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 NORTH FLORIDA, ETC.

BRIEF FOR THE ATTORNEY GENERAL

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STATEMENT OF THE CASE

On February 1, 2022, Governor DeSantis requested this Court's advisory opinion on a question of constitutional interpretation affecting his executive powers and duties. *See* Art. IV, § 1(c), Fla. Const. "In the coming weeks, the Florida Legislature must present to [the Governor] 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)." Request for Advisory Op. at 1. Governor DeSantis has requested the 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.

Request for Advisory Op.at 2; *see also id.* at 4. Specifically, the Governor requests an opinion on whether the retention of that

district is required by Article III, Section 20(a) of the Florida Constitution. Request for Advisory Opinion, at 4.

On February 2, 2022, the Court requested "briefs from interested persons addressing whether the Governor's request is within the purview of [Article IV, Section 1(c) of Florida's Constitution], and if so whether the Court should exercise its discretion to provide an opinion in response to the request."

ARGUMENT

I. THE GOVERNOR'S REQUEST IS WITHIN THE PURVIEW OF ARTICLE IV, SECTION 1(C).

The Governor requests an opinion on whether Article III, Section 20(a) of the Florida Constitution requires the retention of a specific congressional district in northern Florida. The Governor's letter identifies precedent suggesting that this Court may not issue an advisory opinion to address the validity of legislation merely because the Governor has the power to approve or veto that legislation. *See* Request for Advisory Op. at 3 (citing *In re Exec. Commc'n*, 6 So. 925, 925 (Fla. 1887) (suggesting that the duty to veto or approve legislation is not an "executive" function)); *but see Advisory Op. to the*

Governor, 12 So. 2d 583, 584 (Fla. 1943) ("A majority of the Court are of the opinion that the duty imposed on the Governor" to veto or approve legislation "is executive rather than legislative as may be presumed from dicta in *In re Executive Communication*, 23 Fla. 297, 6 So. 925 . . . ."). Whatever the import of that precedent, the Attorney General respectfully submits that the Court can and should answer the Governor's question for multiple independent reasons grounded in the distinctive character of congressional reapportionment.

Lawmaking in Florida is generally a matter of pure discretion. There are two prominent exceptions. Each year, the State must adopt a budget, *see* Art. III, § 19(a)(1), Fla Const., and after each decennial census, the State must reapportion its congressional districts.[1] Like his role in the budgeting process, the Governor must collaborate with

[1] *See Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (because "States must draw congressional districts with populations as close to perfect equality as possible," they "must regularly reapportion districts to prevent malapportionment"); *Georgia v. Ashcroft,* 539 U.S. 461, 488 n.2 (2003) ("When the decennial census numbers are released, States *must* redistrict to account for any changes or shifts in population." (emphasis added)); *Johnson v. Mortham*, 915 F. Supp. 1529, 1543 (N.D. Fla. 1995) ("The Florida Legislature is required to redistrict its congressional districts after each decennial census.").

the Legislature in crafting this mandatory, once-in-a-decade enactment. The Governor is empowered to propose a congressional map pursuant to his power to "recommend measures in the public interest." Art. IV, § 1(e), Fla. Const. As the Legislature deliberates over reapportionment, the Governor is obliged to foster compliance with the requirements of the Constitution because of his duty to "take care that the laws be faithfully executed." Art. IV, § 1(a), Fla. Const. If the Legislature fails to satisfy the State's obligation to reapportion congressional seats in regular session, the Governor would have the power to call the Legislature into special session to bring the State into compliance. Art. III, § 3(c)(1), Fla. Const. And the Governor has the duty to sign or veto the apportionment passed by the Legislature. Art. III, § 8, Fla. Const. The Governor's role in congressional apportionment is therefore akin to his role in the annual budgeting process and related matters of fiscal administration, which this Court has repeatedly held is the proper subject of advisory opinions. *See In re Advisory Op. to Governor*, 509 So. 2d 292, 301 (Fla. 1987); *In re Advisory Op. to Governor*, 243 So. 2d 573, 576 (Fla. 1971); *Op. to the Governor*, 239 So. 2d 1, 8 (Fla. 1970).

