor can districts be drawn that are "unexplained on grounds other than race." *Miller v. Johnson*, 515 U.S. 900 (1995). Here, the Governor's

proposed congressional map cannot be explained on grounds other than race. Indeed, his letter requesting an advisory opinion puts the matter of race squarely as the impetus for the proposed congressional map for which judicial approval is sought.

Consideration of race when drawing congressional district lines may be permissible to ensure compliance with Section 2 of the VRA. But that is allowed only when a detailed analysis shows that a recognized racial minority would be disenfranchised if race was not taken into consideration. And that analysis is dependent on specific facts. But the Governor's consideration of race occurs in the absence of any legislatively determined (or judicially determined) factual and statistical analysis, but instead seeks to limit the impact of the VRA as a policy choice. The Governor's proposed plan reflects a desire to use race to enhance his individual political power by packing Black voters in two of the Black majority Florida districts, while reducing and diluting the number of Black voters (a perverse concept known as "cracking") in the Black communities in the other two Black majority districts, including Congressional District 20. Intentionally packing Black voters beyond that necessary to assure voting strength

hurts those voters' ability to reasonably participate in the political process in violation of the VRA, and encourages unconstitutional discrimination based on race.

In his effort to obtain what is effectively akin to a "pre-clearance" advisory opinion, the Governor is circumventing the normal legislative process by which congressional districts are drawn, thereby usurping the explicit authority granted to the Legislature. This request for an advisory opinion is not for any legitimate purpose, but instead serves only to legitimize the prevention of Black voters from having a fair opportunity to elect candidates of choice. Based on the Governor's letter request, there has been no racial polarization analysis to determine whether the packing of Congressional Districts is necessary to preserve the requirements of the VRA; and the Florida Legislature has made no such policy finding. Nor has the Governor sought assistance from independent redistricting experts to determine whether reducing the number of Black majority congressional districts from four to two serves the interests protected by the VRA.

Because the Governor used race as a predominant factor in

such a manner that his proposed congressional map is not narrowly tailored to comply with Section 2 of the VRA or any other compelling governmental interest, the proposed districts violate the Fourteenth Amendment to the United States. The Court should therefore summarily deny the Governor's request for an advisory opinion and allow the ordinary process of drawing congressional districts to be carried out by the Florida Legislature.

II. The request for an advisory opinion on a legislative policy arising from a hypothetical congressional apportionment plan is not subject to this Court's authority to issue an Advisory Opinion to the Governor.

The Governor's request for an advisory opinion on a legislative policy choice related to a hypothetical congressional apportionment plan is improper. The Supreme Court should decline to issue an advisory opinion. The Florida Constitution does not provide the Governor with any specific power or duty relating to the legislative functions of apportionment and redistricting. As such, a request at this stage for an interpretation of the standards applicable to establishing the congressional district boundaries pursuant to the Florida Constitution is not properly the subject of an advisory opinion to the Governor.

In determining the authority to issue an advisory opinion to the Governor, this Court should be guided by the actual language used in the applicable text. *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible and words in a statute should not be construed as mere surplusage."); *see also Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004) (When reviewing constitutional provisions, the Court "follows principles parallel to those of statutory interpretation.").

The provision at issue allows the Governor to request an advisory opinion on "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. This language is inapplicable to the Governor's request since the subject of the Governor's proposed action does not arise from any enumerated executive authority. In the absence of executive authority, this Court should not issue a purely hypothetical advisory opinion. *See In re Advisory Opinion to the Governor Request of August 28, 1980*, 388 So.

2d 554, 555 (Fla. 1980) ("Because we do not construe your request to involve 'the interpretation of any portion of (the) constitution,' we conclude that the justices of this Court are without authority to render an advisory opinion regarding your responsibilities under the statutory provisions referred to in your request."). Plainly, to empower the Governor to seek an advisory opinion on provisions of the Florida Constitution over which he has no specific duty or responsibility, the limitations of Art. IV, § l(c) of the Florida Constitution would be mere surplusage.

The Governor invoked Article IV, section 1, clause (c) that: "[t]he governor may 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." The Governor asserts his request is based on the Florida Constitution vesting "[t]he supreme executive power" in the Governor, that includes an approval and veto power. The Governor argues that his "supreme executive power" includes the duty to "take care that the laws be faithfully executed" and direct supervision over the administration of the Department of State.

