

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

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

Plaintiffs,

v.

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

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS
AS TO SPECIFIC AFFIRMATIVE DEFENSES

In response to Plaintiffs' Amended Complaint, Defendants the Florida Secretary of State, Florida House of Representatives, and Florida Senate each raised the affirmative defense that they need not comply with the Fair Districts Amendment, Art. III, § 20(a), Fla. Const., because, in their view, the Amendment itself is unconstitutional. But Florida courts have long held that public officials are jurisdictionally barred from asserting that they are excused from a legal duty because that duty is *itself* unconstitutional. *See State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922) (establishing Florida's public official standing doctrine).

Although this Court denied as untimely Plaintiffs' motion to strike Defendants' constitutional affirmative defenses, Plaintiffs may raise Defendants' failure to state a legal defense by motion for judgment on the pleadings within any time that does not delay trial, or even at trial itself. Fla. R. Civ. P. 1.140(c) & 1.140(h)(2). Plaintiffs therefore move for judgment on the pleadings under Florida Rule of Civil Procedure 1.140(c) as to the Secretary's first and second

affirmative defenses, the House’s third and fifth affirmative defenses, and the Senate’s fourth affirmative defense for lack of standing.¹

In filing this motion, Plaintiffs do not affirmatively seek reconsideration of the Court’s substantive determinations.² Instead, using a procedural vehicle that is not time-barred, Plaintiffs seek to effectuate this Court’s holding that the Secretary’s first and second affirmative defenses are barred by the public official standing doctrine and preserve for appeal their argument that the doctrine applies with equal force to Legislative Defendants’ affirmative defenses.

PROCEDURAL HISTORY

In their answers to Plaintiffs’ Amended Complaint, all three Defendants raised affirmative defenses asserting that the Fair Districts Amendment violates several provisions of the federal Constitution. Specifically, the Secretary argues in his first and second affirmative defenses that the Fair Districts Amendment’s non-diminishment and minority-voting-protection provisions “violate the Fourteenth Amendment to the U.S. Constitution” both facially and as applied to North Florida. Sec’y of State’s Answer to Am. Compl. ¶¶ 1–2, at 14. Likewise, the Florida House asserts in its fifth affirmative defense that the “[a]pplication of the Florida Constitution’s non-diminishment provision to the Benchmark Congressional District 5 would violate the Equal Protection Clause of the United States Constitution.” Fla. House Answer to Am. Compl. at 16. Finally, the House’s third and Senate’s fourth affirmative defense each allege that Plaintiffs’ claims violate the federal

¹ Plaintiffs’ argument in support of their motion for judgment on the pleadings is substantially similar to the argument advanced on the public official standing doctrine in their motion to strike.

² Of course, “[a] trial court may sua sponte reconsider and amend or vacate its interlocutory orders prior to final judgment.” *Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014) (citing *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998)).

Constitution’s Elections Clause. Fla. House Answer to Am. Compl. at 16; Fla. Senate Answer to Am. Compl. ¶ 4, at 26.³

Plaintiffs moved to strike each of the above-enumerated affirmative defenses under Florida Rule of Civil Procedure 1.140(f), asserting that the public official standing doctrine bars this Court from considering them. *See generally* Pls.’ Mot. to Strike. This Court held a hearing on the motion on June 5, 2023, and denied Plaintiffs’ motion as untimely. Tr. 63:5–10.⁴ In doing so, it construed Plaintiffs’ motion as a motion to strike under Rule 1.140(b), which provides that “the objection of failure to state a legal defense in an answer or reply must be asserted by motion to strike the defense within 20 days after service of the answer or reply.” *Compare* Fla. R. Civ. P. 1.140(b), *with* Fla. R. Civ. P. 1.140(f) (“A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading *at any time*.” (emphasis added)). The Court nevertheless held that the public official standing doctrine applies to the Secretary’s standing to challenge the constitutionality of the Fair Districts Amendment. Tr. 62:23–63:4. It did not,

³ While the House’s third and the Senate’s fourth affirmative defenses are styled as challenges to the constitutionality of Plaintiffs’ requested relief, at bottom they challenge the constitutionality of the Fair Districts Amendment itself. Fla. House Answer to Am. Compl. at 16; Fla. Senate Answer to Am. Compl. ¶ 4, at 26. Plaintiffs’ requested relief asks the Court to strike the noncompliant plan and order or adopt “a new congressional districting plan that complies with [the Amendment],” Am. Compl. at 33–35, pursuant to binding Florida Supreme Court precedent determining that the Amendment allows such relief. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 297 (Fla. 2015) (“*Detzner I*”) (ordering use of compliant districting plan for congressional elections); *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (endorsing Florida Supreme Court’s application of Fair Districts Amendment to strike down noncompliant plan). By arguing that such relief is unconstitutional, the House’s and Senate’s Elections Clause-related defenses challenge the constitutionality of the Amendment itself—which both the Eleventh Circuit and the Florida Supreme Court have already upheld. *Brown v. Sec’y of State*, 668 F.3d 1271, 1285 (11th Cir. 2012) (rejecting Florida House’s claim that the Fair Districts Amendments violated the Elections Clause of the Constitution); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 n.2 (Fla. 2015) (“*Detzner II*”) (“reject[ing] the Legislature’s federal constitutional challenge to the Fair Districts Amendment” under the Elections Clause); *see also* Pls.’ Reply & Claims of Avoidance, ¶¶ 7, 13.

⁴ A true and correct copy of the Hearing Transcript is attached hereto as **Exhibit A**.

however, extend the public official standing doctrine to the Legislative Defendants' standing to raise affirmative defenses challenging the constitutionality of the Amendment. Tr. 62:11–16.

Plaintiffs now bring this motion under Florida Rule of Civil Procedure 1.140(c), which permits a party to move for judgment on the pleadings “[a]fter the pleadings are closed, but within such time as not to delay the trial.” Notably, “[t]he defenses of failure to state a cause of action or a legal defense . . . may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised either in a motion under subdivision (b) or in the answer or reply.” Fla. R. Civ. P. 1.140(h)(2). Through this motion, Plaintiffs seek to dismiss the Secretary’s first and second affirmative defenses—consistent with this Court’s previous order—and preserve their remaining arguments for appeal.

LEGAL BACKGROUND

Florida’s public official standing doctrine provides that public officials lack standing both to bring suits challenging the constitutionality of a “constitutional or statutory duty, or the means by which it is to be carried out,” *Dep’t of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981), and to “defend [their] nonperformance” of such a duty by challenging the same, *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 794 (Fla. 2008). Florida courts broadly interpret the public official standing doctrine to reach not only “those public officials charged with a duty under the challenged law” but also “public officials whose duties are ‘affected’ by the challenged law.” *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass’n, Inc.*, 274 So. 3d 492, 495 (Fla. 1st DCA 2019).

The doctrine stems from foundational separation of powers principles, which hold that the judiciary alone has the power to decide a law is unconstitutional. *See id.* at 494; *see also Fla. Ass’n of Pro. Lobbyists, Inc. v. Div. of Legis. Info. Servs.*, 7 So. 3d 511, 514 (Fla. 2009) (“[N]o branch may encroach upon the powers of another.”). In other words, because executive and legislative

officers lack the power of judicial review, they must assume that duties assigned to them by law are constitutional “*until* judicially declared otherwise.” *Atl. Coast Line*, 94 So. at 683 (emphasis added). As a result, a public official cannot decide *not* to comply with their legal duty on the basis that the duty is unconstitutional because doing so would preempt the judiciary’s decision and effectively enjoin the law unilaterally until a judicial decision is made. *Id.* (explaining that a public official “refusing to enforce a law because in his opinion it is unconstitutional . . . subjects himself to no penalty if his opinion as to the unconstitutionality of an act is not sustained by the courts,” which “is the doctrine of nullification, pure and simple”); *see also id.* (“[T]he oath of office ‘to obey the Constitution,’ means to obey the Constitution, not as the officer decides, but as judicially determined.”).

It follows from these principles that a public official may not simply allege the unconstitutionality of their legal duty in court—either affirmatively or defensively. They cannot do so affirmatively because any judicial determination must be “in a proper proceeding,” *id.* at 682, and “[d]isagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion,” *Markham*, 396 So. 2d at 1121. And they cannot do so defensively because “the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction,” so any allegation of unconstitutionality before such a judicial declaration has been made is not “true” and therefore “no defense.” *Atl. Coast Line*, 94 So. at 682.

Notwithstanding more than 100 years of Florida law to this effect, Defendants here raised affirmative defenses in their answers to Plaintiffs’ amended complaint claiming that they need not follow the Fair Districts Amendment because they believe the Amendment violates several provisions of the federal Constitution. *See supra* at 2–3. But Defendants are not members of the

judiciary. Whatever powers they may hold, the essential “judicial duty” “to say what the law is” is not among them. *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). And nowhere is the doctrine of “inherent judicial power” more important than, as here, “when the judicial function at issue is the safe-guarding of fundamental rights.” *Pub. Def., Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 271–72 (Fla. 2013) (quoting *Maas v. Olive*, 992 So. 2d 196, 204 (Fla. 2008)).

Defendants’ constitutional affirmative defenses are an affront to Florida’s Constitution, and this Court lacks jurisdiction to consider them.

ARGUMENT

Neither the Secretary nor the Legislature may wield the judicial power. And no exception to the public official standing doctrine applies to the Fair Districts Amendment. For these reasons, the doctrine bars Defendants’ constitutional affirmative defenses, and this Court must dismiss them.

I. Legal Standard.

“After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Fla. R. Civ. P. 1.140(c). “The purpose of a motion for judgment on the pleadings is to test the legal sufficiency of a cause of action or defense where there is no dispute as to the facts.” *Miller v. Finizio & Finizio, P.A.*, 226 So. 3d 979, 982 (Fla. 4th DCA 2017) (quoting *Barentine v. Clements*, 328 So. 2d 878, 879 (Fla. 2d DCA 1976)). In that regard, a motion for judgment on the pleadings “is similar to a motion to dismiss and raises only questions of law arising out of the pleadings.” *Id.* (quoting *Venditti-Siravo, Inc. v. City of Hollywood, Fla.*, 418 So. 2d 1251, 1253 (Fla. 4th DCA 1982)). “[S]uch a motion is properly granted only if the movant is entitled to judgment as a matter of law based solely on the pleadings and attachments thereto.” *Hilbrands v. Hilbrands*, 320 So. 3d 938, 940 (Fla. 2nd DCA 2021) (internal quotations and citation omitted).

II. The Secretary lacks standing to assert constitutional defenses.

As this Court has already held, the public official standing doctrine applies to the Secretary here. Tr. 62:23–63:4. The Secretary is an executive officer. *See* § 20.10, Fla. Stat. And as an executive officer, the Secretary may not exercise the judicial power. Art. II, § 3, Fla. Const. (expressly codifying separation of powers doctrine). Indeed, even if the Fair Districts Amendment imposed no “duty” on the Secretary, which Plaintiffs do not concede, the Secretary’s duties are “‘affected’ by the challenged law.” *Sch. Dist. of Escambia Cnty.*, 274 So. 3d at 495. As Florida’s chief election officer, § 97.012, Fla. Stat., the Secretary is perhaps the public officer most “affected” by the Florida Constitution’s rules on redistricting. *See Exhibit B* (instructing supervisors of elections on implementation of congressional map).

In short, this Court has already recognized that the public official standing doctrine applies with full force to the Secretary, and it must therefore dismiss his first and second affirmative defenses.

III. The Legislature lacks standing to assert constitutional defenses.⁵

The Florida House and Senate make up the legislative branch of Florida’s government. Art. III, § 1, Fla. Const. And just as members of the executive branch cannot exercise the judicial power, neither can the legislative branch. *See* Art. II, § 3, Fla. Const.; *Mil. Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So. 2d 1020 (1981) (“Powers constitutionally bestowed upon the courts may not be exercised by the legislature.”); *cf. Rogers & Ford Constr. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993) (holding that Legislature may not encroach on judicial power by “constitutionally determin[ing] whether a party has standing in a particular cause”). No

⁵ Plaintiffs understand that this Court has already determined that the public official standing doctrine does not apply to Legislative Defendants’ affirmative defenses. Accordingly, they reiterate their arguments here to preserve them for appeal.

court has limited the public official standing doctrine’s applicability to the executive branch. *See Atl. Coast Line*, 94 So. at 682 (explaining that the public official standing doctrine “involves the right of a branch of the government, other than the judiciary” to determine a law’s constitutionality); *cf. Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) (equating standing principles for executive and legislative officers); *Greater New Orleans Expressway Comm’n v. Olivier*, 892 So. 2d 570, 576 (La. 2005) (rejecting argument that public official standing doctrine applied only to executive officers).

The public official standing doctrine applies squarely to the Florida House and Senate because they have an unambiguous constitutional duty to redistrict. U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]”); Art. III, § 20, Fla. Const. (setting “standards for establishing congressional district boundaries” under Article describing “Legislature”); *Detzner II*, 172 So. 3d at 370 (“Our citizens declared that the Legislature must redistrict in a manner that prohibits favoritism or discrimination.” (internal quotations and citation omitted)); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1278 (S.D. Fla. 2002) (“Every ten years, after the census, the Florida legislature is required to redraw the State’s congressional districts and the State Senate and House districts to adjust for population shifts.”). And, in no uncertain terms, the Florida Constitution—by way of the Fair Districts Amendment—sets out “the means by which” the House and Senate are to carry out this duty. *Markham*, 396 So. 2d at 1121; *see* Art. III, § 20(a), Fla. Const. While Legislative Defendants may exercise discretion as to *how* they comply with the Constitution’s dictates, they have no discretion to choose not to comply with them at all. *See State ex rel. Allen v. Rose*, 167 So. 21, 22–23 (Fla. 1936) (explaining that mandamus, which “only lies

to enforce a ministerial act or duty,” “may be invoked to compel the exercise of discretion” as long as it does not “compel such discretion to be exercised in any particular way”).

To be sure, the House and Senate may believe that the means by which the Florida Constitution assigns the duty to redistrict are unconstitutional, but that is a question squarely for the judiciary—not the Legislature—to decide in the first instance. *See* Art. II, § 3, Fla. Const.; *see supra* at 4–6. Moreover, with respect to the House’s third affirmative defense and the Senate’s fourth affirmative defense, both the federal and state judiciary have *already upheld* the constitutionality of the Fair Districts Amendment under the very federal constitutional provision that Legislative Defendants now invoke. *See Brown*, 668 F.3d at 1285 (rejecting Florida House’s claim that the Fair Districts Amendments violated the Elections Clause of the Constitution); *Detzner II*, 172 So. 3d at 370 n.2 (“reject[ing] the Legislature’s federal constitutional challenge to the Fair Districts Amendment” under the Elections Clause); *see also* Pls.’ Reply & Claims of Avoidance, ¶¶ 7, 13. To allow the House and Senate to defend their actions by asserting that they have unilaterally decided that portions of the Florida Constitution are unconstitutional—especially when there are Eleventh Circuit and Florida Supreme Court decisions to the contrary—would be to grant the Legislature unchecked power to cherry-pick which constitutional provisions it will follow. The framers of the Florida Constitution crafted the separation of powers mandated by the Constitution to deny the Legislature this “omnipotent power.” *Trs. Internal Improvement Fund v. Bailey*, 10 Fla. 238, 250 (Fla. 1863). The Legislature must presume that its duties under the Florida Constitution are constitutional unless and until the courts say otherwise, and thus the Florida House and Senate lack standing to assert constitutional defenses in this action.

