IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,
Appellants,
v.

KEN DETZNER, et al.,
Appellees.

Case No.: SC14-1905
L.T. Nos.: 1D14-3953
2012-CA-00412
2012-CA-00490

APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION FOR APPELLATE ATTORNEYS' FEES

Coalition Appellants and Romo Appellants respectfully submit the following reply in support of their motion for an award of appellate attorneys' fees.

I. THIS COURT HAS THE POWER TO ADOPT THE PRIVATE ATTORNEY GENERAL DOCTRINE.

The Legislature argues that this Court lacks the authority to adopt the private attorney general doctrine because doing so would create a new substantive right, and matters of substantive law are exclusively entrusted to the Legislature. (Resp. at 2-10.) According to this argument, only the Legislature may decide when to depart from the American Rule, under which litigants pay their own fees.

The Legislature is wrong in claiming that the judiciary can have no role in crafting substantive law. Courts routinely create, define, and modify substantive rights and duties at common law in the areas of contract, tort, property, and otherwise—ranging from the duty of care in negligence cases, *Wallace v. Dean*, 3 So. 3d 1035, 1046-53 (Fla. 2009), to the rights of riparian or littoral owners, *Sand*

Key Assocs., Ltd. v. Bd. of Trustees of Internal Improvement Trust Fund of Fla., 458 So. 2d 369, 370-71 (Fla. 2d DCA 1984). The judiciary is "not precluded from recognizing" a right at common law "simply because the legislature has not acted to create such a right." *United States v. Dempsey*, 635 So. 2d 961, 964 (Fla. 1994). Substantive rights and obligations created at common law are preempted only when the Legislature enacts a statute that "unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990).

Florida courts' authority to craft and define rights and remedies also extends to attorneys' fees. Even in the absence of a contract or statute, courts have departed from the American Rule and awarded parties their attorneys' fees in cases involving inequitable conduct, common funds, litigation caused by a wrongful act, and partnership accountings. *E.g.*, *Moakley v. Smallwood*, 826 So. 2d 221, 223-24 (Fla. 2002); *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998); *Tenney v. City of Miami Beach*, 11 So. 2d 188, 190 (Fla. 1942); *Truman J. Costello, P.A. v. City of Cape Coral*, 693 So. 2d 48, 49 (Fla. 2d DCA 1997); *Martha A. Gottfried, Inc. v. Amster*, 511 So. 2d 595, 598 (Fla. 4th DCA 1987); *Baxter's Asphalt & Concrete, Inc. v. Liberty Cnty.*, 406 So. 2d 461, 467 (Fla. 1st DCA 1981), *quashed on other grounds*, 421 So. 2d 505 (Fla. 1982); *Larmoyeux v. Montgomery*, 963 So. 2d 813, 818-22 (Fla. 4th DCA 2007). The Legislature concedes that the right to

recover attorneys' fees is substantive (Resp. at 3), and in each of the foregoing cases that right was established by the courts—*i.e.*, by common law—and not by legislative act. Accordingly, the Legislature cannot seriously contend that courts lack authority as a matter of separation of powers to allow fee awards without a contractual or statutory basis.

The Legislature nevertheless relies on *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005), and a series of decisions addressing the offer-of-judgment statute to draw a spurious distinction between procedure (over which this Court is the exclusive arbiter) and substance (which courts are supposedly forbidden from addressing). The Legislature's cases involve a different question—namely, whether the Legislature is **precluded** from taking action because an issue is procedural. Article V, Section 2(a) of the Florida Constitution entrusts the enactment of rules of "practice and procedure" exclusively to this Court and limits the Legislature to "repeal[ing] by general law" such rules **after** their enactment. Under this provision, the Legislature is forbidden from enacting procedural rules, even in the absence of judicial action. *See, e.g.*, *Raymond*, 905 So. 2d at 1051-52 (finding that Legislature could not adopt statute precluding persons charged with a "dangerous crime" from being granted pretrial release on nonmonetary conditions at first appearance because issue was procedural); *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992) (upholding substantive portion of offer-of-judgment statute despite

