

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

CASE NO. 09-CA-2639

CITY OF WESTON, FLORIDA;
VILLAGE OF KEY BISCAYNE,
FLORIDA; TOWN OF CUTLER BAY,
FLORIDA; LEE COUNTY, FLORIDA;
CITY OF DEERFIELD BEACH,
FLORIDA; CITY OF MIAMI
GARDENS, FLORIDA; CITY OF
FRUITLAND PARK, FLORIDA, and
CITY OF PARKLAND, FLORIDA,

Plaintiffs,

vs.

THE HONORABLE CHARLIE CRIST,
Governor of the State of Florida;
HONORABLE KURT S. BROWNING,
Secretary of State, State of Florida; THE
HONORABLE JEFF ATWATER,
President of the Senate, State of Florida;
THE HONORABLE LARRY CRETUL,
Speaker of the House, State of Florida,

Defendants.

**PLAINTIFFS' RESPONSE AND MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs, City of Weston, Florida; Village of Key Biscayne, Florida; Town
of Cutler Bay, Florida; Lee County, Florida; City of Deerfield Beach, Florida; City
of Miami Gardens, Florida; City of Fruitland Park, Florida, and City of Parkland,

Florida (collectively, the “Local Governments”),¹ hereby file their response in opposition to defendants’ motion to dismiss.

INTRODUCTION

It is immediately apparent from defendants’ motion to dismiss that no one in the executive or legislative branches of government wishes to take responsibility for enacting and signing into law a facially defective piece of legislation that, among other things, fundamentally weakens more than two decades of comprehensive growth management history in the State of Florida. Directing attention away from themselves – and never indicating who precisely is responsible for the unconstitutionality of Senate Bill 360² (“SB360” or the “Legislation”) – each defendant argues that he should be dismissed because he is not responsible for enforcing the Legislation, ignoring all the while that the Local Governments’ challenge has *nothing* to do with enforcement of the Legislation and everything to do with the constitutional flaws inherent in the very enactment of

¹ Although an order has not yet been signed granting the *unopposed* motion to intervene of the City of Homestead, Florida; Cooper City, Florida; City of Pompano Beach, Florida; City of North Miami, Florida; Village of Palmetto Bay, Florida; City of Coral Gables, Florida; City of Pembroke Pines, Florida; Broward County, Florida; Levy County, Florida; and St. Lucie County, Florida, this response and memorandum of law is submitted on their behalf as well, so as to avoid the need for a duplicative response once the agreed upon intervention order is executed.

² Senate Bill 360 has now been codified in Chapter 2009-096, Laws of Florida.

SB360.³ Defendants are proper parties in this proceeding; as such, the motion to dismiss must be denied.

ARGUMENT

I. The Local Governments' challenge to SB360 relates to the manner in which the Legislation was enacted, not how it will be interpreted, applied or enforced.

Defendants erroneously attempt to rely on a number of cases that involve constitutional challenges to the manner in which particular legislative enactments have been applied or enforced and cite to *no case law* involving a constitutional challenge based on a violation of either (i) the single subject provision in Art. III, Sec. 6 of the Florida Constitution, or (ii) the unfunded mandate prohibition set forth in Art. VII, Sec. 18(a) of the Florida Constitution. Unlike constitutional challenges to the manner in which a statute is applied or enforced, or constitutionally-based interpretive challenges to statutes for vagueness, overbreadth or similar defects in the language of the statutes, the Local Governments' challenge here goes only to the enactment process rather than to how the Legislation is to be interpreted or applied subsequently. As such, it is

³ Ironically, defendants do not even specifically identify the public official or agency purportedly charged with enforcing SB 360. As more fully discussed below, the reason for that silence may stem from the fact that no single official or agency is charged with enforcement of the Legislation.

eminently reasonable to conclude that those government officials charged with ensuring proper enactment of the Legislation be made defendants to the lawsuit.⁴

A proper party in litigation is “one who has an interest in the subject matter of the action, but whose absence will not prevent a judgment determining substantial issues between the parties.”⁵ *N & C Properties v. Vanguard Bank and Trust Co.*, 519 So. 2d 1048, 1052 (Fla. 1st DCA 1988). Defendants concede that it is entirely appropriate for them to be named as party defendants when the lawsuit is directed to their failure to perform duties ascribed to them. Citing to *Coalition for Adequacy and Fairness in School Funding, Inc. v. Lawton Chiles*, 680 So. 2d 400 (Fla. 1996) (“*Coalition for Adequacy*”), defendants point out – without the slightest irony – that they are proper defendants when the lawsuit “address[es] the alleged failure of the political branches to fulfill their responsibilities directly under the constitution,” Motion to Dismiss at 6, but then go on to disavow any responsibility here. The irony, of course, runs deeper in that *Coalition for Adequacy* involved allegations that the Governor, Senate President and Speaker of the House failed to fund adequately public schools, just as the allegations here

⁴ In fact, the single subject requirement is found with Article III, which more broadly relates to composition and constitutional duties of the Legislature. Art. III, Fla. Const.

⁵ It bears noting that defendants have failed, in their Rule 1.140(b) motion, to assert that the Local Governments failed to join an indispensable party. Fla. R. Civ. P. 1.140(b) (“A motion making any of these defenses [including failure to join an indispensable party] shall be made before pleading if a further pleading is permitted. ... Any ground not stated shall be deemed waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.”).

relate, in part, to defendants' constitutional failure to provide for funding for certain growth management mandates set forth in SB 360 (or otherwise meet the requirements for being exempted from such funding obligations).

