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

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., *et al*.,

Appellants,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State, *et al*.,

Appellees.

Case No. 1D14-5614
L.T. Case Nos. 2012-CA-000412
2012-CA-000490

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INTRODUCTION

This is an appeal from an order denying motions for attorney's fees. The case below challenged the constitutionality of the Florida Legislature's reconfiguration of the State's congressional districts after the 2010 Census. Plaintiffs identified no statutory or contractual basis for an award of attorney's fees. Instead, they argued that they were entitled to fees under the private attorney general doctrine—a common-law doctrine that few states have recognized, and which no court of this State has ever adopted. The trial court applied established Florida cases, declined to adopt the doctrine, and denied Plaintiffs' motions. This Court should affirm.

STATEMENT OF THE CASE AND FACTS

On February 9, 2012, the Florida Legislature enacted new congressional districts for the State of Florida. *See* Ch. 2012-2, Laws of Fla. The Romo Plaintiffs and the Coalition Plaintiffs filed separate complaints, each alleging that the enacted congressional districts violated Article III, Section 20 of the Florida Constitution, R1: 58-69; R114: 14441-59, and the two actions were consolidated, R7: 862-63.

On June 18, 2012, the Legislative Parties moved to strike the Romo Plaintiffs' claim for attorney's fees. R17: 2363-67. In response to the motion, the Romo Plaintiffs cited Section 57.105, Florida Statutes, as the "exclusive basis for their claim for attorney's fees." R18: 2508. The trial court granted the motion and struck the claim for fees. R18: 2508-09. The Romo Plaintiffs did not thereafter

move to amend their complaint to assert a claim for fees. The Coalition Plaintiffs never pled a claim for fees, either in their initial or amended complaint, R11: 1418-46, R114: 14441-59, and never moved for leave to amend to add a claim for fees.

On July 10, 2014, after a 12-day trial, the court issued its final judgment. R90: 11187-227. The court concluded that political operatives had conspired to manipulate the legislative redistricting process and had "found avenues . . . to infiltrate and influence the Legislature." R90: 11208. The court identified two deficiencies and afforded the Legislature time to enact a new plan. R92: 11452-57.

Rather than appeal, the Legislature convened in special session and, on August 11, 2014, passed a remedial redistricting plan that corrected the deficiencies identified by the trial court. *See* Ch. 2014-255, Laws of Fla. The court held an evidentiary hearing at which the Legislative Parties presented the remedial plan. R102: 12942. The court approved the remedy, finding that the revision "sufficiently addresses" the deficiencies identified in the final judgment. R102: 12942-45.

On the same day that the Legislature enacted the remedial plan, Plaintiffs filed motions for attorney's fees. R92: 11458-71; R93: 11472-561. In their motions, Plaintiffs urged the trial court to recognize California's private attorney general doctrine. The Legislative Parties responded that no court in this State had ever recognized the private attorney general doctrine, and that its recognition would contravene the long-settled American Rule, which requires a statutory or contrac-

tual basis for an award of attorney's fees. R105: 13308-507. The Legislative Parties also argued that Plaintiffs had neither pled their claim for attorney's fees nor served a pleading that sets forth a fee claim on the administrator of the State's self-insurance trust fund, as Florida law requires. *Id*. The trial court recognized that Plaintiffs' request was unprecedented and suffered from "procedural deficiencies," R126: 16320-21, and denied their request, R112: 14385-86. This appeal followed.

SUMMARY OF ARGUMENT

This Court should reject Plaintiffs' invitation to adopt the private attorney general doctrine. Recognition of this California-made equitable doctrine is incompatible with this State's 75-year commitment to the American Rule, which requires a statutory or contractual basis for any award of attorney's fees.

The private attorney general doctrine is bad policy. Rejected by the United States Supreme Court, the private attorney general doctrine intrudes upon the Legislature's specification of cases in which fees are recoverable, requires subjective and unpredictable value judgments, encourages proliferated litigation against the State, exposes the public treasury, and discourages the State from presenting a zealous and vigorous defense of Florida law and public policy in court. The private attorney general doctrine implicates fundamental questions of policy, the evaluation of which the Florida Constitution commits to the legislative branch.

The right to recover fees is a matter of substantive law within the Legisla-

ture's domain. The Florida Supreme Court has long recognized that the circumstances under which parties may recover fees is substantive, and has declined to create new fee entitlements. Judicial recognition of the private attorney general doctrine would encroach upon legislative authority and the separation of powers.

Plaintiffs, moreover, failed to satisfy the basic prerequisites to a recovery of attorney's fees. Plaintiffs neither pled a claim for attorney's fees, as the Florida Supreme Court requires, nor served their pleading on the administrator of the State Risk Management Trust Fund, the state-operated, self-insurance trust fund for the payment of claims against the State. Plaintiffs try but fail to explain away their non-compliance with these indispensable conditions precedent to an award of fees.

Even if this Court were to adopt the private attorney general doctrine, the Due Process Clause of the Florida Constitution would prohibit its retroactive application to pending cases. Under the Due Process Clause, the Florida Supreme Court has consistently refused to apply new statutory fee entitlements to pending cases. The same due-process principles apply to fee entitlements created by the Judiciary.

Plaintiffs' predictable complaints of litigation misconduct are unfounded. The trial court flatly rejected them. In fact, the trial court and this Court approved much of the same conduct that Plaintiffs now brand as abusive. To support their allegations, Plaintiffs suppress material facts and present their own unsupported inferences from the evidence as established fact. At bottom, however, Plaintiffs

are offended that the Legislative Parties defended this case "vigorously." The Legislature did—proudly. When Plaintiffs hired avowed partisan operatives to draw their alternative maps, and then represented those maps to the trial court as neutral and non-partisan examples of a fair redistricting, the Legislative Parties' vigorous defense exposed Plaintiffs' attempt to mislead the trial court and undermine the integrity of the judicial process. This Court should reject Plaintiffs' request for fees.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S STEADY ADHERENCE TO THE AMERICAN RULE FORECLOSES THE PRIVATE ATTORNEY GENERAL DOCTRINE.

No court in this State has ever awarded fees on the basis of the "private attorney general doctrine." In Florida, courts embrace the age-old axiom that fees cannot be recovered without a statutory or contractual basis. Given the Florida Supreme Court's historical adherence to the American Rule and its unwavering insistence on a statutory or contractual basis for a fee award, this Court should decline to be the first in this State to recognize the private attorney general doctrine.

In Florida, few rules of law are more deeply rooted than that fees cannot be awarded absent a statute or contract that authorizes their recovery. The American Rule was "well settled" in 1939, *see Main v. Benjamin Foster Co*., 192 So. 602, 604 (Fla. 1939), and was equally "well-settled" in 2009, *see Trytek v. Gale Indus*., *Inc*., 3 So. 3d 1194, 1198 (Fla. 2009). The Florida Supreme Court has declared that it is "committed" to the American Rule, *see Conner v. State Road Dep't of*

Fla., 66 So. 2d 257, 260 (Fla. 1953); *Dorner v. Red Top Cab & Baggage Co*., 37 So. 2d 160, 161 (Fla. 1948); *Ex Parte Graham*, 186 So. 202, 203 (Fla. 1939), and has reaffirmed that principle decade after decade.[1] In light of the State's 75-year commitment to the American Rule, no argument runs so directly against the grain of settled law as Plaintiffs' advocacy of the private attorney general doctrine. Indeed, no court of this State has *ever* recognized a purely equitable exception to the American Rule: "Attorney's fees cannot be awarded as a matter of equity." *Bauer v. DILIB*, *Inc*., 16 So. 3d 318, 320 (Fla. 4th DCA 2009) (quoting *Attorney's Title Ins. Fund*, *Inc. v. Landa-Posada*, 984 So. 2d 641, 643 (Fla. 3d DCA 2008)).