prior ruling that procedural aspects of statute were unconstitutional); *Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996) (finding procedural portions of offer-of-judgment statute unconstitutional). Issues of substantive law, by contrast, are properly addressed by courts where there has been no legislative action to displace the common law. *Dempsey*, 635 So. 2d at 964. If the Legislature regulates in a substantive area, however, the judiciary cannot take conflicting action. *See, e.g.*, *In re Amendments to Fla. Rules of Civil Proc.,* 682 So. 2d 105, 105-06 (Fla. 1996) (rejecting amendment to Florida Rule of Civil Procedure 1.442 that would require courts to consider certain factors in awarding fees pursuant to offer of judgment where proposal was "at variance with" existing offer-of-judgment statute with no such requirement).

Under these well-established principles, it is not determinative that entitlement to fees is "substantive" and an appropriate subject of legislation. The question is, instead, whether the Legislature has in fact acted to displace the judiciary's common law authority to define the contours of the American Rule and award fees in cases where it is appropriate for the American Rule to yield. Here, there is no such legislation and consequently no barrier to judicial action.

This Court's decision in *Thornber* is illustrative. There, several city council members sought to recover attorneys' fees for enjoining a recall petition. 568 So. 2d at 916. The statute on which they relied, however, only required public bodies

to reimburse the attorneys' fees of officials who were prevailing **defendants**. *Id.* (citing § 111.07, Fla. Stat. (1981)). In the decision on review, the First District denied attorneys' fees based on the lack of a comparable statute allowing fees to successful **plaintiffs**. *City of Ft. Walton Beach v. Grant*, 544 So. 2d 230, 236-37 (Fla. 1st DCA 1989). This Court disagreed, finding that the officials were entitled to fees as a matter of common law, regardless of any statutory authorization:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently. This entitlement to attorney's fees arises independent of statute, ordinance, or charter. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose. …
>
> We agree with the district court in *Ferrara* [*v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985),] that, in the "spirit" of common law principles, the unique circumstances of this case should not preclude the council members from recovering attorney's fees under the common law.

Thornber, 568 So. 2d at 916-18 (citations omitted). This Court then turned to whether section 111.07 superseded public officials' common law entitlement to reimbursement of fees and determined that it did not. *See id.* at 918-19. *Thornber* and the other decisions cited above thus make clear that the separation of powers doctrine does not bar fee awards without a statutory or contractual basis, as long as the Legislature has not adopted a statute displacing the common law.

The Legislature strives mightily to dismiss the examples of cases in which Florida courts have awarded fees absent a contract or statute. The Legislature claims that the inequitable conduct doctrine arises from the courts' authority to control their proceedings. It attempts to distinguish the common fund doctrine on the ground that it is not a fee-shifting, but a fee-sharing, device. It distinguishes the wrongful act doctrine on the ground that, under that rule, attorneys' fees are an element of damages. And it seeks to distinguish fees awarded in partnership accounting cases simply because they involve "assets over which a court exercises control," and the availability of fees in accounting or dissolution cases "has been the law for more than a century." (Resp. at 9-10.)

These are distinctions without a difference. In each case, Florida courts have recognized a substantive entitlement to attorneys' fees. Indeed, it is precisely these examples that courts in other jurisdictions have cited in support of their adoption of the private attorney general doctrine. *See, e.g.*, *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782-83 (Utah 1994) (citing bad faith, common fund, and substantial benefit doctrines as bases for court's power to adopt the private attorney general doctrine); *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 811 (Mont. 1999) (collecting cases awarding attorneys' fees absent statute or contractual agreement); *Arnold v. Ariz. Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989) (noting common fund doctrine and other

equitable bases for attorneys' fees as authorization to adopt the private attorney general doctrine).

In sum, the separation of powers doctrine does not preclude this Court from adopting the private attorney general doctrine pursuant to its traditional common law authority, regardless of whether attorneys' fees are a substantive matter. Consequently, this Court may, if it so chooses, adopt the private attorney general doctrine and apply it in this case. For the reasons set forth below and in their motion, Appellants respectfully request that this Court do so.