There appears to be little doubt that naming the Senate President and Speaker of the House as representatives of their respective bodies is appropriate. *Coalition for Adequacy*, 680 So. 2d at 403; *see also* Fla. H.R. Rule 2.6 ("The Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House"); Fla. Sen. Rule 1.4(3) ("The President may authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit on behalf of the Senate"). Moreover, when the challenge asserted centers of the failure of legislative bodies to abide by certain constitutional enactment requirements, who else but the presiding officers of those bodies should be held to account for and defend against this failure? In fact, Art. III, Sec. 2 of the Florida Constitution provides that there shall be a "permanent presiding officer selected from its membership, who shall be designated in the senate as President of the Senate, and in the house as Speaker of the House of Representatives."⁶

⁶ Underlying defendants' "enforcement" theory is the patently unreasonable notion that officials or agencies charged with enforcing legislation should be made to answer for and defend (1) defects in the manner the legislation was enacted, or (2) legislative findings that purportedly justified its enactment. This simply makes no sense. *See, e.g., In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 831 (Fla. 2002) (noting in constitutional challenge based on gerrymandering that "the Legislature and other proponents of the redistricting plan must be afforded an opportunity to respond to any evidence of discriminatory effect").

Other cases similarly support the idea that one or more of the defendants may be proper defendants in a lawsuit challenging the constitutionality of enacted legislation. For example, in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), the Governor was named as a defendant in a successful single-subject challenge to the Comprehensive Economic Development Act of 1990. *Id.* at 1170. The same situation existed in *Florida Defenders of the Environment, Inc. v. Graham*, 462 So. 2d 59 (Fla. 1st DCA 1984), where both the Governor and the Secretary of State were sued in a successful constitutional challenge to an appropriations bill based on a violation of the single-subject requirement of Art. III, Sec. 6 of the Florida Constitution.

In *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002), the plaintiffs challenged the constitutionality of legislation, claiming that the Legislature had gerrymandered voting districts. *Id.* at 684-85. Both the Senate President and the Speaker of the House were named as defendants. *Id.* As it happens, the *Brown* plaintiffs voluntarily dropped the Senate President as a defendant, who then turned around and sought leave to intervene. *Id.* at 685. In the context of the Senate President's appeal of the denial of his re-intervention, the Fourth District observed that the Senate President was "a proper party, one certainly with a cognizable interest in the action." *Id.* at 690; *see also Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002) (Senate President proper party in gerrymandering challenge).

Most recently, in *Lewis v. Leon County*, ___ So. 3d ___, 2009 WL 2059864 (Fla. 1st DCA Jul. 17, 2009), twenty-five Florida counties sued the Senate President and Speaker of the House, among others, challenging the

constitutionality of Chapter 2007-62, Laws of Florida, which established the Office of Criminal Conflict and Civil Regional Counsel.⁷ *Id.* at *1. Among the counties' claims was a challenge based on the unfunded mandate provision in Art. VII, Sec. 18(a) of the Florida Constitution. *Id.* Like the Local Governments here, the counties in *Lewis* asserted that the Legislature had failed to meet the constitutional requirements to exempt the legislation from the unfunded mandate prohibition. *Id.* at *4. Tellingly, neither the Speaker of the House nor the Senate President appealed the trial court's decision to keep them as proper party defendants in the *Lewis* action.⁸

The claims against the Honorable Kurt S. Browning, as Secretary of State of the State of Florida, are viable insofar as the Local Governments are seeking injunctive relief either to prevent SB 360 from being registered as a valid law or to be stricken. That responsibility clearly falls upon the Secretary of State. *See Florida Defenders of the Environment, Inc. v. Graham*, 462 So. 2d 59, 62 (Fla. 1st DCA 1984) (in single-subject challenge naming Governor and Secretary of State as defendants, directing Secretary to strike appropriations bill as relief for

⁷ A copy of the first page of the second amended complaint in the *Lewis* declaratory judgment action is attached as Exhibit "A" for ease of reference, since the First District's decision does not specifically identify all the defendants in that action by name.

⁸ The trial court denied the Speaker's motion to dismiss, which asserted he was not a proper party (*see* Exhibit "B"), and then in the same order added the Senate President as a defendant to the amended complaint. *See* Exhibit "C." To the extent the Speaker or Senate President appealed these rulings, the First District affirmed the trial court's decision "on all grounds." *Lewis*, 2009 WL 2059864 at *1.

unconstitutionality of provision); *see also Gray v. Golden*, 89 So. 2d 785, 786 (Fla. 1956) (Secretary of State named as defendant in single-subject challenge where relief was directed to Secretary's duties to advertise and submit proposed amendment).

The cases on which defendants rely to support their arguments are entirely inapposite. Their reliance on *Walker v. President of the Senate*, 658 So. 2d 1200 (Fla. 5th DCA 1995) is arguably the most curious. Defendants assert that “[w]hen the facial constitutionality of a statute is challenged, ‘it is the state official designated to enforce the rule who is the proper defendant’” Motion to Dismiss at 3 (quoting *Walker, supra*). What is curious about this assertion is that defendants have excerpted *Walker* in a somewhat misleading fashion. The omitted language, which demonstrates that the *Walker* decision was, in fact, *unrelated* to a facial constitutional challenge to a statute, actually reads as follows:

[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule.

