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

CASE NO. 1D10-5094

HONORABLE JEFF ATWATER, et al.,

Appellants,

v.

CITY OF WESTON, FLORIDA, et al.,

Appellees.

INITIAL BRIEF OF APPELLANTS

On Appeal From a Decision of the Circuit Court of the
Second Judicial Circuit, In and For Leon County, Florida

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STATEMENT OF THE CASE AND FACTS

This is an appeal of a decision holding that chapter 2009-96, Laws of Florida, violates article VII, section 18(a) of the Florida Constitution. Article VII, section 18 is known as the unfunded mandate provision.

A. Course of Proceedings in the Trial Court.

The plaintiffs were 17 Florida municipalities and four Florida counties who sought declaratory and injunctive relief under chapter 86, Florida Statutes. The defendants, sued in their official capacities, were Governor Charlie Crist, President of the Senate Jeff Atwater, Speaker of the House Larry Cretul,[1] and Secretary of State Kurt S. Browning. R1: 9.

Plaintiffs sought a declaration that Senate Bill 360, entitled "An Act Relating to Growth Management," codified as chapter 2009-96, Laws of Florida, violated **i)** article III, section 6 of the Florida Constitution, known as the single subject provision, because it allegedly addressed multiple subjects unrelated to its stated subject of "growth management"; and **ii)** article VII, section 18(a) of the Florida Constitution, because it allegedly imposed an unfunded mandate on counties and municipalities. R1: 9-27. The plaintiffs asked that the court enjoin

[1] With the installation of the new legislature for 2011, Mike Haridopolos is substituted for Jeff Atwater as President of the Senate and Dean Cannon is substituted for Larry Cretul as Speaker of the House.

the enforcement of SB 360, R1: 19 & 27, and direct the Secretary of State "to strike SB 360 from the Laws of Florida." R1: 147, 198.

Defendants filed a motion to dismiss the complaint contending that they were not proper parties to this action. R1: 53-60. The Governor, the President of the Senate, and the Speaker of the House also argued that they were immune from suit. Id. The trial court denied this motion, R1: 131, and defendants then answered the complaint. R1: 133 & 141. The answer of the Secretary of State did not take a position on the merits of the complaint. R1: 137.

The plaintiffs thereafter filed a motion for summary judgment arguing that chapter 2009-96 violated the single subject and unfunded mandate provisions. R1: 147-198. The defendants filed a response, R4:653, and the plaintiffs a reply. R4: 751.

B. Disposition in the Trial Court.

A hearing on the motion for summary judgment was set for June 3, 2010. On May 17, 2010, well before the hearing, the defendants filed a suggestion of mootness contending that the legislature's annual reenactment of the Florida Statutes, cured any single subject violation and mooted that claim. R5: 813.

The trial court heard oral argument on all issues. Its corrected final summary judgment ruled that the single subject challenge was moot. R5: 903,

905-907. Focusing on the unfunded mandate claim, the court divided plaintiffs' claims of the compelled expenditure of funds into the following categories, finding that only the first presented an issue of undisputed fact:

a. Mandated adoption of comprehensive plan amendments and transportation strategies "to support and fund mobility."

b. Litigation expenses and increased cost of road improvements as a result of the elimination of state mandated transportation concurrency.

c. Litigation expenses and administrative costs associated with the two-year permit extension provisions of the law.

d. Expenses in connection with mandated formal mediation to resolve intergovernmental coordination disputes.

e. The elimination of the Developments of Regional Impact (DRI) process will result in the cost of mitigating such impacts onto local governments.

f. The requirement of giving 90-day notice of increase in impact fees will result in increased cost to local governments for annual publication and notice of notices, drafting of resolutions and hearings

g. The prohibition against local government adopting security camera regulations to enhance local police services that require local businesses to expend money, which result in the transfer of costs from business owners to local taxpayers will also cause the local governments to expend funds.

R5: 908-910. The trial court noted defendants' argument that items (b) through (g) were not "mandates" within the meaning of article VII, section 18, and the

plaintiffs' concession that those costs and expenses were not quantifiable at the time of the hearing. Id. at 909 & 910.

The trial court therefore focused on item (a), the costs local governments would incur by having to amend their comprehensive plans and develop transportation strategies as required by section 4 of chapter 2009-96. Considering plaintiffs' affidavits, the court concluded that it would cost each local government at least $15,000 to process the mandated comprehensive plan amendments, and that this amount was not "fiscally insignificant." Id. at 912. The court rejected the defendants' argument that the act provided potential savings which would offset the costs imposed, observing that article VII, section 18 did not authorize such an "exemption." Id. at 913-914. Although the legislature did find that SB 360 fulfilled an important state interest, SB 360 did not meet any of the other requirements of article VII, section 18(a). The court therefore entered summary judgment, declared the entire act "unconstitutional" as a violation of article VII, section 18(a), and directed the Secretary of State "to expunge said law from the official records of this State." Id. at 914.