II. THIS COURT SHOULD ADOPT THE PRIVATE ATTORNEY GENERAL DOCTRINE.

The private attorney general doctrine permits an award of attorneys' fees to successful public-interest litigants based on three factors: (1) "the strength or societal importance of the public policy vindicated by the litigation," (2) "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and (3) "the number of people standing to benefit from the decision." *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977). As the Supreme Court of Idaho has explained, the case for adopting the private attorney general doctrine is at its zenith in redistricting cases: "there may well be no greater public policy in a constitutional representative democracy than the policy of insuring that the citizens are properly represented according to the Constitution." *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984) (quotation omitted). "If the Legislature is

unconstitutionally apportioned, a pall is cast over all legislation which the Legislature adopts." *Id.* Consequently, "[i]t would be hard to imagine a case which would be more appropriate for an award of attorney's fees under the Private Attorney General Theory than the instant case … ." *Id.* (quotation omitted).

The Legislature attempts to deny this fact by citing several cases and policy arguments designed to stoke unfounded fears that the private attorney general doctrine would spawn frivolous lawsuits and prevent it from defending itself. These arguments are without merit.

As an initial matter, the Legislature's reliance on the decision by the U.S. Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), is misplaced. (Resp. at 10-12.) The *Alyeska* decision was made in the context of the allocation of power between Congress and the federal judiciary, and turned on two federal statutes that are inapplicable here.

The *Alyeska* court based its decision primarily on a federal law that codified the American Rule for attorneys' fees. *Alyeska*, 421 U.S. at 251 (holding that 28 U.S.C. § 1923 limited "allowances for attorneys' fees that were to be charged to the losing parties[,]" and that "counsel fees collectible from the losing party were expressly limited to the amounts stated in the" law); *see also id.* at 272–73 ("The Court relies primarily on the docketing-fees-and-court-costs statute, 28 U.S.C. § 1923, in concluding that the American Rule is grounded in statute and that the

courts may not award counsel fees unless they determine that Congress so intended." (Marshall, J., dissenting)). In addition to section 1923, the Court relied on a federal law prohibiting an award of fees against the United States and its officials unless expressly permitted by statute, which the Court concluded would bar an award under the private attorney general doctrine. *Id.* at 265-67 (citing 28 U.S.C. § 2412).[1]

Given these two statutes, the Court's rejection of the private attorney general doctrine in *Alyeska* was hardly surprising. Florida, by contrast, has no law comparable to either statute relied upon by the court in *Alyeska*. Consequently, the *Alyeska* decision provides little guidance to this Court as to whether it should adopt the private attorney general doctrine.

Beyond its misplaced reliance on *Alyeska*, the Legislature marches out a parade of horribles that will supposedly result if this Court adopts the private attorney general doctrine. First, the Legislature argues that adopting the doctrine will usurp the role of the Legislature and depart from the American Rule. (Resp. at 12-14.) However, for the reasons explained in the preceding section, where there is

[1] After *Alyeska*, Congress amended the statute to include new section 2412(b) authorizing courts to "now award attorneys' fees against the United States to the same extent that any other party would be liable under **the common law** or the terms of any statute." *WATCH v. Harris*, 535 F. Supp. 9, 13-14 (D. Conn. 1981) (emphasis added).

a void of legislation, the judiciary has the authority to fashion rules for awarding attorneys' fees as a matter of common law. If the Legislature wishes to eliminate the private attorney general doctrine or to define its contours, it is free to displace the common law by statute. Accordingly, adopting the private attorney general doctrine does nothing to infringe upon legislative authority.

Second, the Legislature contends that the private attorney general doctrine would require "unwieldy and subjective determinations" about the public interests at stake and that "[i]t would be impossible to make these value judgments in a fair, principled, predictable, and consistent manner." (Resp. at 14.) But these potential problems are not as intractable as the Legislature claims. By its very nature, the common law involves the balancing of policy considerations that Florida courts make on a daily basis without upending the constitutional structure. Indeed, "[o]ne of the great virtues of the common law" is that courts can shape it "to the requirements of society at the time of its application in court"—which is an inherently policy-based task. *Kohl v. Kohl*, 149 So. 3d 127, 134 (Fla. 4th DCA 2014) (citation and internal quotes omitted). In *Thornber*, for example, this Court had no difficulty in concluding that public official litigants should be reimbursed their attorneys' fees for public policy reasons. 568 So. 2d at 916-18.