Id. at 1200 (emphasis added). The distinction is not without a difference, inasmuch as “rules” are enacted not by the Legislature but rather by state agencies to which rulemaking authority has been delegated. *See, e.g., State, Dept. of Children and Family Servs. v. I.B.*, 891 So. 2d 1168, 1171 (Fla. 1st DCA 2005). In a challenge to the constitutionality of a rule, therefore, it is logical to conclude that the agency that enacted the rule would be the proper defendant. Defendants neglect to point out to the Court that the *Walker* case was premised upon inmates’

complaints “regarding certain operations of the Department of Corrections.” *Id.* It is hardly surprising, given these facts, that the Department of Corrections might be the proper defendant in that action, rather than the Speaker of the House or the Senate President.

The remaining cases cited by defendants similarly provide little refuge. In *Florida Senate v. Fla. Pub. Employees Council 79, AFSCME*, 784 So. 2d 404 (Fla. 2001), the issue presented was whether the trial court had the authority to issue a temporary restraining order to prohibit certain legislators from convening scheduled public hearings. *Id.* at 405-06. There was no constitutional challenge to enacted legislation at issue in the case.

Comparably, *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984) involved a declaratory judgment action by newspaper publishing companies to have certain secret meetings of legislative committees declared unlawful. *Id.* at 1019. In carving out the limited authority of the trial court to afford declaratory relief, the Speaker and Senate President conceded that “the authority of each house of the legislature ... to determine its own internal procedure is at issue and that *neither the constitutionality of any enacted statute, nor any policy commitment of the state of Florida, nor the balancing of compelling interests of the state [is] at issue.*” *Id.* at 1020-21 (emphasis added). The Florida Supreme Court agreed, finding that the trial court lacked the authority to grant declaratory relief, but observed that the

plaintiffs “do not complain of or challenge any specific act or law promulgated by the legislature.”⁹ *Id.* at 1021.

The court’s decision in *Harris v. Bush*, 106 F. Supp. 2d 1272 (N.D. Fla. 2000) is also unavailing. The plaintiff in *Harris* was an involuntarily committed mental health patient who sued in federal court under 42 U.S.C. § 1983 claiming the procedures pursuant to which he was committed (the Baker Act) were unconstitutional. *Id.* at 1273. The claims asserted did not challenge the validity of the enactment of the legislation, but rather its substantive validity vis-à-vis the individual rights of the claimant both facially and as applied. The claimant sued Governor Bush in connection with the involuntary commitment, but the district court dismissed the claim finding that Governor Bush was immune from suit pursuant to the Eleventh Amendment.¹⁰ *Id.* at 1276. As to the claim for declaratory relief, the court concluded that no case or controversy existed between the plaintiff and Governor Bush because the latter had no connection with the

⁹ Defendants’ citation to *Environmental Confed. of S.W. Fla., Inc. v. State*, 886 So. 2d 1013 (Fla. 1st DCA 2004) is puzzling in that the case involved an appeal by public interest groups from an administrative decision of the Department of Environmental Protection relating to a permit challenge. *Id.* at 1015. The First District, therefore, would have had no occasion to comment on who might be proper party defendants in an original action to challenge the constitutionality of legislation that was defectively enacted.

¹⁰ The Eleventh Amendment is immaterial here because it relates solely to the jurisdiction of federal courts: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. Const., Amend. XI.

enforcement of the Baker Act. *Id.* at 1277. In short, the factual circumstances in *Harris* were materially different than the ones presented by this case.

To reiterate, the Local Governments have *not* asserted that the constitutional flaws of SB 360 lie in its enforcement or even in its interpretation, but rather in its enactment. Each of the named defendants had and continues to have a “cognizable interest” in the manner by which SB 360 was enacted. As such, they are each proper party defendants, and the motion to dismiss must be denied.

II. The Legislation imposes implementation and enforcement responsibilities on each of the defendants.

The defendants have conspicuously avoided actually identifying which public official or agency has responsibility for implementing and enforcing SB 360. This is not surprising in that the Legislation is silent with respect to entrusting such responsibilities to any one agency or individual. No less than eight separate agencies or offices are responsible for implementing or enforcing SB 360.¹¹

¹¹ For example, the Department of Community Affairs (“DCA”) is called upon to implement several aspects of SB 360. *See* Ch. 2009-096, Laws of Fla., §§ 2, 13. The Florida Housing Finance Corporation (“FHFC”), which functions under the auspices of the DCA, is required to implement various housing provisions and adopt new administrative rules. *Id.* at §§ 15, 22, and 25. The Department of Children and Families is directed to coordinate with the FHFC, as well as other agencies, to provide affordable housing available whenever and wherever possible to young adults who leave the child welfare system. *Id.* at § 25. The Department of Environmental Protection, along with numerous Water Management Districts around the state, is required to process and implement the legislatively mandated permit extensions. *Id.* at § 14. In addition, numerous municipalities and counties will also be called upon to implement and enforce provisions relating to permit extensions. *Id.*

(continued . . .)

More germane to the motion to dismiss, though, SB 360 imposes numerous implementation and enforcement requirements that specifically tie in the Governor's office and the Legislature (and by extension, the Speaker of the House and the President of the Senate). The Governor, for his part, sits as Chair of the Administration Commission, which is part of the Executive Office of the Governor. § 14.202, Fla. Stat. Pursuant to Chapters 163 and 380 and sections 186.007 and 186.008, Florida Statutes, the Administration Commission is charged with, among other duties, (i) "considering proceedings relating to comprehensive plans or plan amendments and land development regulations"; (ii) "revision and implementation of the State Comprehensive Plan"; (iii) "establishing guidelines and standards for developments of regional impact"; and (iv) "designating areas of critical state concern."¹² Each of these areas of responsibility is directly affected by and implicates the implementation and enforcement of the Legislation.¹³

(. . . continued)

One wonders whether defendants would have found it sufficient if one or more of the Local Governments had sued other local governments to have the Legislation declared unconstitutional.

