

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

BLACK VOTERS MATTER CAPACITY
BUILDING INSTITUTE, INC., *et al.*,

Plaintiffs,

Case No. 2022-CA-000666

v.

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

Defendants.

_____ /

**THE FLORIDA HOUSE OF REPRESENTATIVES AND THE
FLORIDA SENATE'S RESPONSE TO PLAINTIFFS' MOTION FOR
JUDGMENT ON THE PLEADINGS AS TO SPECIFIC AFFIRMATIVE DEFENSES**

Defendants, the Florida House of Representatives and the Florida Senate, oppose Plaintiffs' Motion for Judgment on the Pleadings As to Specific Affirmative Defenses, dated June 16, 2023.

**The Motion Should Be Denied for the Same Reasons
the Court Recently Denied Plaintiffs' Motion to Strike**

1. On April 14, 2023, Plaintiffs moved to strike certain affirmative defenses asserted in Defendants' answers. Plaintiffs argued that the public-official standing doctrine bars Defendants' assertion of those defenses.

2. Defendants responded to the motion, and the Court conducted a hearing on June 5, 2023. In a written order entered on June 12, 2023, the Court denied Plaintiffs' motion to strike.

3. Plaintiffs' Motion for Judgment on the Pleadings raises the same argument again. Plaintiffs concede that the argument presented in their latest motion "is substantially

similar to the argument advanced on the public official standing doctrine in their motion to strike.” Mot. at 2 n.1. In fact, Plaintiffs assert that they “do not affirmatively seek reconsideration of the Court’s substantive determinations.” *Id.* at 2. Instead, as to the House and Senate, Plaintiffs reassert the same public-official standing doctrine only to preserve their arguments for appeal. *Id.* (“Plaintiffs seek to . . . preserve for appeal their argument that the doctrine applies with equal force to Legislative Defendants’ affirmative defenses.”).¹

4. In response, therefore, the House and Senate incorporate by reference Part II of their Response in Opposition to Plaintiffs’ Motion to Strike, dated May 5, 2023, and the arguments they presented at the hearing on June 5, 2023. The transcript of that hearing is attached as Exhibit A to the Motion for Judgment on the Pleadings.

The Motion Should Be Denied Because Plaintiffs Failed to Plead the Public-Official Standing Doctrine As an Avoidance

5. The Court should alternatively deny the motion because it asserts an avoidance that Plaintiffs did not plead and have therefore waived.

6. An assertion that a defendant lacks standing to assert an affirmative defense is an avoidance of that defense. *Cf. Cong. Park Off. Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So. 3d 602, 607 (Fla. 4th DCA 2013) (concluding that a defendant’s assertion that a plaintiff lacks standing to assert a claim is an affirmative defense).

¹ See also Mot. at 4 (“Through this motion, Plaintiffs seek to dismiss the Secretary’s first and second affirmative defenses . . . and preserve their remaining arguments for appeal.”); *id.* at 7 n.5 (“Plaintiffs understand that this Court has already determined that the public official standing doctrine does not apply to Legislative Defendants’ affirmative defenses. Accordingly, they reiterate their arguments here to preserve them for appeal.”); *id.* at 11–12 (“And despite this Court’s determination to the contrary, Plaintiffs preserve their arguments that this Court should also dismiss Defendant Florida House’s third and fifth affirmative defenses and Defendant Florida Senate’s fourth affirmative defense for lack of standing.”).

7. Plaintiffs did not, however, assert the public-official standing doctrine as an avoidance in their reply. *See* Pls.’ Reply & Claims of Avoidance to Def. Sec’y of State, Def. Fla. House, & Def. Fla.’ Senate’s Affirmative Defenses to Pls.’ Am. Compl. (Mar. 20, 2023).

8. An avoidance is waived if not pleaded in a reply. Fla. R. Civ. P. 1.100(a) (“If an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance.”); Fla. R. Civ. P. 1.110(d) (“In pleading to a preceding pleading a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense.”); *Gamero v. Foremost Ins. Co.*, 208 So. 3d 1195, 1197 (Fla. 3d DCA 2017) (concluding that a trial court may not consider an unpleaded avoidance); *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) (concluding that failure to plead an avoidance constitutes a waiver).

9. Thus, in *Frisbie v. Carolina Casualty Insurance Co.*, 162 So. 3d 1079, 1080–81 (Fla. 5th DCA 2015), the court reversed a summary judgment entered in reliance on an avoidance that the plaintiff did not plead in a reply.

10. Here too, Plaintiffs failed to allege that the House and Senate lack standing to assert their affirmative defenses. Because Plaintiffs did not plead this avoidance, the avoidance cannot support a judgment in their favor.

WHEREFORE, the Florida House of Representatives and the Florida Senate request that the Court deny Plaintiffs’ Motion for Judgment on the Pleadings As to Specific Affirmative Defenses, dated June 16, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 28, 2023, the foregoing document was furnished by email to all individuals identified on the Service List that follows.

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