IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,
Appellants,
v.

KEN DETZNER, et al.,
Appellees.

Case No.: 1D14-5614
L.T. Nos.: 2012-CA-00412
2012-CA-00490

ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

Appellants The League of Women Voters of Florida, Common Cause, Brenda Ann Holt, J. Steele Olmstead, Robert Allen Schaeffer, and Roland Sanchez-Medina, Jr. (collectively, the "Coalition Plaintiffs") and Appellants Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Again (collectively, the "Romo Plaintiffs," and together with the Coalition Plaintiffs, the "Plaintiffs") sought attorneys' fees against the Legislature under the private attorney general doctrine, a common law exception to the American Rule on attorneys' fees. Plaintiffs successfully challenged the Legislature's congressional redistricting plan, demonstrating over the course of a protracted and difficult litigation process that the Legislature violated the Florida Constitution. Though recognizing that "equity" and "public policy" favored awarding fees to Plaintiffs, the trial court declined to do so. Coalition Plaintiffs challenge the trial court's ruling in this appeal.

The Litigation in this Case

In February 2012, Plaintiffs filed the underlying consolidated proceedings alleging that the Legislature's 2012 congressional redistricting plan (the "2012 Congressional Plan") and several individual congressional districts violated Article III, Section 20 of the Florida Constitution. (R1:58-69; R114:14,441-59.) This provision, added to the constitution by super-majority vote of Florida's citizens, de-

mands that the Legislature apportion congressional districts, among other things, without "the intent to favor or disfavor a political party or an incumbent." Art. III, § 20, Fla. Const.

The Legislature vigorously opposed Plaintiffs' claims at every stage of the litigation. Early in the case, it resisted an expedited trial and discovery schedule; made and then withdrew a request for a continuance under section 11.111, Florida Statutes; unsuccessfully moved to dismiss Plaintiffs' complaints; and argued on summary judgment that the trial court could not conduct a preliminary facial review that may have hastened or narrowed the proceedings. (R6:649-840; R7:858-61, 904-918; R11:1399-1413; R12:1472-1658; R14:1903-20; R16:2293; R17:2301-02.)

The litigation then devolved into a lengthy war of attrition, with the Legislature adopting a scorched-earth strategy marked by repeated discovery battles and challenges to Plaintiffs' alternative congressional maps. For example, even as it opposed discovery regarding the 2012 Congressional Plan through claims of legislative privilege, the Legislature conducted over a dozen depositions and sought tens of thousands of pages of documents relating to Plaintiffs' alleged motives and the process by which they prepared their exemplar maps. (R62:7293-R66:7987; R77:9596-R78:9807.) Ultimately, the Legislature's campaign against Plaintiffs

came to nothing when the trial court rejected claims that Plaintiffs were guilty of unclean hands and fraud on the court. (R60:7262-66; R82:10,032.)

At the same time, the Legislature's lack of candor and destruction of records hampered Plaintiffs' discovery efforts throughout the case. The Legislature repeatedly proclaimed to the Florida Supreme Court, the trial court, and the public that it had conducted an open and transparent redistricting process. (*See* Senate Initial Br. in *In re: Senate Joint Resolution of Legislative Apportionment 2-B*, SC12-1, at 1-2 (representing that the 2012 redistricting process was "open, fair, and inclusive," involved "extraordinary public participation," and was praised for its "fairness and openness"); House Initial Br. in *In re: Senate Joint Resolution of Legislative Apportionment 2-B*, SC12-1, at 2-3 (detailing alleged "public input" and "outreach" in redistricting process); Ex. CP-619 at 8; R83:10,181; Ex. LD-34A; Ex. LD-34B; Ex. LD-34C; TT5:528, 550-52; TT6:644-45.)

But the Legislature met and communicated in secret with partisan operatives throughout the redistricting process, disproportionately relied on proposed maps that the same operatives prepared and secretly submitted to the Legislature using strawmen or the names of other people (in at least one case without permission), and made key decisions about the 2012 Congressional Plan behind closed doors.

(R90:11,209; TT1:20, 84-85;[1] TT7:842, 845; R90:11,209-10; TT1:43-44; TT5:538-40; TT4:394-95; TT7:849-53; Exs. CP-264, CP-276, CP-285, CP-352, CP-336, CP-387, CP-506, CP-523, CP-586-87, CP-1045-54.) The Legislature conducted its communications with operatives in ways that could not be easily detected. It relied primarily on in-person meetings, personal email accounts, Drop Box transfers, and in at least one case, a secretly-delivered flash drive containing draft legislative maps. (TT1:84; TT3:263-64; Exs. CP-263-69; CP-281-82; CP-289-90; CP-293-94; CP-296; CP-972; CP-974.) When email communications with the operatives left a paper trail, the Legislature destroyed the evidence, even though it knew that litigation regarding the redistricting process was "imminent" and a "moral certainty." (R82:10,030-31; R26:3499; R27:3560.)

