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 FOR JUDGMENT ON THE PLEADINGS AS TO SPECIFIC AFFIRMATIVE DEFENSES

The Court should reject Defendants' arguments opposing Plaintiffs' motion for judgment on the pleadings—indeed, with respect to the Secretary, it already has. On the merits, this Court has already decided that the public official standing doctrine bars the Secretary's affirmative defenses, Tr. 62:23–63:4, and it has no reason to revisit that holding. By the same token, Plaintiffs do not affirmatively ask this Court to revisit its decision that the public official standing doctrine does *not* apply to the Legislative Defendants' affirmative defenses. *See* Mot. at 2. Plaintiffs seek only to effectuate this Court's holding and preserve their remaining arguments for appeal. *Id.* As for Defendants' two procedural arguments, Plaintiffs address them below.

First, Legislative Defendants' waiver argument has no basis in law. Without citation, Legislative Defendants claim that Plaintiffs should have raised Defendants' lack of standing as an avoidance. But as this Court's motion to strike order makes clear, Plaintiffs' assertion that Defendants lack standing to bring certain affirmative defenses is not an avoidance, but an "objection of failure to state a legal defense," Fla. R. Civ. P. 1.140(b). *See* Mot. at 3; *see also* Tr. 63:5–10 (denying Plaintiffs' motion to strike as untimely). And, in turn, Rule 1.140(h)(2) makes clear that a plaintiff may raise a defendant's "failure to state . . . a legal defense" via a "motion for

judgment on the pleadings or at the trial on the merits *in addition* to being raised either in a [Rule 1.140(b)] motion . . . or reply." (Emphasis added). In fact, Rule 1.140(h) expressly operates as a nonwaiver provision for the objection that Plaintiffs raise. *See* Fla. R. Civ. P. 1.140(h)(1) ("A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading *except as provided in subdivision (h)(2)*.").[1]

Moreover, Plaintiffs' assertion that Defendants lack standing does not allege any additional facts and therefore, by definition, cannot be an avoidance. *See Buss Aluminum Prod., Inc. v. Crown Window Co.*, 651 So. 2d 694, 695 (Fla. 2d DCA 1995) ("An avoidance is an allegation of additional facts intended to overcome an affirmative defense."); *Kitchen v. Kitchen*, 404 So. 2d 203, 205 (Fla. 2d DCA 1981) (explaining that avoidances "admit the allegations of the plea to which they are directed and allege additional facts that avoid the legal effect of the confession"); *see also Abston v. Bryan*, 519 So. 2d 1125, 1127 (Fla. 5th DCA 1988) ("A reply to an affirmative defense is permitted only in order to allege new facts that may be sufficient to avoid the legal effect of the facts contained in the affirmative defense.") (citation omitted); *Reno v. Adventist Health Sys./Sunbelt, Inc.*, 516 So. 2d 63, 64 (Fla. 2d DCA 1987) (citing *Kitchen*).

[1] Plaintiffs maintain that this Court lacks subject matter jurisdiction to consider Defendants' affirmative defenses under the public official standing doctrine, *see 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 3783383 (Fla. Aug. 26, 2021), which is an argument that "may be raised at any time," Fla. R. Civ. P. 1.140(h)(2). However, even assuming Plaintiffs' argument is not jurisdictional, Rule 1.140(h) exempts *any* "defense of failure to state . . . a legal defense"—whether jurisdictional or not—from the waiver provision.

Besides, Plaintiffs preserved all relevant factual assertions in their Reply to Defendants' answers: With respect to Legislative Defendants' Elections Clause defenses, Plaintiffs alleged that both the Eleventh Circuit and the Florida Supreme Court have already rejected Defendants' arguments. Pls.' Reply & Claims of Avoidance, ¶¶ 7, 13 (citing *Brown v. Sec'y of State*, 668 F.3d 1271, 1285 (11th Cir. 2012) (rejecting Florida House's claim that the Fair Districts Amendments violated the Elections Clause of the Constitution), and *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 n.2 (Fla. 2015) ("reject[ing] the Legislature's federal constitutional challenge to the Fair Districts Amendment" under the Elections Clause)). And with respect to the Secretary's and the Florida House's Equal Protection Clause defenses, Plaintiffs alleged that "one may draw a minority-performing district in North Florida without race predominating, and that even if race does predominate in the drawing of such a district, drawing such a district would be narrowly tailored to achieve a compelling state interest and would not violate the Fourteenth Amendment." Pls.' Reply & Claims of Avoidance ¶¶ 1, 2. These factual assertions, though unnecessary, support Plaintiffs' arguments under the public official standing doctrine because they confirm that Defendants' defenses asserting unconstitutionality are not based on judicial determinations and, indeed, that some blatantly ignore binding precedent.[2]