¹² See <http://www.myflorida.com/myflorida/cabinet/cabprocess.html>, last accessed on August 27, 2009.

¹³ Certainly, the Governor's direct involvement in the regulation of comprehensive planning matters is completely unlike the attenuated link between the Governor and the enforcement of the Baker Act at issue in *Harris*, defendants' principal authority for dismissal of the Governor. See *Harris*, 106 F. Supp. 2d at 1277 ("Plaintiff does not allege or even suggest that Governor Bush intends to enforce the statutory provision under attack. Nor does he cite the Court to authority stating the Governor of Florida *bears a sufficient connection with* the enforcement of the Baker Act.") (emphasis added).

Additionally, Senate Bill 360 designates certain local governments as Dense Urban Land Areas (“DULA”). See Complaint at ¶¶ 16-18. This designation is generally based upon the population and density of the local governments. Under SB 360, the Office of Economic and Demographic Research *within the Legislature* is required annually to calculate the population and density criteria needed to determine which jurisdictions qualify as Dense Urban Land Areas. Ch. 2009-096, Laws of Fla., § 2. This determination is crucial to implementing the transportation concurrency exemption area (“TCEA”) and development of regional impact provisions within SB 360.¹⁴

The Office of Economic and Demographic Research reports directly to the Legislature and is the research arm of the Legislature principally concerned with forecasting economic and social trends that affect policy making, revenues, and appropriations. See <http://edr.state.fl.us/aboutus.htm>, last accessed on August 27, 2009. In addition, it provides research support for Legislative committees and analyzes the impact of proposed legislation for the Legislature. *Id.*

Finally, the Office of Program Policy Analysis and Government Accountability (“OPPAGA”) is required to submit to the *President of the Senate and the Speaker of the House* by February 1, 2015, a report on TCEAs created by SB 360. Ch. 2009-096, Laws of Fla., § 4, p. 12. This report, at a minimum, is required to “address the methods that local governments have used to implement

¹⁴ The Local Governments’ unfunded mandate challenge is premised, in large part, on the financial consequences of those provisions of SB 360 that relate to DULAs and TCEAs. Complaint at ¶¶ 18-21, 21, 41-46.

and fund transportation strategies to achieve the purposes of designated transportation concurrency exception areas, and the effects of those strategies on mobility, congestion, urban design, the density and intensity of land use mixes, and network connectivity plans used to promote urban infill, redevelopment, or downtown revitalization.” *Id.* OPPAGA is a special staff unit of the Legislature, which when directed by the Legislature, examines agencies and programs.¹⁵

Defendants cannot now disavow all responsibility for the implementation and enforcement of the Legislation as a means of avoiding responsibility for enacting it in a constitutionally defective manner. Consequently, even if the Court were inclined to apply defendant’s “enforcement” standard in determining who the proper parties to this action are, the motion to dismiss must nonetheless be denied.

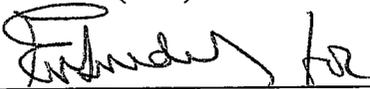
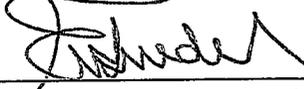
CONCLUSION

The Local Governments’ challenge to SB 360 is based entirely on constitutional defects inherent in the enactment, rather than in the interpretation or implementation, of the Legislation. As such, those individuals who, in their official capacities, are ultimately responsible for enacting into law SB 360 are the logical and proper defendants in this action. However, even if the Court were to

¹⁵ See <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm>, last accessed on August 27, 2009. It also bears noting that SB 360 provides that the Legislature is to receive from the Department of Transportation a report on mobility issues raised by the implementation of Legislation. Chap. 2009-096, Laws of Fla., § 13. The purpose of this report is to recommend legislation and implement a plan to replace the existing transportation concurrency system. *Id.*

base its determination of the motion to dismiss on defendants' standard of determining which entities or individuals have responsibility for implementing and enforcing the Legislation, SB 360 clearly imposes numerous responsibilities on the named defendants with respect to the implementation and enforcement of the Legislation. Accordingly, the Local Governments respectfully request that the Court enter an order denying defendants' motion to dismiss.¹⁶

Respectfully submitted,

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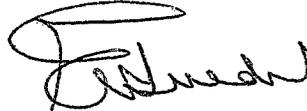
Counsel for Local Governments

¹⁶ To the extent the Court believes it would be necessary for the Local Governments to amend the complaint to provide additional factual allegations in support of the theories articulated herein, or even to name an additional party as a proper defendant, such leave should be freely granted. Defendants request for dismissal with prejudice is certainly not justified. *See Millsaps v. Orlando Wrecker, Inc.*, 634 So. 2d 680, 681 (Fla. 5th DCA 1994) (holding dismissal for failure to join indispensable party, since it is not an adjudication on the merits, should be without prejudice); *Spierer v. City of North Miami Beach*, 560 So.2d 1198 (Fla. 3d DCA), *rev. denied*, 576 So.2d 291 (Fla.1990) (same holding).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent via U.S.

Mail to all attorneys listed on the attached service list, this 1st day of ^{Sept.}~~August~~,
2009.