In at least one case, the Legislature disregarded an order to produce evidence of its collaboration with partisan operatives. When Romo Plaintiffs sought phone records regarding communications between the Legislature and partisan operatives, the trial court overruled the Legislature's objections, found the phone records to be "perfectly discoverable," and ordered that they be produced in redacted form. (R106:13,554-62.) As trial was rapidly approaching, the trial court explained that "[o]bviously [Plaintiffs] need [the phone records] very quickly," and counsel for

[1] Citations to the trial transcript, which was included as a non-consecutively paginated portion with only separate volume numbers at the end of the record on appeal, shall be designated "TT."

the Legislature responded, "Sure." (R106:13,562.) Yet the Legislature simply ignored the order and never produced the records. (TT24:3065-66.)

During the redistricting process itself, the Legislature further hampered public disclosure of its conduct by arranging for seriatim meetings involving no more than two legislators at once to avoid holding a public meeting under Article III, Section 4(e) of the Florida Constitution. (TT3:309-11; TT4:412-13, 416-17; TT5:583-84; TT6:686-87, 761-62; TT8:940-42.) By this maneuver, the Legislature deprived the public of access to – and a written record of – the critical discussions between the officers and redistricting committee chairmen of the two chambers to decide upon the final features of the 2012 Congressional Plan. (TT4:412-13; TT5:583-84; TT8:940-42.)

Plaintiffs were thus faced with a public record revealing nothing about key meetings and a production purged of incriminating documents. Depositions of legislators and staffers, therefore, became critical. Yet the Legislature resisted depositions by claiming legislative privilege. *See League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 141 (Fla. 2013) ("*Apportionment IV*"). Resolving the legislative privilege claim required a year of trial court and appellate proceedings. Ultimately, the Florida Supreme Court partially overruled the Legislature's privilege claim and cleared the path for depositions. *Id* at 154.

The partisan operatives who collaborated with the Legislature followed a similar strategy of misdirection and obstruction. After testifying falsely about their map-drawing efforts, Pat Bainter and other operatives attempted belatedly to claim associational privilege and trade secret protection to shield their subversion of the public redistricting process. *See Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1119-26 (Fla. 2014) ("*Apportionment VI*"). Overcoming the operatives' resistance required, among other things, arguing several hearings before the trial court and a special master, defeating a petition for writ of certiorari to this Court, and fending off an appeal in which the Florida Supreme Court ultimately affirmed the trial court's order. *Id.*

As Plaintiffs unearthed mounting evidence of misconduct, the Attorney General sat on the sidelines without taking an active role in discovery or any other part of the litigation. Finally, at the pretrial conference on May 9, 2014, over two years after this case was filed, the Attorney General expressly disavowed any participation in the case or at the forthcoming trial, characterized herself as a "nominal party," and even requested leave not to attend trial. (R105:13,501 (counsel for the Attorney General, addressing the trial court: "The Attorney General is just a nominal party in this case . . . . We have taken no discovery, no discovery from us, no exhibits, no witnesses. Not going to be doing anything to make this trial last any longer . . . . The only thing I ask of you is if it would be all right with you have

leave [*sic*] not to be required to be in attendance during the entirety of the trial.").) Significantly, the Attorney General did not take the position that she believed the 2012 Congressional Plan was constitutional or that this litigation was unwarranted; she simply declined to take a position or to participate in any way.

After a twelve-day bench trial, the trial court found a conspiracy existed that caused the 2012 Congressional Plan to be infused with partisan intent (R90:11,196, 11,207-08); rejected the Legislature's affirmative defenses (R90:11,226); invalidated the 2012 Congressional Plan (R90:11,226-27); and identified particular defects in Districts 5 and 10 (R90:11,204-21). The trial court found that the Legislature "cooperat[ed] and collaborat[ed]" with partisan operatives, resulting in "a mockery of the Legislature's proclaimed transparent and open process of redistricting" and "managed to taint the redistricting process and the resulting map with improper partisan intent." (R90:11,207-08.) The trial court also found improper intent to benefit the Republican Party and incumbents, coupled with unjustified deviations from tier-two criteria, in Districts 5 and 10 in particular. (R90:11,218, 11,220-21.)[2]

[2] The trial court declined to invalidate several other challenged districts and adopted a revised plan that Plaintiffs contend does not correct the defects in the 2012 Congressional Plan. (R90:11,221-26; R102:12,942-45.) Those rulings are the subject of the merits appeal currently before the Florida Supreme Court. (*See League of Women Voters of Fla. v. Detzner*, Case No. SC14-1905.)

Motions for Attorneys' Fees

Plaintiffs subsequently filed motions to recover their attorneys' fees in the trial court based, in part, on the private attorney general doctrine, which allows private parties to recover fees for public interest litigation when government enforcers cannot or will not act. (R92:11,458-71; R93:11,472-561.) Coalition Plaintiffs served their motion for attorneys' fees on the Department of Financial Services ("DFS"). (Aff. of Service 12/8/14[3]; R126:16,312.)

At the hearing on the motions, the trial court found that Plaintiffs were the prevailing parties, but denied fees for two reasons. First, although the trial court recognized that "equity" and "public policy" support Plaintiffs' fee claim, it believed that an appellate court is the proper body to decide whether Florida should adopt the private attorney general doctrine. (R126:16,320-21.)[4] Second, the trial court found that there were "procedural deficiencies." (R126:16,320.) In that regard, the Legislature had argued that Plaintiffs cannot recover fees because they did not (1) plead entitlement to attorneys' fees pursuant to *Stockman v. Downs*, 573

[3] The affidavit reflecting service of the motion on DFS was inadvertently excluded from the record on appeal. Simultaneously with the filing of this brief, Coalition Plaintiffs have moved, without opposition, to supplement the record with this document. Because that motion has not yet been acted upon at the time of filing this brief, Coalition Plaintiffs have simply cited the document itself, which is attached to the motion to supplement.

