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' REPLY IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES

Defendants' response to Plaintiffs' motion to strike ignores the binding precedent on which the motion is based, and which precludes several of Defendants' defenses due to significant jurisdictional and separation of powers concerns. Instead, Defendants rely on procedural and formalistic arguments to attempt to convince the Court to deviate from this well-established line of precedent. But Plaintiffs' motion is both timely and correct on the merits, and the Court should grant it. For the reasons stated below, and in Plaintiffs' motion, the Court should 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.

ARGUMENT

I. Plaintiffs' motion is timely.

Defendants' untimeliness argument—which comprises the entirety of the Secretary's response—badly misses the mark for at least two reasons.[1] First, Plaintiffs moved to strike under Florida Rules of Civil Procedure 1.140(f), which allows "[a] party . . . to strike . . . redundant,

[1] Although the Secretary purports to incorporate Legislative Defendants' merits arguments, *see* Sec'y's Response at 3, those arguments are limited to Legislative Defendants' role as legislators and do not apply to the Secretary, *see infra* Section II.

immaterial, impertinent, or scandalous matter from any pleading *at any time*," *id.* (emphasis added). Rule 1.140(f) applies neatly to Plaintiffs' motion—which challenges Defendants' standing to bring certain affirmative defenses. As the First District Court of Appeal has long held, when a party lacks standing to bring a particular claim, that matter may be properly stricken as "immaterial, if not also impertinent." *Hodges v. Buckeye Cellulose Corp*., 174 So. 2d 565, 568 (Fla. 1st DCA 1965). That ruling makes sense. If a court lacks jurisdiction to consider a defense raised by a defendant, that defense is "wholly irrelevant" and "can have no bearing upon the equities and no influence upon the decision either as to the relief to be granted or the allowance of costs." *Gossett v. Ullendorff*, 154 So. 177, 179 (Fla. 1934) (setting forth standard for a "motion to strike from an answer any part of it which may be deemed to be redundant, impertinent, or scandalous"); *see also Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1133-34 (Fla. 4th DCA 2003) (affirming Rule 1.140(f) motion to strike under same standard). Such is the case here.[2]

Second, even if Rule 1.140(f) were an improper vehicle for Plaintiffs' challenge, "[t]he defense of lack of jurisdiction of the subject matter may be raised at any time." Fla. R. Civ. P. 1.140(h)(2); *see also Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 389 (Fla. 1st DCA 2021) (holding that "trial court lacked subject-matter jurisdiction . . . because [party] lacked standing under the public official standing doctrine"), *reh'g denied* (May 17, 2021), *review dismissed sub nom. Miami-Dade Cnty. Expressway Auth. v. State*, No. SC21-841, 2021 WL

[2] Referring to the Florida Supreme Court's affirmance of a motion to strike under the public official standing doctrine in *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 794 (Fla. 2008), the Secretary contends that "[i]t's unlikely that the *Crossings* motion was brought under Rule 1.140(f)." Sec'y's Response at 3. However, the petitioner's Supreme Court brief on the merits in that case explains that it successfully moved to strike respondent's affirmative defenses *years* into the litigation, strongly suggesting that its motions were brought under Rule 1.140(f), which allows a motion to strike "at any time." *See* Brief for Petitioner at 1-2, *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, No. SC07-1556, 2008 WL 177426, at * 1-2 (Fla. Jan. 2008).

3783383 (Fla. Aug. 26, 2021); *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019) (affirming summary judgment on intervenor's affirmative defenses because "a public official's '[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'" (quoting *Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981)). This Court may thus construe Plaintiffs' motion as one for judgment on the pleadings as to Defendants' standing to raise the Fair Districts Amendment's constitutionality. *See* Fla. R. Civ. P. 1.140(c) ("After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings."); *Talcott Resol. Life Ins. Co. v. Novation Cap. LLC*, 261 So. 3d 580, 584 (Fla. 4th DCA 2018) ("The purpose of a motion for judgment on the pleadings is to test the legal sufficiency of a cause of action or defense where there is no dispute as to the facts.").

II. The public official standing doctrine is not limited to ministerial officers' statutory duties.

Legislative Defendants' sole substantive argument—that the public official standing doctrine does not apply to challenges to constitutional duties by legislative officials because it bars only challenges to *statutory* duties by *ministerial* officers—is simply wrong. Legislative Defendants fail to acknowledge that the Florida Supreme Court has held that the public official standing doctrine applies to any "constitutional *or* statutory duty, *or* the means by which it is to be carried out." *Markham*, 396 So. 2d at 1121 (emphasis added). The Legislature's responsibility to set congressional districts is plainly a constitutional duty. *See* U.S. Const. art. I, § 4, cl. 1; *see also* Motion at 5. And the Florida Constitution lays out the manner in which that duty is to be carried out. Art. III, § 20, Fla. Const.; *see also* Motion at 5-6.

Relatedly, Legislative Defendants rely on a single quote in a single case for the proposition that the public official standing doctrine applies only to "ministerial officers." *See* Legislative Defs.' Resp. at 5, 7, 9 (quoting *Santa Rosa Dunes*, 274 So. 3d at 496 ("[T]he public official standing doctrine broadly prohibits ministerial officers from challenging legislative enactments.")). But the rest of the sentence from which the quote is drawn confirms that the *Santa Rosa Dunes* court applied the doctrine to the intervenor in that case—a school district, not a "ministerial officer"—for the simple reason that "the statute at issue affects the official duties of the District." *Id.* ("Because the public official standing doctrine broadly prohibits ministerial officers from challenging legislative enactments, and because the statute at issue affects the official duties of the District, the trial court correctly found that the District lacked standing to challenge the constitutionality of [the statute]."). Indeed, Florida courts have applied the doctrine to bar defenses from the Governor, Attorney General, and State Treasurer. *See, e.g.*, *State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681, 682, 684-85 (Fla. 1922). Legislative Defendants can point to no authority that they should be exempt from its reach.

