Filing # 153205547 E-Filed 07/12/2022 09:01:56 PM

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

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

Plaintiffs,

Case No. 2022-CA-000666

v.

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

Defendants.
_____/

THE INDIVIDUAL LEGISLATORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

The Individual Legislators offer this reply in support of their Motion to Dismiss, dated June 6, 2022.[1]

INTRODUCTION

The plaintiffs' response fails to overcome the commonsense proposition that legislators are not proper parties to constitutional challenges to state statutes.

The plaintiffs point to a few cases in which legislators have participated as defendants, but ignore that the legislators in those cases did not seek to be dismissed as improper parties or on the basis of legislative immunity. In one case, the legislator affirmatively intervened. In other cases, legislators participated voluntarily, as is their right. But the *choice* of legislators in other cases to participate as parties in litigation does not begin to establish that legislators can

[1] The "Individual Legislators" are Senate President Wilton Simpson, Speaker of the House Chris Sprowls, Senator and Chair of the Senate Committee on Reapportionment Ray Rodrigues, and Representative and Chair of the House Redistricting Committee Thomas J. Leek.

be *compelled* to participate as party-defendants over their objection—in this case or any other constitutional challenge to a state statute. Similarly, a *waiver* of legislative immunity by other legislators in other cases does not establish that the Individual Legislators in this case—who have *not* waived their legislative immunity—can be sued for actions performed in a legislative capacity.

Contrary to the plaintiffs' contentions, the separation of powers does not permit courts to order legislators to exercise legislative prerogatives. A court cannot order legislators to call a special session, to hold committee meetings, or to introduce, consider, or vote for legislation. The relief that the plaintiffs seek, moreover, is not the calling of a special session, but rather the enactment of new redistricting legislation. As but four of 160 members of the Legislature, the Individual Legislators cannot afford that relief—even if the Court could order it. For similar reasons, the Individual Legislators are redundant defendants; the House and Senate have filed answers and have not moved to be dismissed. Plaintiffs have failed to show why the Individual Legislators' presence in this suit is not duplicative and a waste of judicial and legislative resources.

This Court should accordingly dismiss with prejudice the plaintiffs' claims against the Individual Legislators.

ARGUMENT

I. THE INDIVIDUAL LEGISLATORS ARE NOT PROPER PARTIES.

To prove that the Individual Legislators are proper defendants, the plaintiffs point to six redistricting cases[2] in which legislators participated as defendants. Resp. at 3. But in each

[2] *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013); *Fla. Senate v. Forman*, 826 So. 2d 279

one of those cases, the legislators participated *voluntarily*; they did not seek their dismissal as improper parties or otherwise contest their joinder as defendants. In at least one—*Brown*—the legislator affirmatively intervened. The fact that legislators sometimes elect to participate in litigation does not prove that they are proper parties to all constitutional challenges to enacted legislation. And here, the Individual Legislators *have* objected to their joinder as defendants.

The plaintiffs do not dispute the general rule that the proper parties to a constitutional challenge are the public officials charged with the challenged law's enforcement. Instead, they invoke a narrow exception to that rule—one that permits a public official without enforcement authority to be named as a party if (1) "the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official"; and (2) "the state official has an actual, cognizable interest in the challenged action." *Cnty. of Volusia v. DeSantis*, 302 So. 3d 1001, 1005 (Fla. 1st DCA 2020); *see also Atwater v. City of Weston*, 64 So. 3d 701, 704 (Fla. 1st DCA 2011). No court has ever applied this limited exception in a constitutional challenge like this one, and the plaintiffs tellingly cite only one case that comes within this narrow exception.

The First DCA articulated this exception in *Atwater* to describe a single case in which legislators were named as defendants: *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996). There, the plaintiffs did not seek an injunction prohibiting enforcement of *any* statute, but only a declaration that the Legislature had not made adequate provision for public education under a constitutional provision that expressly obligated it to do so. Because the plaintiffs did not seek a declaration that any statute was invalid, there was no public official with enforcement authority. The legislator defendants, moreover, neither

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(Fla. 2002); *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022); *Adams v. DeWine*, No. 2021-1428, 2022 WL 129092 (Ohio Jan. 14, 2022).

contested their joinder nor defended the trial court's dismissal of the action for failure to name proper defendants. *Id.* at 402–03. And importantly, the House and Senate were not named as defendants—only the presiding officers—and the Court, in a plurality opinion joined by three Justices, held only that "*the Florida Senate and the Florida House of Representatives*, acting through their respective presiding officers, *are proper parties*." *Id.* (emphasis added). The plurality did not find that the two legislators were proper parties, except as necessary to join the House and Senate.