The California Supreme Court addressed and rejected the very argument made by the Legislature now when it adopted the private attorney general doctrine

in *Serrano v. Priest*, 569 P.2d at 1314. *Serrano* involved a successful challenge under the state constitution to funding inequalities among California's various public school districts. *Id.* at 1304. When considering whether to award fees to the plaintiffs under the private attorney general doctrine, the court confronted the argument that the doctrine could not be administered according to objective standards. *Id*. at 1314. The court acknowledged that this could pose problems if the doctrine were recognized for statutory claims, where the trial court's judgment about the importance of the policies would encroach upon the legislature's assessment of how those policies should be enforced. *Id.* at 1315.

However, the court in *Serrano* explained that these concerns were negligible when the public policy at issue was **constitutional** in nature. *Id.* at 1315 ("Such difficulties, however, are not present in the instant case[,]" because "the public policy advanced by this litigation was not one grounded in statute but one grounded in the state Constitution."). Consequently, the court explained that while not sufficient by itself to award fees under the doctrine, the "determination that the public policy vindicated is one of constitutional stature" serves to establish "the first of the three elements requisite to the award (*i.e.*, the relative societal importance of the public policy vindicated)." *Id.* at 1315 n.18.

Thus, to the extent there may be other hypothetical cases in which it might be difficult to apply the private attorney general doctrine in a predictable and

consistent manner, those concerns are not raised in this case—which, like *Serrano*, seeks to vindicate a constitutional right. There can be no genuine doubt regarding the strength and societal importance of that right. This Court and the trial court have repeatedly said that Article III, Section 20 safeguards the most fundamental right in our representative democracy—the right to vote. *See*, *e.g.*, *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 151 (Fla. 2013) ("*Apportionment IV*") (noting that this case "involves nothing less than the public's interest in ensuring compliance with a constitutional mandate in a process this Court has described as the very bedrock of our democracy" (internal quotation marks and citation omitted)); *id.* at 147 (finding that it is "difficult to imagine a more compelling, competing government interest" to overcome legislative privilege "than the interest represented by [Appellants'] article III, section 20(a) claims" (internal quotation marks, citation, and emphasis omitted)).

The remaining factors are similarly straightforward to apply. The necessity and burden of private enforcement are merely questions of whether, and to what extent, public officials or private individuals prosecuted the suit. In this case, there is no dispute that public enforcers played no role at all, leaving the significant burden of enforcing the mandates of Article III, Section 20 entirely to Appellants. The number of people benefitted is likewise an objective question that can readily be determined from the nature of the case and the record. Here, there is again no

dispute that millions of voters stand to benefit from this Court's decision. In the context of this case, the presence of the factors favoring application of the private attorney general is hardly so "subjective" or "unwieldy" a determination that the judiciary should simply deny application. In fact, there can be no real dispute that the necessary factors are present.

Third, the Legislature contends that the doctrine would discourage state actors from mounting a good faith defense and force them to yield to "litigious groups" seeking "to change policy through the courts." (Resp. at 15.) The Legislature misstates the incentives that would, and should, be created by the private attorney general doctrine. Here, the Legislature would have succeeded in violating Florida's constitution had it not been for Appellants' determined efforts. Encouraging suits such as this one is an argument for, not against, the private attorney general doctrine. If the Legislature is suggesting that it would be "chilled" from drawing and then defending illegal districts, "this type of 'chilling effect' was the precise purpose of the amendment outlawing partisan political gerrymandering and improper discriminatory intent." *Apportionment IV*, 132 So. 3d at 138.

The Legislature's conduct can hardly be deemed a "good faith defense," given that its litigation strategy was designed to further a plot to draw Florida's electoral districts in violation of the state constitution. As the trial court found, the Legislature "cooperat[ed] and collaborat[ed]" with partisan operatives, resulting in

"a mockery of the Legislature's proclaimed transparent and open process of redistricting" and "managed to taint the redistricting process and the resulting map with improper partisan intent." (R86:11,309-10.) The trial court also found that the Legislature acted with improper intent to benefit the Republican Party and incumbents. (R86:11,320, 11,322-23.) In such a situation, "[o]nly private citizens can be expected to guard the guardians." *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999) (quotation omitted).