To encourage the Court to set aside the American Rule, Plaintiffs portray the Rule as a "judicially-created doctrine" and a "creature of common law." Br. at 12.[2]

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[1] *See*, *e.g.*, *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004); *Bane v. Bane*, 775 So. 2d 938, 940 (Fla. 2000); *Bell v. U.S.B. Acquisition Co*., *Inc*., 734 So. 2d 403, 406 (Fla. 1999); *Dade Cnty. v. Pena*, 664 So. 2d 959, 960 (Fla. 1995); *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *P.A.G. v. A.F.*, 602 So. 2d 1259, 1260 (Fla. 1992); *Bidon v. Dep't of Prof'l Regulation*, 596 So. 2d 450, 452 (Fla. 1992); *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985); *Estate of Hampton v. Fairchild-Fla. Constr. Co.*, 341 So. 2d 759, 761 (Fla. 1976); *Campbell v. Maze*, 339 So. 2d 202, 203 (Fla. 1976); *Rivera v. Deauville Hotel*, *Emp'rs Serv. Corp.*, 277 So. 2d 265, 266 (Fla. 1973); *Stone v. Jeffres*, 208 So. 2d 827, 828-29 (Fla. 1968); *Codomo v. Emanuel*, 91 So. 2d 653, 655 (Fla. 1956); *Shavers v. Duval Cnty*., 73 So. 2d 684, 686 (Fla. 1954); *Phoenix Indem. Co. v. Union Fin. Co*., 54 So. 2d 188, 190 (Fla. 1951); *Brite v. Orange Belt Sec. Co*., 182 So. 892, 895 (Fla. 1938); *Webb v. Scott*, 176 So. 442, 446 (Fla. 1937).

[2] "Br." refers to the Initial Brief of Coalition Plaintiffs, dated May 18, 2015. "R.P. Br." refers to the "Appellant's (*sic*) Initial Brief," which the Romo Plaintiffs filed on May 18, 2015.

In fact, the American Rule reflects a *legislative* policy. It arises from the absence of general fee-shifting legislation—not from a judicial policy determination. Thus, under the English Rule, fees are allowed not because courts favor fee awards, but because statutes generally authorizing them have long existed in England. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorney's fees.").

> The law concerning attorney fee shifting as it developed in England was a creature of statute. Absent enabling legislation, the English Rule would mirror the American Rule where the "loser" is not responsible for the attorney's fees of the "winner." Thus, the practice in both England and America reflects simple adherence to legislative commands. If colonial America had followed the English fee-shifting practice, the evidence of such a practice would be found in colonial statutes.

John F. Vargo, *The American Rule on Attorney Fee Allocation*, 42 AM. U. L. REV. 1567, 1571 (1993) (footnote omitted). The English Rule and the American Rule are products of the statutes that existed or did not exist in their respective countries.

None of the purported exceptions to the American Rule that Plaintiffs cite contradicts these positions. Br. at 12-13. The power to assess fees as a sanction for litigation misconduct arises from the inherent authority of courts to control their proceedings. *See Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002); *Cox v. Great Am. Ins. Co.*, 88 So. 3d 1048, 1050 (Fla. 4th DCA 2012). So too does the power to compensate attorneys from a common fund generated by their labors

in litigation. *Alyeska*, 421 U.S. at 257-59. Properly understood, the common-fund doctrine is not a fee-shifting device at all. Its effect is to distribute the burden of fees among the beneficiaries of a fund—not to impose an additional liability on a non-prevailing party. *See Bd. of Trs. of City Pension Fund for Firefighters & Police Officers in City of Tampa v. Parker*, 113 So. 3d 64, 68 (Fla. 2d DCA 2013) ("Rather than fee-*shifting*, . . . the common fund doctrine authorizes fee-*sharing*: fees are shared between the litigants and the fund's beneficiaries (of which the litigants are a part), but fees are not shifted between parties adverse to one another."). The common-fund doctrine, therefore, "is not contrary to the American Rule." *Id*.

The wrongful-act doctrine does not authorize fee awards *per se*. It entitles a party who was forced into litigation by the wrongful conduct of a third party to recover the costs of litigation, including attorney's fees, as an element of damages. *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). It reflects not so much a fee claim as a recognition that litigation compelled by wrongful conduct is a compensable injury. And the principle that fees are payable from partnership assets in partnership-dissolution proceedings presupposes—like the common-fund doctrine—the existence of assets over which a court exercises control. It does not simply shift to one party the liability for another's fees. The availability of fees in partnership-dissolution cases has been the law for more than a century, *see Wade v.*

Clower, 114 So. 548 (Fla. 1927) (citing 30 WILLIAM MACK, CYCLOPEDIA OF LAW AND PROCEDURE 749-50 (1908)), and has peaceably coexisted with the maxim that fees cannot be imposed as an award without statutory or contractual authorization.

Plaintiffs also cite the common-law doctrine that public officials charged with official misconduct are entitled to reimbursement from the public for fees incurred in their defense. Br. at 20-21. But this common-law doctrine is not an exception to the American Rule. It does not authorize the recovery of fees from an adverse party, but rather obligates the public to provide a defense for the public officials whom it employs. *See Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990). It therefore bears no similarity to the private attorney general doctrine, which shifts a prevailing party's fees to the non-prevailing party.

Plaintiffs, therefore, have not identified a single equitable exception to the American Rule. Florida's faithful adherence to the maxim that fees cannot be recovered without a statutory or contractual basis is not only long-standing law, but, for the reasons explained below, sound policy that deserves to be reaffirmed.

II. THE PRIVATE ATTORNEY GENERAL DOCTRINE IS BAD POLICY.

The Florida Supreme Court's consistent adherence to the American Rule alone compels rejection of the private attorney general doctrine. But even as a matter of public policy, the Court should refuse to validate the private attorney general doctrine. Most courts that have considered the doctrine, including the

United States Supreme Court, have rejected it for weighty and compelling reasons.

A. For Good Reason, Most Courts Have Rejected the Private Attorney General Doctrine.

Many courts, including the United States Supreme Court, have refused to adopt the private attorney general doctrine. For example, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Court refused to award attorney's fees to two environmental advocacy organizations that had successfully sued to prevent the issuance of permits necessary for construction of an oil pipeline. The Court explained that, for centuries, attorney's fees had not been allowed without statutory authorization. *Id*. at 247. Congress had made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes," and these authorizations differed considerably among themselves. *Id*. at 260-61. It was clear therefore that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id*. at 261. Adoption of the doctrine would "make major inroads on a policy matter that Congress has reserved for itself." *Id*. at 269.

> [C]ourts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not others, depending on the courts' assessment of the importance of the public policies involved in particular cases.

Id. at 269. The Court expressed concern that the private attorney general doctrine

afforded no "judicially manageable standard" that might enable courts to assess the relative importance of cases, and that courts would be tempted to apply the doctrine "in accordance with their own particular substantive-law preferences and priorities." *Id*. at 264 n.39. It held that the American Rule is "deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested." *Id*. at 271.

Most state courts that have confronted the private attorney general doctrine have rejected it.[3] First, as in *Alyeska*, state courts have noted that state legislatures had selected the cases in which fees are awardable, and that it would be improper to disturb that legislative policy.[4] In Florida, too, the Legislature has enacted nu-

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[3] *See Shelby Cnty. Comm'n v. Smith*, 372 So. 2d 1092, 1096-97 (Ala. 1979); *Doe v. Heintz*, 526 A.2d 1318, 1322-23 (Conn. 1987); *Dover Historical Soc'y*, *Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1091 (Del. 2006); *Hamer v. Kirk*, 356 N.E.2d 524 (Ill. 1976); *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 662 (Ind. 2001); *Pearson v. Bd. of Health of Chicopee*, 525 N.E.2d 400, 402-03 (Mass. 1988); *Nemeth v. Abonmarche Dev.*, *Inc*., 576 N.W.2d 641, 653 (Mich. 1998); *Fordice v. Thomas*, 649 So. 2d 835, 846 (Miss. 1995); *Moore v. City of Pacific*, 534 S.W.2d 486, 505 (Mo. Ct. App. 1976); *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 458-59 (N.M. 1999); *Stephenson v. Bartlett*, 628 S.E.2d 442, 446 (N.C. Ct. App. 2006); *Mech. Contractors Ass'n of Cincinnati*, *Inc. v. Univ. of Cincinnati*, 788 N.E.2d 670, 678 (Ohio Ct. App. 2003); *Tibbetts v. Sight 'n Sound Appliance Ctrs.*, *Inc*., 77 P.3d 1042, 1052 n.13 (Okla. 2003); *Jones v. Muir*, 515 A.2d 855, 862 (Pa. 1986); *Providence Journal Co. v. Mason*, 359 A.2d 682, 688 (R.I. 1976); *Van Emmerik v. Mont. Dakota Utils. Co.*, 332 N.W.2d 279, 284 (S.D. 1983); *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986).