Second, the Secretary's argument that partial motions for judgment are foreclosed is wrong. Rule 1.140(h)(2) explicitly permits parties to raise another party's failure to state a legal defense by motion for judgment on the pleadings. Much of the Secretary's case law to the contrary predates

[2] Last month, the U.S. Supreme Court decided two cases that further undermine both of Defendants' constitutional arguments. *See Moore v. Harper*, No. 21-1271, 2023 WL 4187750 (U.S. June 27, 2023) (rejecting Elections Clause theory like that Defendants assert here); *Allen v. Milligan*, 143 S. Ct. 1487, 1516–1517 (2023) (explaining that "under certain circumstances, [courts] have authorized race-based redistricting as a remedy for state districting maps that violate [anti-discrimination laws]").

that rule, which was adopted in 1972, *In re the Fla. Bar*, 265 So. 2d 21, 24 (Fla. 1972). *See* Sec'y's Resp. at 1–2 (citing *Bolen Int'l, Inc. v. Medow*, 191 So. 2d 51, 53 (Fla. 3d DCA 1966); *Morris v. Traux*, 152 So. 2d 515, 519 (Fla. 2d DCA 1963)). And the cases cited by the Secretary that post-date the rule are easily distinguishable. In *Ropiza v. Reyes*, 583 So. 2d 400 (Fla. 3d DCA 1991), for example, the Third DCA reversed, in part, an entry of judgment on the pleadings based on a single question because the trial court "incorrectly foreclosed [plaintiff's] claim under separate allegations for damages on breach of contract." *Id.* at 401. But here, Plaintiffs do not ask for this Court to enter final judgment on the entire case or foreclose Defendants' other defenses—only to dispose of the constitutional defenses that are jurisdictionally barred. Similarly, the Third DCA reversed the trial court's entry of partial judgment on the pleadings in *Martinez v. Fraxedas*, 678 So. 2d 489 (Fla. 3d DCA 1996), because the trial court did not construe the pleadings favorably to the pleader. *Id.* at 491. The footnote that the Secretary cites is pure dicta. *See* Sec'y's Resp. at 2 (citing *Martinez*, 678 So. 2d at 491 n.5); *cf. Salussolia v. Nunnari*, 215 So. 3d 156, 158 (Fla. 3d DCA 2017) (recent Third DCA case affirming only part of a judgment on the pleadings). Finally, *Bradham v. Hayes Enterprises, Inc.*, 306 So. 2d 568 (Fla. 1st DCA 1975), has nothing to do with partial judgment on the pleadings; the First DCA reversed the trial court's entry of judgment on the pleadings because "there were issues of material fact which were not resolved by the pleadings, therefore a judgment on the pleadings was improper." *Id.* at 571. To be sure, Defendants have made no argument that judgment on the pleadings as to the affirmative defenses at issue would be improper for any of the reasons underlying the post-1972 cases they cited.

In any event, Plaintiffs' styling of this motion is not dispositive. Mislabeling a motion does not bar relief. *See, e.g.*, *Fire & Cas. Ins. Co. of Conn. v. Sealey*, 810 So. 2d 988, 992 (Fla. 1st DCA 2002) ("[T]he true nature of a motion must be determined by its content and not by the label the

moving party has used to describe it."). As the Secretary himself asserts, the Florida Rules of Civil Procedure specifically allow for a partial motion for summary judgment. *See* Sec'y's Resp. at 2 (citing Fla. R. Civ. P. 1.510(a)). Plaintiffs filed their motion before summary judgment motions were due, and they are entitled to raise Defendants' failure to state a legal defense as late as during trial itself. *See* Fla. R. Civ. P. 1.140(h)(2). To the extent Plaintiffs should have titled their motion differently, this Court should so construe it.

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Because this Court has already determined that Defendant Secretary lacks standing to bring his first and second affirmative defenses, this Court should dismiss those affirmative defenses pursuant to Plaintiffs' timely motion. 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.

Dated: July 10, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 10, 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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