RON DESANTIS
GOVERNOR

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

www.flgov.com
850-717-9418

February 18, 2022

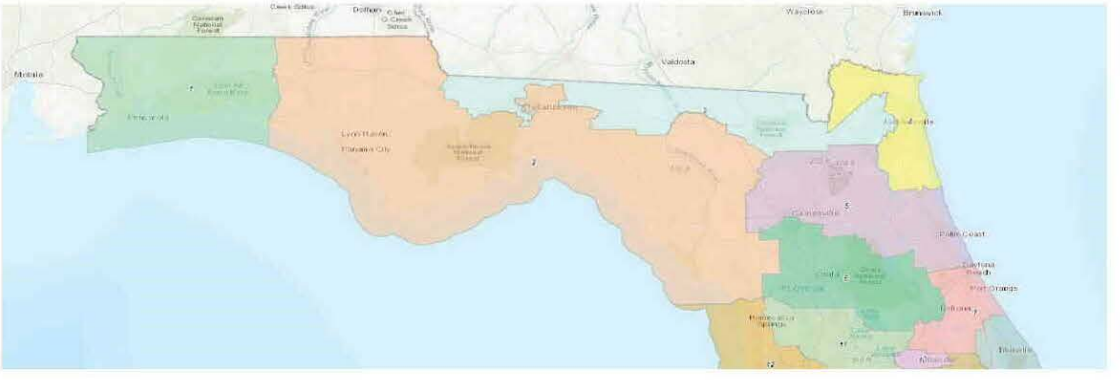
Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

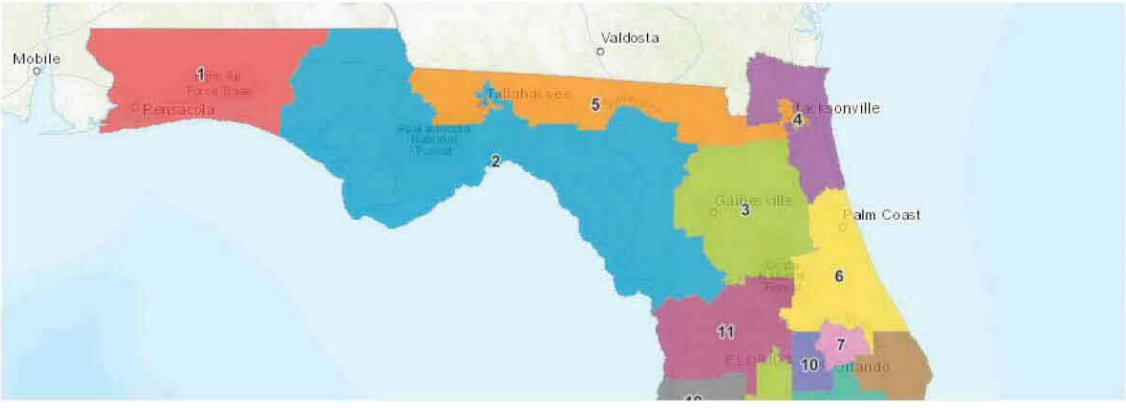
I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps proposed by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations from different regions of northern Florida in a less than majority-minority district so that together they may have an opportunity to elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "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) (citations omitted). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

Proposed Congressional District 3 (Blue)



Current Congressional District 5 (Orange)



The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explain proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It also does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.

Second, only two considerations plausibly explain the district's unusual shape—partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 of the Florida Constitution provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances surrounding the creation of the current district.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The Court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the Court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court determined that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the proposed reapportionment plan seeks to retain the district in large measure to avoid diminishment of minority voting power, race considerations likewise predominate in the creation of proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the U.S. Supreme Court has condemned.

Because it subordinates traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander that can survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (citation omitted). The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1464, 1469. In this case,

however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality), Section 2 is satisfied only when a compact majority of minority citizens can be drawn into a single district. But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), the State of Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

Finally, the U.S. Supreme Court has never held that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. That is especially so where the state race-based requirement lacks a strong basis in evidence. To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, *see Apportionment I*, 83 So. 3d at 619-20, it should be noted that Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-34 (1966). When Florida voters approved Article III, Section 20(a), by contrast, they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.

In any event, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) of the Florida Constitution provides that "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." This section contains two relevant provisions: the first is the non-vote-dilution provision ("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"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The

Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

When Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.

With this reading, both the non-vote-dilution provision and the non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). 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). In other words, the non-vote-dilution provision 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*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid the federal constitutional concerns raised above. *See Cooper*, 137 S. Ct. at 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the foregoing legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis' advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399