[4] *Doe*, 526 A.2d at 1323; *State Bd. of Tax Comm'rs*, 751 N.E.2d at 662; *Nemeth*, 576 N.W.2d at 653; *N.M. Right to Choose/NARAL*, 986 P.2d at 458; *Ste-*

merous statutes that allow fee awards in defined cases. *See*, *e.g.*, § 501.2105(1), Fla. Stat. (2014) (the Florida Deceptive and Unfair Trade Practices Act); *id*. § 760.11(5) (the Florida Civil Rights Act); *id*. § 895.05(7) (the Florida RICO Act).

Second, as the United States Supreme Court has noted, "one of the primary justifications for the American Rule is that 'one should not be penalized for merely defending or prosecuting a lawsuit.'" *Summit Valley Indus. Inc. v. Local 112*, *United Bhd. of Carpenters & Joiners of Am*., 456 U.S. 717, 724 (1982) (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)). Courts in other States have recognized the established position of the American Rule in our jurisprudence and the importance of the policies that the Rule serves. *See N.M. Right to Choose/ NARAL*, 986 P.2d at 459. The American Rule has long received—and continues to merit—similar respect in this State. *See Air Turbine Tech*., *Inc. v. Quarles & Brady*, *LLC*, 165 So. 3d 816, 821 (Fla. 4th DCA 2015) ("Florida disfavors the award of prevailing party attorney's fees in civil cases.").

Third, the private attorney general doctrine requires unwieldy and subjective assessments of the relative importance of the rights vindicated, the necessity of private enforcement, the magnitude of the burden imposed on private litigants, and the significance of the benefit to citizens. *See Stephenson*, 628 S.E.2d at 445.

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phenson, 628 S.E.2d at 445; *Jones*, 515 A.2d at 862-63; *Providence Journal Co.*, 359 A.2d at 688.

> Unbridled judicial authority to "pick and choose" which plaintiffs and causes of action merit an award of attorney fees under the private attorney general doctrine would not promote equal access to the courts for the resolution of good faith disputes inasmuch as it lacks sufficient guidelines to prevent courts from treating similarly situated parties differently and could easily result in decisions that favor a particular class of private litigants while unduly discouraging the government from mounting a good faith defense.

N.M. Right to Choose/NARAL, 986 P.2d at 459. It would be impossible to make these value judgments in a fair, principled, predictable, and consistent manner. *Id*. Indeterminacy would disserve both plaintiffs who might erroneously anticipate an award and defendants uncertain of their exposure: "The subjectivity involved in ranking various public interests could make it difficult for prospective litigants to know in advance whether fee reimbursement would accompany a victory." *State Bd. of Tax Comm'rs*, 751 N.E.2d at 662. As long as courts must determine which rights are worthier than others, it is "far from clear that the doctrine would serve as a significant incentive to those seeking to vindicate the public interest." *Id*.

Fourth, recognition of the doctrine will encourage litigation against the State and expose the State to potential liability in each and every lawsuit. Plaintiffs recognize that the doctrine is not confined to redistricting, but would apply to *all* public agencies in a "variety of circumstances": for example, litigation over hiring practices, environmental assessments, school funding, the use of public property, the validity of utility regulations, the verification of traffic tickets, and the treatment of the mentally ill. Br. at 13-14 n.6. The taxpayers of Florida must bear all

fee awards imposed on state agencies. And the State's incalculable exposure would increase as the hope of lucrative recoveries entices "bounty hunters" to bring claims with little or no chance of success, and thus reshape the "dynamics of public interest litigation." *State Bd. of Tax Comm'rs*, 751 N.E.2d at 662; *accord Stephenson*, 628 S.E.2d at 445. Courts have been mindful of the need to protect and conserve public revenues. *N.M. Right to Choose/NARAL*, 986 P.2d at 458; *cf. Bd. of Cnty. Comm'rs*, *Pinellas Cnty. v. Sawyer*, 620 So. 2d 757, 758 (1993) (noting that, even in England, absent a statute, costs were not awarded at common law against the sovereign (citing *Buckman v. Alexander*, 3 So. 817, 818 (Fla. 1888)).[5]

Fifth, the prospect of a large fee award would "discourage the government from mounting a good faith defense." *N.M. Right to Choose/NARAL*, 986 P.2d at 459. Plaintiffs in "public-interest" litigation are often special interests who resort to the courts to effect a political agenda that failed in the democratic process. Fee liability will pressure the State, contrary to the democratic theory of the Constitu-

[5] A doctrine designed to impose untold liability on state agencies necessarily implicates the constitutional principle that the Legislature alone is authorized to appropriate public revenues. *See* Art. VII, § 1(c), Fla. Const. ("No money shall be drawn from the treasury except in pursuance of appropriation made by law."). The Constitution "gives to the Legislature 'the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.'" *Republican Party of Fla. v. Smith*, 638 So. 2d 26, 28 (Fla. 1994) (quoting *State ex rel. Kurz v. Lee*, 163 So. 859, 868 (1935)); *accord Chiles v. Children A*, *B*, *C*, *D*, *E*, *& F*, 589 So. 2d 260, 265 (Fla. 1991) ("[T]his Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes."). It is appropriate, therefore, that the consideration of a doctrine that entails enormous expense on the State be reserved to the Legislature.

tion, to accede to the demands of well-financed groups and change public policy through the courts—whether by a token defense or an overly generous settlement.

This case is a perfect example. Plaintiffs hired Democratic political consultants headquartered in Washington, D.C., to draw alternative maps and then showcased those maps in the trial court, declaring them to be neutral and non-partisan exemplars. R62-66: 7293-7987. If, to avoid massive fee liability, the Legislature had compromised with Plaintiffs, declining to pursue discovery and accepting their maps, then the trial court would have been misled, and the citizens of Florida might today reside in districts drawn for them by avowed Democratic partisans. Now, tellingly, Plaintiffs criticize the Legislative Parties for "vigorously" defending this case. Br. at 2. The State must remain motivated to defend itself against parties who seek to advance an improper agenda outside of the democratic process.

B. The Arguments For Recognizing the Private Attorney General Doctrine Are Few and Weak.

The few reasons that Plaintiffs cite in support of the doctrine fail to outweigh the strong arguments against it. Plaintiffs argue that, without encouragement, "far fewer public interest cases may be brought," Br. at 21, and that enforcement of redistricting standards will be deterred. Basic facts contradict these assertions.

The American Rule is current law and has been for decades. The mere continuation of settled law will not cause a decline in litigation. On the other hand, recognition of the private attorney general doctrine will throw fuel on "public-

interest" litigation. Whether a dramatic increase in "public-interest" litigation should be encouraged is a question of public policy for the Legislature to decide.

Redistricting litigation in particular requires no additional fuel. It is a well-organized and well-financed national industry. In Florida, redistricting litigation has been brought consistently, decade after decade.[6] In this case alone, more than thirty well-paid attorneys have appeared for Plaintiffs in three-and-a-half years of litigation and appeals. And as Florida continues to increase in population and political consequence, there will be no danger of too little redistricting litigation.