IV. No exception to the public official standing doctrine applies here.

Finally, Florida courts recognize two narrow exceptions to the public official standing doctrine—(1) personal injury and (2) the disbursement of public funds—but neither applies here.⁶

First, the “personal injury” exception to the public official standing doctrine “confers standing on a public official to bring a constitutional challenge when the official can show injury to his person, property, or other material right by the statute in question.” *Sch. Dist. of Escambia Cnty.*, 274 So. 3d at 496. But this exception applies only where an injury occurs in the official’s personal capacity: “the type of personal injury necessary to allow a public official to challenge the constitutionality of a statute is limited to injuries that do ‘not grow out of the obligation of his oath of office, nor out of his official position.’” *Id.* (quoting *Atl. Coast Line*, 94 So. at 684). For example, the exception would apply when failure to carry out the duty at issue would expose the official to individual liability. *See Green v. City of Pensacola*, 108 So. 2d 897, 900 (Fla. 1st DCA 1959) (“It may be seriously questioned whether the Comptroller’s failure to collect a tax lawfully due the State of Florida would render him liable on his official bond as well as subject him to impeachment for nonfeasance in office.”). In other words, officials must have some other interest in the outcome beyond their official duties. Here, the Secretary, sued in his official capacity, and the Florida House and Senate, sued as institutions, do not face injury to their individual property, person, or material right by way of the Fair Districts Amendment. *See Am. Compl.* ¶¶ 30–32, at 11; Sec’y of State’s Answer to Am. Compl. ¶ 30, at 4.

Second, Florida courts recognize a “public funds” exception to this doctrine. *Sunset Harbour Condo. Ass’n v. Robbins*, 914 So. 2d 925, 935 (Fla. 2005) (Bell, J., concurring). This “narrow exception,” *Echeverri*, 991 So. 2d at 797, “allows for standing to challenge the

⁶ No Defendant argued in briefing or at the hearing on Plaintiffs’ motion to strike that these exceptions apply.

constitutionality of a law providing for the expenditure of public funds,” *Sch. Bd. of Collier Cnty. v. Fla. Dep’t of Educ.*, 279 So. 3d 281, 290 (Fla. 1st DCA 2019). Thus, for example, a school board had standing to challenge a law that required it to “share a portion of [its] discretionary capital outlay millage revenues with charter schools.” *Id.* at 285. But the Fair Districts Amendment does not provide for the expenditure of public funds; it merely sets limits on the Legislature’s discretion in the realm of congressional redistricting. This exception therefore similarly does not apply. *See Island Resorts Invs., Inc. v. Jones*, 189 So. 3d 917, 922 (Fla. 1st DCA 2016).

V. Plaintiffs’ motion is timely.

Plaintiffs bring this motion under Florida Rule of Civil Procedure 1.140(c), which permits a party to move for judgment on the pleadings—including on a defendant’s “failure to state . . . a legal defense,” Fla. R. Civ. P. 1.140(h)(2)—“[a]fter the pleadings are closed, but within such time as not to delay the trial.” Trial in this matter has been set for August 21, 2023, which is more than two months away. Courts regularly grant similar motions with less time remaining. *See, e.g., Moore v. Liberty Mut. Ins. Co.*, 988 So. 2d 1285, 1286 n.2 & n.3 (Fla. 2nd DCA 2008) (explaining that “[b]ased on the current pleadings, . . . the circuit court would have been correct in granting [party’s] motion for judgment on the pleadings,” which was filed only “twenty-two days before the trial was scheduled to begin”). Moreover, Rule 1.140(h)(2) would allow Plaintiffs to raise the same objection they raise here—failure to state a legal defense—at trial. Far from causing delay, Plaintiffs seek to streamline the issues for trial by bringing this motion now.

CONCLUSION

Because this Court has already determined that Defendant Secretary lacks standing to bring his first and second affirmative defenses, this Court should dismiss them pursuant to Plaintiffs’ timely motion. And despite this Court’s determination to the contrary, Plaintiffs preserve their

arguments that this Court should also dismiss Defendant Florida House's third and fifth affirmative defenses and Defendant Florida Senate's fourth affirmative defense for lack of standing.

Dated: June 16, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2023, I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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EXHIBIT A

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

CASE NO. 2022 CA 000666

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

Plaintiffs,

vs.

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

Defendants.

TRANSCRIPT OF PROCEEDINGS

(Plaintiff's Motion to Strike Affirmative Defenses/
Status Conference)

DATE TAKEN: June 5, 2023

TIME: 3:00 p.m. to 4:30 p.m.

PLACE: Leon County Courthouse, Room 3D

BEFORE: J. LEE MARSH
CIRCUIT JUDGE

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

STENOGRAPHICALLY REPORTED BY:

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I N D E X

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1 The following proceedings began at 3:00 p.m.

2 **THE COURT:** We are here today in Leon
3 County, Case 2022 CA 000666, Black Voters
4 Matter Capacity Building Institute and others
5 versus Laurel Lee, actually now it's Cord Byrd
6 and others. We are here today on the
7 Plaintiffs' Motion to Strike Affirmative
8 Defenses.

9 Before we begin, I am not sure who is
10 appearing for each party today, so we'll go
11 ahead and announce our appearances on the
12 record and we can move forward.

13 **MR. WERMUTH:** Fritz Wermuth for the
14 plaintiffs, and I am here with Joyoti
15 Jasrasaria who will be arguing for the
16 plaintiffs today.

17 **THE COURT:** All right.

18 **MR. BARDOS:** Your Honor, Andy Bardos for
19 Florida House of Representatives.

20 **MR. NORDBY:** Dan Nordby from Shutts &
21 Bowen on behalf of the Florida Senate. With me
22 today are Tara Price, also from Shutts & Bowen,
23 and Carlos Rey, General Counsel for the Florida
24 Senate.

25 **MR. JAZIL:** Mohammad Jazil on behalf of

1 Secretary Byrd. Your Honor, I've got Michael
2 Beato on behalf of the Secretary Byrd and Joe
3 Van de Bogart for the Secretary as well.

4 **THE COURT:** All right. You may please
5 proceed.

6 **MS. JASRASARIA:** Good afternoon, Your
7 Honor. My name is Jyoti Jasrasaria and I am
8 appearing on behalf of plaintiffs.

9 As this Court knows, plaintiffs move to
10 strike five of defendants' 13 affirmative
11 defenses under the Public Official Standing
12 Doctrine, which bars public officials from
13 challenging the constitutionality of the duties
14 prescribed to them by Florida law.

15 The doctrine itself has been recognized by
16 the Florida courts for more than a century and
17 it's very straightforward. When a government
18 officer takes an oath of office to uphold the
19 state and federal constitutions, he cannot then
20 turn around and use that oath as an excuse to
21 question the constitutionality of his legal
22 duties and elect not to comply with the duties
23 with which he disagrees. And that is because
24 the judiciary alone has the power to determine
25 a law's constitutionality, and unless and until

1 the judiciary says otherwise, public officials
2 must follow the law as it is.

3 And so an affirmative defense seeking to
4 justify defendants' failure to comply with the
5 Fair Districts Amendment by challenging the
6 constitutionality of the amendment itself is no
7 defense at all. Importantly here, none of the
8 fundamental elements of the Public Official
9 Standing Doctrine are in dispute.

10 One, defendants are indisputably public
11 officials who are not members of the judicial
12 branch.

13 Two, the House and Senate have a duty to
14 follow Congressional districts and the
15 Secretary had the duty to implement those
16 districts.

17 Three, the Fair Districts Amendments
18 affect those duties.

19 And four, defendants have asserted no
20 personal injury, and nor does the amendment
21 affect the disbursement of public funds. And
22 so none of the exceptions to the Public
23 Official Standing Doctrine apply.

24 So as a result, the Public Official
25 Standing Doctrine plainly holds that this Court

1 lacks subject matter jurisdiction to consider
2 defendants' affirmative defenses which assert
3 that the Fair Districts Amendment is
4 unconstitutional and that should settle this
5 motion.

6 To the extent there are questions about
7 why this doctrine applies, it's important to
8 take a step back and remember it stems directly
9 from the separation of powers principles, and
10 that it's critical to preserving the rule of
11 law itself.

12 By way of illustration, when a private
13 plaintiff challenges the constitutionality of a
14 law, the challenged law still remains the law,
15 and unless and until a judge says otherwise,
16 everyone continues to follow the law or they
17 face consequences for not following the law.

18 On the flip side, when a public official
19 justifies their failure to follow the law by
20 challenging the law's constitutionality, then
21 that public official has taken it upon himself
22 to adjudicate and apply the law however he sees
23 fit. And so the public official has
24 essentially nullified the law, and the law is
25 not in place unless and until a judge says

1 otherwise.

2 And so if that second scenario were
3 allowed, public officials could unilaterally
4 decide not to follow a law simply because they
5 could assert that the law was unconstitutional.
6 And even though a judge would have the
7 opportunity to make an ultimate decision on
8 that matter, months or years could pass and in
9 this case, in fact, an election cycle has
10 passed, during which a public official could
11 simply ignore their legal duty without any
12 consequences.

13 That cannot be, and the Public Official
14 Standing Doctrine is critical to preserving the
15 rule of law.

16 Unless the Court has any questions, I'd
17 like to reserve my time for rebuttal.

18 **THE COURT:** Counsel, has there ever been a
19 case where this has been applied to a
20 legislature or legislators in their legislative
21 capacity?

22 **MS. JASRASARIA:** That's a good question,
23 Your Honor.

24 There is not a case where it's been
25 applied to the legislature, but it's very clear

1 that the Florida House and Senate make up the
2 legislative branch, which is not part of the
3 judicial branch, and the Separation of Powers
4 Doctrine set forth in Article 3, Section 1, of
5 the Florida Constitution is very clear that the
6 separation of powers applies across all three
7 branches.

8 And Atlantic Coast Line, which is a case
9 that established this doctrine in the first
10 place, mentioned that this case is about a
11 branch of the government other than the
12 judiciary. And so the legislature squarely
13 falls within that.

14 And, of course, it makes sense that this
15 particular set of circumstances is quite rare,
16 that's partly because the legislature doesn't
17 have all that many affirmative duties placed
18 upon it by the Constitution.

19 **THE COURT:** That's what I wanted to ask
20 you. Atlantic talks about ministerial duties.

21 Is it a ministerial duty of the
22 legislature to enact laws and to draw
23 Congressional districts? Is that a ministerial
24 duty or is that something else?

25 **MS. JASRASARIA:** So I think those are two

1 different things.

2 The legislature certainly doesn't have a
3 ministerial duty to enact laws. For example,
4 it didn't need to enact its most recent voting
5 legislation, but here there is no dispute that
6 the task itself, which is the drawing and
7 implication of the Congressional districts --
8 or sorry, the legislature, the drawing of the
9 districts, that is not a discretionary task.
10 It's very clear in the Federal Constitution, in
11 the State Constitution, in case law that the
12 legislature is under an obligatory duty to
13 redistrict every 10 years.

14 And, of course, there is some discretion
15 in how they choose to draw those districts, but
16 the drawing of the districts and in compliance
17 with the Constitution is not discretionary.

18 And I will just point out Atlantic Coast
19 Line itself involved a task that would
20 inherently involve discretion, which was to
21 hear and determine an appeal.

22 And so there, the Court issued a writ of
23 mandamus for the Board of Equalizers, which
24 included the Governor, the Attorney General and
25 the Treasurer to hear the appeal, but it did

1 not tell them how to decide that appeal.

2 So similarly here, the duty to draw the
3 districts in compliance with the Constitution
4 is not discretionary, even though there is
5 certainly some discretion within that task.

6 **THE COURT:** All right. All right. That
7 is all the questions I have for now. I will
8 obviously allow you more time as things come up
9 from the defendants.

10 **MS. JASRASARIA:** Perfect. Thank you.

11 **THE COURT:** I am not sure, it looks like
12 Mr. Bardos, you are going to go first.

13 **MR. BARDOS:** Yes, Your Honor.

14 Good afternoon, Your Honor, Andy Bardos
15 with the GrayRobinson firm for the Florida
16 House of Representatives.

17 I think what we have here is a situation
18 where the plaintiffs are trying to fit a square
19 peg into a round hole. This is a doctrine that
20 was designed for a very different scenario and
21 not the one we have here.

22 Here, what the legislature was confronted
23 with during the legislative process was a clash
24 of constitutional principles. It had to
25 balance the United States Constitution's

1 guaranty of equal protection against the State
2 Constitution's prohibition against the
3 diminishment and ability of minority voters to
4 elect candidates of their choice.

5 To determine whether the Public Official
6 Standing Doctrine applies here, I think it's
7 helpful to look at the Atlantic Coast Line
8 case, which is a case that really originated
9 this doctrine, and to look at what the
10 underpinnings of the doctrine were and what
11 motivated the Court to adopt it.

12 And the first thing that the Court, that I
13 think is apparent from that case and which is
14 apparent throughout all the cases since then,
15 is that the Public Officials Standing Doctrine
16 prohibits public officials from challenging the
17 constitutionality of a statute, that is
18 something that we see throughout the cases. It
19 was true in Atlantic Coast Line and it's been
20 true ever since.

21 When we look at other cases where public
22 officials challenged laws that are not
23 statutes, for example, the Gronemeyer case and
24 Reid, those were not statutes and the Courts
25 allowing those constitutional challenges to

1 proceed.

2 In *Gronemeyer*, it was an ordinance that
3 was being challenged, and the Court said that
4 this is permissible because the public
5 official, quote, does not challenge the
6 validity of any state statute, end quote.

7 And then in *Reid*, the public official
8 challenged the directive of the Department of
9 Revenue, and the Court held that this is
10 permissible because the public official is,
11 quote, not challenging the validity of statutes
12 applicable to him, and therefore distinguished
13 the line of cases that we saw.

14 What the plaintiffs rely on is the one
15 word dicta in the *Markham* case where the Court
16 said that disagreement with a constitutional or
17 statutory duty is not something that can lead
18 to a challenge; but there is no challenge to a
19 constitutional provision in *Markham*, and so
20 clearly that's quintessential dicta.

21 And then when the Florida Supreme Court
22 revisited that in the *Crossings* case, it
23 summarized *Markham* by saying that the common
24 law principle expressed in *Markham* is that
25 public officials lack standing to challenge the

1 constitutional of a statute.

2 So we are back to challenges to a statute.
3 So there's been no case in the 100 years since
4 Atlantic Coast Line was decided where the
5 Public Official Standing Doctrine was applied
6 to bar a public official from challenging a
7 state constitutional provision.