[4] Coalition Plaintiffs do not appeal the trial court's denial of their request for attorneys' fees under the inequitable conduct doctrine.

So. 2d 835 (Fla. 1991); or (2) serve a pleading claiming fees on DFS pursuant to section 284.30, Florida Statutes. (R105:13,311-13; R126:16,311-14, 16,320.) The trial court did not specify whether it was relying upon one or both of these issues as grounds to deny fees.

On November 10, 2014, the trial court entered an order incorporating the rulings made at the hearing. (R112:14,385-86.) The notice of appeal timely followed.[5]

SUMMARY OF ARGUMENT

This Court should recognize the private attorney general doctrine and find that Coalition Plaintiffs are entitled to recover their attorneys' fees under it. Coalition Plaintiffs satisfy the three generally-accepted requirements for application of the private attorney general doctrine because (1) this litigation enforced vital public rights; (2) public enforcers failed or refused to act, and the litigation imposed a significant burden on Coalition Plaintiffs; and (3) millions of Floridians benefitted from this lawsuit.

[5] Plaintiffs have filed a motion for appellate fees in the merits appeal, which has now been fully briefed. (*See* Appellants' Mot. for Appellate Attorneys' Fees, filed on January 9, 2015 in Case No. SC14-1905.) The Florida Supreme Court's ruling on that motion may resolve some or all of the issues in this appeal. But if it does not (e.g., the Florida Supreme Court simply denies the motion without explanation), this appeal is necessary to ensure that the denial of Plaintiffs' attorneys' fee motions receives full appellate review.

In opposing Plaintiffs' attempts to recover fees under this doctrine, the Legislature has incorrectly argued that the American Rule and a supposed prohibition on courts creating substantive rights prevent adoption of the private attorney general doctrine. As a common law principle, the American Rule can and should yield to the competing policy concern of encouraging public interest litigation. Furthermore, Florida courts are not barred from creating substantive rights. In fact, they routinely do so, including in the area of attorneys' fees.

The trial court also erred to the extent it denied attorneys' fees on the basis of "procedural deficiencies." The *Stockman* pleading rule does not apply to fees sought under the private attorney general doctrine. The private attorney general doctrine is not based on contract or statute and requires consideration of conduct occurring after the commencement of litigation, including the burden of prosecuting the lawsuit and the respective roles of private and public enforcers in the litigation. It simply cannot be a known basis for fees at the outset of a case, and usually will not be apparent until the litigation has concluded.

Finally, section 284.30 does not preclude Coalition Plaintiffs from recovering their attorneys' fees. The statute does not apply where, as here, there is no operative complaint or answer claiming fees. Nevertheless, Coalition Plaintiffs provided notice of the claim for fees by serving DFS with their motion for fees.

ARGUMENT

Standard of Review

Whether Florida courts should recognize the private attorney general doctrine as a basis for attorneys' fees is a pure question of law subject to de novo review. *See Keck v. Eminisor*, 104 So. 3d 359, 363 (Fla. 2012) (holding that de novo standard applies where appeal "presents a pure question of law"); *Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 971 (Fla. 2d DCA 2006) (holding that determination whether statute provides fee entitlement is "a pure question of law"). The trial court's alternative ruling that procedural issues barred recovery of attorneys' fees is also reviewed de novo. *See BMR Funding, LLC v. DDR Corp.*, 67 So. 3d 1137, 1140-41 (Fla. 2d DCA 2011) (holding that de novo standard applied in reviewing application of *Stockman* doctrine); *Barco v. Sch. Bd. of Pinellas Cnty.*, 975 So. 2d 1116, 1121 (Fla. 2008) ("[A]ppellate courts apply a de novo standard of review when the construction of a procedural rule . . . is at issue.").

I. COALITION PLAINTIFFS ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

Although Florida generally follows the "American Rule," under which litigants pay their own attorneys' fees unless there is a contract or statute allowing for recovery of fees, *e.g.*, *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985), this Court should join other jurisdictions in recognizing the private attorney general doctrine as an exception to the American Rule. The doctrine allows

private parties suing to enforce public rights to recover their fees where "the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 811 (Mont. 1999) (citation and internal quotation marks omitted). Its purpose is "to promote vindication of important public rights." *Arnold v. Ariz. Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989) (en banc) (quotation omitted).

The American Rule is a judicially-created doctrine. It is based primarily on the equitable principle that parties "should not be penalized for merely defending or prosecuting a lawsuit" because that might cause "the poor [to] be unjustly discouraged from instituting actions to vindicate their rights[.]" *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). In constraining the circumstances in which fees are available, courts are also concerned that the "time, expense, and difficulties of proof" involved in resolving fee claims in every case "would pose substantial burdens for judicial administration." *Id.* (citation omitted).

