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

CITY OF WESTON, FLORIDA; VILLAGE OF KEY BISCAYNE, FLORIDA; TOWN OF CUTLER BAY, FLORIDA; LEE COUNTY, FLORIDA; CITY OF DEERFIELD BEACH, FLORIDA; CITY OF MIAMI GARDENS, FLORIDA; CITY OF FRUITLAND PARK, FLORIDA; and CITY OF PARKLAND, FLORIDA,

Plaintiffs,

v.

THE HONORABLE CHARLIE CRIST, Governor of the State of Florida; HONORABLE KURT S. BROWNING, Secretary of State, State of Florida; THE HONORABLE JEFF ATWATER, President of the Senate, State of Florida; and THE HONORABLE LARRY CRETUL, Speaker of the House, State of Florida,

Defendants.
_____/

Case No. 09-CA-2639

DEFENDANTS' MOTION TO DISMISS

Defendants, Crist, Atwater, Cretul and Browning hereby move to dismiss the instant action and as grounds state:

1. This is a declaratory judgement action challenging the constitutionality of Ch. 2009-36, Laws of Florida (formerly SB 360). Plaintiffs allege violation of Art. III, § 6 (single subject) and Art. VII, § 18 (unfunded mandate), Fla. Const.

2. Plaintiffs are local governments subject to the requirements of the new law.

3. Defendants are the Governor, President of the Senate, Speaker of the House, and Secretary of State of the State of Florida.

4. Plaintiffs' only allegations against the Governor are that he administers and executes the laws of Florida and that he signed SB 360 into law.

5. Plaintiffs' only allegations against the President and Speaker are that they are responsible for ensuring that all procedural requirements for the passage of legislation were followed by their respective houses of the Legislature.

6. Plaintiffs' only allegations against the Secretary of State are that he is responsible for registering, indexing, segregating, and classifying all acts of the Legislature.

7. Plaintiffs fail to state a cause of action against any of these Defendants because none of them are the state official designated to enforce the new law.

WHEREFORE, Defendants respectfully request that this court issue an order dismissing the instant action against these Defendants with prejudice.

MEMORANDUM

This is an action challenging the constitutionality of a state statute. When the facial constitutionality of a statute is challenged,

> 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. *Diamond v. Charles*, 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986); *American Civil Liberties Union v. The Florida Bar*, 999 F. 2d 1486 (11th Cir. 1993). Individual legislators are not themselves proper parties to an action seeking a declaration of rights under a particular statute. Indeed, state legislators are immune from civil suits for their acts done within the sphere of legislative activity. *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). *See also United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980).

Walker v. President of the Senate, 658 So. 2d 1200 (Fla. 5th DCA 1995). This is so regardless of the basis of the constitutional attack because it is only the final product of the legislature that is before the court, not the Legislature's internal workings. *Florida Senate v. Florida Public Employees Council 79, AFSCME*, 784 So.2d 404, 408 (Fla. 2001) (Where the Legislature is concerned, it is only the final product of the legislative process that is subject to judicial review.); *Moffitt v. Willis*, 459 So.2d 1018, 1021 (Fla. 1984) (The judiciary is restricted to the construction or interpretation of final product of the legislature, not its internal procedures.); *Environmental Confederation of Southwest Florida, Inc. v. State*, 886

So.2d 1013, 1021 (Fla. 1st DCA 2004) (same).

In order to state a cause of action under the declaratory judgment statute, the plaintiffs must show

> a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley 59 So.2d 636, 639 (Fla.1952). These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts. In order to show the required "actual, present, adverse and antagonistic interest in the subject matter," Plaintiffs must have before the court the official charged with enforcement. It is that official that will be enjoined should the law be found unconstitutional.

None of the Defendants here qualify as that official and Plaintiffs have not alleged any connection between the Defendants and the enforcement of the law. As to the Governor, the allegations that he is responsible for signing the bill and for administering and executing the laws of Florida are insufficient. A governor's

"general executive power" is not a basis for jurisdiction in most circumstances. *See Harris v. Bush* , 106 F. Supp. 2d 1272, 1276-77 (N.D. Fla. 2000) (citing multiple cases supporting this principle). If a 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' 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. v. Consumers Union of United States, Inc.* , 446 U.S. 719, 731-34, 100 S. Ct. 1967, 1974-76, 64 L. Ed. 2d 641 (1980). *Women's Emergency Network v. Bush* , 323 F.3d 937, 949-50 (11th Cir. 2003). Because the Governor has no special relation to the statute, or to those officers who do enforce it, he must be dismissed as a defendant.

The President of the Senate and the Speaker of the House have even less of a relationship to the enforcement of the challenged law. Neither of these officials

have any enforcement responsibility for this law.[1] They are sued here based on their legislative acts for which they are absolutely immune. *Supreme Court of Virginia v. Consumers Union of U. S., Inc.* 446 U.S. 719, 732 (1980) (Absolute legislative immunity equally applicable to actions seeking declaratory or injunctive relief.) While there are limited circumstances where the President and Speaker might be proper defendants in a suit, this is not one of them. For example, in *Coalition for Adequacy and Fairness In School Funding, Inc. v. Lawton Chiles*, 680 So.2d 400 (Fla. 1996), the Governor, President and Speaker were sued alleging failure of the state to adequately provide for a uniform system of free public schools as required by the State Constitution. That case did *not* involve the challenge to the constitutionality of a statute, but rather addressed the alleged failure of the political branches to fulfill their responsibilities directly under the constitution. Although the court treated them as proper defendants, relief was denied on separation of powers grounds.

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[1] 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. Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services* 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.") The challenged law contains no similar provision for the involvement of the President or Speaker.

Finally, as to the Secretary of State, he also has no relationship to the enforcement of this statute. The allegations of the complaint are simply insufficient to create the adversity necessary to maintain a declaratory judgment. Growth management and affordable housing are not in the Secretary's portfolio of responsibilities. There may be situations where the Secretary is a proper party because of his duties with respect to acts of the legislature. For example, in *Florida House of Representatives v. Martinez*, 555 So.2d 839, 846 (Fla. 1990) the House of Representatives sought a writ of mandamus to compel the Secretary of State to expunge vetoes of the Governor from the official records of the state. As with the President and Speaker, this constitutional confrontation between branches of government where a writ of mandamus is sought is vastly different from this case which is a straightforward challenge to the constitutionality of a statute. The Secretary has no relationship to this statute and is therefore not a proper party.

None of the Defendants in this case are the state officials charged with enforcement of the challenged statute and therefore this case should be dismissed with prejudice as to these Defendants.

Respectfully submitted this 17th Day of August, 2009.

BILL McCOLLUM
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served by U.S. mail or e-mail this 17th Day of August, 2009, on:

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