EDWARD G. GUEDES

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

COUNTY OF VOLUSIA, a political
subdivision of the State of Florida,

Plaintiff,

vs.

Case No. 2008-CA-002448

STATE OF FLORIDA; the Honorable CHARLIE CRIST,
Governor; the Honorable ALEX SINK, Chief Financial Officer;
the Honorable BILL MCCOLLUM, Attorney General;
the Honorable JEFFREY DEEN, District 5, Criminal Conflict
and Civil Regional Counsel; the Honorable MARCO RUBIO,
Speaker, Florida House of Representatives; and the
Honorable KENNETH PRUITT, President, Florida Senate,

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CLERK OF CIRCUIT COURT
LEON COUNTY, FLORIDA

Defendants.

LEON COUNTY, et al.,

Case No. 2008-CA-2475

Plaintiffs,

v.

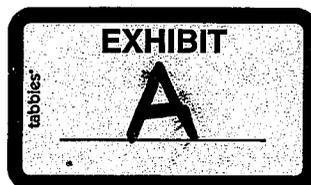
JEFFREY E. LEWIS, et al.,

Defendants.

COUNTY OF VOLUSIA'S
SECOND AMENDED COMPLAINT

Plaintiff, COUNTY OF VOLUSIA, a political subdivision of the State of Florida and a public body corporate and politic, sues defendants, the Honorable JEFFREY DEEN, District 5, Criminal Conflict and Civil Regional Counsel; the Honorable MARCO RUBIO, Speaker, Florida House of Representatives; and the Honorable KENNETH PRUITT, President, Florida Senate, in their official capacity, and says as follows:

1. This is an action for declaratory relief pursuant to chapter 86, Florida Statutes,



seeking a declaration that section 19, chapter 2007-62, Laws of Florida, is unconstitutional in part. The court has jurisdiction. Venue in Leon County is proper.

2. Chapter 2007-62 provides effective October 1, 2007, for offices of criminal conflict and civil regional counsel to be appointed to represent persons in certain cases. Section 19 amends Fla. Stat. 29.008, county funding of court-related functions, to include criminal conflict and civil regional counsel within the term "public defender's offices," contradicting article V, section 14, Florida Constitution, which provides that counties shall not be required to fund court-appointed counsel. There is a bona fide need to determine the plaintiff's legal obligation.

3. Defendants have an affected interest and responsibility for enforcement of the statute.

WHEREFORE, plaintiff seeks a declaration that s.19, chapter 2007-62 violates the Florida Constitution.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail to Edward A. Dion, Esq., Nabors, Giblin & Nickerson, P.A., 208 S.E. 6th Street, Fort Lauderdale, FL 33301; Robert L. Nabors, Esq. and Harry F. Chiles, Esq., Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, FL 32399; George Waas, Esq., #PL-01 The Capitol, Tallahassee, FL 32399-1050, this 10th day of October, 2008.

COUNTY OF VOLUSIA

By:



Daniel D. Eckert
Fla. Bar No. 0180083
County Attorney
123 West Indiana Avenue
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Telephone: 386-736-5950
Facsimile: 386-736-5990
Attorney for Plaintiff

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

LEON COUNTY, et al.,

Plaintiffs,

Case No.: 2008CA2475

v.

JEFFREY E. LEWIS, et al.,

Correct Case Number: 08CA2448

Verified on 9-28-08

Defendants.

Deputy Clerk Initials: JH

Consolidated



BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

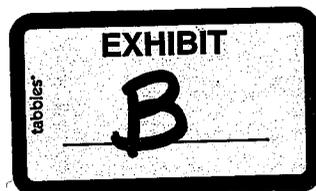
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FILED

DEFENDANTS' MOTION TO DISMISS

Defendants, JEFFREY E. LEWIS, JACKSON S. FLYTE, JOSEPH P. GEORGE, JR., PHILIP J. MASSA, and JEFFREY D. DEEN, in their official capacities as Criminal Conflict and Civil Regional Counsel (CCCRC); MARCO A. RUBIO, in his official capacity as Speaker of the Florida House of Representatives; and KENNETH P. PRUITT, in his official capacity as President of the Florida Senate, by undersigned counsel, hereby move pursuant to Fla. R. Civ. P. 1.140(b)(6) to dismiss this cause for failure to state a cause of action.

For their motion, Defendants assert four grounds: (1) Plaintiffs lack standing to challenge the constitutionality of a state statute; (2) Plaintiffs have failed to sue a proper party; (3) Article V, §14(c), Fla. Const., on which Plaintiffs rely, is



inapplicable to their claim on the merits; and (4) Plaintiffs' unfunded mandate claim is without merit because the Legislature made the requisite finding that the statute serves an important state interest.

I. Introduction.

This lawsuit is brought by 25 counties and the association that putatively represents the several counties of the State. Although somewhat deftly worded so as to give the appearance of avoiding a declaration that they are challenging the constitutionality of a statute, the Plaintiffs are doing precisely that. They contend that an amendment to §29.008(1), Fla. Stat., adopted by the 2007 Legislature as §19 of Chapter 2007-62, Laws of Florida, violates Article V, §14(c), Fla. Const., by requiring the counties to fund the CCCRC offices, which by this amendment are included in the term "public defenders' offices." The counties also contend that the challenged statute violates Article VII, §18(a), Fla. Const., because the Legislature failed to determine that the law fulfills an important state interest. For the reasons set out below, Plaintiffs' claims are without merit. However, before reaching the merits, Plaintiffs' claims are not justiciable because they lack standing to challenge the validity of a statute and they have failed to name a proper party defendant.