During the summary judgment hearing the court inquired whether it could sever any provision of the act that imposed an unfunded mandate. T 73.[2] In

[2] The transcript of the hearing was not included in the record prepared by the clerk

response, counsel for defendants argued that the act had to be considered as a whole—that is, the unfunded mandate provision *together with any cost savings provisions*—and therefore severance would be inconsistent with that position. T 74. Plaintiffs contended the court would have to invalidate the entire act. T 75. As noted, the final judgment rejected the contention that SB 360 had to be considered as a whole. Having reached that conclusion, however, the court did not then consider whether severance was appropriate or possible.

Defendants therefore filed a motion for rehearing arguing that since the court had not considered "the chapter law as a whole," the appropriate remedy should be directed at that section of the act found to violate the constitution. "The proper remedy is for the court to declare that no local government is bound by the requirements of section 4." R5: 896. Plaintiffs responded in opposition, R5: 915, and the court denied the motion for rehearing on September 21, 2010. R5: 924.

Defendants Atwater and Cretul timely filed a notice of appeal on September 24, 2010. R5: 926. Plaintiffs filed a notice of cross appeal on October 15, 2010. R5: 92. The Governor and the Secretary of State did not appeal.

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of the lower court. The transcript has been filed and accepted by this Court as a

STANDARD OF REVIEW

A ruling on a motion for summary judgment is subject to de novo review. The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006); accord. Acosta, Inc. v. Nat'l Union Fire Ins. Co., 39 So. 3d 565, 573 (Fla. 1st DCA 2010). The appellate court must view every possible inference in favor of a party against whom summary judgment was granted. Smith v. Perry, 635 So. 2d 1019, 1020 (Fla. 1st DCA 1994). If the record is silent on a determinative issue of fact, the summary judgment must be reversed. Horizon South Master Home Owners Ass'n v. West, 591 So. 2d 665, 668 (Fla. 1st DCA 1991).

SUMMARY OF THE ARGUMENT

Plaintiffs named the President of the Senate, the Speaker of the House, the Governor and the Secretary of State as defendants in this action. None of these officials is a proper party to this action because none of them have any relationship to the enforcement of the law. Enforcement of SB 360 is the responsibility of the Department of Community Affairs, therefore that agency is the only proper party.

The Legislative defendants and the Governor are absolutely immune from this suit. All actions taken by these officials were within the sphere of their

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supplement to the record on appeal. See Order dated December 9, 2010.

legislative activities – the President and Speaker in passing the law and the Governor in signing it.

One exception to the requirements for passage of an unfunded mandate is where the economic impact of the mandate is "insignificant." Article VII, section 18(d), Fla. Const. The Legislature has consistently interpreted "insignificant" as costs which would not exceed "the average statewide population for the applicable fiscal year times ten cents" averaged over a two-year period. Plaintiffs' evidence showed costs to *one* municipality. The court then, without justification in the record, multiplied these costs by 246 (the number of local governments affected) and determined that the statewide cost would exceed the legislative threshold. Plaintiffs' failure to prove the *statewide* costs is fatal to the summary judgment.

The trial court erred by not considering severance of the section of the law it found to be an unfunded mandate. By refusing to treat the law as a whole for purposes of offsetting savings against the costs mandated, the court erred by failing to treat each section separately for purposes of the remedy. Only the offending section should have been declared in violation of Art. VII, section 18(d).

Finally, the court erred by applying the wrong remedy. Rather than declaring the law unconstitutional and unenforceable, the constitutional language

dictates that the proper remedy for an unfunded mandate is a declaration that local governments need not comply with the new requirement. The constitution states: "No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds." Art. VII, § 18(a), Fla. Const. (emphasis added) The contrast between this "shall be bound" language and the language in article VII, section 18, subsections (b) and (c) which both state: that absent a supermajority vote, the legislature may not enact, amend or repeal any general law "having a specified effect," requires this result.

ARGUMENT

I. DEFENDANTS ARE NOT PROPER PARTIES AND HAVE NOT CONSENTED TO THIS ACTION.

A. The proper party to a case challenging the constitutionality of a law is the entity charged with the law's enforcement.