Even if the public official standing doctrine could be narrowed to "ministerial" functions, *but see Markham*, 396 So. 2d at 1121 (holding that public official standing doctrine applies to *any* "constitutional or statutory duty, or the means by which it is to be carried out"), a court would look to the duty at issue, not the official raising the claim or defense. *See Atl. Coast Line*, 94 So. at 681, 685 (applying public official standing doctrine to bar Florida Governor, Attorney General, and Treasurer from challenging constitutionality of their "ministerial duties"); *cf. Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 572 (La. 2005) (applying public official standing doctrine to state judges when the duty at issue was "ministerial in nature"). Legislative Defendants make no argument that the duties implicated by this litigation are beyond the scope of the doctrine,

and for good reason: their obligation to draw congressional districts in accordance with the Florida Constitution is not discretionary. "Ministerial" simply refers to "some duty imposed expressly by law, . . . involving no discretion in its exercise, but mandatory and imperative." *State ex rel. Allen v. Rose*, 167 So. 21, 22-23 (Fla. 1936). The Florida Constitution mandates compliance with the Fair Districts Amendment. *See, e.g.*, Art. III, § 20, Fla. Const. ("[D]istricts *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.") (emphasis added). While Legislative Defendants may exercise discretion as to *how* they comply with the Constitution's dictates, they have no discretion to choose not to comply with them at all. *See Rose*, 167 So. at 22-23 (explaining that mandamus, which "only lies to enforce a ministerial act or duty," "may be invoked to compel the exercise of discretion" as long as it does not "compel such discretion to be exercised in any particular way"). Thus, like other public officials with wide-ranging responsibilities, the public official standing doctrine bars Legislative Defendants from challenging the constitutionality of their constitutionally-prescribed duties. *See Markham*, 396 So. 2d at 1121 ("Disagreement 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."); *Atl. Coast Line*, 94 So. at 682 (holding that because "the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," any allegation of unconstitutionality before such a judicial declaration has been made is not "true" and "no defense").

Ultimately, Legislative Defendants mischaracterize Plaintiffs' motion rather than engage with it. *See* Legislative Defs.' Response at 6 ("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*."); *see id.* at 8-9 (similar). But while Legislative Defendants may of course defend the constitutionality of the congressional plan, they *may not* do so by challenging the constitutionality of the Florida Constitution itself. *See* Fla. House Answer to Am. Compl. at 16; Fla. Senate Answer to Am. Compl. ¶ 4, at 26. Under Florida's strict separation of powers principles, that question is reserved solely for the judicial branch; executive and legislative officers may not pick and choose which constitutional duties to comply with based on *their* view of what the law should be. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); Legislators' Motion for Protective Order Reply at 3 (describing Florida's Separation of Powers Clause as "strong"; citing *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (characterizing the separation of powers as "the cornerstone of democracy")). Accordingly, the Legislature must assume that duties assigned to it by law are constitutional "*until* judicially declared otherwise." *Atl. Coast Line*, 94 So. at 683 (emphasis added); *see also* Motion at 1-4; *Mil. Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981) ("Powers constitutionally bestowed upon the courts may not be exercised by the legislature."). And to that maxim, Legislative Defendants have no response.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion and 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.

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Respectfully submitted,

Frederick S. Wermuth
Florida Bar No. 184111
Thomas A. Zehnder
Florida Bar No. 0063274
Quinn B. Ritter
Florida Bar No. 1018135
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com
qritter@kbzwlaw.com

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 656-0177
Facsimile: (206) 656-0180
akhanna@elias.law

/s/ Jyoti Jasrasaria
Christina A. Ford
Florida Bar No. 1011634
Joseph N. Posimato*
Jyoti Jasrasaria*
Julie Zuckerbrod*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW
Suite 400
Washington, D.C. 20001
Phone: (202) 968-4490
Facsimile: (202) 968-4498
cford@elias.law
jposimato@elias.law
jjasrasaria@elias.law
jzuckerbrod@elias.law
**Admitted Pro Hac Vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 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.

/s/ Jyoti Jasrasaria
Jyoti Jasrasaria*
*Admitted *Pro Hac Vice*

Counsel for Plaintiffs

SERVICE LIST

Bradley R. McVay
Ashley Davis
David Chappell
Christopher DeLorenz
Joseph S. Van de Bogart
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
brad.mcvay@dos.myflorida.com
ashley.davis@dos.myflorida.com
david.chappell@dos.myflorida.com
christopher.delorenz@eog.myflorida.com
joseph.vandebogart@dos.myflorida.com

Mohammed O. Jazil
Michael Beato
Chad E. Revis
Holtzman Vogel Baran Torchinsky
& Josefiak, PLLC
119 S. Monroe Street, Suite 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com
crevis@holtzmanvogel.com

Counsel for Florida Secretary of State

Daniel E. Nordby
Shutts & Bowen LLP
215 S. Monroe Street
Suite 804
Tallahassee, FL 32301
ndordby@shutts.com

Kyle E. Gray
Deputy General Counsel of the Florida Senate
302 The Capitol
404 South Monroe Street
Tallahassee, FL 32399
gray.kyle@flsenate.gov

Counsel for Florida Senate

Andy Bardos, Esq.
GrayRobinson, P.A.
301 S. Bronough Street
Suite 600
Tallahassee, FL 32302
andy.bardos@gray-robinson.com

Counsel for the Florida House of Representatives