As a creature of common law, the American Rule can – and often does – yield when competing policy or equitable considerations outweigh the principles on which it is based. Florida courts, for example, already permit attorneys' fees without a contractual or statutory basis in cases involving bad faith litigation conduct, *Moakley v. Smallwood*, 826 So. 2d 221, 223-24 (Fla. 2002); creation of a

common fund, *Tenney v. City of Miami Beach*, 11 So. 2d 188, 190 (Fla. 1942); litigation caused by the wrongful act of the defendant, *Martha A. Gottfried, Inc. v. Amster*, 511 So. 2d 595, 598 (Fla. 4th DCA 1987); and partnership accountings, *Larmoyeux v. Montgomery*, 963 So. 2d 813, 818-20 (Fla. 4th DCA 2007).

A. This Case Meets Each of the Requirements of the Private Attorney General Doctrine.

Courts recognizing the private attorney general doctrine as an additional exception to the American Rule generally consider three factors in deciding whether to award fees under the doctrine: (1) "the strength or societal importance of the public policy vindicated by the litigation," (2) "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and (3) "the number of people standing to benefit from the decision." *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977). Because redistricting challenges involve precisely the circumstances for which the private attorney general doctrine is intended, several courts have awarded fees under the doctrine in redistricting cases. *See, e.g.*, *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984) (applying private attorney general doctrine in redistricting case); *Hickel v. SE Conference*, 868 P.2d 919, 923-27 (Alaska 1994) (applying analogous public interest doctrine in redistricting case).[6]

[6] Courts in other jurisdictions have also applied the doctrine in a variety of circumstances not involving redistricting. *See, e.g.*, *Deleon Guerrero v. Commonwealth Dep't of Pub. Safety*, No. 2012-30, 2013 WL 6997105, at *7 (N. Mar. I. Dec. 19, 2013) (awarding attorneys' fees under private attorney general doctrine

It is difficult to imagine a better case in which to recognize and apply the doctrine than this one. First, as the Florida Supreme Court has already ruled, the public policy vindicated by this action is of maximum strength and societal importance, going to the very core of our representative democracy. *See Apportionment IV*, 132 So. 3d at 151 (noting that this case "involves nothing less than the public's interest in ensuring compliance with a constitutional mandate in a process this Court has described as the very bedrock of our democracy") (internal quotation marks and citation omitted); *id.* at 147 (finding that it is "difficult to imagine a more compelling, competing government interest" to overcome legislative privilege "than the interest represented by [Plaintiffs'] article III, section 20(a), claims") (internal quotation marks, citation, and emphasis omitted). In applying the private attorney general doctrine in a redistricting case, the Supreme Court of Idaho described the interest at stake with remarkably similar language:

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for challenge to non-meritocratic hiring practices at public safety department); *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 202 P.3d 1226, 1266 (Haw. 2009) (awarding attorneys' fees to environmental group that obtained an injunction requiring state officials to prepare an environmental assessment before implementing a ferry project); *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999) (constitutional challenge to funding of public schools); *Montanans*, 989 P.2d at 812 (constitutional challenge to use of property held in trust for public schools); *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994) (challenge to utility regulations); *Brown v. State*, 565 So. 2d 585, 592 (Ala. 1990) (challenge to convictions based on improper verification of traffic tickets); *Arnold*, 775 P.2d at 537 (class action seeking to compel state and county governments to provide treatment for the mentally ill); *Serrano*, 569 P.2d at 1315 (challenge to funding inequalities among various school districts).

> [T]here may well be no greater public policy in a constitutional representative democracy than the policy of insuring that the citizens are properly represented according to the Constitution. If the Legislature is unconstitutionally apportioned, a pall is cast over all legislation which the Legislature adopts.

Hellar, 682 P.2d at 531. Accordingly, Coalition Plaintiffs have more than satisfied the first factor for application of the private attorney general doctrine.

Second, were it not for the burden shouldered by Plaintiffs in this suit, the unconstitutional congressional redistricting plan would have remained in place. As the trial court found, the Legislature was complicit in a plot hatched by political operatives to subvert the redistricting process. (R90:11,207-08.) What's more, the operatives (and the collaborating Legislature) would have "successfully concealed their scheme and their actions from the public had it not been for the Plaintiffs' determined efforts to uncover it in this case." (*Id*.)

Because of the Legislature's efforts to obstruct, delay, and intimidate, the burden of pursuing Plaintiffs' Article III, Section 20 claims was immense. The public record did not provide a full record of what had occurred because the Legislature used personal email accounts, Drop Box transfers, secretly delivered thumb drives, and other difficult-to-trace methods of communications (TT1:84; TT3:263-64; Exs. CP-263-69; CP-281-82; CP-289-90; CP-293-94; CP-296; CP-972; CP-974); and avoided public meetings by conducting seriatim discussions with no more than two legislators present at a time (TT3:309-11; TT4:412-13, 416-17;

TT5:583-84; TT6:686-87, 761-62; TT8:940-42). Accordingly, Plaintiffs could turn only to this litigation and the discovery process to obtain information shedding light upon what had occurred. Even then, information did not come easy. The Legislature had, as it turn out, "systematically deleted" incriminating documents and emails (R90:11,209), and went so far as to violate an order to turn over phone records that may well have shed further light on its secret communications with operatives during critical time periods (TT24:3065-66).