The trial court initially erred in failing to dismiss this suit because the President of the Senate, Speaker of the House, Governor, and Secretary of State are not proper defendants to this action, and the court therefore lacked jurisdiction under chapter 86, Florida Statutes. Plaintiffs sought a declaratory judgment that SB 360 is unconstitutional. Section 86.091, Florida Statutes, sets forth that when declaratory relief is sought, parties must have an "interest [that] would be affected by the declaration." To establish jurisdiction, plaintiffs must show that a case or controversy, namely, an "actual, present, adverse, and antagonistic interest," exists. May v. Holley, 59 So. 2d 636, 639 (Fla. 1952). Those entities with adverse and antagonistic interests must be "before the court" in order to maintain the action. Santa Rosa Cnty. v. Administration Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1994) (quoting Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991). Without the proper defendant, a court has no jurisdiction to consider a declaratory judgment suit. Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 402-404 (Fla. 1996) (citing Santa Rosa, 661 So. 2d at

1192-93). This requirement is "necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts." Scanlan, 582 So. 2d at 1170 (quoting May, 59 So. 2d at 639).

The declaratory relief sought must have the ability to affect the entity being sued if a case or controversy truly exists. Consequently, the proper defendant is the official responsible for the law's enforcement, for it is that official's duties that will be affected and whose "interests are at stake." Coal. for Adequacy & Fairness, 680 So. 2d at 403. Therefore, "when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule." Walker v. President of the Senate, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) (citing Am. Civil Liberties Union v. The Fla. Bar, 999 F.2d 1486, 1490 (11th Cir. 1993) (concluding that the Florida Bar was the proper defendant in a case in which the plaintiffs sought to limit the reach of a Rule of Judicial Conduct); Diamond v. Charles, 476 U.S. 54, 64 (1986) ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III.").[3]

[3] Plaintiffs argued below that the caselaw cited for the proposition that they must

A defendant is not proper if it cannot provide the relief sought. *See, e.g.*, Howard v. Commonwealth, 957 A.2d 332, 335 (Pa. Commw. Ct. 2008) (holding that the Pennsylvania Governor was not a proper party because the statute challenged did not give him any enforcement authority "and that a contrary holding would have the effect of having him become an indispensable party to every action challenging the constitutionality of legislation"). An action challenging a state statute brought against public officers is proper only when "their authority to implement or enforce a statute is in question" or "their own actions are at issue." Id.

Though they originally sought to invalidate the law on constitutional grounds, in their motion for summary judgment plaintiffs attempted to recast their lawsuit as "directed at the constitutional infirmities and failure to perform certain duties related to the *enactment* of SB 360." R1:194 n.24. This claim does not, however, match the claims in their complaint, the relief they seek, or the legal

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sue the enforcing entity applies only to challenges to rules, rather than to legislatively-enacted statutes. R1:71. But plaintiffs pointed to no reason for treating a rule differently from a statute as to the proper party to be sued when each is challenged as unconstitutional — in either case, it is the enforcing, and not the enacting, entity. While the Eleventh Circuit case involved rules of judicial conduct, it cited to Diamond, in which the Supreme Court considered the constitutionality of a state abortion law. 476 U.S. at 56; *see also* Walker, 658 So. 2d at 1200 ("Individual legislators are not themselves proper parties to an action seeking a declaration of rights under a particular *statute*") (emphasis added).

conclusions of the trial court. Plaintiffs do not assert that the Legislature or any of the defendants acted "outside the sphere of legitimate legislative activity." Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The procedures followed by the Legislature in enacting the law simply are irrelevant to the issues the plaintiffs have raised. Rather, plaintiffs assert that the product of the legislative process, the law itself, violates the constitution. Therefore, plaintiffs must bring their suit against the enforcing agency.

Moreover, plaintiffs may challenge only the final product of legislation, not the process of legislating. The Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME, 784 So. 2d 404, 408 (Fla. 2001) ("[I]t is only the final product of the legislative process that is subject to judicial review."). This rule protects separation of powers, ensuring that the judicial branch does not encroach on the legislative process. Id. (citing Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991)). This separation "is essential to the effective operation of our constitutional system of government." In re Advisory Op. to the Governor, 276 So. 2d 25, 30 (Fla. 1973); see also Moffitt v. Willis, 459 So. 2d 1018, 1021 (Fla. 1984) (citation omitted) ("[T]he legislature has the power to enact measures, while the judiciary is restricted to the construction or interpretation thereof.").