Similarly, Appellants were hardly seeking to "change policy through the courts." (Resp. at 15.) To be sure, the Legislature may prefer that Article III, Section 20 were not the law, given its history of opposing, undermining, seeking to invalidate, and ultimately violating the FairDistricts Amendments. But the citizens of Florida adopted Article III, Section 20, the Legislature's efforts to invalidate it failed, and it is now the law. Bringing litigation to enforce a duly enacted amendment is hardly an underhanded effort to "change policy." The only attempt to "change policy" was, in fact, the Legislature's effort to circumvent its constitutional mandate. Adopting the private attorney general doctrine will not impede the Legislature's ability to defend itself in litigation, but instead will incentivize the members of the Legislature to follow the law.

Finally, the Legislature raises the specter of increased burdens on Florida taxpayers that will result by encouraging "bounty hunters" and promoting

"litigation even of claims with little or no chance of success." (Resp. at 16.) The Legislature exaggerates this concern. Properly construed, the private attorney general doctrine applies to a very narrow class of cases, and it will offer no recompense to those who bring unsuccessful, much less frivolous claims. In that regard, although the Legislature offers a healthy dose of speculation and rhetoric, it provides no actual evidence that hordes of greedy public-interest plaintiffs have cowed legislatures into submission and depleted state treasuries in the numerous jurisdictions that have adopted the private attorney general doctrine.

III. APPELLANTS MET THE PROCEDURAL REQUIREMENTS FOR SEEKING ATTORNEYS' FEES.

The Legislature raises meritless claims that Appellants failed to comply with two alleged procedural requirements for seeking appellate attorneys' fees: 1) that Appellants failed to plead their claim for attorneys' fees in their complaint; and 2) that Appellants failed to serve a pleading asserting a claim for attorneys' fee on the state's trust-fund administrator. (Resp. at 20-29.)

First, contrary to the Legislature's argument, Florida law provides that a request for appellate attorneys' fees need not be claimed in the complaint, but rather must be asserted in a motion served together with the reply brief. The Legislature bases its argument on *Stockman v. Downs*, in which this Court held that "a claim for attorney's fees, whether based on statute or contract, must be pled." 573 So. 2d 835, 837 (Fla. 1991). However, the *Stockman* rule does not apply to

requests for appellate attorneys' fees, as is demonstrated by the Florida Rules of Appellate Procedure and case law.

Florida Rule of Appellate Procedure 9.400(b) provides that "a motion for attorneys' fees … shall be served not later than: (1) **in appeals, the time for service of the reply brief**[.]" (Emphasis added.) As the Fifth District explained in *Altamonte Hitch & Trailer Serv., Inc. v. U-Haul Co. of E. Florida*, Rule 9.400(b) requires that "[i]n order for an appellate court to make an award of attorney's fees for appellate work, a timely motion must be filed and there must be a legal substantive basis for the award. There is no requirement that they be pled below." 498 So. 2d 1346, 1347 (Fla. 5th DCA 1986). Although the Legislature points out that *Altamonte Hitch* predated *Stockman*, the Fifth District was clear that pleading was required at the trial court level—the same result that would have followed under *Stockman*—and denied trial court fees on that basis. *See id.* at 1347. It simply held that **appellate** fees are distinct and do not require pleading.

Nothing in *Stockman* indicates any intent to silently overrule *Altamonte Hitch* or expand the requirements of Rule 9.400(b). To the contrary, this Court recently reiterated that *Stockman* does not apply in appellate proceedings. *Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co.*, 140 So. 3d 529, 535 (Fla. 2014). Although the Legislature points out that *Advanced Chiropractic* dealt with a writ of certiorari, that is not a meaningful distinction.