I. Plaintiffs, as governmental entities, cannot challenge the constitutionality of a statute from an offensive posture.

The 25 counties are public bodies and political subdivisions of the State of Florida. Such public entities lack standing to challenge the validity of legislation affecting their duties and responsibilities. See, Florida Department of Agriculture and Consumer Services, et al., v. Miami-Dade County, et al., 790 So. 2d 555 (Fla. 3d DCA 2001). In this case, the Court held that the county lacked standing to bring an action challenging the constitutionality of a statute authorizing the Department of Agriculture and Consumer Services to take possession of any material determined by the agency to pose a threat to the agricultural or public interests of the state. The Court said in pertinent part: “In Florida, it is clear that ‘state officers and agencies must presume legislation to be valid and *do not have standing to initiate litigation for the purpose of determining otherwise.*’ (Emphasis added.) 790 So. 2d at 557-58. See also, Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981). 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 ... See Askew v. City of Ocala, 348 So. 2d 308 (Fla. 1977).” 396 So. 2d at 1121. See also, Fuchs v. Robbins, 818 So. 2d 460, 464 (Fla. 2002).

In its latest statement on the issue, the Florida Supreme Court further limited the standing of public officials by eliminating any doubt that even the defensive posture exception no longer exists and

caution[ed] that past precedent indicates that the public funds exception is a narrow exception. See, e.g., Dep't of Educ. v. Lewis, 416 So. 2d 455, 459 (Fla. 1982) (holding that public funds exception did not confer standing to challenge constitutionality of proviso in appropriations bill upon Department of Education, State Board of Education, and Commissioner of Education in his official capacity, and distinguishing such entities and officials from comptroller, who "as the state's chief officer for disbursement of funds, would have standing to challenge a proviso in an appropriations bill").

Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri, 2008 Fla. LEXIS 1222 (Fla. July 3, 2008).

Plaintiffs cannot rely on the public funds exemption as they are not in the category of officials constitutionally charged with disbursement of funds. Green v. Pensacola, 108 So. 2d 897, 901 (Fla. 1st DCA 1959)(holding Comptroller had standing to challenge an act of the Legislature, commenting "we think it worthy of note that the Comptroller of the State of Florida is a constitutional officer charged with the duty to protect the public funds, whereas the purely ministerial officers involved in the Barr case were of statutory origin and charged with the sole duty to

carry out the mandates of the Legislature.”¹

If these Plaintiffs have standing here, then the exception has swallowed the rule and any public official can challenge the constitutionality of a law because virtually any action by a public official in the furtherance of a legislative objective will cost some money at some point. However, as demonstrated above, our jurisprudence is uniformly to the contrary.

Accordingly, for the reasons set out above, Plaintiffs lack standing to challenge §29.008(1), Fla. Stat., as amended by Section 19 of Chapter 2007-62, Laws of Florida.

II. Plaintiffs have failed to name as a party defendant the state official or agency charged with enforcement of the challenged statute.

It is well-settled that an action seeking to declare a law unconstitutional must be directed to the official or agency of government charged with enforcement or implementation of the challenged law. See, Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993); Presbyterian Homes of the Synod of Florida v. Wood, 297 So. 2d 556 (Fla. 1974); Walker v. Florida Senate, 658 So. 2d 1200

¹ In Barr v. Watts, 70 So. 2d 347, 350 (Fla. 1953), the supreme court held that the State Board of Law Examiners lacked standing to challenge a statute stating, “a ministerial officer, charged with the duty of administering a legislative enactment, cannot raise the question of its unconstitutionality without showing that he will be injured in his person, property, or rights by its enforcement, State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362, or that his administration of the Act in question will require the expenditure of public funds, Steele v. Freel, 157 Fla. 223, 25 So.2d 501.

(Fla. 5th DCA 1995)(“when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant.”).

In Harris v. Bush, 106 F. Supp. 1272, 1276 (N. D. Fla. 2000), the court addressed this circumstance as follows:

In order to challenge the constitutionality of a rule of law, a plaintiff must bring forth an action against the state official (or agency) responsible for enforcing the rule. *See, ACLU v. The Florida Bar*, 999 F. 2d 1486 (11th Cir. 1993).

In the case sub judice, there are no allegations that the CCCRC Defendants and the legislative leaders are delegated the responsibility or authority to enforce the challenged statute; in fact, they are not so charged.

Because these Defendants have no regulatory or enforcement authority over §29.008(1), Fla. Stat., as amended, Plaintiffs fail to state a cause of action as to them.

III. The Legislature has the power to define terms as it sees fit depending on the subject matter, constrained only by constitutional limitations not applicable here.

The gist of Plaintiffs’ argument in Count I is that by adding the offices of CCCRC to the definition of “public defenders’ offices” by Section 19 of Chapter 2007-62, the Legislature violated Article V, §14(c), Fla. Const., which provides in

pertinent part that:

No county or municipality, *except as provided in this subsection*, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel or the offices of the clerks of the circuit and county courts performing court-related functions. *Counties shall be required to fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for the trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall also pay reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law.* (emphasis added)

Plaintiffs' argument fails as a matter of law. Section 19 of Chapter 2007-62 Laws of Florida, defines "public defenders' offices" to include CCCRC offices only "(f)or the purposes of this section [meaning §29.008, Fla. Stat.]." The Supreme Court "reject[ed] the assertion that the OCCRC are public defenders simply because they are defined as such for the sole purposes of funding." Crist v. Fla. Ass'n of Crim. Def. Lawyers, 978 So. 2d 134, 145 (Fla. 2008). The OCCRC is defined as part of the public defenders offices "solely for purposes of implementing the constitutional guidelines concerning funding." Id. The Court then focused on the duties of the OCCRC as compared to those of the public

defender and confirmed that the creation of the OCCRC was not unconstitutional because they “neither compete with nor displace the public defenders in any of their statutorily assigned duties.” Id. at 146.