8 The next thing about Atlantic Coast Line,
9 which I think is relevant, is what explains why
10 the doctrine is limited to statutes, and that
11 is the Court noted several times that statutes
12 are entitled to a presumption of
13 constitutionality. And that is because the
14 legislature, in passing statutes, takes an oath
15 to uphold the Constitution, and the public
16 officials have to presume that the legislature
17 complied with that and that the statutes that
18 the legislature passed is constitutional.

19 I am not aware, and the plaintiffs have
20 not cited any cases to suggest, that there is
21 any presumption that a state constitutional
22 provision is necessarily presumed to be
23 consistent with the Federal Constitution. So
24 the same presumption does not apply.

25 And so when Atlantic Coast Line says we

1 presume and public officials must presume that
2 state statutes are constitutional, and that
3 they must continue to apply them until they are
4 judicially determined to be invalid, that does
5 not apply to a state constitutional provision.

6 The third thing that Atlantic Coast Line
7 pointed out, and Your Honor alluded to this, is
8 that the duty being challenged -- the challenge
9 will be barred if the duty is a ministerial
10 one.

11 And I think it's notable that Atlantic
12 Coast Line referenced ministerial officers and
13 ministerial duties 16 times. And we see that
14 word used again in cases as recent as Santa
15 Rosa, which is a recent First DCA decision.

16 And the reason for this is a ministerial
17 duty is a positive and precise command to a
18 public official: A public official must
19 certify a document; a public official must send
20 out notice, something that is precise. A
21 public official must hear an appeal. The fact
22 of hearing an appeal is a clear mechanical duty
23 that they must follow that process. Those are
24 ministerial duties that are assigned to public
25 officials.

1 But I think it's no exaggeration to say
2 that there is no duty that is less ministerial
3 than the enactment of legislation. And even
4 within the enactment of legislation, when there
5 are state constitutional provisions that occur
6 with the discretion of the legislature and
7 limit what it can do, such as the diminishment
8 standard, that does not prescribe a ministerial
9 duty.

10 And I think it's important to note that
11 not all duties are ministerial. There are
12 duties that are not ministerial. Otherwise,
13 the term ministerial duty, which we see so
14 frequently in cases, would be a redundancy.

15 So when we see a duty, for example, of the
16 nondiminishment standard or, for that matter,
17 equal protection or due process, which also
18 limits the discretion of the legislature
19 enacting legislation, that's very different
20 from the sort of precise and positive commands
21 to public officials that courts usually treat
22 as ministerial duties.

23 So the legislature, of course, must comply
24 with it. It is a duty, but it is not
25 ministerial, it is not mechanical. There is a

1 significant amount of discretion involved,
2 because there is endless disagreement as to
3 what these standards mean and endless varieties
4 of methods by which to interpret and implement
5 them in drawing a redistricting map. So it's
6 very much unlike a ministerial duty.

7 And the fourth thing that I think is
8 notable about Atlantic Coast Line is the policy
9 purpose for this doctrine. And the Court noted
10 that the purpose is to ensure that the public
11 business is administered in a stable and
12 orderly way.

13 The Court alluded to this in the Barr case
14 as well, where the Court said that the state's
15 business cannot come to a standstill while the
16 validity of a particular statute is contested by
17 the very agency charged with the responsibility
18 of administering it.

19 The Florida Supreme Court in the Crossings
20 case alluded to the same doctrine, said that
21 the Public Officials Standing Doctrine promotes
22 important public policy of ensuring an orderly
23 and uniform application of state law, because
24 we cannot have public officials across the
25 state picking and choosing when they apply

1 ministerial duties.

2 That doesn't apply here either. In fact,
3 the public business would be conducted in a
4 much more stable and orderly way if both
5 constitutional challenges were heard at once;
6 plaintiffs' challenged to the statute under the
7 nondiminishment standard and the legislature's
8 challenge to the nondiminishment standard under
9 equal protection; and, for that matter, all
10 defendants challenged that. And the reason is
11 this.

12 If the defense is stricken and the
13 plaintiffs move forward and demonstrate that
14 the district does not comply with the
15 nondiminishment standard, then that district
16 must be redrawn.

17 At that point someone else may come along
18 and assert the equal protection challenge that
19 the defendants are unable to assert here, and
20 then strike down that district. And then we
21 must redraw the district again. And we would
22 have three different districts instead of
23 deciding all of the issues at once. And so we
24 see here that --

25 **THE COURT:** Hold on. Doesn't that go to

1 standing? Don't we deal with that in these
2 courts all the time? There would be plenty of
3 cases -- this Court would love to say let's
4 just deal with it once, but standing ends up in
5 the way and we have to take it piecemeal. So
6 what's wrong with that?

7 **MR. BARDOS:** That's right, Your Honor. I
8 am simply alluding to the fact that the public
9 policy motivation for adopting this very
10 special and unique standing doctrine of public
11 official standing is not supported but rather
12 undermined by its application here which tends
13 to show --

14 **THE COURT:** What is the peril to the
15 legislature? How are they unable to, assuming
16 the constitutionality of a Florida
17 constitutional provision, they are now claiming
18 it's some harm to them?

19 What's the harm? That they can't pass
20 redistricting? Didn't they do that in the
21 original session? They passed what they
22 thought was legislation that would actually
23 comply with the Florida -- so what's the harm
24 here?

25 **MR. BARDOS:** I don't think there is any

1 necessary showing of harm. I think the Public
2 Official Standing Doctrine doesn't exist
3 because of any sort of harm to the public
4 official. I think that the reason the
5 doctrine --

6 **THE COURT:** Right, that's why they don't
7 have standing. There is no harm to the
8 official of complying with the statute. Isn't
9 that what Atlantic Coast says?

10 So when we look at, in essence, the
11 plaintiff has shown this to be a jurisdictional
12 issue of hearing this challenge; where does the
13 legislature have standing? Don't they need any
14 harm?

15 **MR. BARDOS:** Your Honor, I don't think
16 asserting an affirmative defense requires harm.
17 Bringing a claim, standing to assert a claim on
18 the plaintiffs' part requires the plaintiff to
19 demonstrate that the plaintiff has been
20 injured, but I don't think --

21 **THE COURT:** Doesn't this affirmative
22 defense in essence require this Court to rule
23 on the constitutionality of a provision, so
24 seeking this Court weighing in on that?

25 That seems like there needs to be standing

1 to assert that a provision in the Florida
2 Constitution, voted in by the electors of this
3 state; the electors said this is what we want
4 in our constitution.

5 Where is the harm by which the legislature
6 can then challenge the voters and their
7 decision?

8 **MR. BARDOS:** Again, I don't think that a
9 defendant needs to demonstrate harm in order to
10 assert an affirmative defense. I think harm is
11 typically something that's required of a
12 plaintiff in order to bring a claim, so that we
13 know the plaintiff has a stake sufficient to
14 justify a resolution of the plaintiffs'
15 grievance.

16 But I don't think that in this situation
17 the defendant has to show that when the
18 defendant is defending the statute, which is
19 what we are doing, that that defense is based
20 on some sort of harm or that invalidation of a
21 statute would lead to some sort of harm, that
22 we can't defend the statute unless the statute
23 harms us.

24 We can defend the statute when we are
25 sued. Now there is --

1 **THE COURT:** But you are defending statutes
2 saying it's okay because that portion of the
3 constitution is unconstitutional at the federal
4 level.

5 **MR. BARDOS:** Right, but I still think that
6 doesn't require harm in order to assert that.

7 Now if we were to come within the Public
8 Official Standing Doctrine, if the court were
9 to find that that does apply, then there are
10 exceptions where a public official could show I
11 really am harmed, and so that exception then
12 trumps the Public Official Standing Doctrine.

13 Our position is the Public Official
14 Standing Doctrine doesn't even apply in the
15 first place. And so just like any other
16 defendant who's asserting affirmative defense,
17 the defendant doesn't have to demonstrate that
18 it would suffer some harm before it can assert
19 an affirmative defense. So --

20 **THE COURT:** No, but doesn't it has to show
21 the Court has some jurisdiction on deciding
22 that claim?

23 **MR. BARDOS:** Right. So jurisdiction --
24 that's an interesting question. The plaintiffs
25 raise the jurisdictional issue, but standing is

1 not jurisdictional in this state.

2 Now there is certainly some cases where
3 there is language that goes both ways on that
4 issue, but I think the most significant source
5 of -- source that we should look to in that
6 respect is the Florida Supreme Court's recent
7 decision in Page versus Deutsch Bank, 308
8 Southern Third 953. And when Florida courts
9 have deliberately considered this issue of
10 whether standing is a jurisdictional matter in
11 Florida in state court, they have answered the
12 question in the negative.

13 And so what the Florida Supreme Court said
14 in the Page decision is that the subject matter
15 of jurisdiction is universally acknowledged to
16 never be waivable; but this Court has held that
17 the issue of standing is a waivable defense.
18 And if standing is waivable, then standing is
19 obviously not a component of subject matter
20 jurisdiction.

21 That is the Florida Supreme Court
22 reasoning that standing is waivable, therefore,
23 it's not a jurisdictional issue.

24 The First DCA said the same thing,
25 standing is an affirmative defense that's

1 waived if not raised in a responsive pleading,
2 Collins Asset Group versus Property Asset
3 Management.

4 In that respect, Your Honor, I will note
5 that the plaintiffs did not assert the Public
6 Official Standing Doctrine in their reply.
7 They are asserting it now in a motion, but it
8 is an avoidance at the very least, so they
9 should have asserted it in their reply.

10 **THE COURT:** Whether it's called standing
11 or whether it's called subject matter
12 jurisdiction, you'd agree this Court always has
13 to be concerned with subject matter
14 jurisdiction because it can be raised any time,
15 including on appeal; correct?

16 **MR. BARDOS:** Absolutely, Your Honor. Our
17 position is simply that standing is not a
18 jurisdictional issue.

19 So, Your Honor, we think that the Public
20 Official Standing Doctrine does not apply here.
21 It has to be a statute, because of a
22 presumption of validity; it has to concern
23 ministerial duties, which the enactment of
24 legislation is not. And so we haven't found a
25 case either applying it to the legislature --

1 **THE COURT:** Why shouldn't there be a
2 presumption of validity to a provision of a
3 Florida constitution? Why should we not
4 presume what the Florida Constitution says is
5 valid? Like, one of which they cited was the
6 separation of power.

7 Shouldn't I presume that that one is
8 valid? So why not assume all provisions of the
9 Florida Constitution, until otherwise shown,
10 are, in fact, valid?

11 **MR. BARDOS:** I think there are a couple of
12 answers. I think the simpler answer may be,
13 Your Honor, is looking for something more, but
14 the simpler answer is I don't believe there is
15 a case that expresses that there is such a
16 presumption.

17 Beyond that, though, I think the
18 presumption is based on the notion that when
19 the legislature passes a statute, we have a
20 body of elected representatives and public
21 officials performing their duties under oath,
22 and they have taken an oath to comply with the
23 Constitution.

24 And so we have to presume that they do
25 that in good faith, and that the statutes that

1 they passed carry with them a presumption of
2 validity.

3 A constitutional provision, in particular
4 one proposed by citizen initiative like the one
5 here, doesn't have that same pedigree, it
6 doesn't come from a body established and
7 operating under oath to ensure that its actions
8 are constitutional.

9 **THE COURT:** But isn't that the whole point
10 of the constitution? The U.S. Constitution,
11 the Florida Constitution, that is exactly --
12 it's the consent of the government, it is the
13 common people come together to form their
14 government through a constitution, splitting
15 the powers into the various elected officials,
16 be they executives, judiciary or legislature.
17 It's still those common people, isn't it?

18 **MR. BARDOS:** Absolutely. But the question
19 is whether the state constitution is presumed
20 to be consistent with the federal constitution.
21 And that's simply a presumption that if it
22 exists, it would rest on different grounds from
23 the presumption of constitutionality that
24 attends a statute, and it hasn't been expressed
25 in the cases, to the extent that I have seen.

1 Now maybe the plaintiffs will point us to a
2 case that has recognized such a presumption.

3 So, Your Honor, I think -- and I think
4 it's important also to note that Miami-Dade
5 Expressway Authority case distinguish Reid and
6 Gronemeyer on the ground that those cases did
7 not challenge the constitutionality of the
8 state statute; so again, very recently we have
9 the First DCA expressing that this doctrine is
10 limited to statutes.

11 So that's the Public Official Standing
12 Doctrine.

13 The other point we raised, Your Honor, in
14 our response is this difference between a
15 1.140(b) motion to strike and a motion under
16 1.40(f). And we think this is an important
17 issue.

18 So a motion to strike under 1.140(b) is
19 the equivalent of a motion to dismiss. It
20 challenges the legal sufficiency of a pleading.
21 Just like the motion to dismiss challenges the
22 legal sufficiency of a complaint, a 1.140(b)
23 motion challenges the legal sufficiency of an
24 answer.

25 Just like the motion to dismiss can raise

1 defenses that would be raised in an answer, the
2 1.140(b) motion raises arguments that can be
3 raised in a reply.

4 So they are parallel. There is a
5 parallel, the 1.140(b) motion is due at the
6 same time the reply is; we see how that works
7 together. Just like the defendant would have
8 to raise standing in an answer as an
9 affirmative defense in a challenge to a claim,
10 a plaintiff would have to raise it in a reply
11 and challenge to an answer.

12 They didn't do that here. It wasn't
13 raised in their reply. They didn't file a
14 motion to strike within the 20 days, and so
15 instead they filed a motion to strike under
16 Rule 1.140(f), which can be done at any time.

17 Now 1.140(f) is an entirely different
18 standard, and we submitted to Your Honor the
19 Chris-Craft case which says these are two
20 entirely different tests, 1.140(b) versus (f).

21 And 1.140(f) says essentially that if
22 the -- if a complaint is -- or a complaint --
23 or an answer in this case -- is legally
24 sufficient, then the Court can strike improper
25 allegations from that complaint, if those

1 allegations have nothing to do with the case or
2 if they are scandalous or if they are --

3 **THE COURT:** Talk to me about the two words
4 immaterial and impertinent. Why does that not
5 refer to -- if they don't have a legal ability
6 to bring this claim, that therefore it's
7 immaterial and impertinent?

8 **MR. BARDOS:** Yeah. So I think there are a
9 couple of answers to that.

10 One is what immaterial and impertinent
11 looks at is whether this issue that's raised is
12 wholly unrelated to litigation. And it's
13 clearly not.

14 Clearly the issue is relevant to the
15 litigation, whether the nondiminishment is
16 constitutional or not has a direct bearing on
17 this case.

18 And so a situation where it is wholly
19 impertinent is the case that plaintiffs cite,
20 the Hodges case which they cite in support of
21 their reading. But in fact, if you looked at
22 that case, the argument that was made in a
23 motion to strike is not simply that there was a
24 lack of standing.

25 But, in fact, what the Court -- what was

1 argued in Hodges is that a judicial declaration
2 of constitutionality is totally unnecessary to
3 complete adjudication of plaintiffs' claims for
4 damages to the property and such
5 constitutionality argument is not an issue
6 between the parties.