More redistricting litigation waits in the wings. The Coalition Plaintiffs now prosecute their challenge to State Senate districts. *The League of Women Voters of Fla. v. Detzner*, No. 2012-CA-002842 (Fla. 2d Cir. Ct. filed Sep. 5, 2012). The National Democratic Redistricting Trust challenged Congressional District 5 and dismissed that challenge on August 10, 2015, after the Supreme Court directed the Legislature to redraw District 5 as the National Democratic Redistricting Trust had

[6] The Florida Supreme Court alone has decided redistricting cases more than once per decade. *See*, *e.g.*, *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176 (Fla. 2003); *Fla. Senate v. Forman*, 826 So. 2d 279 (Fla. 2002); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002); *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543 (Fla. 1992); *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276 (Fla. 1992); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040 (Fla. 1982); *Milton v. Smathers*, 389 So. 2d 978 (Fla. 1980); *Cardenas v. Smathers*, 351 So. 2d 21 (Fla. 1973); *Futch v. Stone*, 281 So. 2d 484 (Fla. 1973); *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305*, 279 So. 2d 14 (Fla. 1973); *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305*, 263 So. 2d 797 (Fla. 1972).

proposed. *Warinner v. Detzner*, No. 4:14-cv-00164 (N.D. Fla.). In response, Congresswoman Corinne Brown has filed suit to undo the reconfiguration of District 5. *See Brown v. Detzner*, No. 4:15-cv-00398-MW (N.D. Fla. filed Aug. 12, 2015).

There is no scarcity of funds for redistricting litigation. The National Democratic Redistricting Trust, which funds the Romo Plaintiffs, was created to fund redistricting litigation across the country. It set out to raise $12.5 million. John Breshahan, *Redistricting Draws Unregulated Cash*, POLITICO, Mar. 29, 2011, http://www.politico.com/news/stories/0311/52095.html. Outside groups allied with political parties kept pace admirably. FairDistricts Now, Inc., which exists to fund the Coalition Plaintiffs, raised more than $5.3 million by June 30, 2014, *see* FOUNDATION CENTER, http://foundationcenter.org/findfunders/990finder. Large contributions from out-of-state interests, including labor unions, flowed to the National Democratic Redistricting Trust and FairDistricts Now. *See* UNITED STATES DEPARTMENT OF LABOR, http://kcerds.dol-esa.gov/query/getPayerPayeeQry.do. In fact, the Democratic Party has already established the "2020 Redistricting Fund" to collect millions of dollars in anticipation of the next redistricting cycle. Alan Suderman, *McAuliffe to Lead National Redistricting Effort by Democrats*, WASH. POST, Aug. 4, 2015, http://www.washingtonpost.com/local/mcauliffe-to-lead-national-redistricting-effort-by-democrats/2015/08/04/a11f6eb4-3acd-11e5-b759-e3c43f009486_story.html. Plaintiffs cannot plausibly argue that, in a State as sig-

nificant as Florida, redistricting litigation will vanish without state subsidies. The danger is the reverse—that redistricting litigation will proliferate uncontrollably.

There is likewise no danger that defendants in redistricting litigation will be "emboldened to . . . run up their adversaries' costs." Br. at 21. Courts are vested with broad discretion to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense." Fla. R. Civ. P. 1.280(c). The real danger is that the threat of fees will greatly discourage a vigorous defense, and that a feckless defense will embolden parties such as Plaintiffs to misuse the courts to realize partisan objectives that were rejected in the democratic process. A zealous and watchful defense protects the judicial system from misuse and embarrassment.

Plaintiffs argue that this case involves "precisely the circumstances for which the private attorney general doctrine is intended." Br. at 13. When called upon to create a new rule, however, the Court must consider not only the case before it, but the operation of the rule in other cases. Unless Plaintiffs seek a "redistricting exception" to the American Rule, the private attorney general doctrine will be unmanageable. Because state agencies constantly litigate cases that affect public interests, courts have noted that the doctrine is "far-reaching," *Alyeska*, 421 U.S. at 247, "drastic," *Shelby Cnty. Comm'n*, 372 So. 2d at 1097, "broad," *Doe*, 526 A.2d at 1323, and "sweeping," *State Bd. of Tax Comm'rs*, 751 N.E. 2d at 662.

Even in redistricting cases, courts have not jumped to adopt the private at-

torney general doctrine. In *Stephenson*, the plaintiffs had prevailed in a challenge under the State Constitution to North Carolina's state legislative districts. The court, however, refused to adopt the private attorney general doctrine and affirmed its adherence to the American Rule. 628 S.E.2d at 445. Similarly, in *Moore*, the plaintiffs prevailed on their claim that ward districts established by city ordinance violated the one-person, one-vote requirement of the United States Constitution. The court refused to adopt the doctrine, however. 534 S.W.2d at 505. It observed that the Supreme Court's decision in *Alyeska* had "rejected the private-attorney-general concept as an intrusion upon the prerogative of congress to decide when private litigation should be encouraged by the awarding of attorney's fees." *Id*.

III. THE COURT LACKS CONSTITUTIONAL AUTHORITY TO CREATE AN ENTITLEMENT TO ATTORNEY'S FEES.

Plaintiffs' invitation to this Court to establish a new, extra-statutory entitlement to attorney's fees must be rejected for constitutional reasons as well. The Florida Supreme Court has correctly recognized time and time again that the creation of fee entitlements is a matter of substantive law—not procedure. And the Florida Constitution commits matters of substantive law to the Legislature alone.

The Florida Constitution makes a now-familiar distinction between matters of procedure and those of substance. "Generally, the Legislature is empowered to enact substantive law while [the Florida Supreme Court] has the authority to enact procedural law." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014); *accord Se.*

Floating Docks, *Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012); *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 222 n.12 (Fla. 2003). "[M]atters of substantive law are within the Legislature's domain." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005). The Constitution also prohibits each branch of government from exercising powers that appertain to another branch, *see* Art. II, § 3, Fla. Const., and the Supreme Court has strictly enforced the separation of powers as the "cornerstone of American democracy," *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

As the Florida Supreme Court has repeatedly held, it is "clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive." *Se. Floating Docks*, *Inc.*, 82 So. 3d at 78 (quoting *Timmons v. Combs*, 608 So. 2d 1, 2-3 (Fla. 1992)); *accord* 2 PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 22.5 (2015) ("Whether a party has a right to recover attorney fees for legal services rendered in connection with an appeal . . . is a matter of substantive law."). Because an entitlement to attorney's fees is a substantive right, the power to create a fee entitlement rests within exclusive domain of the legislative branch.

The Supreme Court has therefore upheld statutes that create fee entitlements and declined to adopt rules that purport to confer a right to fees. *See Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996) (noting that the right to recover attorney's fees is substantive, while holding that the time period within which an offer of judgment must be served is a matter of procedure); *TGI Friday's*, *Inc. v. Dvorak*,

663 So. 2d 606, 611 (Fla. 1995) (upholding an offer-of-judgment statute and concluding that the Legislature had "modified the American rule . . . and created a substantive right to attorney's fees"); *Timmons*, 608 So. 2d at 2-3 (explaining that the offer-of-judgment statute created a "substantive right" and that "the circumstances under which a party is entitled to attorney's fees is substantive"); *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992) (holding that a fee entitlement in an offer-of-judgment statute was substantive law); *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 504 (Fla. 1982) (holding that Section 57.105, Florida Statutes, does not impinge on judicial authority to regulate procedure because an award of attorney's fees is "a matter of substantive law properly under the aegis of the legislature").

More recently, in *Southeast Floating Docks*, the Court examined whether the offer-of-judgment statute is substantive for conflict-of-law purposes. To inform its analysis, the Court reviewed the decisions in which fee entitlements were deemed to be substantive for purposes of the Florida Constitution's division of responsibility for procedural and substantive matters. The Court reiterated that "the circumstances under which a party is entitled to costs and attorney's fees is substantive" and held that the offer-of-judgment statute is "substantive for both constitutional and conflict of law purposes." 82 So. 3d at 80. In doing so, the Court "reaffirm[ed] the holding in the *Timmons* and *TGI Friday's* cases that the Legislature created a substantive right to attorney's fees" in the offer-of-judgment statute. *Id*.;

see also Finkelstein v. N. Broward Hosp. Dist., 484 So. 2d 1241, 1243 (Fla. 1986) (describing a statute that authorized awards of attorney's fees to prevailing parties in medical-malpractice cases as conferring a "substantive right to attorney's fees").