The requested opinion also implicates the Governor's power of "direct supervision" over the "administration" of the Department of State, Art. IV, § 6, Fla. Const., in executing the law. As the Governor's letter notes, the Secretary of State administers the State's election laws, which are greatly affected by congressional reapportionment. Because of the federal constitutional requirement of equal population in congressional districts, *Evenwell v. Abbott,* 578 U.S. 54, 59 (2016), having to redraw one congressional district will have a cascading effect on many others. Even beyond that, one of the duties of the Secretary of State is to administer the process of amending the State's Constitution through citizen initiatives. The metes and bounds of the State's congressional districts directly affect that process. The Secretary must verify that each such "petition" is "signed by a number of electors in each of one half *of the congressional districts of the state*, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen." Art. XI, § 3, Fla. Const. (emphasis added). The boundaries of each district will control those numbers,

and thus the Secretary's exercise of her duties, in at least two key respects: First, it will dictate the number of individuals living within each district (the denominator). Second, it will dictate the district for which any elector's signature is counted (thus affecting the numerator).

Those effects give this Court jurisdiction for essentially the same reasons the Court exercised jurisdiction in *Advisory Opinion to Governor re Implementation of Amend. 4*, 288 So. 3d 1070 (Fla. 2020) (per curiam). There, as here, the Governor requested an opinion on the requirements of the Constitution as they related to the administration of the State's election laws. This Court concluded that it had jurisdiction to decide whether Article VI, Section 4 of the Constitution required the restoration of a felon's voting rights even if a felon had failed to pay outstanding legal financial obligations ordered by a court as part of a criminal sentence. *Id.* at 1075-76. As the Court observed, that question affected the Governor's power to execute the laws and to exercise his clemency powers. *Id.* at 1075. And it likewise bore directly on his authority to "provide the Department of State with necessary direction regarding the

implementation of voter registration laws." *Id.* at 1076. Whether the Constitution requires a certain congressional map likewise bears directly on the Governor's execution of the law and authority to supervise the Secretary of State's implementation of the election laws and the citizen-initiative process.

The Attorney General acknowledges that "article IV, section 1(c), Florida Constitution, does not *generally* empower this Court to issue advisory opinions concerning the validity of statutes enacted by the legislature." *In re Advisory Op. to Governor*, 509 So. 2d 292, 301 (Fla. 1987) (emphasis added). But the Governor's request, because it arises in the unique redistricting context, does not implicate concerns about generally opining on constitutionality of a proposed law. And regardless, the Governor is not asking the Court to address whether proposed legislation is unconstitutional. Instead, he is asking whether the Florida Constitution *requires* the drawing of a certain congressional district—a matter that will inform, though not conclusively control, the outcome of the congressional reapportionment process.

In any event, this Court has made clear that, since the adoption of the 1968 Constitution, it may "issue[] advisory opinions to the Governor addressing the validity of legislation that affected his executive powers or duties" under the Florida Constitution. *Amend. 4*, 288 So. 3d at 1076. It is true that this Court had construed its advisory-opinion authority more narrowly under the 1885 Constitution. *E.g., In re Advisory Op. to Governor*, 137 So. 881, 881 (Fla. 1931). But "[t]he 1968 Constitution for the first time permitted interested parties to be heard in advisory opinion cases," *Amend. 4*, 288 So. 3d at 1076 n.2, and thus "enlarged to some extent the power of this Court to be of assistance," *Id.* (quoting *In re Advisory Opinion to Governor*, 243 So. 2d 573, 576 (Fla. 1971)). Because the constitutional question here affects the Governor's executive powers and duties, the Court has jurisdiction to answer it.

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO PROVIDE AN OPINION IN RESPONSE TO THE GOVERNOR'S REQUEST.

Here, the Court should exercise its discretion to provide an opinion in response to the Governor's request.

As the Governor's request notes, the congressional redistricting process happens once a decade, and it must be completed before the upcoming congressional elections. There is a strong interest in ensuring that this process proceeds under a correct understanding of the requirements of the Florida Constitution. If the Legislature enacts a map inconsistent with those requirements, the result would be significant uncertainty on the part of voters and candidates regarding the validity of the congressional maps. Moreover, the proper interpretation of Article III, Section 20(a) has significant ramifications for the Governor's executive powers and duties. *See* Request for Advisory Op. at 2-3.