This case is entirely unlike *Coalition for Adequacy*. As in most constitutional challenges, the plaintiffs challenge a specific statute that public officials outside the Legislature enforce—not a legislative omission under an express constitutional command. And even under *Coalition for Advocacy*'s exceptional facts, the proper defendants there were the House and Senate, which are defendants here.[3] Therefore, the Individual Legislators are not proper parties and should be dismissed.

II. THE INDIVIDUAL LEGISLATORS ARE ENTITLED TO LEGISLATIVE IMMUNITY.

The plaintiffs do not and cannot seriously contend that state legislators are not entitled to legislative immunity. Indeed, legislative immunity is firmly established in state and federal law. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Walker v. President of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995). It applies to both official-capacity and individual-capacity actions, *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980); *Scott v. Taylor*, 405 F.3d 1251, 1254-55 (11th Cir. 2005), and serves as the foundation of the legislative privilege that protects legislators from compelled testimony concerning their legislative responsibilities,

[3] Given the distinctions between this case and *Coalition for Advocacy*, and despite their voluntary participation here, the House and Senate do not concede that they are proper parties to this action.

see Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 523–24 (Fla. 1st DCA 2012) (explaining that the legislative privilege is a "necessary incident" of legislative immunity from suit).

The Individual Legislators could have waived their immunity, but they did not. That immunity protects them from being called before this tribunal as defendants in litigation over actions taken in a legislative capacity.

Rather than deny the existence of legislative immunity, the plaintiffs ask this Court to create out of whole cloth a new "redistricting" or "public-importance" exception to legislative immunity. Resp. at 3 ("The Individual Legislators identify no case . . . holding that legislators are immune from suit in redistricting cases."); *id.* at 5 ("It does not stand for the proposition that legislators are absolutely immune from civil cases of public importance . . . ."). But legislative immunity, which originated in the Sixteenth and Seventeenth Centuries, *Expedia*, 85 So. 3d at 522, is a generally applicable principle not limited to particular causes of action. The plaintiffs cite no case to support a purported redistricting or public-importance exception. They only quote the statement in *United States v. Gillock*, 445 U.S. 360, 371 (1980), that *Tenney* was a "civil action brought by a private plaintiff to vindicate private rights." Resp. at 5. Of course, *Gillock* made that statement to distinguish *criminal* proceedings to which the legislative privilege *did not extend*—not to suggest that legislative immunity is inapplicable to "important" civil cases.

The plaintiffs also suggest that the Florida Supreme Court limited legislative immunity in *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013), but that case concerned only the contours of the legislative privilege against compelled testimony—not immunity from suit. In fact, the Court specifically noted that "[t]his case does

not involve legislative immunity, nor does it involve the liability of any individual legislator." *Id.* at 147 n.11.

Because the Individual Legislators have not waived their immunity, and because there is no redistricting exception to legislative immunity, the Court should dismiss the Individual Legislators.

III. FLORIDA'S STRONG SEPARATION OF POWERS REQUIRES DISMISSAL OF THE INDIVIDUAL LEGISLATORS.

The plaintiffs claim that this Court could grant relief against the Individual Legislators by ordering at least two of them—the Speaker and Senate President—to call a special session. Of course, if a court may order legislators to call a special session, then it may also order them to conduct committee meetings, introduce legislation, and consider and vote for legislation. Florida's strict separation of powers does not, however, permit any branch of government to direct or control the other two branches of government in their exercise of their constitutional prerogatives.

An order that directs the Legislature or individual legislators to call a special session, meet in committee, or introduce, consider, or vote for legislation would violate the separation of powers. "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided" in the Florida Constitution. Art. II, § 3, Fla. Const. Accordingly, the "judiciary cannot compel the legislature to exercise a purely legislative prerogative." *Moffitt v. Willis*, 459 So. 2d 1018, 1022 (Fla. 1984). The quintessential legislative prerogative is the "legislative power," which the Florida Constitution confers on the Legislature, Art. III, § 1, Fla. Const., and which includes the "authority to enact laws," *State v. Duval Cnty.*, 79 So. 692, 697 (Fla. 1918); *accord Fla. House of Representatives v. Crist*, 999 So. 2d 280, 284 (Fla. 2008) ("Enacting laws . . . is quintessentially a legislative function.").

Thus, a court may not prohibit the Legislature from conducting a hearing, *Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So. 2d 404, 409 (Fla. 2001), or command the Legislature to enact or not enact legislation, *Corcoran v. Geffin*, 250 So. 3d 779, 784 (Fla. 1st DCA 2018). "Florida's strong adherence to a strict separation of powers doctrine . . . has led [the Florida Supreme] Court to repeatedly warn against judicial legislation." *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991).