The Court's exercise of authority to adopt rules also reflects that fee entitlements are substantive—not procedural. In *In re Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996), the Court rejected a proposed rule that purported to authorize courts, in determining whether litigants are entitled to attorney's fees under the offer-of-judgment statute, to consider whether the offeree's rejection of the offer was reasonable. The Court explained that it was without authority to modify the conditions that entitle a litigant to recover fees: it "is clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive and that our rule can only control procedural matters." *Id*. at 105-06 (quoting *Timmons*, 608 So. 2d at 2-3). The Court rejected the proposal "because we must respect the legislative prerogative to enact substantive law." *Id*. at 106.[7]

Plaintiffs concede that fee entitlements are substantive, Br. at 24, but argue

[7] The committee notes to Florida Rule of Appellate Procedure 9.400, which addresses motions for appellate attorney's fees, also recognize that an entitlement to attorney's fees is a matter of substantive law. They note that the deletion of the phrase "allowable by law," which appeared in the predecessor rule, was "not intended to give a right to assessment of attorneys' fees unless otherwise permitted by substantive law." And appellate courts have noted that Rule 9.400 "contemplates an allowance of attorney's fees only if otherwise authorized by substantive law." *Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs*, *Inc.*, 810 So. 2d 514, 515-16 (Fla. 5th DCA 2002); *accord Israel v. Lee*, 470 So. 2d 861, 862 (Fla. 2d DCA 1985); *In re Crosley's Estate*, 384 So. 2d 274, 277 (Fla. 4th DCA 1980).

that courts, like the Legislature, may create them, *id*. at 25. Courts, however, have refused to create fee entitlements, recognizing that their creation lies within the legislative domain. In *Kittel v. Kittel*, 210 So. 2d 1 (Fla. 1968), the Court, though sympathetic to a spouse who sued for a declaration that a divorce obtained by her husband was void, refused to award fees, finding no statute that authorized the award. "It may well be that, under the circumstances, the Legislature should provide some means for requiring the husband to pay for the services of his wife's attorney. This is, however, a legislative, not a judicial, prerogative." *Id*. at 4. In *The Florida Bar*, 344 So. 2d 828, 835 (Fla. 1977), the Court repealed a judicial rule that purported to authorize courts to award fees in probate and guardianship proceedings, noting that the fee entitlement was "substantive rather than procedural."

No less mistaken is Plaintiffs' assertion that, while the Legislature cannot enact procedural rules, courts possess a coordinate power with the Legislature to create substantive law. The separation of powers is not a one-way street. If the Legislature cannot enact procedural rules, then the Judiciary cannot enact substantive law. As *Kittel* and *The Florida Bar* establish, courts have rejected the view that the separation of powers circumscribes the powers of the Legislature alone.

It is settled, therefore, that in Florida the right to recover fees is a substantive right that can be conferred only by the Legislature. This conclusion makes perfect sense. Substantive law includes the rules and principles that "fix and declare the

primary rights of individuals with respect to their persons and property." *Raymond*, 906 So. 2d at 1049. Whether one party is entitled to recover—and the other party is obligated to pay—prevailing-party attorney's fees directly implicates the primary rights of parties with respect to their property. On the other hand, practice and procedure include "the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." *Id*. at 1048 (internal marks omitted). This definition describes such rules as Florida Rule of Civil Procedure 1.442 and Florida Rule of Appellate Procedure 9.400, which regulate the method by which attorney's fees are requested and recovered, but do not claim to operate as an independent basis to recover fees.

Plaintiffs, therefore, are wrong to suggest that this Court may create a new entitlement to fees on "equitable considerations," Br. at 12, and they are *right* that recognition of the private attorney general doctrine "involves a policy choice," *id*. at 21 (internal marks omitted). Whether suits against the State should be promoted and nourished by awards paid from the public treasury, and whether a vigorous defense of state law and policy should be discouraged, are questions of public policy that the Legislature alone is authorized to answer. *See Fla. House of Representatives v. Crist*, 999 So. 2d 601, 613 (Fla. 2008) ("[T]he legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." (quoting *B.H. v.*

State, 645 So. 2d 987, 993 (Fla. 1994))); *Saunders v. City of Jacksonville*, 25 So. 2d 648, 650 (Fla. 1946) ("Questions of policy are delegated to the legislature.").

IV. BECAUSE PLAINTIFFS DID NOT COMPLY WITH NOTICE REQUIREMENTS THAT ARE CONDITIONS PRECEDENT TO THE RECOVERY OF ATTORNEY'S FEES, THEIR CLAIM FOR FEES IS BARRED.

Plaintiffs failed to comply with two notice requirements that are indispensable conditions precedent to a fee award: they neither pled their claim nor complied with the statute that requires notice to the administrator of the State Risk Management Trust Fund. Indeed, Plaintiffs first broached the private attorney general doctrine *after* the trial court entered its final judgment. Thus, their claim is barred.

A. Plaintiffs Failed to Plead Their Claim for Attorney's Fees.

A claim for attorney's fees must be pled. *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991). A party's failure to plead a fee claim in its complaint waives the claim. *Green v. Sun Harbor Homeowners' Ass'n*, *Inc*., 730 So. 2d 1261, 1263 (Fla. 1998). "The *Stockman* rule continues to be applied strictly." *Walker v. Cash Register Auto Ins. of Leon County*, *Inc*., 946 So. 2d 66, 72 (Fla. 1st DCA 2006).

Plaintiffs did not comply with the *Stockman* rule. The Romo Plaintiffs initially pled a fee claim, R1: 68, but the Legislative Parties moved to strike the claim early in the litigation, R17: 2363-67. In opposition to the motion to strike, the Romo Plaintiffs cited Section 57.105, Florida Statutes, as the "exclusive basis for their claim for attorney's fees." R18: 2508. The trial court granted the motion

and struck the claim. R18: 2508-09. The Coalition Plaintiffs *never* pled a claim for fees, R11: 1418-46, R114: 14441-59, and neither the Romo Plaintiffs nor the Coalition Plaintiffs ever moved to amend their pleadings to add a fee claim as the litigation progressed. After the court struck the Romo Plaintiffs' fee claim, Plaintiffs never again hinted at a claim for attorney's fees until they filed their post-judgment motions for fees on August 11, 2014. At no time before then did Plaintiffs even *mention* the private attorney general doctrine. At best, their assertion of a fee claim—and of the private attorney general doctrine—was an afterthought.

The Romo Plaintiffs contend that their *stricken* fee claim satisfies *Stockman*, R.P. Br. at 4-5, but it would serve no purpose to strike a fee claim if the claimant could later move for fees as though the claim had never been stricken. The striking of the fee claim did not put the Legislative Parties on notice that the Romo Plaintiffs' had fee claim; it put them on notice that the Romo Plaintiffs did *not* have one. *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002), did not hold otherwise; it concluded only that *Stockman* does not require the basis of the claim to be pled.

Plaintiffs attempt to avoid *Stockman* on several grounds. First, they argue that *Stockman* applied only to fees sought "pursuant to statute or contract," Br. at 27, but Plaintiffs misread *Stockman*. The Court's express purpose was to establish a "uniform" rule. 573 So. 2d at 838 n.2. Before *Stockman*, courts required litigants to plead fee claims that arose from contract, but not those that arose from

statute. *Id*. at 836. The Court could not "find any rationale that meaningfully supports the distinction" between statutory and contractual entitlements, and preferred that "the treatment be made uniform." *Id*. at 838 n.2 (quoting *Brown v. Gardens by the Sea S. Condo. Ass'n*, 424 So. 2d 181, 183 (Fla. 4th DCA 1983)). Thus, when the Court stated that fee claims must be pled, "whether based on statute or contract," *id*. at 837, it did not mean to create a new distinction unsupported by any rationale, but rather to establish a uniform rule. Its reference to "statute or contract" expressed that intention because statutes and contracts were the only two grounds for fee awards in Florida. *See Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985) (noting that the American Rule "requires each side to pay its own attorney's fee unless directed otherwise by a statute or an agreement between the parties").