7 So the plaintiff there had raised an equal
8 protection claim in the complaint and the
9 defendant's argument was this has nothing to do
10 with our dispute. Not only is there is no
11 standing, but it has nothing to do with our
12 dispute. So it was both. So the Court said
13 that 1.140(f) was appropriate in that case.
14 But that's the distinction, Your Honor.

15 And the other part of this is if a claim
16 is irrelevant whenever it's not legally
17 sufficient, then the 20-day deadline under
18 1.140(b) doesn't mean anything; that any party
19 could ignore that 20-day deadline, go beyond
20 the 20 days and then turn around, file a
21 1.140(f) motion at any time and say, well, this
22 claim is legally insufficient and therefore
23 it's irrelevant.

24 And I just don't think that's how the
25 rules were intended to operate. I think the

1 20-day deadline was intended to have some
2 meaning. I think the legal sufficiency
3 analysis, if it is distinct as the Chris-Craft
4 case said, they are two separate tests, and
5 they have to be, in order for that 20-day
6 deadline to mean anything.

7 **THE COURT:** But talk to me about 1.140(b).
8 One of those says lack of jurisdiction over
9 subject matter and it talks about this
10 timeline. Well, that timeline doesn't apply to
11 lack of subject matter jurisdiction, does it?

12 **MR. BARDOS:** Yeah, that's right.

13 So the 20-day deadline applies -- it
14 appears in the plush language beneath 1 through
15 6. So jurisdiction -- it doesn't apply to 20
16 days, it appears beneath that list and applies
17 specifically to a motion to strike, motion to
18 strike for legal insufficiency.

19 So, yes, if it's a jurisdictional, which
20 we contend this is not, then that could be
21 raised at any time.

22 But if it's not a jurisdictional issue and
23 it challenges legal sufficiency of a defense,
24 then that 20-day deadline in the rule applies,
25 and the plaintiff cannot then turn around and

1 say, well, I missed that.

2 And the fact they didn't plead this in
3 their reply and then didn't file a motion
4 within 20 days suggests that this is probably
5 something they thought of too late.

6 But they can't turn around then and say,
7 well, it's irrelevant because it's legally
8 insufficient, because the 20-day deadline
9 really has no meaning at that point.

10 So, Your Honor, we do think there is a
11 significant difference between the (b) and (f)
12 motions.

13 On top of that, striking pleadings, as the
14 Bay Colony case demonstrates, is not favored,
15 it's considered drastic action, it's used
16 sparingly, and all doubts are resolved against
17 striking the pleadings.

18 So unless Your Honor has any further
19 questions, I will wrap up and we'll ask that
20 the Court deny the motion.

21 **THE COURT:** All right. Mr. Nordby.

22 **MR. NORDBY:** Thank you, Judge.

23 On behalf of the Florida Senate, I agree
24 with Mr. Bardos' argument. I just want to make
25 a few more brief points, if I could.

1 I certainly agree with his arguments as to
2 the timeliness. To read a motion to strike for
3 lack of legal sufficiency to be subsumed within
4 the immaterial or impertinent provision of (f),
5 I think where you really read the time
6 limitation out of 1.140(b) out of the
7 requirement at all. So I think timeliness is
8 one way to resolve this that we think would be
9 appropriate under the rules, but would also
10 avoid some of the more practical concerns that
11 you have expressed with regards to merits of
12 it.

13 But on the merits of the Public Official
14 Standing Doctrine, this case does not fall into
15 really any of the precedence the plaintiffs
16 have cited here. Those cases really fall into
17 two categories.

18 The one is what some of the cases call an
19 affirmative challenge to legislation. That was
20 the case in the Miami-Dade County Expressway
21 Authority decision from the First DCA that
22 actually Mr. Jazil and I litigated in front of
23 Judge Cooper in this courtroom about a year and
24 a half ago.

25 In that case a state agency affirmatively

1 sued and asked the court to declare that a
2 statute was unconstitutional. And the First
3 District said no, that's not proper, the Public
4 Official Standing Doctrine prohibits a state
5 agency from suing for the declaration that a
6 statute is unconstitutional.

7 It did distinguish the cases, the
8 Gronemeyer case and others, on the basis that
9 was being challenged in those cases was not a
10 statute, and therefore the Public Official
11 Standing Doctrine did not apply.

12 **THE COURT:** I want to interrupt you
13 because cases of first impression -- this is
14 that type of case. We've already been -- some
15 of the defendants have already asked this Court
16 to recognize an executive privilege that didn't
17 exist anywhere in case law that I could find
18 from the state.

19 Now that ended up not being an issue in
20 this case; it happened in another case
21 somewhere in the circuit. But in this case, it
22 was not executive function, it was legislative
23 function of the Governor.

24 So why not say it now? Why not say, we
25 got government officials who are challenging

1 their own constitution and whether it meets the
2 constitution? Why not say the rationale is
3 similar?

4 **MR. NORDBY:** A couple reasons.

5 One is the nature of the pleading here is
6 an affirmative defense. It's not a
7 counterclaim, it's not a crossclaim. The
8 defendants in this case are not asking the
9 Court affirmatively to make a declaration.

10 **THE COURT:** Right, but that's because what
11 they are arguing -- I am not saying I agree
12 with it. Their argument is because the
13 legislature has nullified, which is the very
14 harm that the Public Official Standing Doctrine
15 seeks to avoid.

16 Their argument is that the legislature has
17 nullified it and said, we think it's
18 unconstitutional, therefore this is the
19 legislation we are going to pass.

20 That's the very reason -- it doesn't have
21 to be brought in an initial claim, if the
22 Public Official Standing Doctrine doesn't exist
23 for the legislature. So that's the very --
24 that's the very essence. So why not extend it
25 here?

1 **MR. NORDBY:** So here's why.

2 I think this case is different from the
3 cases that they cited which is on the other
4 side of the Public Official Standing Doctrine
5 cases, the public official who refuses to
6 perform a duty on the alleged grounds that that
7 duty is unconstitutional.

8 In that case, that would be the scenario
9 here if, for example, the Secretary of State
10 were to say I am not going to enforce
11 Chapter 2022-265, Laws of Florida, because I
12 believe this Congressional map is
13 unconstitutional. That would be the case in
14 which the negative implication of the Public
15 Official Standing Doctrine might come into
16 play.

17 Of course, the Secretary of State and the
18 Supervisors of Elections have not done that.
19 They are enforcing the law that was passed by
20 the legislature and signed by the Governor
21 here.

22 This case does not involve a claim by the
23 plaintiffs that the Article 3, Section 20, of
24 Florida Constitution is itself
25 unconstitutional. This course, in adjudicating

1 the constitutionality of the legislation that
2 was passed by the legislature and was signed by
3 the Governor, will necessarily have to contend
4 with the application of the federal
5 constitution as well; just as the legislature
6 did when it was considering this legislation.

7 It's not only the Florida Constitution
8 that applies to redistricting legislation, such
9 as this. Federal Voting Rights Act may apply
10 for the manner of legislation that could be
11 applied, the Federal Equal Protection Clause
12 may apply. We cited the elections clause as
13 well.

14 **THE COURT:** And I get it that -- I forgot
15 which Alabama case it is -- Allen v.
16 Milligan -- I get that there is some -- we are
17 waiting on rulings from the U.S. Supreme Court
18 at least in Allen v. Milligan on the Voting
19 Rights Act, but isn't there a host of other
20 federal legislation that has been found to be
21 constitutional and in conformance with the
22 Equal Protection Clause that uses this same
23 language that's in the Florida Fair Districts
24 Amendment?

25 **MR. NORDBY:** I don't think there is

1 anything precisely on point with this language
2 and the sort of arguments that are being made
3 here.

4 My point was simply that when considering
5 the enactment of legislation, the legislature
6 has an obligation to consider all superior laws
7 here, anything that the supremacy clause would
8 hold to prevail over provisions of the state
9 constitution or over state statute. And it did
10 so here.

11 And in the course of adjudicating this
12 dispute here, this Court cannot blind itself,
13 we would submit, to the application of the
14 Equal Protection Clause.

15 **THE COURT:** Well, then, am I to take --
16 and based on prior filings, didn't they do that
17 once? And it was vetoed. And so am I to take
18 it -- were they deciding to operate
19 unconstitutionally then or now? I mean --

20 **MR. NORDBY:** Neither is the case. Of
21 course, we are defending the constitutionality
22 of the legislation that was passed.

23 My point is simply these are not easy
24 questions. I point you to a different decision
25 from Alabama, Chief Judge Pryor writing for a

1 three-judge panel in the case, where he says
2 these are easy questions. Sometimes under the
3 existing case law, the requirements of the
4 Equal Protection Clause may run up against the
5 requirements of the Voting Rights Act; may run
6 up against the requirements of the Florida
7 Constitution requirement here.

8 So in the course of trying to enact
9 legislation that will first satisfy
10 bicameralism presentment and then satisfy the
11 application of all of these different doctrines
12 of federal law and state law, the legislature
13 had to consider all of the sources of authority
14 that would apply to that legislation. And this
15 Court, too, cannot as Mr. Bardos said, cannot
16 blind itself to the application of the federal
17 constitution and federal law in adjudicating
18 the plaintiffs' claim here.

19 If this Court were to proceed only with an
20 examination of what the Florida Constitution
21 requires in isolation from the other provisions
22 of law that apply to this, we could end up with
23 a ruling that would itself fail to comply with
24 superior law under the Federal Constitution and
25 that would be a poor place to find ourselves

1 in.

2 **THE COURT:** Once again, and I want to make
3 sure this is clear, this affirmative defense is
4 in the alternative argument, isn't that
5 correct?

6 You are not conceding that the legislation
7 violates the statute, the Florida
8 constitutional provision; this is in the event
9 the Court even finds that. So we may never
10 reach this question, is that correct?

11 **MR. NORDBY:** That's absolutely correct.
12 It's an affirmative defense, so this Court may
13 never reach these affirmative defenses.

14 If this Court finds for us on the merits
15 of the primary claims being described by the
16 plaintiffs here, then it will never reach these
17 affirmative defenses as grounds for its
18 decision.

19 **THE COURT:** All right.

20 **MR. NORDBY:** Thank you very much.

21 **THE COURT:** Mr. Jazil.

22 **MR. JAZIL:** Thank you, Your Honor.

23 May it please the Court, I echo the
24 comments made by my colleagues, Mr. Bardos and
25 Mr. Nordby, and I join in them.

1 There is a footnote in the plaintiffs'
2 reply saying that it would be inappropriate for
3 the Secretary to join in the arguments that are
4 being made. I would like too address that
5 point.

6 I think it's perfectly appropriate for the
7 Secretary to join those arguments because those
8 arguments in part are that the Public Official
9 Standing Doctrine is rooted in challenges to
10 statutes, not constitutions. The only contrary
11 authority on that point is the dictum from
12 Markham as Mr. Bardos explained.

13 Markham dealt with a statutory issue and
14 talked about the Public Official Standing
15 Doctrine; the Atlantic Railroad case from 1922
16 dealt with a statute, dealt with the Public
17 Official Standing Doctrine in a statutory
18 context.

19 The Florida Supreme Court's most recent
20 and most elaborate explanation of the doctrine
21 in 2008, the Flemings case, talked about it in
22 a statutory context.

23 So Your Honor is correct. One of the
24 questions of first impression here that must be
25 squarely addressed is whether or not the Public

1 Official Standing Doctrine serves as a bar for
2 public officials to raise as an affirmative
3 defense the possible unconstitutionality of
4 provisions of the Florida Constitution.

5 And there, Your Honor, I point the Court
6 back to the Separations of Concept Doctrine
7 that underlies the notion of public official
8 standing. And the cases say, look, it's
9 inappropriate for an executive official to
10 challenge an enactment of the legislative
11 branch because that is a separations of power
12 issue.

13 So then the question becomes, okay, if
14 it's a provision of the state constitution that
15 was put there through a citizen initiative, are
16 the same separations of power concerns
17 implicated? And I would suggest to the Court
18 that they are not.

19 This is not an instance where you have one
20 branch of government fighting with another
21 branch of government over what one has done and
22 the other refuses to follow. This is an
23 instance where there is a provision in the
24 Florida Constitution, and the question is,
25 well, okay, if there is a provision in the

1 Florida Constitution and one branch of
2 government passes a statute, enacts something
3 consistent with what they believe that
4 provision requires, another branch of
5 government signs it and puts it into law, is
6 that in and of itself appropriate?

7 Under the Federal Constitution, right,
8 because we got two -- we got federalism and
9 separations of power both working here. And I
10 will posit to the Court that the state level
11 standing doctrine, Public Official Standing
12 Doctrine, and its separations of power concerns
13 are not implicated in this instance as they
14 have been, and have been discussed in other
15 cases.

16 Your Honor, I also would like to discuss
17 this subject matter jurisdiction question that
18 you discussed with my friends.

19 I tried convincing the Florida
20 Supreme Court a year and a half ago to try to
21 make a standing subject matter jurisdiction
22 issue and receive from the discussion in the
23 Polk versus Deutsch Bank case. The very last
24 paragraph of that case talked about how subject
25 matter jurisdiction cannot be waived. Subject

1 matter jurisdiction can be raised at any time,
2 but standing in state court is not a subject
3 matter jurisdictional issue. It is in federal
4 court, it is not in state court.

5 So I just would like to underscore that
6 point.

7 And, Your Honor, my friend cited to the
8 Hodges case from 1965, the Florida
9 Supreme Court discussing the appropriateness of
10 filing a motion to strike.

11 And my friend Mr. Bardos discussed the
12 case and I defer to his distinction of the
13 Hodges case, but I simply note that the case is
14 from 1965. The rules that we're operating
15 under are substantially revised in 1972. And
16 so I would simply point the court to the
17 advisory committee notes from 1972 that talk
18 about how a motion to strike -- they broke it
19 up into two parts in the revisions from 1972,
20 subpart (f) and subpart (b).

21 And once the motion to strike is broken up
22 that way -- we made the point in our papers,
23 Your Honor -- and I am not going to read the
24 papers to you -- that the plaintiffs' filings
25 is more akin to a motion under subpart (b)

1 which must be filed within 20 days, and this is
2 untimely.

3 With that, Your Honor, I have nothing
4 further to add, unless the court has some
5 questions.

6 **THE COURT:** Let me ask. So you say there
7 is a difference -- this isn't -- perhaps I
8 shouldn't use warring or a difference of
9 opinion between multiple branches, that it
10 makes a difference that it's a citizen-based
11 initiative, but what if the citizens said, you
12 know what, we only want judges to serve one
13 term, the Governor to serve one term, and
14 legislature to serve one term, that's two or
15 four years. And they put that in the
16 constitution, and it passes. And it goes over
17 the threshold and it's put in the constitution.

18 Then we have a legislature that says, I
19 don't really like that. We are going to make
20 this law and the Governor says, yeah, I don't
21 like that either. And then the judiciary gets
22 to pass on it.

23 So why all of a sudden do we look at it
24 differently? Why can the ministerial act of a
25 state official not prevent them from

1 challenging that?