By taking these steps, the Legislature hampered investigation and discovery into the intent behind the 2012 Congressional Plan. If the Legislature had simply conducted the open and transparent process that it had publicly promised, it could have greatly expedited discovery and made the presentation and resolution of Plaintiffs' claims at trial much easier. As it stood, Plaintiffs were left to weave together the "bits and pieces" of evidence that had not been destroyed or allegedly forgotten "into a narrative consistent with their theory." (R90:11,198.)

At the same time, the Legislature derailed the proceedings with numerous motions, depositions, and discovery requests in support of its claim that Plaintiffs were motivated by partisan intent, a spurious claim because the relevant issue was **the Legislature's** disregard of its constitutional mandate, not the alleged conduct of private citizens. (R62:7293-R66:7987; R77:9596-R78:9807.) The operatives joined in the Legislature's efforts to hamper and deter Plaintiffs by testifying false-

ly and filing repeated motions and appeals to avoid producing documents that revealed their involvement in the redistricting process. *See generally Apportionment VI*, 150 So. 3d 1115. All of this made what could have been a relatively straightforward discovery and trial process into an expensive multi-year odyssey.

Meanwhile, not a single public official stepped in to guard against the Legislature's abuses. In particular, the Attorney General, whose charge it is to enforce the Florida Constitution, made **no** effort to investigate the 2012 redistricting process or to enforce Article III, Section 20. And she failed to do so even after significant evidence of misconduct emerged from discovery. Despite this evidence, the Attorney General sat on the sidelines, going so far as to refer to herself as a "nominal party" and request permission not to attend trial. (R105:13,501.) In such a situation, "[o]nly private citizens can be expected to guard the guardians." *Claremont Sch. Dist.*, 761 A.2d at 394 (quotation omitted).

The people of Florida enacted Article III, Section 20 by initiative to prevent the very type of self-dealing abuse of power demonstrated by the Legislature in this case. The very nature of this provision evinces the electorate's suspicion that the Legislature could not be trusted to put the people's interest ahead of its own. Unfortunately, the actions undertaken by the Legislature and uncovered through this litigation confirmed the public's worst fears. Thus, private enforcement was necessary, and the resultant burden on Coalition Plaintiffs was considerable.

Finally, more than 4.5 million of Florida's citizens reside in the seven districts already redrawn as a result of this litigation, and more will be impacted if the Florida Supreme Court rules for Plaintiffs in the merits appeal. But regardless of the outcome of that appeal, all Floridians have benefitted because this case enforced the organic law of this state as passed by an overwhelming majority of voters and defended every citizen's right to have the redistricting process conducted in accordance with the requirements of the state constitution. *See, e.g.*, *Hellar*, 682 P.2d at 531 ("The apportionment of the Idaho Legislature affects every Idaho citizen."). In bringing this suit, Plaintiffs served the interests of the entire Florida public, and for that they should not have to bear the costs individually. *See Claremont Sch. Dist.*, 761 A.2d at 394 ("Because the benefits of this litigation flow to all members of the public, the plaintiffs should not have to bear the entire cost of this litigation."); *Sierra Club*, 202 P.3d at 1266 (awarding fees where "[a]ll parties involved and society as a whole would have benefitted had the public been allowed to participate in the review process" of a harbor ferry project) (quotation omitted); *Montanans*, 989 P.2d at 812 (awarding fees where "litigation has clearly benefited a large class: all Montana citizens interested in Montana's public schools").

In sum, this suit meets each requirement for awarding attorneys' fees under the private attorney general doctrine. As the trial court expressly found, evidence of the Legislature's constitutional impropriety came to light **only** from Plaintiffs'

"determined efforts to uncover it in this case." (R90:11,208.) Absent the ability to recover fees, future private litigants will be deterred from engaging in similar efforts to uncover official wrongdoing and future legislatures will be encouraged to drive away adversaries by increasing their litigation costs at every opportunity. Therefore, this Court should recognize the private attorney general doctrine and find that Coalition Plaintiffs are entitled to recover their fees under it.

B. The Legislature's Arguments Against Adoption of the Private Attorney General Doctrine Are Without Merit.

The Legislature has raised two principal objections to adoption of the private attorney generally doctrine: (1) Florida courts generally follow the American Rule, and (2) the separation of powers doctrine precludes Florida Courts from creating substantive rights. For the reasons stated below, both arguments fail.

1. The American Rule Should Yield in Favor of Recognizing the Private Attorney General Doctrine.

Coalition Plaintiffs do not dispute that Florida typically follows the American Rule; the relevant question is whether the Rule should yield under these circumstances. Like all common law principles, the American Rule is subject to adaptation and exception. *Cf. Stone v. Wall*, 734 So. 2d 1038, 1043 (Fla. 1999) ("[T]he common law must keep pace with changes in our society and to that end may be altered when the reason for the rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights") (citations

and internal quotation marks omitted); *Kohl v. Kohl*, 149 So. 3d 127, 134 (Fla. 4th DCA 2014) ("One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court.") (quoting *Hack v. Hack*, 433 A.2d 859, 868-69 (Pa. 1981)).

In that regard, the Florida Supreme Court has never treated the American Rule as a talisman that senselessly wards off any and all fee claims not based on contract or statute. Instead, the Florida Supreme Court has applied exceptions and deviated from the American Rule when justified by legitimate policy considerations.