This Court has exercised its discretion to issue advisory opinions to answer similar questions of significant public import. Shortly after the 1968 Constitution was adopted, for instance, the Court answered the Governor's request for an advisory opinion in *Opinion to the Governor*, 239 So. 2d 1, 8-9 (Fla. 1970). There, the Court pointed out that the "import of [the] request [wa]s to have this Court pass upon the constitutionality vel non of the 1970 General Appropriations Bill." *Id.* at 8. Noting that the Court "was not always

in agreement under the Constitution of 1885 as to whether or not such a question could be answered," the Court concluded that it should be answered for two reasons. First, the 1968 constitutional revision "permit[ted] interested persons to be heard," allowing for the presentation of "both sides of this controversy by the filing of briefs." *Id.* Second, the Court recognized the "great public interest in maintaining the fiscal stability of state government." *Id.* at 9. In other words, because adversarial presentation of the issues had become possible and because of the importance of the issue, the Court answered the question.

Six months later, in response to a request regarding the constitutionality of a proposed tax on certain income of corporations, the Court noted that "[i]t has long been the policy of this Court to decline to express any opinion on the constitutionality vel non of a proposed legislative enactment prior to its adoption by the Legislature." *In re Advisory Op. to Governor*, 243 So. 2d 573, 576 (Fla. 1971). Even so, because requests could now be treated "in somewhat the nature of an adversary proceeding" and because of "the

emergency of the situation"—without an answer, "fiscal chaos" could result—the Court unanimously agreed to answer the question. *Id.*

In 1975, the Court again unanimously opined on the constitutionality of a statute. In *In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520 (Fla. 1975), the Court concluded that a portion of the Florida Correctional Reform Act was unconstitutional. Although the Court's opinion did not reveal the reasons for answering the question, the Governor's request sheds light on why the Court likely agreed to do so. The Governor "recognize[d] that this Court is reluctant to pass on the constitutionality of an act of the Legislature in an advisory opinion." *Id.* at 521. But, he argued, "a determination is vital not only to the executive powers and duties of the Governor, but to those individuals whose restoration of rights is in question," and it "would be very difficult for these questions to reach a judicial forum through any [other] method." *Id.*

A few years later, the Court again answered questions regarding the constitutionality of a law establishing judicial vacancies and redefining the appellate districts. *See In re Advisory Op. to Governor Request of June 29, 1979*, 374 So. 2d 959, 962 (Fla. 1979). Noting

the "confusion surrounding this important enactment," and "[i]n light of the irreparable harm to the public that might result from an erroneous implementation of this statute," the Court determined that it should answer the questions. *Id.* In concurrence, Justice Boyd stressed that "the validity of this legislation is of extreme importance and urgency, so that we have not only the power but the duty to respond to [the Governor's] question," and that "to allow this legislation to be implemented with its constitutionality in doubt may lead to chaotic results in our court system." *Id.* at 967, 968 (Boyd, J., concurring).

Finally, in *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987), after noting that Article IV, Section 1(c) does not "generally empower" the Court to issue advisory opinions regarding the validity of statutes, the Court exercised its discretion to answer a question regarding the imposition of certain taxes because of the "potentially chaotic impact upon [the Governor's] constitutional duties as fiscal manager of Florida." *Id.* at 301.

In sum, when the Court has been confronted with assessing the validity of a statute or proposed statute in response to the Governor's

request, it has exercised its discretion to do so when an unanswered question would lead to chaotic results,[2] undermine the stability of state government,[3] or significantly affect the Governor's constitutional powers and duties.[4] As noted above, this case implicates all three interests.

CONCLUSION

For the foregoing reasons, the Governor's request is within the purview of Article IV, Section 1(c) of Florida's Constitution and the Court should exercise its discretion to provide an opinion in response to the request.

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[2] *In re Advisory Op. to the Governor*, 509 So. 2d at 301; *In re Advisory Op. to Governor Request of June 29, 1979*, 374 So. 2d at 962.

[3] *In re Advisory Op. to the Governor*, 509 So. 2d at 301; *In re Advisory Op. to Governor*, 243 So. 2d at 576; *Op. to the Governor*, 239 So. 2d at 8-9.

[4] *In re Advisory Op. of Governor C.R.*, 306 So. 2d at 521.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 7th day of February, 2022, on all parties required to be served.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it is 14 pages long, in compliance with this Court's Order of February 2, 2022.

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