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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al. Plaintiffs, v. CORD BYRD, in his official capacity as Florida Secretary of State, et al., Defendants.	Case No. 2022-ca-000666

PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

In response to Plaintiffs' Amended Complaint, Defendants the Florida Secretary of State, Florida House of Representatives, and Florida Senate each raised the affirmative defense that they need not comply with the Fair Districts Amendment, Art. III, § 20(a), Fla. Const., because, in their view, the Amendment itself is unconstitutional. But Florida courts have long held that public officials are jurisdictionally barred from asserting that they are excused from a legal duty because that duty is *itself* unconstitutional. *See State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922) (establishing Florida's public official standing doctrine). Plaintiffs therefore move under Florida Rule of Civil Procedure 1.140(f) to strike the Secretary's first and second affirmative defenses, the House's third and fifth affirmative defenses, and the Senate's fourth affirmative defense for lack of standing.

LEGAL AND PROCEDURAL BACKGROUND

Florida's public official standing doctrine provides that public officials lack standing both to bring suits challenging the constitutionality of a "constitutional or statutory duty," *Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981), and to "defend [their] nonperformance" of such a duty by challenging the same, *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*,

991 So. 2d 793, 794 (Fla. 2008). The doctrine stems from foundational separation of powers principles, which hold that the judiciary alone has the power to decide a law is unconstitutional. *See Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019); *see also Fla. Ass'n of Pro. Lobbyists, Inc. v. Div. of Legis. Info. Servs.*, 7 So. 3d 511, 514 (Fla. 2009) ("[N]o branch may encroach upon the powers of another."). In other words, because executive and legislative officers lack the power of judicial review, they must assume that duties assigned to them by law are constitutional "*until* judicially declared otherwise." *Atl. Coast Line*, 94 So. at 683 (emphasis added). As a result, a public official cannot decide *not* to comply with their legal duty on the basis that the duty is unconstitutional—because doing so would be preempting the judiciary's decision and effectively substituting the official's own judgment for that of a court's in the first instance. *Id.* ("[T]he oath of office 'to obey the Constitution,' means to obey the Constitution, not as the officer decides, but as judicially determined.").

It follows from these principles that a public official may not simply allege the unconstitutionality of their legal duty in court—either affirmatively or defensively. They cannot do so affirmatively because any judicial determination must be "in a proper proceeding," *id.* at 682, and "[d]isagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion," *Markham*, 396 So. 2d at 1121. And they cannot do so defensively because "the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," so any allegation of unconstitutionality before such a judicial declaration has been made is not "true" and therefore "no defense." *Atl. Coast Line*, 94 So. at 682.

Notwithstanding more than 100 years of Florida law to this effect, Defendants here raised affirmative defenses in their answers to Plaintiffs' amended complaint claiming that they need not

follow the Fair Districts Amendment because they believe the Amendment violates several provisions of the federal Constitution. Specifically, the Secretary argues in his first and second affirmative defenses that the Fair Districts Amendment's non-diminishment and minority-voting-protection provisions "violate the Fourteenth Amendment to the U.S. Constitution" both facially and as applied to North Florida. Sec'y of State's Answer to Am. Compl. ¶¶ 1–2, at 14. Likewise, the Florida House asserts in its fifth affirmative defense that the "[a]pplication of the Florida Constitution's non-diminishment provision to the Benchmark Congressional District 5 would violate the Equal Protection Clause of the United States Constitution." Fla. House Answer to Am. Compl. at 16. Finally, the House's third and Senate's fourth affirmative defense each allege that Plaintiffs' claims violate the federal Constitution's Elections Clause. Fla. House Answer to Am. Compl. at 16; Fla. Senate Answer to Am. Compl. ¶ 4, at 26.[1]

But Defendants are not members of the judiciary. Whatever powers they may hold, the essential "judicial duty" "to say what the law is" is not among them. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). And nowhere is the doctrine of "inherent judicial power" more important than, as here, "when the judicial function at issue is the safe-guarding of fundamental rights." *Pub. Def.,*