Plaintiffs next insist that the private attorney general doctrine could not possibly have been pled at the outset of litigation. Br. at 27-29. But unlike claims for fees under Section 57.105, Florida Statutes, a claim for fees under the private attorney general doctrine is foreseeable and can be pled in good faith at the outset of litigation. Under Section 57.105, compliance with *Stockman* is unnecessary because it is "extremely difficult, if not impossible, for a party to plead in good faith its entitlement to attorney's fees . . . before the case is ended." *Ganz v. HZJ, Inc*., 605 So. 2d 871, 872 (Fla. 1992). A fee entitlement under Section 57.105 depends entirely on the merits of arguments made in litigation. No such obstacles prevent a

plaintiff from pleading the private attorney general doctrine; a plaintiff knows at the outset of the litigation what rights it seeks to vindicate. *See Buldhaupt v. City of Des Moines*, 772 N.W.2d 269 (Iowa Ct. App. 2009) (denying a claim for fees under the private attorney general doctrine because the plaintiff did not plead it).

Plaintiffs claim not to have anticipated the burdens of litigation. Supposedly, Plaintiffs expected the Legislative Parties to present a weak defense and the Attorney General to join their cause and prosecute this litigation on their behalf. Under the private attorney general doctrine, however, the "burden" element is satisfied as a matter of law where, as here, a plaintiff seeks no damages or other financial benefit. *Tourgeman v. Nelson & Kennard*, 166 Cal. Rptr. 3d 729, 745 (Cal. Ct. App. 2014); *Cal. Common Cause v. Duffy*, 246 Cal. Rptr. 285, 296 (Cal. Ct. App. 1987). Plaintiffs could have and should have pled "burden" in their complaints.

Even as a factual matter, Plaintiffs' claim that the burdens of litigation were unforeseeable is not credible. The Romo Plaintiffs sued the Attorney General. R1: 58. Surely, they did not believe that the Attorney General, as a defendant, would cross-claim and prosecute this case in their behalf. Nor could Plaintiffs have believed the Legislative Parties would not defend this case vigorously. Plaintiffs monitored the redistricting process, knew that the Legislature had retained counsel to represent its interests in redistricting, and witnessed the advocacy in *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012), and

In re Senate Joint Resolution of Legislative Apportionment 2-B, 89 So. 3d 872 (Fla. 2012), in which the Legislative Parties defended and the Court reviewed the validity of state legislative districts. Plaintiffs knew that this case would be sharply contested. Their claims to the contrary are efforts to window-dress a weak argument.

Compliance with *Stockman* is especially important when parties seek fees under the private attorney general doctrine. To allow parties to sandbag the State with crushing liability upon the conclusion of litigation would frustrate the State's paramount interest in the protection, conservation, and management of public funds. It is not too much to ask to require parties who seek to drain millions of dollars from the public treasury to disclose their intentions at the outset of a case.

The truth appears to be that the private attorney general doctrine was an afterthought—not that Plaintiffs *actually* considered whether it might be pled in good faith and *actually* expected the Attorney General to support their cause—and that Plaintiffs are now making excuses for their failure to plead it in their complaint.

But even if the private attorney general doctrine could not have been pled at the outset, Plaintiffs were obligated to amend their pleadings once their entitlement became apparent. *Flagship Resort Dev. Corp. v. Interval Int'l*, *Inc*., 28 So. 3d 915, 924 (Fla. 3d DCA 2010) (finding no waiver because, while party did not plead fee claim, it "obtained leave to amend its answer to seek attorney's fees prior to the entry of final judgment"); *Precision Tune Auto Care*, *Inc. v. Radcliffe*, 815 So. 2d

708, 712 (Fla. 4th DCA 2002) (noting that it "was the plaintiffs' obligation to obtain leave of court to amend their complaint" to plead fee claim); *Chittenden v. Boyd*, 669 So. 2d 1136, 1138 (Fla. 4th DCA 1996) (noting that party "failed to plead an entitlement to fees and did not move to amend her pleadings at any time before entry of the final judgment"). Between February 2012, when Plaintiffs filed their complaints, and July 2014, when the trial court entered its final judgment, Plaintiffs never moved to amend their pleadings to assert a claim for attorney's fees. Their failure to assert a claim before the court entered judgment is a waiver.

B. Plaintiffs Failed to Serve a Pleading Claiming Attorney's Fees on the Trust-Fund Administrator.

Plaintiffs likewise failed to comply with the notice requirement of Section 284.30, Florida Statutes, which establishes a trust fund for the payment of claims against the State. Therefore, their claim for fees is barred.

To protect public resources, the Legislature created a state-operated, self-insurance trust fund for the payment of claims—including claims for attorney's fees—against the State. § 284.30, Fla. Stat. (2014). A party that seeks fees "must serve a copy of the pleading claiming the fees" on the trust-fund administrator. *Id*. The statute entitles the trust-fund administrator to "participate with the agency in the defense of the suit and any appeal thereof with respect to such fees." *Id*.

This notice-of-claim requirement is an indispensable condition precedent to the maintenance of a fee claim. *Hale v. Dep't of Revenue*, 973 So. 2d 518, 522

(Fla. 1st DCA 2007). It enables the trust-fund administrator "to monitor and perhaps influence the proceedings—by effecting a settlement or otherwise—for which it may be required to pay fees." *Heredia v. Dep't of Highway Safety & Motor Vehicles*, 547 So. 2d 1007, 1007 (Fla. 3d DCA 1989). Like the notice requirement of *Stockman*, the notice requirement of Section 284.30 ensures predictability and enables the State to anticipate liability and thus to manage and conserve public funds.

A claim for fees is barred where the claimant fails to serve its pleading on the trust-fund administrator. In *Heredia*, the plaintiff notified the trust-fund administrator only after "the rendering of the services in question and when it was too late to do anything about it." *Id*. at 1007. The court explained that notice must be provided "at the commencement of the action" to enable the trust-fund administrator to influence the proceedings. *Id*. The plaintiff's omission was an "incurable violation" and barred the claim for attorney's fees. *Id*.; *accord Goodman v. Martin Cnty. Health Dep't*, 786 So. 2d 661, 664 (Fla. 4th DCA 2001) (concluding that compliance with statutory notice requirement was "a condition precedent to the recovery of attorney's fees against the state"); *Dep't of Health & Rehab. Servs. v. Cordes*, 644 So. 2d 609, 610 (Fla. 1st DCA 1994) (concluding that it was error to award fees where plaintiff failed to comply with the statutory notice requirement).

Here, Plaintiffs have never served any *pleading* on the trust-fund administrator. The Coalition Plaintiffs served a copy of their motion for attorney's fees on

the trust-fund administrator on October 1, 2014, four months after the trial and more than 31 months after filing their complaint. *See* Unopposed Mot. to Suppl. the R., Attach. A, May 18, 2015. The Romo Plaintiffs served their post-trial motion for fees on the trust-fund administrator on May 18, 2015, nine months after it was filed in the trial court, and simultaneously with the filing of their initial brief in this appeal. *See* App'x to Appellant's (*sic*) Initial Br., Tab 1, May 18, 2015.

None of these belated efforts satisfies the statute. First, the statute requires service of a "pleading," and a motion is not a "pleading" for purposes of Section 284.30. *N.S. v. Dep't of Children & Families*, 119 So. 3d 558, 561 (Fla. 5th DCA 2013); *cf. Green*, 730 So. 2d at 1263 (concluding that a motion is not a "pleading" for purposes of the *Stockman* rule). To this day, Plaintiffs have not served a "pleading" on the trust-fund administrator. Second, Plaintiffs did not give notice to the trust-fund administrator "at the commencement of the action," but long after the trial, "when it was too late to do anything about it." *See Heredia*, 547 So. 2d at 1007. The service of a motion in the closing stages of this litigation is insufficient to satisfy the plain words and obvious intent of Section 284.30, Florida Statutes.