This Court's holding that *Stockman* is limited to "requests for attorney's fees **at the trial level**," while appellate fee requests are "governed by the rules of appellate procedure," is not somehow less true in the context of an appeal from a final judgment. *Id.* That is because appellate fee requests are "separate and distinct" from claims for fees in the trial court and do not carry the same procedural requirements. *Parrot Cove Marina, LLC v. Duncan Seawall Dock & Boatlift, Inc.*, 978 So. 2d 811, 816 (Fla. 2d DCA 2008); *see also Superior Prot., Inc. v. Martinez*, 930 So. 2d 859, 860 (Fla. 2d DCA 2006) (holding that failure to timely seek fees in trial court was not bar to appellate fee award because, "[i]n appellate proceedings, the timeliness of a motion for attorneys' fees is governed by Florida Rule of Appellate Procedure 9.400(b), which requires that the motion 'be served not later than the time for service of the reply brief' ").

In this case, Appellants served their motion for appellate attorneys' fees on the Legislature on January 9, 2015, the date they served their reply brief in the above-captioned appeal. Thus, Appellants complied with the requirements for timely seeking appellate attorneys' fees under Rule 9.400(b).[2]

[2] Even assuming that the *Stockman* doctrine did apply in appellate proceedings, pleading would not be required, and the Legislature received adequate notice of Appellants' fee claim, for the reasons stated in Part III of their motion.

Second, the Legislature contends that Appellants are barred from seeking appellate attorneys' fees because they did not serve a "pleading" on the Department of Financial Services ("DFS") under section 284.30, Florida Statutes.[3] The Legislature concedes that Appellants served a copy of their motion for appellate attorneys' fees on DFS, but claim that a motion for fees is not a "pleading," as that term is used in section 284.30. (Resp. at 28.)

The Legislature's unduly technical reading is self-defeating. If the term "pleading" is construed strictly to mean a complaint or answer, nothing at all would have to be served in this case because no pleading is required to seek appellate attorneys' fees. As Rule 9.400(b) provides, appellate attorneys' fees are sought by motion. Thus, under the Legislature's interpretation, section 284.30's requirement of serving "the pleading claiming the fees" does not apply on its face.

The Legislature nevertheless attempts to create a procedural barrier that would effectively preclude parties from ever seeking appellate attorneys' fees from the state. As explained previously, Rule 9.400(b) requires that parties seeking attorneys' fees for appellate work file a "motion" no later than "the time for service of the reply brief." Under the Legislature's construction of section 284.30, no party

[3] Section 284.30 provides in relevant part that "[a] party to a suit in any court, to be entitled to have his or her attorney's fees paid by the state or any of its agencies, must serve a copy of the pleading claiming the fees on the Department of Financial Services."

could ever exercise its right to seek appellate attorneys' fees from the state because the appellate briefs and motion under Rule 9.400(b) would never qualify as a "pleading." This cannot be what section 284.30 means.[4]

If, as the Legislature insists, a pleading seeking fees must always be served on DFS at the outset of litigation, no party could ever obtain fees based on conduct arising after the filing of the complaint, such as fees under section 57.105, Florida Statutes, the inequitable conduct doctrine, or here, the private attorney general doctrine—or, for that matter, fees sought in an amended pleading after commencement of the case. And there would be a *de facto* requirement that attorneys' fees be pleaded at the trial level to seek fees on appeal, contrary to the decisions cited above. If section 284.30 were construed to upend typical court procedures in the manner suggested by the Legislature, it would likely be an unconstitutional infringement on this Court's authority. Art. V, § 2(a), Fla. Const.; *Raymond*, 906 So. 2d at 1051-52. Instead, the statute merely means what it says—namely, when a "pleading claiming the fees" exists, it must be served on DFS. § 284.30, Fla. Stat.

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[4] The cases cited by the Legislature address parties' failure to serve pleadings seeking fees at the trial level. *Hale v. Dep't of Revenue*, 973 So. 2d 518, 520-21 (Fla. 1st DCA 2008); *Goodman v. Martin Cnty. Health Dep't*, 786 So. 2d 661, 664 (Fla. 4th DCA 2001); *Dep't of Health & Rehabilitative Servs. v. Cordes*, 644 So. 2d 609, 609 (Fla. 1st DCA 1994); *Heredia v. Dep't of Highway Safety & Motor Vehicle*s, 547 So. 2d 1007, 1008 (Fla. 3d DCA 1989).