Plaintiffs argued below that the Legislature had a duty to pass the bill with

2/3 vote or otherwise satisfy the other requirements of Art. VII, section 18(a) and that the Legislature failed to fulfill this duty; and that this failure made them amenable to suit. However, the 2/3 majority vote is not an enforceable duty imposed on the legislature. Rather, it is a requirement for constitutionality of a statute that imposes a mandate. The failure to achieve that supermajority simply means, as set forth in Art. VII, section 18(a), Fla. Const., that the counties are not bound by the provision. The inclusion of the Legislative officers is unnecessary to adjudicate whether the Legislature passed the bill with the requisite number of votes to satisfy the constitutional exception. Nothing in this case approaches the substantive mandate found in Art. IX, § 1, Fla. Const. See Coal. for Adequacy & Fairness, 680 So. 2d at 400. Plaintiffs seek a declaration that the law is unconstitutional, not that the Legislature failed to comply with some enforceable right. There is no enforceable right and the lower court could not order the Legislature to take any particular action. Plaintiffs assert that the *law* enacted is unconstitutional, and the proper party to such a suit is the entity charged with enforcement.

B. The Department of Community Affairs is charged with enforcement of SB 360 and therefore is the proper party here.

SB 360 repeatedly refers to the state land planning agency, the Department

of Community Affairs (DCA), in its enforcement mechanisms for the provisions plaintiffs identified as imposing unfunded mandates. *See* R1:160-161. For instance, in the section amending the concurrency requirements, if DCA determines that a local government has "insufficient cause for the failure to adopt into its comprehensive plan land use and transportation strategies to support and fund mobility," it may submit those findings to the Administration Commission, who is charged with imposing sanctions. Ch. 2009-96, § 4, at 1365, Laws of Fla. And it is DCA that determines whether there is "insufficient cause" for a "local government's failure to enter into an approved interlocal agreement as required by statute." *See* id. § 3, at 1363. *See also* Santa Rosa Cnty., 661 So. 2d at 1191 (county sought declaratory judgment against DCA (as well as the Division of Administrative Hearings) after DCA determined the county's comprehensive plan was not in compliance with the Growth Management Act). Those findings are submitted to the Administration Commission, which determines the appropriate sanctions based on DCA's findings. Id. Furthermore, throughout Part II of ch. 163, Fla. Stat., DCA is empowered with numerous enforcement responsibilities aimed at compelling compliance including the authority to determine compliance and the power to enforce compliance by prohibiting adoption of further amendments when a local government has failed to comply with statutory requirements. See

generally, § 163.3184(8),(9),(10) (Process for adoption of plan and plan amendments); §§ 163.3177(3)(c); 163.3177(12)(j); 163.3191(10); 163.3177(4). Therefore, it is DCA that is charged with investigating and "compelling compliance" with SB 360. Black's Law Dictionary 608 (9th ed. 2009) (defining "enforcement").

C. Because none of the defendants has the duty to enforce SB 360, none of them are a proper party in this case.

1. Legislators

The Senate President and Speaker of the House, appellants here, were named as defendants in this action. But they have no enforcement authority under SB 360. Indeed, in nearly every case legislators do not enforce the laws they enact.[4] Hence, "[i]ndividual legislators are not themselves proper parties to an action seeking a declaration of rights under a particular statute." Walker v. President of the Senate, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995). Because neither the Speaker nor the President have any enforcement responsibility for SB 360, the claims against them should have been dismissed.

[4] There are rare situations where the President and Speaker are involved in the enforcement of a law and would therefore be proper defendants in a challenge to its constitutionality. *See, e.g.*, Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs., 7 So. 3d 511, 514 (Fla. 2009) ("If a violation is found, the committee must report its findings, together with a recommended penalty, to either the President of the Senate or Speaker of the House, as appropriate."). SB 360

To the extent the Speaker and President are sued for enacting SB 360, they are absolutely immune. Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. 719, 732 (1980)[5] (absolute legislative immunity applies to actions seeking declaratory or injunctive relief); Junior v. Reed, 693 So. 2d 586, 589 (Fla. 1st DCA 1997) (absolute immunity applies to government officials performing legislative functions). Legislators may not be compelled to defend their legislative decisions or actions in court. "[T]he central role of [parliamentary privilege under the separation of powers] is to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary." Gravel v. United States, 408 U.S. 606, 617 (1972) (citing United States v. Johnson, 383 U.S. 169, 181 (1966)).[6] For legislative immunity encompasses not only civil liability, but also freedom from declaratory judgments. Supreme Court of Va., 446 U.S. at 731 ("[A] private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." (citation omitted) (alteration in original)); *see also* Penthouse, Inc. v. Saba, 399 So. 2d 456, 458 (Fla. 2d DCA

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contains no similar provision for the involvement of the President or Speaker.