The Romo Plaintiffs assert that Section 284.30 does not apply to them because their fee claim was stricken and thus not contained in a pleading that could have been served on the trust-fund administrator. R.P. Br. at 6. But the statute requires service on the trust-fund administrator "at the commencement of the ac-

tion," *Heredia*, 547 So. 2d at 1007, and the Romo Plaintiffs' claim was not stricken until August 2012—six months after commencement of litigation. Nor can Section 284.30 be so easily evaded. The statute does not allow litigants to omit fee claims from their pleadings and then conveniently assert that the statute does not apply.

The Romo Plaintiffs' assertion that the purpose of the statute was served because the trust-fund administrator was aware of the fee claim in October 2014—three months after the final judgment—mistakes the statute's purpose. R.P. Br. at 6. The purpose of the statute is to enable the trust-fund administrator to monitor and influence the progress of the proceedings, *Heredia*, 547 So. 2d at 1007, not merely to argue the motion for attorney's fees. And the notion that service of the motion on the trust-fund administrator during the pendency of this appeal "cured" the deficiency would defeat that purpose. R.P. Br. at 6-7. It would allow any litigant to "cure" any deficiency at any time after an objection is raised.

V. ANY NEW FEE ENTITLEMENT CANNOT AND SHOULD NOT APPLY RETROACTIVELY TO PENDING CASES.

Next, a newly created fee entitlement cannot apply retroactively to parties in pending litigation. Because a fee entitlement is a substantive right for purposes of the Due Process Clause of the Florida Constitution, the application of a new fee entitlement is limited to causes of action that accrue after the entitlement is created.

The Due Process Clause of the Florida Constitution prohibits the "retroactive application of a substantive law that . . . imposes or creates a new obligation or

duty in connection with a previous transaction." *Maronda Homes*, *Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n*, *Inc*., 127 So. 3d 1258, 1272 (Fla. 2013); *accord Gupton v. Vill. Key & Saw Shop*, *Inc*., 656 So. 2d 475, 477 (Fla. 1995) ("We have held that a substantive law that interferes with vested rights—and thus creates or imposes a new obligation or duty—will not be applied retrospectively.").

For purposes of retroactive application, an entitlement to fees is a substantive right and a substantive burden.[8] In *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), the Court held that a statute authorizing awards of attorney's fees in medical-malpractice actions cannot constitutionally apply to "causes of action that accrued prior to the statute's effective date." *Id*. at 1153. The Court explained that, given the American Rule, "a statutory requirement for the non-prevailing party to pay attorney fees constitutes a 'new obligation or duty,' and is therefore substantive in nature." *Id*. at 1154. Thus, its retroactive application to a cause of action that had previously accrued was inconsistent with the Florida Due Process Clause.

Similarly, in *L. Ross*, *Inc. v. R. W. Roberts Construction Co.*, *Inc.*, 481 So. 2d 484 (Fla. 1986), the Court found unconstitutional the retroactive application of a statutory amendment that repealed a cap on attorney's fees recoverable in certain

[8] The boundary between procedure and substance is not identical in all contexts and for all purposes. A "measure which is substantive for one purpose, may be procedural for another." *In re Commitment of Cartwright*, 870 So. 2d 152, 161 (Fla. 2d DCA 2004). A fee entitlement, however, is substantive for purposes of Article V, Section 2(a), Florida Constitution, *see supra* Part III, and retroactivity.

actions against sureties. "The right to attorney fees is a substantive one, as is the burden on the party responsible for paying the fee." *Id*. at 485. Because the amendment "affecting the substantive right and concomitant burden" was also substantive, the amendment could not be applied to the parties before the Court. *Id*.

More recently, in *Menendez v. Progressive Express Insurance Co.*, 35 So. 3d 873 (Fla. 2010), the Court reaffirmed that the "statutory right to attorney's fees is not a procedural right, but rather a substantive right." *Id*. at 878. An amendment allowing insurers to avoid fee liability by payment of a claim during a safe-harbor period was a "substantive change" incapable of retroactive application. *Id*. at 879.

The same principles apply here. As even Plaintiffs acknowledge, Br. at 24, an entitlement to fees—and the concomitant burden to pay fees—is substantive. Thus, if the Court adopts the private attorney general doctrine, it cannot constitutionally apply that doctrine to this case.

The adoption of a fee entitlement by the Judiciary is not immune from these due-process principles. The Due Process Clause restrains all instrumentalities of government—executive, legislative, and judicial. *See*, *e.g.*, *NAACP v. State of Alabama*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) ("State action, as that phrase is understood for purposes of

the Fourteenth Amendment, refers to exertions of state power in all forms."). If the legislative creation of an obligation to pay fees is the creation of a "new obligation or duty" that, under the Due Process Clause, cannot be applied retroactively, *see Young*, 472 So. 2d at 1154, then so is the judicial creation of the same obligation.

At a minimum, this Court should, in its discretion, decline to apply the doctrine retroactively. Given Florida's long-standing commitment to the American Rule and the absence of any notice that Plaintiffs intended to assert the private attorney general doctrine, it would be fundamentally unfair to the parties—and the taxpayers—to apply the doctrine retroactively. *Cf. Martinez v. Scanlan*, 582 So. 2d 1167, 1175 (Fla. 1991) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969))). The Florida Supreme Court has often deferred the application of new rules in similar circumstances.[9]

In determining whether new rules of law announced in civil cases should be limited to a purely prospective application, federal courts consider three criteria: (1) whether the decision announces a new principle of law; (2) whether retroactive

[9] *See City of Miami v. Bell*, 634 So. 2d 163, 166 (Fla. 1994); *Nat'l Distrib. Co., Inc. v. Office of Comptroller*, 523 So. 2d 156, 158 (Fla. 1988); *Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985); *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980); *ITT Cmty. Dev. Corp. v. Seay*, 347 So. 2d 1024, 1029 (Fla. 1977); *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1973); *Gulesian v. Dade Cnty. Sch. Bd.*, 281 So. 2d 325, 326 (Fla. 1973).

operation would advance the purposes of the new rule; and (3) whether retroactive operation would be inequitable. *See Glazner v. Glazner*, 347 F.3d 1212, 1220 (11th Cir. 2003) (en banc) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

Each of these considerations argues strongly against retroactive operation here. First, adoption of the doctrine would announce a new principle of law and a clear departure from this State's long-standing adherence to the American Rule. Second, retroactive operation of the private attorney general doctrine would not advance its purposes. If the purpose of the doctrine is to encourage private parties to sue to vindicate public rights, Br. at 10, 21, then retroactive application to litigation that has already been brought and thus needs no encouragement does nothing to advance that purpose. And third, retroactive operation would be inequitable. To create liability where none existed—not only here, but in scores of other pending cases that the State continues to defend—would be inequitable. As the Eleventh Circuit explained, "where the class of persons affected by the new rule would suddenly face a strong likelihood of liability when they faced no possibility of liability before, we would be inclined to view the equities as weighing heavily in favor of pure prospective application." *Glazner*, 347 F.3d at 1220. So should this Court.

VI. PLAINTIFFS' ACCUSATIONS OF LITIGATION MISCONDUCT ARE UNFOUNDED.

To be perfectly clear, the Legislative Parties are proud of their zealous defense both of this case and of the Florida Constitution. The trial court, which was

best situated to assess Plaintiffs' claims of litigation abuse and misconduct, clearly and explicitly rejected those claims. R126: 16320. This Court must do the same.

Plaintiffs' statement of facts is disturbingly inaccurate and unreliable. Plaintiffs recite imprecise rhetorical generalities,[10] omit critical facts, and present their own mistaken and overextended inferences from the evidence as established fact. The result is a portrait of abuse and misconduct with no basis in reality. A review of Plaintiffs' record citations destroys the credibility of their factual assertions.