2 **MR. JAZIL:** Your Honor, I would say in
3 that scenario, if you have the Governor or a
4 member of the legislature saying some part of
5 that citizen initiative violates the federal
6 constitution, I would think they would have a
7 good case for arguing that they have standing
8 to try to sue and to say this is inappropriate.

9 We can make your hypothetical more
10 complicated, Your Honor, but let's assume we
11 have a citizen initiative that says we are
12 going to have segregated schools, Black
13 citizens and white citizens shouldn't go to the
14 same schools. And that citizen initiative gets
15 the requisite number of signatures, gets placed
16 on the ballot and it passes.

17 The question then becomes: Does the
18 public official have a duty to implement that
19 provision of the state constitution for a
20 statute or otherwise if it's self implementing
21 rather, or does that same official have a duty
22 to read that provision and say, okay, I got
23 this provision in the state constitution; I
24 also have a federal provision, the Equal
25 Protection Clause and cases 1954 on say that

1 this is completely unconstitutional. How
2 should I balance the duty? How should I deal
3 with it? What are my responsibilities to the
4 folks who elected me?

5 And so I am trying to enforce both a state
6 constitutional provision and a federal
7 provision that are inconsistent with one
8 another and the supremacy clause says one
9 should trump the other.

10 **THE COURT:** But why does it leave just an
11 individual party, like we had happen in the
12 past, we have Brown sue the Board of Education
13 for that very, very same thing. Why don't we
14 have an individual person that seeks a
15 declaratory action? Why is it that the
16 government starts getting -- I thought we are
17 about less government; government of restraint.
18 Why is it now the government is proactively
19 deciding what they want against the wishes of
20 people? Why isn't it that the people bring
21 that and say it violates our constitution?

22 **MR. JAZIL:** Sure. Your Honor, Brown sues
23 the Governor of Florida to implement the
24 constitutional provision I described. The
25 governor of Florida raises that as an

1 affirmative defense that that constitutional
2 provision is in fact inconsistent with the
3 Federal Equal Protection Clause.

4 Under the plaintiffs' reading of the
5 cases, Your Honor would be required to strike
6 the governor's affirmative defense saying that
7 provision requiring segregation isn't an
8 affirmative defense.

9 And so, Your Honor, I use that to
10 highlight the point that it's appropriate for
11 the court to consider these issues as the cases
12 proceed and as -- if the plaintiffs succeed, to
13 consider whether or not our affirmative defense
14 is appropriate.

15 And as practical matter, Your Honor
16 brought up the Alabama cases, Allen versus
17 Milligan, and Merrill versus Milligan, and
18 whichever way captured it, and these are some
19 of the issues that the state and the law,
20 Section 2 of the Voting Rights Act is at stake
21 at the U. S. Supreme Court.

22 And one of the options the U. S. Supreme
23 Court has, the argument that the state of
24 Alabama made, was that Section 2 is at war with
25 the Equal Protection Clause. That was their

1 argument, and I think I am probably quoting it
2 right; if I am misquoting, I apologize to
3 Mr. LaCour, Alabama Solicitor General, but
4 their point was, what Section 2 is requiring
5 and what the Equal Protection Clause are
6 requiring seemed to be incompatible.

7 I note, Your Honor, the U.S. Supreme Court
8 has always assumed but never decided that
9 compliance with Section 2 of the Voting Rights
10 is a compelling state interest.

11 So these points, to Mr. Nordby's comment,
12 aren't in flux. These are difficult issues and
13 we just don't know where all the balls will
14 land in the next few months as some of these
15 cases get decided.

16 **THE COURT:** Thank you, Mr. Jazil.

17 **MR. JAZIL:** Thank you, Your Honor.

18 **MS. JASRASARIA:** Your Honor, I would like
19 to briefly begin with timeliness.

20 As plaintiffs' papers state, they move to
21 strike under Rule 1.140(f), and here the
22 defense of that issue are, quote, wholly
23 irrelevant and can have no bearing upon the
24 equities and no influence upon the decision as
25 to the relief granted, because this Court lacks

1 jurisdiction to consider the defenses.

2 And I will just note that in Crossings,
3 the petitioner's Supreme Court on the merits
4 explains that it successfully moved to strike
5 respondent's affirmative defenses under the
6 Public Official Standing Doctrine years into
7 the litigation, which strongly suggests that
8 its motions were brought under the same rule,
9 which allows a motion to strike at any time.

10 And with respect to the standing issue
11 that was raised, first, I will just note that
12 we just heard about these additional cases that
13 were being cited in the past 30 minutes, but my
14 point is that the Public Official Standing
15 Doctrine is about more than whether a public
16 official can just bring a particular claim;
17 it's also about whether this Court can
18 adjudicate that claim. And so it is a subject
19 matter jurisdiction issue.

20 And, you know, after the Page case was
21 decided, the First DCA did hold that the trial
22 court lacked subject matter jurisdiction
23 because the party lacked standing under the
24 Public Official Standing Doctrine; that was the
25 Department of Transportation versus Miami-Dade

1 County Expressway Authority.

2 Similarly, the School District of Escambia
3 County case noted that a public official's
4 disagreement with a constitutional or statutory
5 duty does not create a judicable controversy or
6 provide an indication to give a judicial
7 opinion.

8 So this is more than just a separate
9 issue. This is a subject matter jurisdiction
10 issue.

11 **THE COURT:** Right, but isn't that --
12 that's just the Court weighing in willy-nilly
13 on somebody wants to know what the answer is.

14 Why is it not judicable that the court has
15 to render a decision, or potentially does --
16 and I discussed that with Mr. Nordby -- that
17 this may never come before the Court? I am not
18 sure.

19 But if it does, isn't it -- the Court is
20 not issuing an opinion for just so we know;
21 it's because it is pertinent and relevant to
22 this very lawsuit brought by the plaintiffs.
23 And it's the only way, if it gets to an
24 affirmative defense, it's the only way
25 defendants get to justify their actions.

1 **MS. JASRASARIA:** Well, I would argue that
2 it's not relevant to the issues that are before
3 this Court, which is whether the congressional
4 districts comply with the constitution. And
5 the defendants may continue to defend the
6 congressional districts under the law as it is
7 but not under the basis that they don't have to
8 comply with the law because it's
9 unconstitutional.

10 And as this Court was beginning to point
11 out, the Atlantic Coast Line case, even though
12 it's about a defensive posture, does note that
13 when a party is bringing a constitutional
14 challenge, injury will not be presumed, it must
15 be shown.

16 And so the injury is required here, even
17 though this is an affirmative defense. And so
18 any decision about the constitutionality of the
19 Fair Districts Amendment, if they have not been
20 followed, would be a hypothetical question.
21 It's not a question that is currently before
22 this Court.

23 **THE COURT:** But if we get to the
24 affirmative defense, then don't they have a
25 duty to prove whatever that affirmative defense

1 is?

2 **MS. JASRASARIA:** If we get to the point
3 where this Court decides that the districts
4 were not in compliance with the Fair Districts
5 Amendment, then under the law as it is,
6 defendants would be obligated to draw districts
7 and implement districts that are in compliance,
8 and at that point, as this Court mentioned, an
9 individual could certainly allege that their
10 equal protection rights were being -- were
11 harmed under a map that does comply with the
12 Fair Districts Amendment, in which case they
13 could challenge the Fair Districts Amendment's
14 constitutionality, that's the type of claim we
15 have seen time and time again. But that's not
16 the issue in this case where plaintiffs are
17 asking this Court to adjudicate the
18 constitutionality under this particular
19 provision. And --

20 **THE COURT:** Couldn't that be severed? I
21 mean, they are not asking, I don't think -- and
22 they can correct me if I am wrong; they are not
23 asking the Court to strike down the entirety of
24 the Fair Districts Amendment, are they?

25 I think no portion of a plan or individual

1 district shall be drawn with the intent to
2 favor or disfavor a political party, they are
3 not saying that that's unconstitutional under
4 the Florida -- under the U.S. Constitution.

5 So I mean, I think they are only talking
6 about a small portion. Why can't the Court
7 find that, if that comes up? It may not be an
8 issue. We don't know yet until we heard the
9 trial on the merits portion to see if these
10 don't comply with it as it is currently
11 written.

12 But if they don't comply as currently
13 written, then why can't the Court find --
14 potentially, I am not saying I would, but
15 potentially find that a small portion of the
16 Fair Districts Amendment is not in line with
17 the U.S. Constitution? Why can't the Court do
18 that?

19 **MS. JASRASARIA:** Your Honor, the answer to
20 that question is simply found within the Public
21 Official Standing Doctrine itself, which states
22 that even if potentially there may be a
23 question of constitutionality, public officials
24 are not parties that can raise those questions.

25 And so even if there were a scenario in

1 which one of these provisions -- one section or
2 provision were unconstitutional, that's not
3 before this Court, and these parties do not
4 have standing to raise that issue; and that is
5 because this is again a very straightforward
6 application of the doctrine.

7 And I will just note that -- I will note
8 that the affirmative defenses that have been
9 raised are not simply challenging under the
10 Equal Protection Clause of the Federal
11 Constitution. They are also challenging under
12 the Elections Clause of the Federal
13 Constitution.

14 And as plaintiffs did note in their reply
15 to the answers, that issue has already been
16 adjudicated by both the Florida Supreme Court
17 and the 11th Circuit. And so in the event of
18 those affirmative defenses, not only are the
19 House and Senate prejudging the issue, but they
20 are actually openly disagreeing with a Court
21 decision. And so in that case --

22 **THE COURT:** Well, that won't be the first
23 time they done that in this case, is it? They
24 specifically said that as it relates to
25 legislative privilege in this case. We had a

1 big discussion on that, that they made sure the
2 record was very clear, and it has gone up to
3 the DCA, and it's very clear this Court and the
4 DCA is bound by the decision under
5 Apportionment 4.

6 So that wouldn't be the first time, if
7 they want to preserve this for appeal, that
8 they have to raise it, right? If they do
9 disagree, they have to raise it down here at
10 the trial level, correct?

11 **MS. JASRASARIA:** Well, the doctrine is --
12 the separation of powers are clear, and the
13 doctrine is binding on this Court certainly.
14 But a party cannot raise an issue like this
15 because they have to follow the law as it's
16 judicially determined, and until and unless the
17 judge says otherwise, they have to presume that
18 the provisions of the constitution -- any law
19 that provides a duty to a public official is
20 the law.

21 **THE COURT:** Right. They have to raise it
22 here if they think the law -- the law got it
23 wrong, right?

24 Crawford versus Washington, Crawford had
25 to raise jurisprudence, over a hundred years

1 word of jurisprudence not in his favor, he
2 still had to raise that before he could get to
3 the U.S. Supreme Court, and then to say, you
4 know what, he is right, look at the text of the
5 constitution. They have to raise it, right?

6 I am not saying they win at trial court
7 level, but they got to raise it, don't they, if
8 they want to preserve it? Just because there
9 is case law that is not in their favor, they
10 need to disclose that. But they have to raise
11 it, don't they, if they are challenging that
12 ultimately above that?

13 **MS. JASRASARIA:** If they are trying to
14 challenge something that affects their duties
15 under Florida law, then they cannot challenge
16 that and it must be struck.

17 So that's again very clear under the law,
18 under the doctrine. And again, this is a
19 straightforward application of the doctrine. I
20 think that my friends were trying to say that
21 these are not easy questions, but frankly, the
22 easiest answer to try to figure out which law
23 to follow is simply follow the law as it is
24 until and unless it's judicially determined
25 otherwise. And so that is what we have here.

1 And I will just note that some of the
2 concerns around the fact this is a
3 constitutional provision, I will just say that
4 the separation of powers issue at stake here is
5 not a disagreement between the legislature and
6 the executive branch. It's the fact that the
7 judicial branch is the only one with the
8 authority to determine the constitutionality of
9 a provision.

10 And the legislature is also similarly
11 prohibited from encroaching on the judicial
12 power, and that's the separation of powers
13 issue that's at issue here. And the fact that
14 this is a constitutional provision, again,
15 Markham does mention constitutional duty, and
16 the purpose of the doctrine is to prevent
17 against selective enforcement of the law. And
18 it rests on the premise that people of the
19 state have the right to expect that their
20 government officials will promptly carry out
21 and put into effect the will of the people.
22 That comes from Crossings, which is quoting
23 Barr.

24 And, of course, in Crossings, the will of
25 the people was effectuated through the

1 legislative enactment, but here the will of the
2 people is even clearer because this is a
3 constitutional provision that's been passed by
4 popular vote.

5 And so I think, again, there's really no
6 question that here the constitutional provision
7 which happens to affect a clear duty of the
8 legislature falls equally into this doctrine,
9 even though it is a unique circumstance.

10 To the point of trying to balance the
11 Florida Supreme Court with the U.S.
12 Constitution, I will just note that here
13 defendants are citing federal law that they say
14 bars the use of race in the way CD-5 was drawn.
15 No court has held that CD-5 follows the 14th
16 Amendment.

17 And so again, here we are dealing with a
18 constitutional provision, and then defendants'
19 interpretation of federal case law, but there
20 is -- they, under the Public Officials Standing
21 Doctrine, don't have the authority to consider
22 the constitutionality or determine the
23 constitutionality without a court's decision on
24 that point, whether it's the federal
25 constitution or the state constitution.

1 Unless the court has any further
2 questions --

3 **THE COURT:** Thank you. We are here before
4 the Court today in Case 2022 CA 66, Black
5 Voters Matter Capacity Building Institute and
6 others versus Florida Secretary of State and
7 others. We are here today on the Plaintiffs'
8 Motion to Strike Affirmative Defenses.

9 What's clear in this case is, like many
10 things in this case, we get to start afresh and
11 look at issues that have maybe not been
12 previously adjudicated, one of which is this
13 very issue.

14 I don't feel confident that I have been
15 given any case law directly on point as to the
16 Public Official Standing Doctrine on
17 challenging a Florida Constitution, challenging
18 the constitutionality of a portion of the
19 Florida Constitution vis-a-vis the U.S.
20 Constitution.

21 What the Court has, that is most closely
22 at hand, is statutory provisions. There are a
23 numbers of cases cited by both sides, but they
24 ultimately rest on Atlantic Coast Line Railroad
25 Company, 84 Florida 592, from the Florida

1 Supreme Court way back in 1922 that discusses
2 that matter.

3 Here, we are dealing with an entirely
4 different creature, and that is one of the
5 legislature of the State of Florida operating
6 under its constitutional mandate and power to
7 enact legislation and present it to the
8 Governor of the State of Florida for the
9 Governor to either veto, sign into law, or
10 allow to pass into law without signature.

11 And accordingly, as to both the House and
12 the Senate, this Court finds that the Public
13 Official Standing Doctrine does not apply,
14 especially as it relates to -- and the Court
15 considers this important -- as this is an
16 affirmative defense in this case.

17 As to the Secretary, I will tell you it's
18 a much closer call, because in this case, with
19 the Secretary, the Secretary does not have that
20 power to enact legislation. The Secretary is
21 merely carrying out the legislation, whatever
22 it may be.