[5] Nor can the Governor be sued for signing SB 360 into law. Id. at 731-734; *see also* Women's Emergency Network v. Bush, 323 F.3d 937, 950 (11th Cir. 2003).

[6] The "state legislative privilege [is] on a parity with the similar federal privilege."

1981) ("If an exercise of legislative or judicial power is involved, then immunity is absolute.").

This immunity serves several purposes. Critically, it ensures that the dignity of the legislative process is maintained. *Cf.* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."). It also protects the efficient functioning of the government ensuring that legislators are not subject to the diversion and expense of litigation every time a statute is challenged as unconstitutional. *See* Drombowski v. Eastland, 387 U.S. 82, 85 (1967) (concluding that absolute immunity permits legislators to be free from "the consequences of litigation's results and the burden of defending themselves"). This Court has noted that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." Junior, 693 So. 2d at 589 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)). Legislative immunity preserves "legislative independence." Supreme Court of Va., 446 U.S. at 731-32.

Plaintiffs asserted below that the Speaker and President were proper parties because SB 360 imposes duties on the Office of Economic and Demographic

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Johnson, 383 U.S. at 180 (citing Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).

Research, a legislative entity. But the law clearly does not permit that Office to enforce the provisions; rather, it requires that the Office provide data to determine which localities are subject to the law. *See, e.g.*, Ch. 2009-96, § 2, at 1359, Laws of Florida ("The Office … shall annually calculate the population and density criteria needed … ."). The mere participation by an entity in the workings of a law does not mean that the entity is at all involved in enforcement.

The authorities cited by the plaintiffs in their trial court documents in which legislators did participate in cases challenging the constitutionality of statutes reflect that legislators *may* participate in such actions, at their discretion. *See* Fla. H.R. Rule 2.6 ("The Speaker *may* initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House … .") (emphasis added); Fla. S. Rule 1.4(3) ("The President *may* authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit on behalf of the Senate … .") (emphasis added). But these rules do not demonstrate that legislators are proper parties that may be forced to defend a law over which they have no enforcement authority. While legislators may voluntarily participate in litigation challenging the constitutionality of legislative acts, they enjoy ancient inviolable immunity from compulsion to defend or to testify in such actions. The legislators have not voluntarily submitted to the courts' jurisdiction to defend this legislation, and permitting this case to

proceed runs counter to their immunity.

No basis exists for considering legislators as proper parties in this case. Indeed, permitting this suit to proceed flies in the face of key government litigation principles, including legislative immunity and separation of powers. Legislators cannot serve as the default defendants to every constitutional challenge. The plaintiffs state no claim related to the passage of SB 360; their challenge is to the constitutionality of the law, and the legislators are not the proper parties in such an action. The trial court erred in failing to dismiss the individual legislators.

2. Governor

Though not an appellant here, the Governor also is not charged with enforcing SB 360, calling into question the trial court's jurisdiction to enter its order against him as well. The assertion that he is responsible generally for the execution of the laws is insufficient. The Governor is not a catch-all enforcing authority for every statute enacted. *See* Harris v. Bush, 106 F. Supp. 2d 1272, 1276-77 (N.D. Fla. 2000) (concluding that in most circumstances a governor's "general executive power" is not a basis for jurisdiction). If the Governor's general executive power provided a sufficient connection to a state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant. Id. at 1277. Where the enforcement of a statute is the

responsibility of parties other than the Governor, the Governor's general executive power is insufficient to confer jurisdiction. Id.

Plaintiffs asserted below that because the Administration Commission, which the Governor chairs, is charged with enforcing SB 360, that the Governor is a proper party. A close review of the provisions in which the Commission is mentioned, however, does not reveal that the duties of enforcement are on the Commission. Rather, those provisions set forth duties reflecting the Commission's role as an *adjudicative* body. *See, e.g.*, Ch. 2009-96, § 3, at 1363, Laws of Fla. Moreover, if the Commission is the enforcing authority, then plaintiffs should have named the Commission itself, not the Governor alone. *See*, Women's Emergency Network v. Bush, 323 F.3d 937, 949 (11th Cir. 2003) (shared authority over the Department of Highway Safety and Motor Vehicles was simply too attenuated to establish that the Governor was responsible for enforcement) .

Finally, Plaintiffs' contention that the Governor is a proper party because he signed SB 360 into law also must fail. Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law. Supreme Ct. of Va., 446 U.S. 719, 731-34 (1980); Women's Emergency Network, 323 F.3d at 950.