Courts repeatedly sustained much of the same conduct that Plaintiffs now brand as abusive. For example, Plaintiffs complain that the Legislative Parties opposed an expedited trial, Br. at 2, but the trial court agreed with the Legislative Parties and refused to expedite the trial. Plaintiffs likewise complain that the Legislative Parties asserted legislative privilege, *id*. at 2, 5, but this Court agreed with the Legislative Parties, *see Fla. House of Representatives v. Romo*, 113 So. 3d 117 (Fla. 1st DCA 2013), and the Supreme Court affirmed in part, *see League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013). The Legislative Parties were not required to waive their institutional privileges in order to please Plaintiffs. And, after the Florida Supreme Court ruled, the Legislative Parties never once presented a privilege objection to the trial court. In fact,

[10] Thus, Plaintiffs refer to a "scorched-earth strategy," Br. at 2, 28, "repeated discovery battles," *id*. at 2, a "strategy of misdirection and obstruction," *id*. at 6, "efforts to obstruct, delay, and intimidate," *id*. at 15, and attempts to "derail the proceedings," *id*. at 16, with little explanation of the meaning of these phrases.

legislators and legislative staff even testified about their subjective impressions and motivations, which the Supreme Court's decision did not require them to do.

Plaintiffs complain that the Legislative Parties sought discovery directed to the alternative maps that Plaintiffs offered, Br. at 2, but the courts sustained the Legislative Parties' right to this information ***eight times***, while Plaintiffs resisted these orders to the point of sanctions.[11] And the information proved critically important. The Legislative Parties found that Plaintiffs had hired avowed partisan Democratic consultants in Washington, D.C., to draw their alternative maps—maps that Plaintiffs had represented to the court as non-partisan examples of fair

[11] The trial court first granted the Legislative Parties' motion to compel discovery directed to alternative maps. R27: 3683-85. It then denied the Romo Plaintiffs' motion for reconsideration. R28: 3844-45. Five days later, the Superior Court for the District of Columbia denied a motion to quash a subpoena directed to the Romo Plaintiffs' map-drawer. R105: 13397-402. On March 13, 2013, the trial court sanctioned the Coalition Plaintiffs for their violation of the order compelling them to produce documents related to their alternative map. R32: 4371-72. Next, when the shadowy organization that controls the Coalition Plaintiffs moved for a protective order, the court, while narrowing the document requests, ordered production of all non-privileged documents concerning any alternative map presented to the court. R41: 5240-41. Later, the trial court granted the Legislative Parties' motion for leave to amend their answers to plead, as an affirmative defense, Plaintiffs' unclean hands with respect to the alternative maps presented to the court at the summary-judgment stage. R42: 5349-50. On April 14, 2014, the D.C. Superior Court denied the Democratic Congressional Campaign Committee's motion to quash a subpoena. R105: 13413-19. At the pretrial conference, the trial court denied the Romo Plaintiffs' motion in limine to exclude evidence regarding the intent of their map-drawers. R106: 13575-76. At trial, deposition excerpts directed to the Romo Plaintiffs maps were admitted without objection. T24: 3049-54. And at the remedial hearing on August 20, 2014, the court ruled that evidence establishing the partisan intent of Plaintiffs' maps was relevant. R106: 13593.

redistricting. R62-66: 7293-7987. Emails and deposition testimony established that Plaintiffs' maps were drawn by partisan consultants for partisan purposes. *Id*.

Thankfully, the scheme was exposed. The Coalition Plaintiffs withdrew their maps and presented no alternative maps at trial. The Romo Plaintiffs[12] presented two maps at trial. The Legislative Parties introduced uncontradicted evidence of the partisan origins and objectives of those maps. R123-124: 15927-16118. The trial court ignored the Romo Plaintiffs' maps, mentioning them not once in its final judgment. R90: 11187-227. The Legislative Parties did not use their "resources" to harass and intimidate Plaintiffs, Br. at 21, but to uncover an improper attempt to undermine the integrity of the judicial process. The trial court was fully informed of the facts and was able to avoid extreme embarrassment.

Plaintiffs next contend that the Legislative Parties "ignored" an order compelling production of phone records. *Id*. at 4-5. In fact, the Legislative Parties regularly apprised Plaintiffs' counsel of the efforts made to obtain those records.

On March 14, 2014, Plaintiffs noticed their intent to subpoena the phone records of former Speaker Dean Cannon and his aide, Kirk Pepper. SR1: 16522-43. On March 31, the Legislative Parties timely objected to the invasive nature of

[12] The Romo Plaintiffs are proxies for national Democratic Party interests. The National Democratic Redistricting Trust, which is headquartered in Washington, D.C., and funds Democratic redistricting litigation nationwide, directs and finances the litigation for the Romo Plaintiffs , who merely lent their names to the effort to confer standing on the national Democratic Party. R124: 16088-118.

the subpoenas, which sought, *inter alia*, account numbers and billing information, including credit card numbers, and information related to personal calls. SR1: 16544-50. Plaintiffs did not respond until April 25, SR1: 16551-679, or bring the matter before the court for hearing until May 9, R106: 13554-62—***ten days before trial***. The court then agreed with the Legislative Parties' privacy concerns and authorized the redaction of personal information. *Id*. The two-and-a-half year-old phone records were no longer in Cannon's or Pepper's possession, however, and both made prompt and repeated efforts to obtain copies from their carriers. Counsel to the Legislative Parties often apprised Plaintiffs' counsel of the status of these mostly unsuccessful efforts, in person and in writing. Counsel to the Legislative Parties also advised the court, T15: 1911-12, as did Pepper in his testimony, T3: 327-28. Once the court entered its final judgment, Plaintiffs never renewed their interest in the phone records. In suggesting that the Legislative Parties "disregarded" the court's order, Plaintiffs take a shortcut and ignore all of the material facts.[13]

[13] Plaintiffs also rehash their claims that the Legislative Parties purged emails, conducted seriatim meetings to avoid the Sunshine Law, communicated with political operatives by secretive methods, and relied on maps drawn by operatives. Br. at 3-5. The record refutes these assertions. The Legislative Parties did not preserve all redistricting records, but there is no evidence that records were discarded selectively or to avoid exposure. Instead, the evidence showed that the Legislature maintained and discarded records in compliance with its long-standing record-retention policies. T4: 358, 455-56; T5: 615-16; T7: 800; T10: 1150; T13: 1663. Bill sponsors conferred informally to negotiate differences, but there is no evidence that meetings were designed to avoid public notice. Instead, the evidence showed that, from time immemorial, bill sponsors have resolved their differences

While Plaintiffs treat the political operatives and the Legislative Parties as collaborators, the Legislative Parties did not collaborate with the operatives and are not responsible for their conduct. The Legislative Parties were not involved in the operatives' appeals or discovery disputes, weighing in only to correct Plaintiffs' inaccurate accounts of the Legislative Parties' actions or positions. Of the six appellate proceedings that arose from the action below, only one—an original action concerning the legislative privilege—was initiated by the Legislative Parties.[14]

Neither the law nor the facts support Plaintiffs' claim for attorney's fees. The trial court rejected Plaintiffs' attempts to attribute misconduct to the Legislative Parties, finding no basis for their assertions. This Court should do the same.

CONCLUSION

For the foregoing reasons, the Court should affirm the Order Denying Parties' Motion for Attorneys' Fees, dated November 10, 2014.

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through private, informal meetings—as happened here. T4: 411; T6: 687; T21: 2701. Plaintiffs presented no evidence of any "in person" redistricting meetings between legislators and political operatives after the release of redistricting data by the U.S. Census Bureau in March 2011. And the Legislature did *not* communicate with political operatives through Drop Box transfers and flash drives. Instead, one staff member who had no role in the creation of maps improperly leaked the Legislature's work product to a political consultant. While the Legislative Parties have never excused these leaks, the evidence showed that the leaker acted alone, without the approval or knowledge of any legislator. T3: 270-71, 314-15; T13: 1630-31.

[14] Case Nos. 12-5280, 13-0966, 14-2163, 14-3953, 14-5614, and 15-1697.

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I certify that the foregoing answer brief was served by electronic transmission this fourteenth day of August, 2015, on the individuals identified on the Service List that follows.

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