The Legislature merely placed the OCCRC within the offices of the public defenders for funding and administrative purposes. It is without question that the Legislature is free to define a word or phrase as it sees fit, subject only to constitutional limitations.

The Constitution of this State is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid. The Legislature may exercise any lawmaking power that is not forbidden by organic law.

Absent a constitutional limitation, the Legislature's 'discretion reasonably exercised is the sole brake on the enactment of legislation.

Crist, 978 So. 2d at 141. See also, State v. Ocean Highway and Port Authority, 217 So.2d 103 (Fla. 1968)(acquisition of a pulp and paper mill by the port Authority defined as a public purpose) and Thursby v. Stewart, 103 Fla. 990, 138 So. 742 (Fla. 1931) (Legislature can define what is a county purpose allowing for the raising and spending of public funds), for the proposition that the Legislature

has the power to define otherwise undefined terms in the Constitution

A review of the Florida Statutes shows that the Legislature has often defined the same words and phrases differently, depending on the subject matter. For example, the words “employer” and “employee” have different meanings throughout the Florida Statutes, depending on the particular subject matter. See Fla. Jur. 2d Words and Phrases, 2008 Edition (more than 15 pages devoted to defining “employee;” more than nine pages devoted to defining “employer”).

The Legislature is free to define “public defenders’ offices” for the purpose of §29.008, Fla. Stat., to include CCCRC offices. There is then no conflict with the provisions of in Article V, §14(c), which now requires that the counties “*fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities*” for the OCCRC as part of the offices of the public defenders.

IV. The Legislature Made the Requisite Findings Under VII, §18(a), Fla. Const.

Plaintiffs, in Count II of their Complaint, contend that Article VII, §18(a), Fla. Const., renders the challenged statute invalid as to them (i.e. unconstitutional) because the Legislature has failed to determine that §29.008(1), Fla. Stat., as

amended fulfills an important state interest. No magic words are required for the Legislature to make such a finding and in this case, the finding that this statute serves an important state interest can be found in the following language:

The Legislature finds that the creation of offices of criminal conflict and civil regional counsel and the other provisions of this act are necessary and best steps toward enhancing the publicly funded provision of legal representation and other due process services under constitutional and statutory principles in a fiscally responsible and effective manner.

It is the intent of the Legislature to facilitate the orderly transition to the creation and operation of the offices of criminal conflict and civil regional counsel, as provided in this act, in order to enhance and fiscally support the system of court-appointed representation for eligible individuals in criminal and civil proceedings. To that end, the Legislature intends that the five criminal conflict and civil regional counsel be appointed as soon as practicable after this act becomes law, to assume a term beginning on July 1, 2007. . . . The Justice Administrative Commission shall assist the regional counsel as necessary in establishing their offices. In addition, it is the intent of the Legislature that the various agencies and organizations that comprise the state judicial system also assist with the transition from current law to the creation and operation of the regional offices.

Ch. 2007-62, § 31(1)-(2), Laws of Fla.

This Court should defer to this finding because legislation is presumed to be valid in all its manifestations and, as the Court said in State v. Hodges, 506 So. 2d

437, 439 (Fla. 1st DCA 1987):

The starting point of any analysis directed to the constitutionality of a legislative act is the principle that “legislative acts are presumed to be constitutional and ... courts should resolve every doubt in favor of constitutionality.” (Citation omitted.) This presumption of validity applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted. (Citation omitted.) All doubts as to validity must be resolved in favor of constitutionality, (citation omitted) and if a constitutional interpretation is available, the courts must adopt that construction.(Citations omitted.) Furthermore, since **public purpose determinations are reserved to the legislature, a party challenging such a determination must demonstrate that the law as enacted was beyond the power of the legislature.** (Citations omitted)(Emphasis added.)

See also, State v. Ocean Highway and Port Authority, 217 So.2d 103 (Fla. 1968)

(Since the Legislature determined that public purpose would be served, we should not find to the contrary unless it be found the Legislature was not just and reasonable or was arbitrary.')

In sum, “any legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. If any state of facts, known or to be presumed, justify the law, the court’s power of inquiry ends.” Florida Department of Revenue v. City of Gainesville, 918 So. 2d 250, 265 (Fla. 2005)(citing State v. Bales, 343

So. 2d 9, 11 (Fla. 1977)). See also Noble v. Martin County Health Facilities, 682 So. 2d 1089 (Fla. 1996).

Here, as noted above, Article V, §14(c), Fla. Const., provides the requirement that counties fund the infrastructure cost of public defender offices. Plaintiffs would have this Court presume that there is no public purpose supportive of this provision when the presumption is—and must be—to the contrary.² That is, unless Plaintiffs can establish beyond a reasonable doubt, Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981), that the challenged law is in palpable conflict with another constitutional provision, the subject statute will be upheld. Such is the case here, as all presumptions favor the validity of §29.008(1), Fla. Stat. as amended in 2007.