3. Secretary of State

Similarly, the Secretary of State clearly has no role in enforcing this statute.

Plaintiffs seek to have the Secretary expunge the law from the books. But that reflects a misconception about the Secretary's role and responsibilities as to the laws of Florida. Neither the Florida Constitution nor the Florida Statutes give the Secretary the authority to expunge a law. The Secretary's only role with respect to laws is as a recordkeeper. § 15.07, Fla. Stat. She has no other involvement in the law and has no power or duty to strike a law deemed unconstitutional.

In their Motion for Summary Judgment, the plaintiffs pointed to Florida Defenders of the Environment, Inc. v. Graham,, 462 So. 2d 59, 62 (Fla. 1st DCA 1985), in which this Court ordered the Secretary of State to strike an unconstitutional appropriation from the law. That twenty-five-year-old case, however, should not be determinative of the issue raised here. That case stands alone as ordering the particular relief sought. More importantly, it cites no authority for the relief, and contains no indication that the role of the Secretary was ever questioned or put into consideration. *See, e.g.*, T.M. v. State, 39 So. 3d 559, 559 n.1 (Fla. 4th DCA 2010) (noting that issue before the court was not controlled by a similar decision because there, the issue was not raised). When a law is declared unconstitutional, it is invalid and unenforceable. It serves no purpose to direct the Secretary to strike or expunge a statute.

In sum, none of the defendants is a proper party. Plaintiffs' main arguments

for the defendants' inclusion could be made in every action challenging the constitutionality of a statute, such that these entities would be proper parties in every case that raises a constitutional question. But that has never been the law of Florida. The enforcing entity must defend the constitutionality of a statute, while the legislature is protected by absolute immunity from a compelled defense of Florida laws. The enforcing entity under SB 360 was not made a defendant to this action. Because plaintiffs have not demonstrated how the defendants would be affected by a judicial declaration, the case should have been dismissed.

II. PLAINTIFFS FAILED TO PROVE THE STATEWIDE FISCAL IMPACT OF SB 360.

It is well settled in Florida "that a party moving for summary judgment must conclusively show the absence of any genuine issue of material fact and the court must draw every inference in favor of the party against whom a summary judgment is sought." Horizon South Master Home Owners Ass'n, Inc. v. West, 591 So. 2d 665, 668 (Fla. 1st DCA 1991) (quoting Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985)). Until the moving party meets that burden, "the opposing party is under no obligation to show that issues do remain to be tried." Horizon South, 591 So. 2d at 668 (quoting Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966)). Further, "if the record 'is silent on a determinative issue of fact,' then plaintiffs have failed to carry their

burden, and the final order must be reversed." Horizon South, 591 So. 2d at 668 (quoting Shores v. Wegmann, 370 So. 2d 87, 88 (Fla. 1st DCA 1979)).

Here, although plaintiffs produced evidence of what a planning firm would charge local governments for various services allegedly mandated by SB 360, that affidavit did not show that the local governments affected by that act would in fact require the assistance of private planning firms. The plaintiffs therefore did not prove the statewide fiscal impact of SB 360. The record is silent.

The trial court found that pursuant to SB 360 some 246 counties and municipalities would be designated as Transportation Concurrency Exception Areas ("TCEAs") by virtue of their being defined as Dense Urban Land Areas ("DULAs"). R5: 911. As such, these counties and municipalities were required "to adopt comprehensive plan and transportation strategies and to file the comprehensive plan amendments within two years of being designated as a TCEA." Id. Reviewing the affidavits of Shelley Eichner, R4: 646, Patricia Bates, R4: 643, and Erica Gonzalez-Santamaria, R4: 637, the trial court concluded that the cost to a local government to comply with the mandated comprehensive plan amendment would range from a low of $41,264 to a high of $104,170. R5: 911. The cost for 246 local governments would therefore range from $10,150,944 to $25,625,820. Id.

The legislature, as the trial court noted, has indicated that under article VII, section 18(d) a law having an "insignificant" fiscal impact is one whose costs would not exceed "the average statewide population for the applicable fiscal year times ten cents." R5: 911 & 912. Accepting this as a proper yardstick, the court found that amount to be $1,860,000, assuming Florida's population to be "a little less than 18.6 million people as argued and conceded by the parties." Id. The court however failed to consider the costs averaged out over a two year period as required by the House and Senate memos. Id.