In *Thornber v. City of Fort Walton Beach*, for example, several city council members sought to recover attorneys' fees for enjoining a recall petition. 568 So. 2d 914, 916 (Fla. 1990). The statute on which they relied, however, only required public bodies to reimburse the attorneys' fees of officials who were prevailing defendants. *Id.* (citing § 111.07, Fla. Stat. (1981)). The district court denied attorneys' fees based on the lack of a comparable statute allowing fees to successful plaintiffs. *See City of Ft. Walton Beach v. Grant*, 544 So. 2d 230, 236-37 (Fla. 1st DCA 1989). The Florida Supreme Court reversed, finding that the officials were entitled to their fees regardless of any statutory authorization:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to

> avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently. This entitlement to attorney's fees arises independent of statute, ordinance, or charter. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose. . . .
>
> We agree with the district court in *Ferrara* [*v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985),] that, in the "spirit" of common law principles, the unique circumstances of this case should not preclude the council members from recovering attorney's fees under the common law.

Thornber, 568 So. 2d at 916-18 (citations omitted).

The private attorney general doctrine similarly involves "a policy choice between encouraging public interest litigation and preserving the 'American Rule' of each party bearing its own attorney's fees absent a statute or contract directing otherwise." *Arnold*, 775 P.2d at 537. Although the American Rule recognizes that unsuccessful litigation should not be penalized as a general matter and that fee claims increase the judicial burden, those concerns are greatly outweighed by the need for worthy public interest litigation when government enforcers cannot or will not act. If private parties are forced to bear the entire expense, far fewer public interest cases may be brought, enforcement of vital constitutional rights will be left to the political whims of officials, and the public will suffer as a result.

Moreover, without the possibility of fee reimbursement, recalcitrant legislatures would be emboldened to use taxpayer resources to run up their adversaries' costs, thereby shielding constitutional violations from scrutiny by the expense nec-

essary to raise an effective challenge. This turns the policy behind the American Rule on its head. *See Fleischmann Distilling Corp.*, 386 U.S. at 718 (emphasizing a main basis of the rule is to **avoid** discouraging citizens – especially those with limited financial resources – from "instituting actions to vindicate their rights"). The number of cases legitimately justifying fees under the private attorney general doctrine will also be small, meaning that adoption of the doctrine will not undermine the worthy goal of avoiding excessive fee disputes.

For these reasons, other states have adopted the private attorney general doctrine despite having their own commitments to the American Rule. *See, e.g.*, *Stewart*, 885 P.2d at 782-83 (adopting private attorney general doctrine even though "[t]he general rule in Utah, and the traditional American rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award"); *Montanans*, 989 P.2d at 811-12 (recognizing private attorney general doctrine despite both parties' agreement that "Montana has followed the American rule"); *Deleon Guerrero*, 2013 WL 6997105, at *4 (rejecting argument that "*stare decisis* prevents us from adopting the private-attorney-general exception because the American Rule has long been recognized in the Commonwealth"). Indeed, several such courts embracing the doctrine specifically noted other exceptions already accepted in Florida to emphasize that the American Rule is not an unyielding principle. *See Arnold*, 775 P.2d at

537 (common fund doctrine); *Stewart*, 885 P.2d at 782 (bad faith conduct and common fund doctrine); *Montanans*, 989 P.2d at 811 (bad faith conduct and common fund doctrine). Accordingly, this Court should join its sister jurisdictions in recognizing the private attorney general doctrine as an exception to the American Rule.

2. The Separation of Powers Doctrine Is Not a Barrier to Adoption of the Private Attorney General Doctrine.

In the pending motion for appellate fees before the Florida Supreme Court, the Legislature contended that the judiciary is limited to creating rules of procedure and cannot adopt the private attorney general doctrine because it involves substantive rights, which are supposedly the sole province of the Legislature. But courts routinely create, define, and modify substantive rights and duties at common law in the areas of contract, tort, property, and otherwise – ranging from the duty of care in negligence cases, *Wallace v. Dean*, 3 So. 3d 1035, 1046-53 (Fla. 2009), to the rights of riparian or littoral owners, *Sand Key Assocs., Ltd. v. Bd. of Trustees of Internal Improvement Trust Fund of Fla.*, 458 So. 2d 369, 370-71 (Fla. 2d DCA 1984). The judiciary is "not precluded from recognizing" a right at common law "simply because the legislature has not acted to create such a right." *United States v. Dempsey*, 635 So. 2d 961, 964 (Fla. 1994) (citation and internal quotation marks omitted). Common law rights and obligations are preempted only when the Legislature enacts a statute that "unequivocally states that it changes the common law,

or is so repugnant to the common law that the two cannot coexist." *Thornber*, 568 So. 2d at 918.

In fact, Florida courts have repeatedly exercised their common law authority to craft and define rights in the area of attorneys' fees. As noted above, even if there is no contract or statute, courts award fees in cases involving inequitable conduct, common funds, litigation caused by a wrongful act, and partnership accountings. *See Moakley*, 826 So. 2d at 223-24; *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998); *Tenney*, 11 So. 2d at 190; *Truman J. Costello, P.A. v. City of Cape Coral*, 693 So. 2d 48, 49 (Fla. 2d DCA 1997); *Martha A. Gottfried, Inc.*, 511 So. 2d at 598; *Baxter's Asphalt & Concrete, Inc. v. Liberty Cnty.*, 406 So. 2d 461, 467 (Fla. 1st DCA 1981), *quashed on other grounds*, 421 So. 2d 505 (Fla. 1982); *Larmoyeux*, 963 So. 2d at 818-20. The parties agree that the right to recover attorneys' fees is substantive, and in each of these decisions that right was established by the courts – *i.e.*, by common law – and not by legislative act.