[1] While the House's third and the Senate's fourth affirmative defenses are styled as challenges to the constitutionality of Plaintiffs' requested relief, at bottom they challenge the constitutionality of the Fair Districts Amendment itself. Fla. House Answer to Am. Compl. at 16; Fla. Senate Answer to Am. Compl. ¶ 4, at 26. Plaintiffs' requested relief asks the Court to strike the noncompliant plan and order or adopt "a new congressional districting plan that complies with [the Amendment]," Am. Compl. at 33–35, pursuant to binding Florida Supreme Court precedent determining that the Amendment allows such relief. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 297 (Fla. 2015) (ordering use of compliant districting plan for congressional elections); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (endorsing Florida Supreme Court's application of Fair Districts Amendment to strike down noncompliant plan). By arguing that such relief is unconstitutional, the House's and Senate's Elections Clause-related defenses challenge the constitutionality of the Amendment itself.

Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261, 271–72 (Fla. 2013) (quoting *Maas v. Olive*, 992 So. 2d 196, 204 (Fla. 2008)).

Defendants' constitutional affirmative defenses are an affront to Florida's Constitution, and this Court lacks jurisdiction to consider them.

ARGUMENT

Neither the Secretary nor the Legislature may wield the judicial power. And no exception to the public official standing doctrine applies to the Fair Districts Amendment. For these reasons, the doctrine bars Defendants' constitutional affirmative defenses, and this Court must strike them.

I. Legal Standard.

"A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Fla. R. Civ. P. 1.140(f). Under this standard, a court may strike an affirmative defense on the ground that it violates the public official standing doctrine. *See Echeverri*, 991 So. 2d at 803 (affirming the trial court's order striking a public official's affirmative defense under the public official standing doctrine).

Florida courts broadly interpret the public official standing doctrine to reach not only "those public officials charged with a duty under the challenged law" but also "public officials whose duties are 'affected' by the challenged law." *Sch. Dist. of Escambia Cnty.*, 274 So. 3d at 495.

II. The Secretary lacks standing to assert constitutional defenses.

The Secretary is an executive officer. *See* § 20.10, Fla. Stat. And as an executive officer, the Secretary may not exercise the judicial power. Art. II, § 3, Fla. Const. (expressly codifying separation of powers doctrine). The public official standing doctrine applies to the Secretary here because—even if the Fair Districts Amendment imposed no "duty" on the Secretary, which Plaintiffs do not concede—the Secretary's duties are "'affected' by the challenged law." *Sch. Dist.*

of Escambia Cnty., 274 So. 3d at 495. Indeed, as Florida's chief election officer, § 97.012, Fla. Stat., the Secretary is perhaps the public officer most "affected" by the Florida Constitution's rules on redistricting. *See* **Exhibit A** (instructing supervisors of elections on implementation of congressional map).

In short, the public official standing doctrine applies with full force to the Secretary, and this Court must therefore strike his first and second affirmative defenses.

III. The Legislature lacks standing to assert constitutional defenses.

The Florida House and Senate make up the legislative branch of Florida's government. Art. III, § 1, Fla. Const. And just as members of the executive branch cannot exercise the judicial power, neither can the legislative branch. *See* Art. II, § 3, Fla. Const.; *cf. Rogers & Ford Constr. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993) (holding that Legislature may not encroach on judicial power by "constitutionally determin[ing] whether a party has standing in a particular cause"); *cf. Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) (equating standing principles for executive and legislative officers); *Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 576 (La. 2005) (rejecting argument that public official standing doctrine applied only to executive officers). The public official standing doctrine applies squarely to the Florida House and Senate because they have an unambiguous constitutional duty to redistrict. Art. III, § 20, Fla. Const. (setting "standards for establishing congressional district boundaries" under Article describing "Legislature"); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015) ("Our citizens declared that the Legislature must redistrict in a manner that prohibits favoritism or discrimination." (internal quotations and citation omitted)); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1278 (S.D. Fla. 2002) ("Every ten years, after the census, the Florida legislature is required to redraw the State's congressional districts and the State Senate and House districts to adjust for population shifts."). And, in no uncertain terms, the Florida Constitution—by way of the

Fair Districts Amendment—sets out "the means by which" the House and Senate are to carry out this duty. *Markham*, 396 So. 2d at 1121; *see* Art. III, § 20(a), Fla. Const.