The defendants filed the affidavit of Darren F. Taylor, an experienced planner. The Taylor affidavit indicated that mobility planning was already required in chapter 163, Florida Statutes, and that SB 360 provided certain savings to local government, but it did not quantify those savings. R5:828-831. Accepting as true all that was said in the Taylor affidavit, the court found that

> at the very least, the local governments would be required to expend not less than $3,690,000 . . . to simply process the mandated comprehensive plan amendments at $15,000 per local government. Eichner Aff. 3. The Court finds this amount not "fiscally insignificant."

R5: 912. The Eichner affidavit does not support this finding. Paragraph 9.a. on page 3 of the Eichner affidavit simply says that the amount the Eichner firm would charge the City of Weston "for drafting the necessary comprehensive plan

amendments, creating the supporting data and analysis, and attending the required public hearings is $15,000." The lower court multiplied this $15,000 by 246 to arrive at the $3,690,000 figure, ignoring the requirement of a two year average.

The lower court's extrapolation is not supported by the Eichner affidavit or any other evidence. The City of Weston is relatively small (pop. 61,697) and the affidavit does not indicate whether the city even has a planning staff. Most of the more sizeable counties and cities in Florida do have planning staffs. In addition, many smaller local governments' issues may be less complex, requiring less effort to comply. The Eichner affidavit says only what that firm would charge for performing necessary services if it were retained. It does not say that all 246 counties and municipalities require outside assistance to amend their comprehensive plans, nor does it give any number that would likely require outside assistance. The low to high range is invalid for the same reason—there is no evidence supporting the conclusion that any particular number of local governments will need to retain an outside firm. Plaintiffs have therefore failed to prove the statewide fiscal impact of SB 360.[7]

[7] The trial court did not separately address the affidavits of Patricia Bates and Erika Gonzalez-Santamaria. The first states that the cost to the city of Weston to advertise two hearings on a comprehensive plan amendment would be $1,264. R4: 643. The second states that the cost to the Town of Cutler Bay for advertising two hearings would be $4,170. R4: 637. Even if 243 other local governments incurred

In concluding its analysis the trial court pointed to a brief sentence in the Senate Bill Analysis and Fiscal Impact Statement that said "[t]he bill will have a negative fiscal impact on local governments that are designated TCEAs by requiring updated comprehensive plans." R5: 914. This statement standing alone is not evidence of SB 360's statewide fiscal impact. Even if it could be considered as evidence, it does not indicate the actual fiscal impact of SB 360.

III. THE TRIAL COURT ERRED IN DECLARING CHAPTER 2009-96, LAWS OF FLORIDA, UNCONSTITUTIONAL IN ITS ENTIRETY.

The trial court found that the cost to local governments, specifically those that have TCEAs, of amending their comprehensive plans constituted an unfunded mandate in violation of article VII, section 18(a) of the Florida Constitution: "SB 360 (ch. 2009-96) is declared unconstitutional as a violation of Article VII, § 18(a), Florida Constitution, and the Secretary of State is ordered to expunge said law from the official records of this State." R5: 914.

Article VII, section 18(a) provides in part that:

> No county or municipality shall be bound by any general law requiring such county or municipality to spend funds

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the higher cost, which would be pure speculation, the total advertising costs for the local governments would be considerably less than $1,860,000. In any case, plaintiffs never contended that the cost of advertising alone was not fiscally insignificant, nor did the lower court so find.

> or to take an action requiring the expenditure of funds . . . . (e.s.)

This language does not require that a court invalidate and order expunged from the official records any part of an act found to violate article VII, section 18(a), much less the entire chapter law. It simply relieves the local government of the obligation to take action requiring the expenditure.

Basic interpretive principles command this result. It has long been the law of Florida that the words of the constitution "are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense." Wilson v. Crews, 34 So. 2d 114, 118 (Fla. 1948) (quoting City of Jacksonville v. Glidden Co., 169 So. 216, 217 (Fla. 1936)). Hence, "[i]f the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written." Ford v. Browning, 992 So. 2d 132, 136 (Fla. 2008). In the only reported case under article VII, section 18(a), a challenge to chapter 2007-62, Laws of Florida, this Court struck only one section of that law upon a finding that the legislature had failed to state that the law served an important state interest. Lewis v. Leon County, 15 So. 3d 777 (Fla. 1st DCA 2009).

Recognizing that local governments are not bound by a funding mandate under article VII, section 18(a) leaves them free to comply or not, and also allows

the legislature to appropriate money in a future year to make compliance mandatory. In this respect, the contrast between the language of subsection (a) and subsections (b) and (c) is significant. Subsections (b) and (c) both state: that absent a supermajority vote, the legislature may not enact, amend or repeal any general law" having a specified effect. There is a clear difference between a local government "not being bound" and an express prohibition on enacting, amending, or repealing a general law.