The decision in *N.S. v. Dep't of Children & Families*, 119 So. 3d 558 (Fla. 5th DCA 2013), cited by the Legislature, merely highlights this point. The mother in dependency proceedings moved for attorneys' fees pursuant to section 57.105, arguing that the Department of Children & Families had no basis to pursue the action against her. *N.S.*, 119 So. 3d at 559-60. The trial court denied the fee claim because she had not given notice of the motion to DFS under section 284.30. *Id.* at 560. The Fifth District reversed, explaining that in an administrative action by the state against an individual in which the individual does not have an opportunity to claim attorneys' fees in a pleading, section 284.30's notice requirement does not apply. *Id.* at 560-61. As the court held, the "types of proceedings requiring notice are those **for which a pleading must be filed**." *Id.* at 561 (emphasis added).

Similarly, in *Viering v. Florida Commission on Human Relations ex rel. Watson*, 128 So. 3d 967, 969-70 (Fla. 1st DCA 2013), the First District found that the defendant in an administrative proceeding was not barred from seeking fees under section 284.30, despite not having served DFS with her motion for fees or any other document. The *Viering* court reasoned that the defendant to an administrative proceeding does not "file[] a complaint" and is "under no obligation to file an answer" and, therefore, "did not file an initial pleading that could have been served on [DFS]." *Id.* at 969. The motion itself was not required to be served because "[m]otions are not pleadings" and do not fall within the statutory

requirement of serving "a copy of the pleading claiming the fees." *Id.* at 969, 970 (internal quotation marks omitted).

Both *N.S.* and *Viering* thus recognize that the phrase "the pleading claiming the fees" only has meaning when a pleading seeking fees is required. Because appellate proceedings do not involve pleadings, the statutory service requirement does not apply at all. If, however, this Court construes "pleading" more broadly to include the motion seeking appellate fees, Appellants have satisfied the service requirement. Appellants timely served DFS with their motion for appellate fees and thereby gave the notice that the statute intends. Accordingly, regardless of how the statute is construed, Appellants' claim for appellate fees is not barred by the service requirement in section 284.30.

IV. DUE PROCESS DOES NOT PROHIBIT THE AWARD OF ATTORNEYS' FEES IN THIS CASE.

The Legislature contends that the Due Process clause of the Florida Constitution prohibits the retroactive application of the private attorney general doctrine to this case. (Resp. at 29-33.) This argument misconstrues the nature of the right to due process. Accordingly, it warrants little consideration.

Due process protects individuals from the government, not the government from individuals seeking to vindicate their rights. *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991) ("[D]ue process under the Florida Constitution protects the full panoply of individual rights from unwarranted

encroachment by the government."); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127 n.10 (1992) (noting the "traditional and common-sense notion that the Due Process Clause … was intended to secure the individual from the arbitrary exercise of the powers of government" (internal quotation marks and citation omitted)). The Legislature cites no authority, nor could it, for the proposition that due process protects one branch of the government from rules duly enacted by another.

In any event, Due Process does not preclude private attorney general fees in this case. The Legislature discusses at length the principles governing retroactivity of statutes, but no statute is at issue here.[5] A different analysis applies to judicial decisions, even when substantive rights are at stake. In that regard, this Court "has

[5] Although the Legislature again attempts to draw a sharp line between procedural statutes (which may be retroactive) and substantive statutes (which purportedly cannot be retroactive), this Court has already recognized that this "dichotomy does not in every case answer the question." *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986). This Court has also "embraced a third alternative": "If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes." *Id.*; *see also Grammer v. Roman*, 174 So. 2d 443, 446 (Fla. 2d DCA 1965) ("Remedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes."). A remedial statute is meant "to correct or remedy a problem or redress an injury." *Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388, 396 (Fla. 5th DCA 2002). Even applying the statutory analysis, the private attorney general doctrine can be retroactively applied because it is meant to remedy the inaction of public enforcers where vital public rights are at stake.

the sole power to determine whether [its] decision should be prospective or retroactive in application." *Benyard v. Wainwright*, 322 So. 2d 473, 474 (Fla. 1975). Generally, this Court's decisions "announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application." *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992); *see also Wuornos v. State*, 644 So. 2d 1000, 1007 n.4 (Fla. 1994) ("[N]ew points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.").