Courts in redistricting cases do not, therefore, order legislatures to enact redistricting legislation, but instead afford legislatures an *opportunity* to act before the courts do. *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[I]n the normal case, a court that has invalidated a State's existing apportionment plan should enjoin implementation of that plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment."); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so").

The plaintiffs claim that the Florida Supreme Court ordered the Legislature to enact redistricting legislation in *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015). Not so. After the Court relinquished jurisdiction, the Legislature convened in special session but failed to pass a new redistricting plan. The Florida Supreme Court then explained that it had "provided the Legislature with the *opportunity* to pass a constitutionally compliant plan." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 261 (Fla. 2015) (emphasis added). The Court never suggested that, in failing to enact new redistricting legislation, the Legislature had violated a court order—or that the judiciary may commandeer the power of

the Legislature and mandate the enactment of new laws. Rather, the Court simply recognized that the Legislature had not produced a new redistricting plan within the time afforded to it, and then undertook the task of adopting an alternative map that the Court deemed compliant for use in future elections.

Even if the Florida Supreme Court had ordered the Legislature to enact a redistricting plan in *League of Women Voters*, it certainly did not direct that order to individual legislators. Rather, the Court concluded that the "appropriate remedy" was to "require the Legislature to redraw the map." 172 So. 3d at 413 (emphasis added). Nowhere did the Court suggest that it could order four individual legislators to enact new districts for the State of Florida. *League of Women Voters* thus provides no support for the Individual Legislators' joinder as defendants.

Finally, the plaintiffs note that, in 2014, the Speaker and the Senate President called a special session for the purpose of redrawing congressional districts. But that proves nothing. It does not prove that a court may order them to do so—it cannot, without assuming powers vested in another branch—or that such an order would even afford the plaintiffs relief, without also ordering committees to meet, a bill to be introduced, members to consider and vote for a bill, and the Governor to sign it. The relief the plaintiffs seek, after all, is not the calling of a special session, but rather the adoption of a new redistricting plan. To afford that relief, the Court cannot stop short of a wholesale takeover of the lawmaking process. But that plainly cannot be done, since the separation of powers limits the "remedies that may be crafted" by a circuit court. *Corcoran*, 250 So. 3d at 787.

Because the Individual Legislators cannot afford any relief that this Court may order, and because the plaintiffs' separation-of-powers theories cannot be squared with precedent—

or a healthy republic—the Individual Legislators cannot redress the plaintiffs' alleged injuries and should be dismissed.

IV. THE INDIVIDUAL LEGISLATORS ARE REDUNDANT DEFENDANTS.

Last, the plaintiffs incorrectly claim that the Individual Legislators are not redundant defendants because (1) they possess authorities that are separate from those of the House and Senate, and which the Court may order them to exercise; and (2) Florida courts do not dismiss redundant defendants, except in tort actions under section 768.28(9)(a) of the Florida Statutes.

The plaintiffs are wrong on both counts. First, even if the Court had authority to order the legislative enactment of new districts (which it does not), it may not and need not order individual legislators separately to perform their own functions in the legislative process, such as calling a special session, holding committee meetings, or voting for bills. If it did, then a majority of both chambers could be joined as defendants to enable the Court to order them to vote for a bill.

Second, the plaintiffs' claim that Florida courts do not dismiss redundant defendants except under section 768.28(9)(a) is simply incorrect. For example, *Braden Woods Homeowners Association, Inc. v. Mavard Trading, Ltd.*, 277 So. 3d 664 (Fla. 2d DCA 2019), was an action for equitable relief that made no mention of section 768.28. The plaintiffs named as defendants both Manatee County and, in his official capacity, the Director of Building and Development Services for the county. The court explained that an official-capacity action is, in actuality, an action against the governmental entity that employs the official, and that the official "would be bound as an employee of the County by any injunctive or declaratory relief granted." *Id.* at 671. The court accordingly held that the official was redundant and affirmed his dismissal.

Here, the House and Senate have served answers and have not moved to be dismissed. The joinder of the Individual Legislators is therefore redundant, and the Court should dismiss them.

CONCLUSION

This Court should dismiss the plaintiffs' claims against the Individual Legislators with prejudice.

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CERTIFICATE OF SERVICE

I certify that, on July 12, 2022, this reply was filed electronically through the Florida Courts e-filing Portal and was served by email on all counsel of record.

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