To be sure, the House and Senate may believe that the means by which the Florida Constitution assigns the duty to redistrict are unconstitutional, but that is a question squarely for the judiciary—not the Legislature—to decide in the first instance. *See* Art. II, § 3, Fla. Const.; *see supra* at 2–3. To allow the House and Senate to defend their actions by asserting that they have decided that portions of the Florida Constitution are unconstitutional would be to grant the Legislature the power to cherry-pick which constitutional provisions it will follow. The framers of the Florida Constitution crafted the separation of powers mandated by the Constitution to deny the Legislature this "omnipotent power." *Trs. Internal Improvement Fund v. Bailey*, 10 Fla. 238, 250 (Fla. 1863). The Legislature must presume that its duties under the Florida Constitution are constitutional until the courts say otherwise, and thus the Florida House and Senate lack standing to assert constitutional defenses in this action.

IV. No exception to the public official standing doctrine applies here.

Finally, Florida courts recognize two narrow exceptions to the public official standing doctrine—(1) personal injury and (2) the disbursement of public funds—but neither applies here.

First, the "personal injury" exception to the public official standing doctrine "confers standing on a public official to bring a constitutional challenge when the official can show injury to his person, property, or other material right by the statute in question." *Sch. Dist. of Escambia Cnty.*, 274 So. 3d at 496. But this exception applies only where an injury occurs in the official's personal capacity: "the type of personal injury necessary to allow a public official to challenge the constitutionality of a statute is limited to injuries that do 'not grow out of the obligation of his oath of office, nor out of his official position.'" *Id.* (quoting *Atl. Coast Line*, 94 So. at 684). For example, the exception would apply when failure to carry out the duty at issue would expose the official to

individual liability. *See Green v. City of Pensacola*, 108 So. 2d 897, 900 (Fla. 1st DCA 1959) ("It may be seriously questioned whether the Comptroller's failure to collect a tax lawfully due the State of Florida would render him liable on his official bond as well as subject him to impeachment for nonfeasance in office."). In other words, officials must have some other interest in the outcome beyond their official duties. Here, the Secretary, sued in his official capacity, and the Florida House and Senate, sued as institutions, do not face injury to their individual property, person, or material right by way of the Fair Districts Amendment. *See* Am. Compl. ¶¶ 30–32, at 11; Sec'y of State's Answer to Am. Compl. ¶ 30, at 4.

Second, Florida courts recognize a "public funds" exception to this doctrine. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 935 (Fla. 2005) (Bell, J., concurring). This "narrow exception," *Echeverri*, 991 So. 2d at 797, "allows for standing to challenge the constitutionality of a law providing for the expenditure of public funds," *Sch. Bd. of Collier Cnty. v. Fla. Dep't of Educ.*, 279 So. 3d 281, 290 (Fla. 1st DCA 2019). Thus, for example, a school board had standing to challenge a law that required it to "share a portion of [its] discretionary capital outlay millage revenues with charter schools." *Id.* at 285. But the Fair Districts Amendment does not provide for the expenditure of public funds; it merely sets limits on the Legislature's discretion in the realm of congressional redistricting. This exception therefore similarly does not apply. *See Island Resorts Invs., Inc. v. Jones*, 189 So. 3d 917, 922 (Fla. 1st DCA 2016).

CONCLUSION

Under the public official standing doctrine, Defendants' subjective beliefs about the constitutionality of the Fair Districts Amendment have no place in this litigation. For all of the foregoing reasons, this Court should strike Defendant Secretary's first and second affirmative defenses, Defendant Florida House's third and fifth affirmative defenses, and Defendant Florida Senate's fourth affirmative defense for lack of standing.