This "take care" clause and the Governor's oversight of the Department of State, together with his veto power, do not implicate the constitutional enumeration of the Governor's powers. While the Court reads the "take care" clause broadly, *Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Rights Amend.*, 288 So. 3d 1070, 1075-76 (Fla. 2020), the Court looks to the existence of a separate and independent power, duty, or responsibility of the Governor before finding that a question comes within the advisory opinion jurisdiction. *See generally*, *In re Advisory Op. to Governor*, 243 So. 2d 573 (Fla. 1971) (asking for opinion on constitutionality of corporate income tax in his capacity as chief administrative officer responsible for planning and budgeting); *Op. to the Governor*, 239 So. 2d 1, 3 (Fla. 1970) (asking for opinion on the constitutionality of the General Appropriations Act in his capacity as the chief administrative officer responsible for the planning and budgeting); *In re Advisory Op. of Governor Civil Rights*, 306 So. 2d 520, 521 (1975) (asking for opinion on constitutionality of the Florida Correctional Reform Act related to clemency power); *Advisory Op. to Governor—1996 Amendment 5*, 706 So. 2d 278, 279 (Fla. 1997)

(asking for opinion on the constitutionality of the Everglades Forever Act and its tax provisions). In each of these advisory opinions, an independent executive authority was present.

The Governor's pending request differs because the Florida Constitution prescribes exclusive legislative authority over apportionment to the Legislature. Article III, section 16 does not implicate the Governor except to invoke his ability to reconvene the Legislature. The Governor has no unique separate or intendent power or duty relating to apportionment. The Governor's veto authority does not implicate the legislative reapportionment power any more than the Governor's veto of any bill pursuant to Art. II, Sec. 8 of the Florida Constitution could broaden the Court's advisory jurisdiction.

The request to involve the Court in the issuance of an advisory opinion on a legislative policy not yet adopted that does not implicate the Governor's enumerated duties minimizes the legislative role in evaluating the constitutionality of their own proposals. While it may be proper for the Court to issue an opinion on the Governor's authority once the Legislature has acted, the separation of powers doctrine should restrain this Court from advising the Governor of the

status of the law before the Legislature votes. The constitutionality of legislation "should only be passed upon in adversarial proceedings." *In re Advisory Op. to the Governor*, 113 So. 2d 703, 705 (Fla. 1959).

As further discussed, legislative apportionment and redistricting are complex decisions dependent on legislatively derived facts and the application of a broad series of constitutional precepts. The constitutionality of an apportionment and redistricting bill warrants extensive briefing, statistical analysis, and guidance by experts on the subject. An advisory opinion is inadequate to assess the interactions between demographics, geography, and the Florida Constitution.

Jurisprudential concerns encourage the rejection of the Governor's request. If the scope the Governor's authority to request an advisory opinion is as broad as stated in the Governor's submission, then this Court will effectively authorize a pre-legislation opportunity for the Governor to determine the constitutionality of legislative policy before enactment, a choice decidedly contrary to the separation of powers doctrine.

CONCLUSION

This Court should decline to issue an advisory opinion in a matter that is fundamentally a federal question. The request for judicial approval of a proposed congressional map not yet enacted by the Florida Legislature that discriminates against Florida Black voters and violates the rights of Black voters under the Voting Rights Act of 1965 (VRA) and the Fourteenth and Fifteenth Amendments to the United States Constitution should be denied.

The Governor reads his own authority too broadly. The power to approve or veto laws does not make one a king, nor does it convert the Supreme Court to a privy council. The decennial process of apportionment and redistricting has no constitutionally sited, specific, enumerated role for the Governor beyond his general authority to approve or veto the Congressional plan. Legal and jurisprudential concerns counsel against his request, as do this Court's precedents. Simply put, issuing the requested advisory opinion on a hypothetical, unenacted policy choice available to the legislature, and the legislature only, is improper.

The Court lack's jurisdiction to issue the advisory opinion and

the Governor's request should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify this document was served through the Florida e-Filing portal to all parties who have appeared on February 7, 2022.

CERTIFICATE OF COMPLIANCE

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/s/ Benedict P. Kuehne
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