To draw a spurious distinction between procedure (over which the judiciary is the exclusive arbiter) and substance (which courts are supposedly forbidden from addressing), the Legislature has relied on cases such as *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005), and a line of decisions addressing the offer-of-judgment statute, *see, e.g.*, *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992); *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996); *In re Amendments to Fla. Rules of Civil Proc.*, 682 So.

2d 105, 105-06 (Fla. 1996). Those cases involve a different question – namely, whether the Legislature is **precluded** from taking action because an issue is procedural.

Article V, Section 2(a) of the Florida Constitution entrusts the enactment of rules of "practice and procedure" exclusively to the Florida Supreme Court and limits the Legislature to "repeal[ing] by general law" such rules **after** their enactment. Under this provision, the Legislature is forbidden from enacting procedural rules, even in the absence of judicial action. *See, e.g.*, *Raymond*, 906 So. 2d at 1051-52 (finding that Legislature could not adopt statute precluding persons charged with a "dangerous crime" from being granted pretrial release on nonmonetary conditions at first appearance because issue was procedural); *Leapai*, 595 So. 2d at 15 (upholding substantive portion of offer-of-judgment statute despite prior ruling that procedural aspects of statute were unconstitutional); *Knealing*, 675 So. 2d at 596 (finding procedural portions of offer-of-judgment statute unconstitutional).

Issues of substantive law, by contrast, are properly addressed by courts where there has been no legislative action to displace the common law. *See Dempsey*, 635 So. 2d at 964. If the Legislature regulates in a substantive area, however, the judiciary cannot take conflicting action. *See, e.g.*, *In re Amendments*, 682 So. 2d at 105-06 (rejecting amendment to Fla. R. Civ. P. 1.442 that would require

courts to consider certain factors in awarding fees pursuant to offer of judgment where proposal was "at variance with" existing offer-of-judgment statute with no such requirement).

Under these well-established principles, it is not determinative that entitlement to fees is a "substantive" right. The question is, instead, whether the Legislature has in fact displaced the judiciary's common law authority to define the contours of the American Rule and award fees in cases where the American Rule should yield to competing considerations. Here, there is no such legislation and consequently no barrier to judicial action. *Cf. Thornber*, 568 So. 2d at 916-18 (holding that Legislature had not preempted judiciary's authority to award fees to successful public official plaintiffs as matter of common law). Thus, the separation of powers doctrine does not preclude this Court from adopting the private attorney general doctrine pursuant to its traditional common law authority.

II. NO PROCEDURAL BARRIERS PREVENT COALITION PLAINTIFFS' RECOVERY OF THEIR ATTORNEYS' FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

A. The *Stockman* Pleading Rule Does Not Apply to the Private Attorney General Doctrine.

The Legislature has argued that Plaintiffs cannot recover their fees because they have not satisfied the pleading requirement set forth in *Stockman*, 573 So. 2d 835. *Stockman* does not apply for at least two reasons.

First, *Stockman* held that a party must plead entitlement to attorneys' fees sought "pursuant to statute or contract," with certain exceptions. *Id.* at 838; *see also id.* at 837 ("[W]e hold that a claim for attorney's fees, whether based on statute or contract, must be pled."). Neither *Stockman* nor any case following it appears to have imposed a similar requirement when a party seeks fees pursuant to a common law doctrine such as the private attorney general doctrine.

Second, the *Stockman* rule only requires pleading "where the entitlement to fees and costs existed **from the outset** based upon a contract or statute which was the subject of the underlying claim or defense." *Cooper v. Marriott Int'l, Inc.*, 16 So. 3d 156, 159 (Fla. 4th DCA 2009) (emphasis in original). If "the entitlement to fees and costs arose **during the suit** based upon some event which is supplemental to the underlying action," fees need not be pleaded. *Id.* (emphasis in original). Florida courts have applied this exception in various circumstances where activities during the litigation itself affected entitlement to fees. *See, e.g.*, *Ganz v. HZJ, Inc.*, 605 So. 2d 871, 872 (Fla. 1992) (holding that fees under section 57.105 need not be pleaded); *Ocean Bank v. Caribbean Towers Condo. Ass'n, Inc.*, 121 So. 3d 1087, 1090 (Fla. 3d DCA 2013) (holding that fees need not be pleaded in dispute over liability for condominium assessments after foreclosure sale); *Cooper*, 16 So. 3d at 160 (finding pleading not required where party sought fees under section

44.103(6), Florida Statutes, because outcome of court proceeding was less favorable than prior arbitration).

Like those situations, the private attorney general doctrine involves factors that can only be evaluated after the litigation is well underway: namely, "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff." *Serrano*, 569 P.2d at 1314; *see also Hellar*, 682 P.2d at 531 (same); *Deleon Guerrero*, 2013 WL 6997105, at *8 (same). During the litigation, the Attorney General or another public agency certainly could have investigated and prosecuted the Legislature's constitutional violations, lessening or even alleviating altogether Plaintiffs' burden. As it turned out, the Attorney General disavowed any enforcement role, calling herself a "nominal party" and even asking, in the end, for permission not to attend trial. (R105:13,501.) It was, of course, impossible to know until **after** the litigation was well under way and the time for pleading closed that public enforcers would not participate in the lawsuit or otherwise take action to address the Legislature's constitutional violations.