23 And accordingly, the Court is going to
24 extend the Public Official Standing Doctrine to
25 the Secretary in this case as it relates to

1 challenging a provision of the Florida
2 Constitution vis-a-vis the U.S. Constitution.
3 And I am going to extend the Public Official
4 Standing Doctrine.

5 However, the Court is going to note that
6 as it relates to the Secretary and both the
7 House and the Senate, the Court ultimately
8 concurrs that as it relates to a motion to
9 strike, the Court finds it to be untimely and
10 will not strike it as to each.

11 Ultimately, whether this Court has to
12 adjudicate this issue or not is yet to be seen.
13 But it is ultimately one that, as noted by both
14 parties I believe in their briefs, each public
15 official, the undersigned judge included, swore
16 an oath to both the U.S. Constitution and the
17 State Constitution. And the Court is mindful
18 of that.

19 So, no, I don't believe a state court can
20 ever disregard the import of the federal
21 constitution in a ruling.

22 So I look forward ultimately to hearing
23 the arguments of the parties regarding this
24 matter.

25 Maybe we'll have some higher courts help

1 illuminate the situation for us; maybe we will,
2 maybe we won't. But ultimately, the Court
3 finds that it isn't an issue that may
4 ultimately -- I have to say it that way -- may
5 ultimately be ripe for this Court to opine
6 upon.

7 But once again, as an affirmative defense,
8 we know ultimately the plaintiff initially, at
9 least before we ever get there, has a burden
10 going forward to make out its claims. And
11 then, to the extent it may or may not, the
12 defendants shall be allowed to put on whatever
13 defenses they have to the allegations in these
14 cases or in this case, in these counts.

15 So with that, I will have -- and I will
16 let the defendants kick which attorney has the
17 lower stack of work to -- I will let you do
18 that off on your own, but I will have the
19 defendants provide a draft order, obviously
20 running it through the plaintiffs for entry.

21 But I appreciate the excellent work of
22 counsel. Again, as we see, now it appears like
23 it will be every 10 years, we see novel issues
24 that come before the Court, excellent work by
25 counsel from all the parties on bringing those

1 to light.

2 And it's the job of this Court to -- what
3 I say at the trial level, it's the job of this
4 Court to try to get it right in a timely
5 fashion, and ultimately it's the job of our
6 appellate courts to get it right, because they
7 got a little bit more time to act. And I
8 respect that separation.

9 And so with that, I know the parties are
10 working really hard moving forward. You guys
11 have worked out a lot amongst yourselves, I
12 appreciate that, I applaud that. And I believe
13 the people of Florida appreciate that.

14 These are important issues as to all the
15 parties, because they go ultimately to the
16 heart of our jurisprudence, and that is how do
17 we choose the people that represent us in the
18 legislative branch, in the executive branch,
19 and, at least as it relates to the state, we in
20 the judicial branch here in the state. And
21 these are important issues, so I appreciate the
22 hard work of all parties.

23 Thank you all.

24 **MR. WERMUTH:** We have one additional issue
25 notice.

1 **THE COURT:** You are right. That's the
2 part I didn't know what you guys wanted to talk
3 about. Please, everybody be seated. There was
4 an issue of case management. I did see that
5 for me it was kind of an afterthought. It
6 might not have been for you guys. Go ahead.

7 **MR. WERMUTH:** Yes, Your Honor. Well,
8 basically the parties have been talking about
9 case management issues leading up to trial and
10 one of those issues is we obviously have trial
11 set to begin on August 21st, and we have been
12 looking at deadlines coming up.

13 The first of those that are going to be
14 coming up is on the 23rd of June, we have
15 pretrial motions due. And the parties were
16 looking at doing a few things here, that is to
17 divide out the response times for the motions
18 that will be filed on the 23rd of June if they
19 are filed.

20 And we were looking -- currently the Court
21 has pretrial statements -- a pretrial
22 conference set on July 14th, and in order to
23 kind of permit the briefing to go in a regular
24 course, we were hoping to have the pretrial
25 moved to the 3rd of August, if the Court is

1 available, and have the motions for summary
2 judgment heard that time, if you are available.
3 If not, we have to revert back to a previous
4 schedule.

5 **THE COURT:** Here's my concern, whenever we
6 get into this scheduling, is the way this
7 normally happens is, oh, the parties agreed for
8 this date for summary judgment, and then they
9 hand me a stack this tall. And they give me
10 about a day and a half to read it, if I am
11 lucky; sometimes it's like three hours.

12 So my concern is when I am going to get it
13 so that I actually have time to read it and
14 when we can get all of these things done in a
15 timely manner?

16 **MR. WERMUTH:** If I may approach, I have an
17 actual schedule.

18 **THE COURT:** Absolutely. Let me see it.
19 Because some of you guys have done this once
20 before, like last cycle. I have not.

21 **MR. WERMUTH:** On the current schedule,
22 Your Honor, the motions will be filed on
23 June 23rd, and our responses would be due on
24 July 7th, and then you would have seven days to
25 look at those in advance of the pretrial

1 conference, which I imagine will be the time we
2 could hear the summary judgment motion.

3 So we are actually looking to make the
4 response deadline for the summary judgment
5 motions on the 14th of July, which would then
6 give you -- I am not sure of the number of
7 days, it would be at least 16 days, actually
8 more, 20 days.

9 **THE COURT:** I understand, but I also have
10 other jury trials.

11 **MR. WERMUTH:** Yes, all of this assumes
12 that you have time on that day or perhaps the
13 following day, which would be August the 4th.
14 I know the parties are available on the 3rd
15 because I confirmed, but if not, then we would
16 have to revert to the 14th.

17 **THE COURT:** This is the proposed
18 modification?

19 **MR. WERMUTH:** It is. The old schedule
20 was, if you look on the docket, it's on
21 September 29, 2020 -- or 2022, I misspoke.
22 Then you will see there are other matters
23 addressed in that.

24 **THE COURT:** When are we going to hear
25 summary judgment?

1 **MR. WERMUTH:** Hearing summary judgment, we
2 would imagine that would occur on the date of
3 pretrial conference.

4 **THE COURT:** Seeing I will likely be out of
5 town that Monday, Tuesday and Wednesday that
6 week, I don't know I necessarily want to hear
7 the summary judgment on Thursday.

8 **MR. WERMUTH:** Are you available Friday,
9 August 4th?

10 **THE COURT:** If the Court could do
11 August 4th, do we want to leave the pretrial
12 for August 3rd? That's fine, I just don't know
13 about hearing a full summary judgment on the
14 3rd. I don't mind leaving the pretrial on the
15 3rd.

16 **MR. WERMUTH:** That would be fine for us.

17 **THE COURT:** Does that work for the
18 defendants?

19 **MR. BARDOS:** It does for the House, Your
20 Honor.

21 **MR. JAZIL:** Does for the Secretary, unless
22 my friend Mr. Wermuth is about to sue me in
23 another case in federal court.

24 **THE COURT:** I do realize there is a
25 somewhat parallel path on this one going on in

1 federal court. I don't mind them, they don't
2 mind me. So until and unless I have to --

3 **MR. JAZIL:** Your Honor, they have adopted
4 your order, it's essentially governing the
5 depositions in the federal case now.

6 **THE COURT:** I thought they found
7 legislative privilege and said goodbye?

8 **MR. JAZIL:** To the legislative parties.

9 **THE COURT:** Yeah, which I understand that,
10 because they are not operating under the
11 provision under the Florida Constitution. I
12 get that. Okay.

13 **MR. NORDBY:** Judge, August 3rd works for
14 the Senate as well.

15 **THE COURT:** For the 3rd, right, but what
16 about the 4th for the summary judgment?

17 **MR. NORDBY:** Yes.

18 **THE COURT:** That works? Why don't we do
19 that? We'll leave the pretrial conference on
20 August 3rd, and we'll do the summary judgment
21 on August 4th.

22 And I will make -- let's put together a
23 full revised scheduling order. One of the
24 things I realized last time is the clerk
25 didn't -- we'll include the clerk in so they

1 get the dates actually put in, they won't
2 docket it as a pretrial date, and I will work
3 on that. But if we do just a fully amended
4 order with the dates on there, we can get that
5 entered, no problem. That should work.

6 **MR. WERMUTH:** The parties were also
7 looking at the issue of what the Court may want
8 in terms of documentation produced as a
9 pretrial statement. And you will see in the
10 proposal that I made, it envisions having
11 deposition designations, having exhibits with
12 objections all ready.

13 **THE COURT:** Again, the more, the merrier;
14 the earlier, the better, because what I don't
15 want to do is at the last second, like we have
16 three days' worth of motion hearings to go
17 through before we actually even start the
18 trial.

19 **MR. WERMUTH:** I guess to understand,
20 perhaps if you could give us guidance on what
21 you would like as far as content for a pretrial
22 statement, beyond what you see envisioned in
23 this schedule.

24 **THE COURT:** Really, I just need to know
25 where the parties agree and where they

1 disagree.

2 I've got a lot of background, you have
3 done enough. And I read Judge Smith's order, I
4 read the DCA's order on top of that, so I get
5 kind of where we are. But I do need to know
6 the major sticking point areas that are going
7 to take time.

8 I don't know that this is the case, but
9 when I am doing a standard auto injury case or
10 something, somebody will say, oh, we got
11 motions in limine. Well, if they are the
12 standard "you can't do this, or you can't do
13 that," then I can rule on it very quickly.

14 And in criminal cases, it's no
15 self-serving hearsay by the defendant. Yeah,
16 those are quick, they get filed.

17 If it's something that's going to take an
18 hour or two hours, I need to know about that
19 kind of thing in advance just for planning
20 purposes so we know; because we have got quite
21 a bit of time scheduled for this trial, but you
22 got quite a bit of information to present, both
23 sides.

24 But that way we are mindful of any live
25 witnesses, we are mindful of those sorts of

1 things. So we are not dealing with motions
2 practice when we've got people sitting out in
3 the hallway ready to testify, or if you guys
4 agree to remote appearances, we don't have
5 people sitting in Zoom waiting rooms waiting to
6 testify.

7 That's always my concern. I get that this
8 is a bench trial. Anybody that's tried a jury
9 trial in front of me knows what upsets me the
10 most is making jurors wait while we do what I
11 call other court business; it's very important,
12 but they don't need to be sitting here in the
13 courthouse, same thing with witnesses.

14 I will take the time with you guys.
15 That's my job, that's what I've sworn an oath
16 to do, is to take the time it takes. But I
17 want to be mindful of there are going to be
18 other people that are getting paid, but taking
19 their time where they could be doing something
20 else instead of being here. So I just need to
21 those sorts of things.

22 **MR. WERMUTH:** In terms of exhibits, would
23 you envision -- is the trial going to be in
24 this room?

25 **THE COURT:** I have no idea. My guess is

1 likely, it will probably be in 3G or 2F, is my
2 guess. This is not a bad size courtroom, but
3 it will probably in one of the very big
4 courtrooms. I imagine we are going to have a
5 lot of people interested in it.

6 It is a very important matter within this
7 state. So I don't want to, like in a courtroom
8 like this, I don't want people to not be able
9 to come in and see, because we are not -- we
10 may have media people that are broadcasting;
11 that's up to the media and we welcome them, but
12 we are not going on Zoom with it.

13 This is a public courtroom in the State of
14 Florida open to any individual that wants to
15 come in and sit and watch. And that's why we
16 are probably going to be in one of the bigger
17 courtrooms, and where the parties are.

18 You guys are making use of your space
19 here, but those actually have -- I think it was
20 2F, I tried a four-defendant attempted murder
21 trial, we had the state and four other parties,
22 and we fit in there, we made that work.

23 I want the public to be able to be here at
24 the trial, and I want the parties to be able to
25 spread out appropriately, as you will have

1 exhibits and binders and all of those others
2 things you need to do to convey a lot of
3 information to the Court. So --

4 **MR. WERMUTH:** I guess with the setup --
5 forgive me if I am asking something that should
6 be referred to a technology person at the
7 courthouse, but I am curious to know, are you
8 going to be interested in seeing hard copy
9 exhibits in binders?

10 **THE COURT:** I do like hard copy. You can
11 have electronic, but I am known to flip
12 through. And I don't ask lots of questions,
13 but when I am a fact finder, sometimes I have
14 questions of witnesses and I may want to write
15 on my own copy; and obviously a copy for the
16 clerk, but I like having my own copy of the
17 exhibits.

18 **MR. WERMUTH:** The clerk will want a copy,
19 hard copy? It could be voluminous exhibits.

20 **THE COURT:** Generally they do because you
21 start getting into digital, they are going to
22 need a paper copy also anyway.

23 They may appreciate one in both forms, I
24 don't know. I will let you talk to the clerks
25 that day.

1 But yes, they will need a hard copy
2 because there is nothing worse than when the
3 computers die, power goes out across town or a
4 server goes down, we have paper copies, we may
5 move forward.

6 **MR. WERMUTH:** I guess, is there somebody
7 we should contact about electronic exhibits in
8 terms of --

9 **THE COURT:** Marci -- court administration,
10 you can talk to court administration people,
11 Marci will have that number, but court admin;
12 because again, we'll be working with them
13 earlier and see if we can nail down a courtroom
14 earlier.

15 I will tell you how it normally works, is
16 civil gets last. We might be able to get a
17 little more sway on this case, but civil gets
18 the last bite at the apple; the felony guys get
19 to go first because there is life, liberty,
20 pursuit of happiness, and speedy trials, a lot
21 of individual liberties are at stake in those.

22 **MR. WERMUTH:** I remember back in 2014 when
23 we had the courtroom down -- ceremonial
24 courtroom down at that end of the building that
25 had a big monitor. I guess we are just

1 confirming that --

2 **THE COURT:** Well, likely that's where we
3 are going to be. We'll put them on notice we
4 need a big courtroom. So whether that's 3G or
5 2F, I am not sure yet. Court admin will be
6 working that issue.

7 And technology-wise, I think they are both
8 set up if we needed Zoom, they are both set up
9 to do it.

10 So again, I don't know what you guys have
11 got and agreed on and what have you. But also,
12 if there is videotaped depositions, they play
13 that way, whatever.

14 **MR. WERMUTH:** I guess that's all. On the
15 scheduling issues, we'll submit an agreed
16 schedule.

17 And the only other thing we have
18 outstanding, there is a current pending motion
19 on the motion to compel regarding the Foltz.

20 **THE COURT:** I tell you on a motion to
21 compel, if somebody wants to call up for
22 hearing, they contact the judicial assistant
23 because sometimes motions to compel resolve
24 issues without being heard, sometimes they
25 don't. If there is agreement by the parties to

1 hold a hearing, so be it, but somebody needs to
2 let me know.

3 **MR. WERMUTH:** It was assumed to be just
4 submitted on the papers under your procedures,
5 but we can --

6 **THE COURT:** Again, as I said, it may be
7 done, but I will tell you generally when there
8 is disagreement, there is filings on both
9 sides, I usually wait for the whole hearing.
10 But if the parties want me to hear it without a
11 hearing, I will read and rule.

12 **MR. WERMUTH:** That's our preference.

13 **MR. JAZIL:** That's fine with the
14 Secretary, Your Honor.