CERTIFICATE OF CONFERRAL

In accordance with the Court's policies and procedures, counsel for Plaintiffs attended a telephonic conferral conference with counsel for Defendants Florida Secretary of State, Florida House, and Florida Senate on April 14, 2023. Despite Plaintiffs' good-faith attempt to confer, all Defendants oppose Plaintiffs' motion to strike.

Dated: April 14, 2023

Respectfully submitted,

/s/ Jyoti Jasrasaria

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2023 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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EXHIBIT A

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Cc: Davis, Ashley E.; Matthews, Maria I.; Marconnet, Amber; O"Brien, Colleen E.; Labasky, Ron - FSASE Legal Counsel

Subject: RE: Please read -- 3rd Update on state redistricting case (U.S. congressional map)

Attachments: 2022.05.12 - Order Granting Motion for Temporary Injunction.pdf
FL_PlanA.csv

Dear Supervisors,

Yesterday evening, in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)), the trial court issued an order vacating the automatic stay referenced in my previous e-mail (see below).

The Secretary intends to soon file an Emergency Motion at the First District Court of Appeal asking the appellate court to reinstate the stay. We expect that the First District Court of Appeal will take up the issue quickly and we will continue to promptly update you with any rulings or developments.

In the meantime, the trial court's May 12, 2022, Order Granting Motion for Temporary Injunction is now in effect. For your convenience, I have included as an attachment to this e-mail a copy of the trial court's order. Additionally, and pursuant to the trial court's order, I have included as an attachment to this e-mail the final corrected version of an excel file necessary for you to replicate Plaintiffs' "Proposed Map A" which is currently the operative map for the upcoming 2022 elections. Please note that neither the Department of State nor the Florida Legislature created this file; this is the product of Plaintiffs' expert alone.

As you proceed with implementation, please do make sure to remember that if the First District Court of Appeal grants the Secretary's emergency motion to reinstate the stay, the state's legislatively enacted map (SB 2-C) would once again become the operative map for the upcoming

2022 elections. On that note, and consistent with the trial court's oral pronouncement during the hearing yesterday, to the extent that it is possible, we ask that you proceed on two fronts and plan to implement both maps. At a minimum, as you undertake implementation on "Proposed Map A," you should make sure to preserve any and all work that has already been done towards implementing SB 2-C.

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Subject: RE: Please read -- 2nd Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

As forecasted in the below communication from this morning, the trial court in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)) entered this afternoon a written Order Granting Motion for Temporary Injunction. The Secretary's Notice of Appeal immediately "stayed" the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), causing SB 2-C (the state's current, enacted congressional map) to remain in effect for the upcoming 2022 elections absent further direction from the courts. Therefore, you should continue implementing SB 2-C, the map the Florida Legislature enacted and the Governor approved on April 22, 2022.

The Secretary's Notice of Appeal is attached herein and includes the Order Granting Motion for Temporary Injunction.

We will continue to promptly update you with any additional developments.

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Subject: Please read -- Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

Yesterday afternoon, in the state court redistricting case (*Black Voters Matter et al v. Lee, et al* /2022CA000666, 2nd Jud. Cir.), the trial court held a hearing on Plaintiffs' motion for a temporary injunction and *orally* ruled that they have a likelihood of success on the merits of their claim that SB 2-C (the state's current, enacted congressional map) violates the non-diminishment standard of Article III, Section 20 of the Florida Constitution in portions of North Florida. The trial court indicated that it will soon issue an order in *writing* temporarily enjoining SB 2-C and ordering a different map be put in place – i.e., Plaintiffs' "Proposed Map A." The Secretary intends to appeal the decision to the First District Court of Appeal immediately, but cannot do so until the written order is issued.

The Secretary's appeal will immediately "stay" the trial court's ruling pursuant to the Florida Rules of Appellate Procedure, causing SB 2-C to remain in effect for the upcoming 2022 elections absent further direction from the courts.

We will continue to provide updates and guidance as information becomes available.

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