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. Case No. 2022 CA 666

CORD BYRD, in his official capacity as Florida Secretary of State, et al.,

Defendants.
_____/

FLORIDA LEGISLATURE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

The Florida Senate and Florida House of Representatives oppose Plaintiffs' motion to strike the Senate's fourth affirmative defense and the House's third and fifth affirmative defenses. The motion is untimely under Florida Rule of Civil Procedure 1.140(b) and should be denied on that basis alone. But even if Plaintiffs had filed a timely motion to strike, their challenge to the legal sufficiency of the Legislature's affirmative defenses would still fail on the merits. The Legislature's affirmative defenses do not implicate the public official standing doctrine and, contrary to Plaintiffs' arguments, this

Court has jurisdiction to adjudicate these defenses if necessary in the course of this litigation. The motion to strike should be denied.

Legal Standard

Rule 1.140(b) requires a party challenging the legal sufficiency of an affirmative defense to assert that objection in a motion to strike the defense. *See* 1972 Amend., Comm. Notes, Fla. R. Civ. P. 1.140 ("The proper method of attack for failure to state a legal defense remains a motion to strike."). A motion to strike a defense under Rule 1.140(b) must be brought within 20 days after service of the pleading. Fla. R. Civ. P. 1.140(b) ("[T]he objection of failure to state a legal defense in an answer . . . must be asserted by motion to strike the defense within 20 days after service of the answer . . . .").

Separately, Rule 1.40(f) authorizes a motion to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading." A motion to strike under Rule 1.140(f)—unlike a motion to strike under Rule 1.140(b)—may be filed "at any time."

Argument

I. Plaintiffs' motion to strike the Legislature's affirmative defenses is untimely.

Plaintiffs' motion asks this Court to strike certain affirmative defenses raised by the Legislature on the grounds that these defenses are "jurisdictionally barred" by the public official standing doctrine. Mot. at 1. *See also* Mot. at 4 (doctrine "bars" Defendants' affirmative defenses); Mot. at 6 (House and Senate "lack standing to assert constitutional defenses in this action"). Plaintiffs' allegations fall squarely within the ambit of Rule 1.140(b), which governs motions to strike objecting to the legal sufficiency of a defense raised in an answer. But Plaintiffs didn't file their motion within 20 days as required by Rule 1.140(b). Instead, they filed their motion to strike *46 days* after the House and Senate served their answers and affirmative defenses on February 27, 2023.

Perhaps in recognition that a Rule 1.140(b) motion to strike would be untimely, Plaintiffs claim they are moving to strike under Rule 1.140(f). Mot. at 1, 4. But Plaintiffs' motion never argues that the Legislature's affirmative defenses include material that is "redundant, immaterial, impertinent, or scandalous." In fact,

Plaintiffs don't even mention those terms other than in a direct quotation from Rule 1.140(f) in the motion's "legal standard" section. Mot. at 4. Plaintiffs fail to cite a single case that explains what any of those terms mean or how they would apply to the defenses Plaintiffs ask this Court to strike. And it is difficult to comprehend how the standards for striking material under Rule 1.140(f) could possibly apply to the affirmative defenses Plaintiffs seek to challenge. *See* Senate Ans. and Aff. Def. at 26 (asserting that relief sought by Plaintiffs is inconsistent with the Elections Clause of the United States Constitution); House Ans. and Aff. Def. at 16 (asserting that relief sought by Plaintiffs is inconsistent with Elections and Equal Protection Clauses of the United States Constitution). Affirmative defenses seeking to ensure that any relief ordered by this Court complies with the federal constitution are simply not "redundant, immaterial, impertinent, or scandalous." If a plaintiff may challenge the sufficiency of an affirmative defense in a motion to strike filed under Rule 1.140(f), then Rule 1.140(b)'s time limitation would be meaningless.

Rule 1.140(b) imposes a 20-day deadline for filing a motion to strike a defense as legally insufficient. Plaintiffs' motion is untimely and should be denied on that basis.

II. The public official standing doctrine does not bar this Court's consideration of the Legislature's affirmative defenses.

Even if Plaintiffs had timely filed their Rule 1.140(b) motion, their arguments would still fail on the merits because the public official standing doctrine has no relevance to the Legislature's affirmative defenses. "The public official standing doctrine, first explained in *State ex rel. Atlantic Coast Line Railway Co. v. State Board of Equalizers*, . . . provides that 'a public official may not defend his *nonperformance* of a *statutory* duty by challenging the constitutionality of the statute.'" *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019) (emphasis added) (quoting *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 797 (Fla. 2008)). "The doctrine, grounded in the separation of powers, recognizes that public officials are obligated to obey *the legislature's* duly enacted statute until the judiciary passes on its constitutionality." *Santa Rosa Dunes*, 274 So. 3d at 494 (emphasis added); *id.* at 496 ("the public

official standing doctrine broadly prohibits ministerial officers from challenging legislative enactments"). In sum, the public official standing doctrine prohibits *ministerial officers* from: 1) challenging *legislative* enactments; or 2) defending their non-performance of a statutory duty by challenging the constitutionality of the *statute* imposing that duty. *See*, *e.g.*, *Crossings at Fleming Island*, 991 So. 2d 793; *Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388 (Fla. 1st DCA 2021).