Defendants reiterate that the Legislature may choose to declare its policy or make its position known in any manner, subject only to constitutional limitations. In this light, §27.511(1), Fla. Stat., is supports the Legislature's finding set forth above that creating the CCCRC offices and placing them with the Public Defenders' office serves an important state interest. That provision reads as follows:

²Of course, for the purpose of this case, the Legislature's decision to include CCCRC offices in the definition of public defenders offices is equally reflective of a presumptively valid

(1) It is the intent of the Legislature to provide **adequate representation** to persons entitled to court-appointed counsel under the **Federal or State Constitution** or as authorized by **general law**. It is the further intent of the Legislature to provide adequate representation in a **financially sound manner**, while **safeguarding constitutional principles**. Therefore, an office of criminal conflict and civil regional counsel is created within the geographic boundaries of each of the five district courts of appeal. The regional counsel shall be appointed as set forth in subsection (3) for each of the five regional offices. The offices shall commence fulfilling their constitutional and statutory purpose and duties on October 1, 2007. (Emphasis added.)

The above language—particularly the highlighted portion—can hardly be more expressive of an important state interest served by the OCCRC and to the extent §29.008(1), Fla. Stat., as amended, requires a legislative expression of an important state interest, the linkage between the above-quoted statute and the one challenged here certainly meets the requirement of Article VII, §18(a), Fla. Const. Additionally, implementation of the conflict counsel system is intended to fulfill the mandate of Gideon v. Wainwright, 372 U.S. 335 (1963), in a cost effective way and actually expands representation of indigent Defendants beyond what the public defenders currently do. Improving the quality of due process provided for those

public purpose.

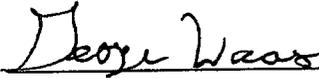
without the ability to pay is unarguably an important public purpose. Plaintiffs' second claim on the merits must therefore fail.

CONCLUSION

For the reasons set out above, dismissal is indicated. In that Plaintiffs cannot plead any set of facts so as to overcome the legal impediments to their claim, dismissal should be with prejudice.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

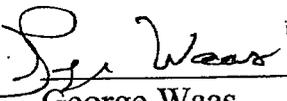


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Edward A. Dion, Esq., Nabors, Giblin & Nickerson, P. A., 208 S. E. 6th Street, Fort Lauderdale, Florida 33301; and Robert L. Nabors, Esq., and Harry F. Chiles, Esq., Nabors, Giblin & Nickerson, P. A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida this 5th day of September, 2008.



George Waas

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

VOLUSIA COUNTY,

Plaintiff,

v.

CASE NO.: 2008-CA-2448

STATE OF FLORIDA, etc.,

Defendants.

LEON COUNTY, et al.,

Plaintiffs,

v.

CASE NO.: 2008-CA-2475

JEFFREY E. LEWIS, et al.,

Defendants.

CLERK OF COURT
LEON COUNTY, FLORIDA
JAN 15 09 11:21

**ORDER ON DEFENDANTS' MOTIONS TO DISMISS
AND PROVIDING FOR BRIEFING SCHEDULE AND FINAL HEARING**

THIS CAUSE came on to be heard upon Defendants' Motions to Dismiss each of the above-referenced actions, and subsequently, for the scheduling of further proceedings, and the Court having considered the same, together with the Plaintiffs' memoranda in opposition, having heard the arguments of counsel, and being otherwise fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

1. Defendants' Motions to Dismiss as to standing be and the same are hereby

DENIED.



IN
COMPUTER
E.A.

2. Defendants' Motions to Dismiss as to proper parties be and the same are hereby **DENIED** except as to Governor Crist and Attorney General McCollum, and in that regard, the motion directed to Volusia County's Amended Complaint is **GRANTED**, without prejudice.

3. Defendants' Motions to Dismiss as to failure to state a cause of action be and the same are hereby **DENIED**, as the defenses raised are not capable of disposition on the merits on a motion to dismiss.

4. Upon the ore tenus motion of Volusia County, leave is hereby granted to add the Speaker of the House of Representatives and the President of the Senate as parties Defendant in Case No. 2008-CA-2448. Counsel for Defendants has agreed to accept service on their behalf.

5. Volusia County previously noticed its voluntary dismissal, without prejudice, of the State of Florida as a Defendant, and that dismissal is confirmed.

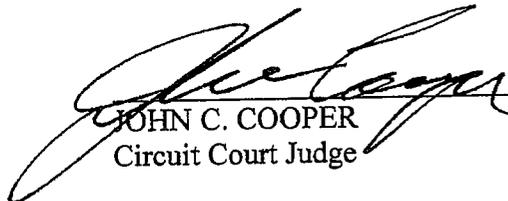
6. Volusia County has now further agreed that, while Chief Financial Officer Sink may be a proper party, she is not a necessary party to these proceedings, and Volusia County orally agreed to a voluntary dismissal, without prejudice, as to the Chief Financial Officer. That dismissal, too, is confirmed.

7. Volusia County shall file and serve its Second Amended Complaint in Case No. 2008-CA-2448, adding and dropping the parties as referenced above, by no later than Monday, October 13, 2008.

8. Pursuant to agreement of all parties, dispositive motions, if any, shall be filed and served on or before Friday, November 21, 2008. Responses, as deemed necessary, shall be filed and served by no later than Wednesday, December 3, 2008.

9. A final hearing on the dispositive motions shall be held on Friday, December 12, 2008, beginning at 10:00 a.m. Two hours have been reserved. No further notice of such hearing is necessary.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 13th day of October, 2008.


JOHN C. COOPER
Circuit Court Judge

Copies to:
Counsel of Record

Copies Mailed By
SB on 10-15-08