As this Court has held with respect to interpretation of statutes, the use of different terms in different sections of the same statute is strong evidence that different meanings were intended. Beshore v. Dep't of Financial Servs., 928 So. 2d 411, 413 (Fla. 1st DCA 2006). In construing constitutional provisions, courts follow principles paralleling those of statutory interpretation. Ford, 992 So. 2d at 136. Therefore, while violation of subsections (b) and (c) would require invalidation of the law, subsection (a) merely relieves the local governments of any obligation to comply with a funding mandate. The trial court thus erred in finding chapter 2009-96 unconstitutional in its entirety.

The appellees argued in the trial court that Lewis v. Leon County was wrong in severing only the funding requirement and that the language of article VII, section 18(a)—that no local government "shall be bound by any general law"—

mandates invalidation of the entire act. R5: 915, 919. This position is not only without precedent but contrary to a long line of authority holding that courts may sever not only sections of a chapter law but offending phrases. See State v. Rubio, 967 So. 2d 768, 775 (Fla. 2007) (citing State v. Calhoun County, 170 So. 883, 886 (Fla. 1936)). As these two cases make clear, a court may sever an offending phrase in a statute or a section of a chapter law even where, as in Calhoun County, the law lacks a severability clause. The courts' authority to do so flows from their inherent power to preserve the constitutionality of a law. Rubio, 967 So. 2d at 775.

Plaintiffs have set forth two additional objections to the appellees' interpretation. They contend that neither section 4 of chapter 2009-96 nor the previously applicable state mandated transportation concurrency would exist, and that if there are different rules for growth management for different jurisdictions, mass confusion will result. R5: 919-920. Neither is persuasive.

First, the existing local government comprehensive plan would continue to exist. The question facing local governments is simply whether to amend it in accordance with new requirements and bear the expense. Second, there is little likelihood of mass confusion. If one local government is affected by the action or inaction of a neighboring local government, it can take that into account in its

planning process. Also, as an affected party[8] the local government has standing to challenge a plan or plan amendment. § 163.3184(8)(c), Fla. Stat.

In the alternative, appellants submit that section 4 of chapter 2009-96 can be severed.[9] The test for severability involves consideration of four factors:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are no so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

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[8] "Affected person" includes . . . *adjoining local governments* that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. § 163.3184(1)(a), Fla. Stat.

[9] Although appellants did not, strictly speaking, make a severance argument in their motion for rehearing, R5: 896, that does not constitute a waiver of the question. Appellants have found no Florida case reaching such a conclusion. Indeed, "[s]everability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999). The doctrine, derived from separation of powers, "is 'designed to show great deference to the legislative prerogative to enact laws.'" Id. (quoting Schmitt v. State, 590 So. 2d 404, 4115 (Fla. 1991)). This Court has inherent authority to preserve the constitutionality of an act by the elimination of invalid portions. State v. Rubio, 967 So. 2d 768, 775 (Fla. 2007); Small v. Sun Oil Co., 222 So. 2d 196, 199 (Fla. 1969).

Ray v. Mortham, 742 So. 2d 1276, 1281 (Fla. 1999) (quoting Smith v. Dep't of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987)).

Severing section 4 would affect only the newly-created exceptions to the previously existing transportation concurrency requirements. Section 4 as it existed before the 2009 amendment would be revived. B.H. v. State, 645 So. 2d 987 (Fla. 1994). The 30 remaining substantive sections of chapter 2009-96 relating to growth management would still constitute a coherent act, and the legislative purposes can be accomplished. As to the third prong, it cannot be said that the legislature would not have passed the act without section 4 – a point on which the plaintiffs bear the burden of proof. Ray v. Mortham, 742 So. 2d at 1283. Finally, even without section 4, it is plain that 30 other substantive sections remain that make the act complete in itself. Accordingly, section 4 may be severed.

CONCLUSION

This Court should hold that summary judgment was improperly granted because of Plaintiffs' failure of proof and REVERSE and REMAND this case to the trial court with instructions to dismiss this case based on plaintiffs' failure to name any proper party as a defendant, recognizing the absolute immunity of the President, Speaker and Governor for their activities in the legislative sphere. This court should also remand with instructions that, in cases brought under article VII, section 18(a), the proper procedure is to sever the offending provision where possible and the proper remedy is to declare that local governments are not bound by the offending provision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

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