Plaintiffs' motion turns the public official standing doctrine on its head by seeking to prohibit the Legislature from *defending* the constitutionality of Florida's legislation adopting congressional districts against a constitutional challenge *brought by the Plaintiffs*. Mot. at 5-7. But the doctrine does not operate to prevent the *Legislature* from *defending* the constitutionality of legislative acts. Instead, the purpose of the doctrine is to prevent ministerial officers from nullifying statutes by refusing to perform their duties on the basis of their own judgment that their statutory duties are unconstitutional. *See Crossings at Fleming Island*, 991 So. 2d at 798 (explaining that "to allow a public official to refuse to obey a law would be 'the doctrine of nullification, pure and simple" (quoting

State ex rel. Atl. Coast Line Ry. Co. v. State Bd. of Equalizers, 94 So. 681 (1922))).

Under Florida's public official standing doctrine, public officials are generally barred from "attacking the constitutionality of a statute." *Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d at 391. The First District recently held, for example, that the Miami-Dade County Expressway Authority (a state agency) lacked standing to file a complaint challenging the constitutionality of a statute dissolving the Authority and transferring its assets and authority to the newly created Greater Miami Expressway Agency. *Id.* at 391-92. *See also Santa Rosa Dunes*, 274 So. 3d at 496 (holding that school district lacked standing to attack the constitutionality of a property tax exemption because the public official standing doctrine "broadly prohibits ministerial officers from challenging legislative enactments").

In addition to the prohibition on initiating constitutional challenges to statutory enactments, the public official standing doctrine also provides that a public official "may not defend his nonperformance of a statutory duty by challenging the constitutionality of the statute." *Crossings at Fleming Island*, 991 So.

2d at 797 (citing *Atl. Coast Line*, 94 So. 681). In this respect, the doctrine exists "to prevent public officials from nullifying legislation through their refusal to abide by the law and requires them instead to defer to the judiciary's authority to consider the constitutionality of a legislative act." *Santa Rosa Dunes*, 274 So. 3d at 495. For example, in *Crossings at Fleming Island*, a property appraiser who denied tax exemptions to the plaintiff sought to defend the non-performance of his statutory duties by asserting, as an affirmative defense, the unconstitutionality of the statute that entitled the plaintiff to those tax exemptions. 991 So. 2d at 794–95.

Neither of these aspects of the public official standing doctrine is implicated here. The only constitutional challenge to a legislative act involved in this litigation is *Plaintiffs'* challenge to the constitutionality of Florida's congressional apportionment codified at Chapter 2022-265, Laws of Florida. None of the Legislature's affirmative defenses involves a constitutional challenge to this legislation. To the contrary, all of the Legislature's affirmative defenses present legal defenses against *Plaintiffs'* constitutional

challenges to Chapter 2022-265, Laws of Florida.[1] Plaintiffs' motion to strike does not identify a single case in which the public official standing doctrine was applied to prohibit a defendant—let alone the Legislature—from *defending* the constitutionality of legislation.

The Senate and House, moreover, are not "ministerial officers." *Santa Rosa Dunes Owners*, 274 So. 3d at 496. They are elective bodies that exercise the least ministerial of all governmental powers: the power to make laws. The public official standing doctrine applies to ministerial officers—not legislative bodies.

Based on its resolution of the claims in Plaintiffs' amended complaint, this Court may not ever need to reach the Legislature's affirmative defenses. The merits of the parties' legal arguments on the affirmative defenses also present a question for another day. But Plaintiffs' claim that the Legislature lacks authority even to *assert* its affirmative defenses—and that this Court "lacks jurisdiction to

[1] To the extent the Legislature's affirmative defenses note the preemptive effect of the federal constitution on this Court's adjudication of Plaintiffs' claims, those arguments are a direct consequence of the Supremacy Clause. *See* U.S. Const. Art. VI, cl. 2. (providing that the federal constitution and laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

consider them" (Mot. at 4)—finds no support in the laws or precedent of this state. The public official standing doctrine does not bar the Legislature from defending the constitutionality of its legislative acts.

Conclusion

The motion to strike should be denied.

/s/ Andy Bardos
ANDY BARDOS (FBN 822671)
GRAYROBINSON, P.A.
301 South Bronough Street,
Suite 600
Tallahassee, Florida 32301
(850) 577-9090
andy.bardos@gray-robinson.com
vanessa.reichel@gray-robinson.com

Counsel for the Florida House of Representatives

/s/ Daniel Nordby
DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS, JR. (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
GMeros@shutts.com
TPrice@shutts.com
MMontanaro@shutts.com
CHill@shutts.com

CARLOS REY (FBN 11648)
KYLE GRAY (FBN 1039497)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399
(850) 487-5855
Rey.Carlos@flsenate.gov

Counsel for Florida Senate

Certificate of Service

I certify that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal on May 5, 2023.

/s/ *Daniel Nordby*