15 **THE COURT:** Okay. I think this is -- if I
16 am not mistaken, is this one the third party
17 to -- is it Mr. Foltz's e-mails and stuff?

18 **MR. WERMUTH:** The reason it's being
19 submitted on the papers is because it involves
20 issues that the Court has already ruled upon.

21 **THE COURT:** I guess I am going to ask
22 this. I thought when we discussed this
23 previously, he was employed by the state to do
24 a job.

25 Why is that not public record? Because he

1 is an employee of the state at the time even as
2 a contractor. I thought the case law was
3 pretty clear that contractors, when doing jobs
4 for the state, that's all public records.

5 Why is that any different? I guess I will
6 ask Mr. Jazil, because frankly, when I read the
7 motion, that was exactly what I was thinking.

8 And I know we are not here to hear it, but
9 that was the question that came up. So I guess
10 you know what's likely to happen if I walk back
11 into my office without having that question
12 answered.

13 **MR. JAZIL:** Well, Your Honor, I will then
14 ask for a hearing at some point.

15 **THE COURT:** Let's get it scheduled. We
16 can do it next week sometime.

17 **MR. JAZIL:** Yes, sir, I will coordinate.

18 **THE COURT:** We'll hear it next week.

19 Thank you. Thank you all.

20 (Proceedings concluded at 4:30 p.m.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, SANDRA L. NARGIZ, RPR, CM, CRR, CRC,
CCR, certify that I was authorized to and did
stenographically report the foregoing proceedings,
and that the transcript is a true and complete
record of my stenographic notes.

DATED on June 13, 2023.

SANDRA L. NARGIZ
RPR, CM, CRR, CRC, CCR-GA
snargiz@comcast.net

<p>MR. BARDOS: [14] 5/18 12/13 20/7 20/25 21/15 22/8 23/5 23/23 25/16 26/11 27/18 30/8 32/12 69/19</p> <p>MR. JAZIL: [11] 5/25 41/22 47/2 48/22 50/17 69/21 70/3 70/8 78/13 79/13 79/17</p> <p>MR. NORDBY: [10] 5/20 33/22 36/4 37/1 38/25 39/20 41/11 41/20 70/13 70/17</p> <p>MR. WERMUTH: [21] 5/13 65/24 66/7 67/16 67/21 68/11 68/19 69/1 69/8 69/16 71/6 71/19 73/22 75/4 75/18 76/6 76/22 77/14 78/3 78/12 78/18</p> <p>MS. JASRASARIA: [10] 6/6 9/22 10/25 12/10 50/18 53/1 54/2 55/19 57/11 58/13</p> <p>THE COURT: [62] 5/2 5/17 6/4 9/18 10/19 12/6 12/11 19/25 20/14 21/6 21/21 23/1 23/20 25/10 26/1 27/9 30/3 32/7 33/21 35/12 36/10 38/14 39/15 41/2 41/19 41/21 46/6 48/10 50/16 52/11 53/23 54/20 56/22 57/21 61/3 66/1 67/5 67/18 68/9 68/17 68/24 69/4 69/10 69/17 69/24 70/6 70/9 70/15 70/18 71/13 71/24 73/25 75/10 75/20 76/9 77/2 77/20 78/6 78/15 78/21 79/15 79/18</p>	<p>3</p> <p>30 [1] 51/13</p> <p>301 [1] 3/5</p> <p>308 [1] 24/7</p> <p>32301 [3] 2/15 2/22 3/5</p> <p>32802 [1] 2/10</p> <p>3:00 [2] 1/16 5/1</p> <p>3D [1] 1/17</p> <p>3G [2] 74/1 77/4</p> <p>3rd [8] 66/25 68/14 69/12 69/14 69/15 70/13 70/15 70/20</p>	<p>administration [2] 76/9 76/10</p> <p>adopt [1] 13/11</p> <p>adopted [1] 70/3</p> <p>adopting [1] 20/9</p> <p>advance [2] 67/25 72/19</p> <p>advisory [1] 45/17</p> <p>affect [3] 7/18 7/21 60/7</p> <p>affects [1] 58/14</p> <p>affirmative [34] 1/13 5/7 6/10 7/3 8/2 10/17 21/16 21/21 22/10 23/16 23/19 24/25 29/9 34/19 36/6 41/3 41/12 41/13 41/17 43/2 49/1 49/6 49/8 49/13 51/5 52/24 53/17 53/24 53/25 56/8 56/18 61/8 62/16 64/7</p> <p>affirmatively [2] 34/25 36/9</p> <p>aforesaid [1] 1/20</p> <p>afresh [1] 61/10</p> <p>after [1] 51/20</p> <p>afternoon [2] 6/6 12/14</p> <p>afterthought [1] 66/5</p> <p>again [18] 16/14 19/21 22/8 28/8 41/2 54/15 56/5 58/17 58/18 59/14 60/5 60/17 64/7 64/22 71/13 76/12 77/10 78/6</p> <p>against [7] 13/1 13/2 33/16 40/4 40/6 48/19 59/17</p> <p>agency [3] 18/17 34/25 35/5</p> <p>ago [2] 34/24 44/20</p> <p>agree [6] 25/12 33/23 34/1 36/11 71/25 73/4</p> <p>agreed [3] 67/7 77/11 77/15</p> <p>agreement [1] 77/25</p> <p>ahead [2] 5/11 66/6</p> <p>akin [1] 45/25</p> <p>al [2] 1/6 1/10</p> <p>Alabama [5] 38/15 39/25 49/16 49/24 50/3</p> <p>all [35] 2/1 5/17 6/4 7/7 10/6 10/17 12/6 12/6 12/7 13/14 17/11 19/9 19/23 20/2 26/8 33/16 33/21 34/7 39/6 40/11 40/13 41/19 46/23 50/13 64/25 65/14 65/22 65/23 67/14 68/11 71/12 75/1 77/14 79/4 79/19</p> <p>allegations [3] 29/25 30/1 64/13</p> <p>allege [1] 54/9</p> <p>alleged [1] 37/6</p> <p>Allen [3] 38/15 38/18 49/16</p> <p>allow [2] 12/8 62/10</p> <p>allowed [2] 9/3 64/12</p> <p>allowing [1] 13/25</p> <p>allows [1] 51/9</p> <p>alluded [3] 16/7 18/13 18/20</p> <p>alluding [1] 20/8</p> <p>alone [1] 6/24</p> <p>along [1] 19/17</p> <p>already [4] 35/14 35/15 56/15 78/20</p> <p>also [14] 3/8 5/22 17/17 28/4 34/9 44/16 47/24 51/17 56/11 59/10 68/9 71/6 75/22 77/11</p> <p>alternative [1] 41/4</p> <p>always [3] 25/12 50/8 73/7</p> <p>am [31] 5/9 5/14 6/7 12/11 15/19 20/8 23/11 36/11 37/10 39/15 39/17 45/23 48/5 50/1 50/2 52/17 54/22 55/14 58/6 63/3 67/10 67/12 68/6 72/9 75/5 75/7 75/11 75/13 77/5 78/16 78/21</p> <p>amended [1] 71/3</p> <p>amendment [11] 7/5 7/6 7/20 8/3 38/24</p>
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EXHIBIT B

From: [McVay, Brad R.](#)
To: [Adkins, Janet](#); [Andersen, Mark](#); [Anderson, Chris](#); [Anderson, Shirley](#); [Arnold, Melissa](#); [Arrington, Mary Jane](#); [Baird, Maureen "Mo"](#); [Ballard, Seth](#); [Barton, Kim](#); [Beasley, Bobby](#); [Bennett, Michael](#); [Brown, Tomi](#); [Cannon, Starlet](#); [Chambless, Chris H.](#); [Chason, Sharon](#); [Convers, Grant](#); [Corley, Brian](#); [Cowles, Bill](#); [Davis, Vicki](#); [Dehn, Dan](#); [Doyle, Tommy](#); [Driggers, Heath](#); [Dunaway, Carol](#); [Earley, Mark](#); [Edwards, Jennifer J.](#); [Edwards, Lori](#); [Farnam, Aletris](#); [Griffin, Joyce](#); [Hale, Bryce](#); [Hanlon, John](#); [Hart, Travis](#); [Hays, Alan](#); [Hogan, Mike](#); [Hoots, Brenda](#); [Hutto, Laura](#); [Jones, Tammy](#); [Keen, Bill](#); [Kinsey, Jennifer](#); [Knight, Shirley](#); [Latimer, Craig](#); [Lenhart, Kaiti](#); [Lewis, Lisa](#); [Link, Wendy](#); [Lux, Paul](#); [Marconnet, Amber](#); [Marcus, Julie](#); [Matthews, Maria I.](#); [McNeill, Justin "Tyler"](#); [Meadows, Therisa](#); [Milton, Christopher](#); [Morgan, Joe](#); [Negley, Mark](#); [Oakes, Vicky](#); [Osborne, Deborah](#); [Overturf, Charles](#); [Riley, Heather](#); [Rudd, Carol F.](#); [Sanchez, Connie](#); [Scott, Joe](#); [Scott, Lori](#); [Seyfang, Amanda](#); [Smith, Diane](#); [Southerland, Dana](#); [Stafford, David H.](#); [Stamoulis, Paul](#); [Swan, Leslie](#); [Trepiedi, Vincenza](#); [Turner, Ron](#); [Villane, Tappie Ann](#); [Walker, Gertrude](#); [White, Christina](#); [Wilcox, Wesley](#); [Adkins, Janet](#); [AdminManateeCounty](#); [Anderson, Shirley](#); [Armstrong, Linda](#); [Arnold, Melissa](#); [Baird, Maureen "Mo"](#); [Ballard, Seth](#); [Barksdale, Matt](#); [Barton, Kim](#); [BayCountySOE](#); [Bennett, Michael](#); [Bobanic, Tim](#); [Bridges, Christina](#); [Brittain, Paula](#); [Brown, Tomi](#); [Burger, Joanne](#); [Cannon, Starlet](#); [Carter, Leslie](#); [Chason, Sharon](#); [ClayCountySOE](#); [CollierCountySOE](#); [Convers, Grant](#); [Corley, Brian](#); [Dehn, Dan](#); [Delesdernier, Carl](#); [Dickerson, Katrina](#); [Doyle, Tommy](#); [Driggers, Heath](#); [Dunaway, Carol](#); [DuvalCountySOE](#); [Earley, Mark](#); [Farnam, Aletris](#); [Figueroa, Annette](#); [Fryman, Melinda](#); [GadsdenCountySOE](#); [Gibson, Stephanie](#); [Greene, Celina](#); [Hankemeyer, Kim](#); [Hart, Travis](#); [Hays, Alan](#); [HighlandsCountySOE](#); [HillsboroughCountySOE](#); [Hogan, Mike](#); [Hoots, Brenda](#); [Hutto, Laura](#); [Jackson, Brayden](#); [JacksonCountySOE](#); [James, Thomas](#); [Jones, Tammy](#); [Keen, Bill](#); [Kinsey, Jennifer](#); [Lenhart, Kaiti](#); [LeSuer, Timothy](#); [Lewis, Lisa](#); [LibertyCountySOE](#); [Long, Sarah](#); [Lux, Paul](#); [Mahan, Kemie](#); [Marcus, Julie](#); [MarionCountySOE](#); [Marisa Crispell](#); [MartinCountySOE](#); [Mavo, Wendy](#); [McGirr, Louise](#); [McNeill, Justin "Tyler"](#); [Meadows, Therisa](#); [Merrick, Jason](#); [MiamiDadeCountySOE](#); [Miller, Scott](#); [Milton, Christopher](#); [Molina, Imaltzin](#); [MonroeCountySOE](#); [Moore, Christopher](#); [Moreno, Luis](#); [Morgan, Joe](#); [Morley, Tiffany M.](#); [Mosca, Alex](#); [NassauCountySOE](#); [Negley, Mark](#); [Norris, Tina](#); [Nunez, Jorge](#); [Oneal, Casandra](#); [OrangeCountySOE](#); [Osborne, Deborah](#); [OsceolaCountySOE](#); [Overturf, Charles](#); [PalmBeachCountySOE](#); [Pearson, Maria](#); [PinellasCountySOE](#); [PolkCountyElections](#); [Ponce, Jose](#); [Reeves, Barbara](#); [Riley, Heather](#); [Rodriguez, Robert](#); [Rorapough, Robin](#); [Rudd, Carol F.](#); [Sacerio, Ed](#); [Sanchez, Connie](#); [SarasotaCountySOE](#); [Savarv, Evelyn](#); [Sawczyn, Jamie](#); [Scott, Joe](#); [Scott, Lori](#); [SeminoleCountySOE](#); [Seyfang, Amanda](#); [Smith, Diane](#); [Southerland, Dana](#); [Stafford, Katelvn](#); [Stamoulis, Paul](#); [Steven, Scarselli](#); [StJohnsCountySOE](#); [Swan, Leslie](#); [Teaman, Jason](#); [Thompson, Holly](#); [Trepiedi, Vincenza](#); [Trutie, Suzy](#); [Tyson, Chase](#); [Villane, Tappie Ann](#); [WakullaCountySOE](#); [Walker, Gertrude](#); [Wilkinson, Lori](#); [Earley, Mark](#); [Overturf, Charles](#); [JeffersonCountySOE](#)
Cc: [Davis, Ashlev E.](#); [Matthews, Maria I.](#); [Marconnet, Amber](#); [O'Brien, Colleen E.](#); [Labasky, Ron - FSASE Legal Counsel](#)
Subject: RE: Please read -- 3rd Update on state redistricting case (U.S. congressional map)
Attachments: 2022.05.12 - Order Granting Motion for Temporary Injunction.pdf
FL PlanA.csv

Dear Supervisors,

Yesterday evening, in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)), the trial court issued an order vacating the automatic stay referenced in my previous e-mail (see below).

The Secretary intends to soon file an Emergency Motion at the First District Court of Appeal asking the appellate court to reinstate the stay. We expect that the First District Court of Appeal will take up the issue quickly and we will continue to promptly update you with any rulings or developments.

In the meantime, the trial court's May 12, 2022, Order Granting Motion for Temporary Injunction is now in effect. For your convenience, I have included as an attachment to this e-mail a copy of the trial court's order. Additionally, and pursuant to the trial court's order, I have included as an attachment to this e-mail the final corrected version of an excel file necessary for you to replicate Plaintiffs' "Proposed Map A" which is currently the operative map for the upcoming 2022 elections. Please note that neither the Department of State nor the Florida Legislature created this file; this is the product of Plaintiffs' expert alone.

As you proceed with implementation, please do make sure to remember that if the First District Court of Appeal grants the Secretary's emergency motion to reinstate the stay, the state's legislatively enacted map (SB 2-C) would once again become the operative map for the upcoming

2022 elections. On that note, and consistent with the trial court's oral pronouncement during the hearing yesterday, to the extent that it is possible, we ask that you proceed on two fronts and plan to implement both maps. At a minimum, as you undertake implementation on "Proposed Map A," you should make sure to preserve any and all work that has already been done towards implementing SB 2-C.