The burden of enforcement likewise cannot be determined without reviewing the history of the litigation. It was not clear from the outset, for example, that Plaintiffs would face a scorched-earth strategy from the Legislature and its partisan operative co-conspirators requiring Plaintiffs to fend off appeals, assertions of legislative and associational privileges, and unfounded claims of unclean hands and

fraud on the court. Nor was it apparent that Plaintiffs would have to piece together their case in the face of the Legislature's spoliation of redistricting-related records. In that sense, the private attorney general doctrine is akin to the inequitable conduct doctrine,[7] which the parties agree need not be pleaded under the *Stockman* rule. (R105:13,312-13.) Just as bad faith tactics cannot be evaluated until they occur in a lawsuit, courts cannot determine whether private enforcement was necessary and imposed a sufficient burden until after the dust has cleared in litigation. Accordingly, the *Stockman* rule does not apply to Coalition Plaintiffs' request for fees under the private attorney general doctrine.

B. Section 284.30, Florida Statutes, Does Not Bar Recovery of Fees.

At the hearing on the motions for attorneys' fees, the Attorney General made an *ore tenus* objection, in which the Legislature joined, that Plaintiffs did not comply with section 284.30, Florida Statutes. That statute provides: "A party to a suit in any court, to be entitled to have his or her attorney's fees paid by the state or any of its agencies, must serve a copy of the pleading claiming the fees on [DFS]." § 284.30, Fla. Stat. (2014). Under the plain language of section 284.30, the requirement to serve DFS only applies when there is in fact a "pleading claiming . . . fees." *See N.S. v. Dep't of Children & Families*, 119 So. 3d 558, 560-61 (Fla. 5th

[7] Under the inequitable conduct doctrine, courts may award attorneys' fees "in situations where one party has acted vexatiously or in bad faith," even if there is no contract or statute providing for fees. *Moakley*, 826 So. 2d at 224.

DCA 2013) (finding section 284.30 inapplicable to claim for attorneys' fees in dependency case because there was no pleading in which defendant could have sought fees); *Viering v. Fla. Comm'n on Human Relations ex rel. Watson*, 128 So. 3d 967, 969-70 (Fla. 1st DCA 2013) (holding that section 284.30 did not apply to defendant in administrative proceeding, in part, because she "did not file an initial pleading that could have been served on [DFS]").

Under the typical definition of "pleading" as a complaint, answer, or reply, section 284.30 does not apply on its face because there was no complaint, answer, or reply in which Coalition Plaintiffs "claim[ed] . . . fees." *See* Fla. R. Civ. P. 1.100(a) (providing that "[n]o other pleadings shall be allowed" except for the complaint, answer, and reply). As explained in the previous section, Coalition Plaintiffs were not required to, and did not, request fees in a pleading because their entitlement to fees arose well after the filing of the litigation.

Construing section 284.30 to require service of a complaint or answer claiming fees at the outset of the case even when the *Stockman* doctrine does not apply would extend the requirement to plead fees beyond the bounds set by the Florida Supreme Court. If section 284.30 upended typical pleading rules in this manner, it would likely be an unconstitutional infringement on the judiciary's authority. *See* Art. V, § 2, Fla. Const. (ascribing power to create rules of procedure to supreme court); *Raymond*, 906 So. 2d at 1051-52 ("Although the Legislature may repeal a

court procedural rule, it cannot create a new procedural rule by statute."). Under such a construction, section 284.30 would also silently insulate the state from fee claims under section 57.105, the inequitable conduct doctrine, and any other statute or doctrine based on conduct occurring after the initial pleading. Section 284.30, of course, does none of these things. The statute merely means what it says: when a "pleading claiming the fees" exists, it must be served on DFS.

Section 284.30 does not require service where, as here, the fee claim is made by motion rather than pleading. *See N.S.*, 119 So. 3d at 561 (finding section 284.30 inapplicable to motion for fees under section 57.105); *Viering*, 128 So. 3d at 969-70 (holding that section 284.30 did not apply to motion for fees under section 120.595(5), Florida Statutes, because "[m]otions are not pleadings"). Nevertheless, Coalition Plaintiffs went beyond the statutory requirement and served DFS with their motion for attorneys' fees. (Aff. of Service 12/18/14 (*see supra* n.3); R126:16,312.)[8] DFS thus had notice of the claim for fees and could have appeared at the hearing if it wished to do so.[9] Accordingly, section 284.30 does not bar Coalition Plaintiffs from recovering their fees.

[8] Coalition Plaintiffs will also serve DFS with a copy of this brief via process server.

[9] Rather than appear at the hearing, DFS had the Attorney General state a general objection under section 284.30 on its behalf. (R126:16,311-14.)

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's denial of attorneys' fees to Coalition Plaintiffs and remand with instructions for the trial court to enter judgment against the Legislature for Coalition Plaintiffs' attorneys' fees in an amount to be determined by the trial court.

Respectfully submitted,

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