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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

In addition, Florida has a very broad public records law. Written communications to or from state officials regarding state business constitute public records. Public records are available to the public and media upon request, unless the information is subject to a specific statutory exemption. Therefore, any information that you send to this address, including your contact information, may be subject to public disclosure.

From: McVay, Brad R.

Sent: Thursday, May 12, 2022 8:23 PM

To: Adkins, Janet <jadkins@votenassaufl.gov>; Andersen, Mark <baysuper@bayvotes.org>; Anderson, Chris <anderson@voteseminole.org>; Anderson, Shirley <Shirley.Anderson@HernandoVotes.gov>; Arnold, Melissa <melissa@voteokeechobee.gov>; Arrington, Mary Jane <maryjane@voteosceola.com>; Baird, Maureen "Mo" <MBaird@votecitrus.gov>; Ballard, Seth <sballard@votecitrus.gov>; Barton, Kim <kbarton@alachuacounty.us>; Beasley, Bobby <bbeasley@co.walton.fl.us>; Bennett, Michael <mike@votemanatee.com>; Brown, Tomi <vote@votecolumbiafl.gov>; Cannon, Starlet <elections@dixievotes.com>; Chambless, Chris H. <cchambless@clayelections.com>; Chason, Sharon <schason@votecalhoun.com>; Conyers, Grant <Grant@libertyelections.com>; Corley, Brian <bcorley@pascovotes.gov>; Cowles, Bill <bill@ocfelections.gov>; Davis, Vicki <vdavis@martinvotes.com>; Dehn, Dan <dan@lakevotes.gov>; Doyle, Tommy <TDoyle@LeeElections.com>; Driggers, Heath <hdriggers@votemadison.com>; Dunaway, Carol <Carol@votejacksonfl.gov>; Earley, Mark <Mark.Earley@leonvotes.gov>; Edwards, Jennifer J. <Jennifer.Edwards@CollierVotes.gov>; Edwards, Lori <loriedwards@polkelections.com>; Farnam, Aletris <vote@myglades.com>; Griffin, Joyce <rjg@keys-elections.org>; Hale, Bryce <bhale@votecitrus.gov>; Hanlon, John <gulfsoe@votegulf.gov>; Hart, Travis <travis@lafayettevotes.com>; Hays, Alan <alan@lakevotes.com>; Hogan, Mike <mhogan@coj.net>; Hoots, Brenda <supervisor@hendryelections.org>; Hutto, Laura <lhutto@hamiltonvotesfl.gov>; Jones, Tammy <tammy@votelevy.com>; Keen, Bill <Bill.Keen@sumterelections.org>; Kinsey, Jennifer <jkinsey@suwanneevotes.com>; Knight, Shirley <shirleyknight@gadsdensoefl.gov>; Latimer, Craig

<clatimer@votehillsborough.gov>; Lenhart, Kaiti <klenhart@flaglerelections.com>; Lewis, Lisa <llewis@volusia.org>; Link, Wendy <Wendylink@votepalmbeach.gov>; Lux, Paul <plux@co.okaloosa.fl.us>; Marconnet, Amber <Amber.Marconnet@DOS.MyFlorida.com>; Marcus, Julie <jmarcus@votepinellas.gov>; Matthews, Maria I. <Maria.Matthews@DOS.MyFlorida.com>; McNeill, Justin "Tyler" <soe@jeffersoncountyfl.gov>; Meadows, Therisa <therisa@holmeselectionsfl.gov>; Milton, Christopher <chris.milton@bakercountyfl.org>; Morgan, Joe <jmorgan@wakullaelectionfl.gov>; Negley, Mark <mnegley@votedesoto.com>; Oakes, Vicky <voakes@sjcvotes.us>; Osborne, Deborah <debbie.osborne@unionflvotes.com>; Overturf, Charles <Charles.Overturf@putnam-fl.com>; Riley, Heather <heather@votefranklinfl.gov>; Rudd, Carol F. <crudd@wcsoe.gov>; Sanchez, Connie <elections@gilchrist.fl.us>; Scott, Joe <jscott@browardvotes.gov>; Scott, Lori <lscott@votebrevard.com>; Seyfang, Amanda <amanda@votebradfordfl.gov>; Smith, Diane <diane@hardeecountyelections.com>; Southerland, Dana <taylor-elections@gtcom.net>; Stafford, David H. <dstafford@escambiavotes.com>; Stamoulis, Paul <paulstamoulis@soecharlottecountyfl.gov>; Swan, Leslie <lswan@voteindianriver.gov>; Treppiedi, Vincenza <vinnie@soecharlottecountyfl.gov>; Turner, Ron <rturner@sarasotavotes.com>; Villane, Tappie Ann <villane@santarosa.fl.gov>; Walker, Gertrude <elections@slcelections.com>; White, Christina <Christina.White@miamidade.gov>; Wilcox, Wesley <wwilcox@votemarion.gov>; Adkins, Janet <jadkins@votenassaufl.gov>; AdminManateeCounty <Admin@votemanatee.com>; Anderson, Shirley <Shirley.Anderson@HernandoVotes.gov>; Armstrong, Linda <linda@soecharlottecountyfl.gov>; Arnold, Melissa <melissa@voteokeechobee.gov>; Baird, Maureen "Mo" <MBaird@votecitrus.gov>; Ballard, Seth <sb Ballard@votecitrus.gov>; Barksdale, Matt <matt@votebradfordfl.gov>; Barton, Kim <kbarton@alachuacounty.us>; BayCountySOE <fvrsnotices@bayvotes.org>; Bennett, Michael <mike@votemanatee.com>; Bobanic, Tim <tbobanic@votebrevard.gov>; Bridges, Christina <Christina.Bridges@putnam-fl.com>; Brittain, Paula <Paula.Brittain@bakercountyfl.org>; Brown, Tomi <vote@votecolumbiafl.gov>; Burger, Joanne <Joanne.Burger@bakercountyfl.org>; Cannon, Starlet <elections@dixievotes.com>; Carter, Leslie <lcarter@hamiltonvotesfl.gov>; Chason, Sharon <schason@votecalhoun.com>; ClayCountySOE <Notices@ClayElections.com>; CollierCountySOE <Supervisor.Elections@CollierVotes.gov>; Conyers, Grant <Grant@libertyelections.com>; Corley, Brian <bcorley@pascovotes.gov>; Dehn, Dan <dan@lakevotes.gov>; Delesdernier, Carl <cdelesdernier@alachuacounty.us>; Dickerson, Katrina <kdickerson@wakullaelectionfl.gov>; Doyle, Tommy <TDoyle@LeeElections.com>; Driggers, Heath <hdriggers@votemadison.com>; Dunaway, Carol <Carol@votejacksonfl.gov>; DuvalCountySOE <duvalsoecontacts@coj.net>; Earley, Mark <Mark.Earley@leonvotes.gov>; Farnam, Alettris <vote@myglades.com>; Figueroa, Annette <annettefigueroa@polkelections.com>; Fryman, Melinda <cvatf@votecolumbiafl.gov>; GadsdenCountySOE <info@gadsdensoefl.gov>; Gibson, Stephanie <Stephanie@voteokeechobee.gov>; Greene, Celina <cgreene@wakullaelectionfl.gov>; Hankemeyer, Kim <KHankemeyer@VoteMarion.com>; Hart, Travis <travis@lafayettevotes.com>; Hays, Alan <alan@lakevotes.com>; HighlandsCountySOE <highlandssoe@votehighlands.com>; HillsboroughCountySOE <HillsboroughSOEContacts@votehillsborough.gov>; Hogan, Mike <mhogan@coj.net>; Hoots, Brenda <supervisor@hendryelections.org>; Hutto, Laura <lhutto@hamiltonvotesfl.gov>; Jackson, Brayden <brayden.jackson@bakercountyfl.org>; JacksonCountySOE <email@votejacksonfl.gov>; James, Thomas <Tj@leonvotes.gov>; Jones, Tammy <tammy@votelevy.com>; Keen, Bill <Bill.Keen@sumterelections.org>; Kinsey, Jennifer <jkinsey@suwanneevotes.com>; Lenhart, Kaiti <klenhart@flaglerelections.com>; LeSuer, Timothy <tlesuer@myokaloosa.com>; Lewis, Lisa <llewis@volusia.org>; LibertyCountySOE

<vote@libertyelections.com>; Long, Sarah <sarah@votebradfordfl.gov>; Lux, Paul <plux@co.okaloosa.fl.us>; Mahan, Kemie <KMahan@clayelections.com>; Marcus, Julie <jmarcus@votepinellas.gov>; MarionCountySOE <MarionDOE@VoteMarion.com>; Marisa Crispell <Marisa.Crispell@ocfelections.gov>; MartinCountySOE <elections@martinvotes.com>; Mayo, Wendy <wmayo@wcsoe.gov>; McGirr, Louise <lmcgirr@co.okaloosa.fl.us>; McNeill, Justin "Tyler" <soe@jeffersoncountyfl.gov>; Meadows, Therisa <therisa@holmeselectionsfl.gov>; Merrick, Jason <jmerrick@wakullaelectionfl.gov>; MiamiDadeCountySOE <ELECT-MDSOEC@miamidade.gov>; Miller, Scott <smiller@votenassaufl.gov>; Milton, Christopher <chris.milton@bakercountyfl.org>; Molina, Imaltzin <Imaltzin.Molina@miamidade.gov>; MonroeCountySOE <info@keys-elections.org>; Moore, Christopher <MooreChr@leonvotes.gov>; Moreno, Luis <luis@votepalmbeach.gov>; Morgan, Joe <jmorgan@wakullaelectionfl.gov>; Morley, Tiffany M. <Tiffany.Morley@dos.myflorida.com>; Mosca, Alex <MoscaA@leonvotes.gov>; NassauCountySOE <nassaumgmt@votenassaufl.gov>; Negley, Mark <mnegley@votedesoto.com>; Norris, Tina <tnorris@pascovotes.gov>; Nunez, Jorge <jorge@votepalmbeach.gov>; Oneal, Casondra <CasondraOneal@PolkElections.com>; OrangeCountySOE <orasoecontact@ocfelections.gov>; Osborne, Deborah <debbie.osborne@unionflvotes.com>; OsceolaCountySOE <osceolasoemgmt@voteosceola.com>; Overturf, Charles <Charles.Overtuff@putnam-fl.com>; PalmBeachCountySOE <mailbox@votepalmbeach.gov>; Pearson, Maria <mpearson@votenassaufl.gov>; PinellasCountySOE <pinellascountyemail@votepinellas.gov>; PolkCountyElections <polksoe@polkelections.com>; Ponce, Jose <jose.ponce@miamidade.gov>; Reeves, Barbara <barbara@holmeselectionsfl.gov>; Riley, Heather <heather@votefranklinfl.gov>; Rodriguez, Robert <rar@miamidade.gov>; Rorapough, Robin <Robin@VotePalmBeach.gov>; Rudd, Carol F. <crudd@wcsoe.gov>; Sacerio, Ed <ed@votepalmbeach.gov>; Sanchez, Connie <elections@gilchrist.fl.us>; SarasotaCountySOE <SarasotaDOEContacts@sarasotavotes.com>; Savary, Evelyn <esavary@wakullaelectionfl.gov>; Sawczyn, Jamie <JSawczyn@coj.net>; Scott, Joe <jscott@browardvotes.gov>; Scott, Lori <lscott@votebrevard.com>; SeminoleCountySOE <SEMISOE@VoteSeminole.org>; Seyfang, Amanda <amanda@votebradfordfl.gov>; Smith, Diane <diane@hardeecountyelections.com>; Southerland, Dana <taylor-elections@gtcom.net>; Stafford, Katelyn <Katelyn@Libertyelections.com>; Stamoulis, Paul <paulstamoulis@soecharlottecountyfl.gov>; Steven, Scarselli <sscarselli@flaglerelections.com>; StJohnsCountySOE <SOE@votesjc.com>; Swan, Leslie <lswan@voteindianriver.gov>; Teaman, Jason <teaman@voteseminole.org>; Thompson, Holly <ThompsonH@leonvotes.gov>; Treppiedi, Vincenza <vinnie@soecharlottecountyfl.gov>; Trutie, Suzy <suzy.trutie@miamidade.gov>; Tyson, Chase <chase.tyson@bakercountyfl.org>; Villane, Tappie Ann <villane@santarosa.fl.gov>; WakullaCountySOE <wakullacountysoe@mywakulla.com>; Walker, Gertrude <elections@slcelections.com>; Wilkinson, Lori <lwilkinson@votenassaufl.gov>; Earley, Mark <Mark.Earley@leonvotes.gov>; Overturf, Charles <Charles.Overtuff@putnam-fl.com>; JeffersonCountySOE <soe@jeffersoncountyfl.gov>

Cc: Davis, Ashley E. <Ashley.Davis@dos.myflorida.com>; Matthews, Maria I. <Maria.Matthews@DOS.MyFlorida.com>; Marconnet, Amber <Amber.Marconnet@DOS.MyFlorida.com>; O'Brien, Colleen E. <Colleen.O'Brien@dos.myflorida.com>

Subject: RE: Please read -- 2nd Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

As forecasted in the below communication from this morning, the trial court in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)) entered this afternoon a written Order Granting Motion for Temporary Injunction. The Secretary's Notice of Appeal immediately "stayed" the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), causing SB 2-C (the state's current, enacted congressional map) to remain in effect for the upcoming 2022 elections absent further direction from the courts. Therefore, you should continue implementing SB 2-C, the map the Florida Legislature enacted and the Governor approved on April 22, 2022.

The Secretary's Notice of Appeal is attached herein and includes the Order Granting Motion for Temporary Injunction.

We will continue to promptly update you with any additional developments.

Brad McVay
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Phone: 850-245-6511

From: McVay, Brad R.

Sent: Thursday, May 12, 2022 10:46 AM

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Subject: Please read -- Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

Yesterday afternoon, in the state court redistricting case (*Black Voters Matter et al v. Lee, et al* /2022CA000666, 2nd Jud. Cir.), the trial court held a hearing on Plaintiffs’ motion for a temporary injunction and *orally* ruled that they have a likelihood of success on the merits of their claim that SB 2-C (the state’s current, enacted congressional map) violates the non-diminishment standard of Article III, Section 20 of the Florida Constitution in portions of North Florida. The trial court indicated that it will soon issue an order in *writing* temporarily enjoining SB 2-C and ordering a different map be put in place – i.e., Plaintiffs’ “Proposed Map A.” The Secretary intends to appeal the decision to the First District Court of Appeal immediately, but cannot do so until the written order is issued.

The Secretary’s appeal will immediately “stay” the trial court’s ruling pursuant to the Florida Rules of Appellate Procedure, causing SB 2-C to remain in effect for the upcoming 2022 elections absent further direction from the courts.

We will continue to provide updates and guidance as information becomes available.

Brad McVay

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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

In addition, Florida has a very broad public records law. Written communications to or from state officials regarding state business constitute public records. Public records are available to the public and media upon request, unless the information is subject to a specific statutory exemption. Therefore, any information that you send to this address, including your contact information, may be subject to public disclosure.