Consequently, this Court has often given retroactive effect to decisions creating, modifying, or eliminating substantive rights at common law. *See, e.g.*, *Hoffman v. Jones*, 280 So. 2d 431, 439-40 (Fla. 1973) (holding that comparative negligence doctrine could be raised in many pending cases); *Linder v. Combustion Eng'g, Inc.*, 342 So. 2d 474, 475-76 (Fla. 1977) (holding that strict liability doctrine would be applied retroactively in many pending cases); *Kalisch v. Kalisch*, 646 So. 2d 292, 292 (Fla. 3d DCA 1994) (holding that abrogation of interspousal immunity doctrine was retroactive). Contrary to the Legislature's arguments, there is no Due Process violation when this Court adopts an exception to the American Rule in a pending case because "a person has no property, no vested interest, in any rule of the common law." *Clausell v. Hobart Corp.*, 515 So.

2d 1275, 1275-76 (Fla. 1987) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978)) (alteration omitted).

The Legislature notes that this Court may depart from the general rule of retroactivity when it would work an "injustice or hardship," *Martinez v. Scanlan*, 582 So. 2d 1167, 1175 (Fla. 1991) (citation omitted), and relies on a federal test for retroactivity of new rules of law. (Resp. at 32.) The only "hardship" identified by the Legislature is that it would be required to pay fees in this case and "scores" of unidentified pending cases. (*Id.* at 33.) Although the Legislature imagines that bands of mercenary litigants will pounce upon the private attorney general doctrine and deplete the treasury, speculation and innuendo do not establish the extraordinary hardship necessary to justify deviation from the general rule of retroactivity. The private attorney general doctrine is narrowly limited, and any claim of injustice or undue hardship is undermined by the experience of other jurisdictions that have not been thrown into poverty by their adoption of the doctrine. If there are "scores" of cases where the Florida Attorney General has declined to enforce constitutional protections as in this case, then that only speaks to the urgent need to adopt this doctrine.

Although this Court has never adopted the three-pronged test discussed in *Glazner v. Glazner*, 347 F.3d 1212, 1220 (11th Cir. 2003), it actually counsels **against** solely prospective application of the private attorney general doctrine. The

private attorney general doctrine is a new principle of law, but its adoption would not be a surprise in light of this Court's recognition of other exceptions to the American Rule. (Mot. at 10.) The Legislature argues that prospective application would still promote one of the goals of the private attorney general doctrine (*i.e.*, encouraging future public interest litigation), but that is not the question under *Glazner*. The *Glazner* test instead asks whether retroactive operation would advance the purposes of the new rule. 347 F.3d at 1220. Retroactivity will reimburse Appellants for exposing and prosecuting a constitutional violation and will encourage other private litigants to continue prosecuting pending cases. Without retroactivity, other parties may limit or cease litigating existing cases if this Court declares that they have no right to attorneys' fees. Finally, the Legislature offers the specter of fee awards in "scores of other pending cases" to claim that retroactivity will be inequitable. (Resp. at 33.) As noted above, overblown speculation does not establish genuine inequity.

It is, therefore, unsurprising that other courts have not hesitated to award attorneys' fees when they first adopted the private attorney general doctrine, even though the exact same arguments advanced by the Legislature for non-retroactivity would have existed in those cases. *See, e.g.*, *Serrano,* 569 P.2d at 1315 (adopting the private attorney general theory and affirming trial court's award of plaintiffs' attorney's fees); *Arnold*, 775 P.2d at 537-38 (same); *Montanans*, 989 P.2d at 812

(adopting the private attorney general doctrine and holding that the district court erred in denying reasonable attorney's fees in underlying case).[6] Accordingly, this Court should join its sister jurisdictions, decline to deviate from the ordinary rule of retroactivity, and award Appellants their appellate fees.

CONCLUSION

For the reasons set forth in this reply and in their motion for appellate attorneys' fees, Appellants respectfully request that this Court adopt the private attorney general doctrine and award Appellants their appellate attorneys' fees under the doctrine.

WHEREFORE, Appellants request that this Court (1) grant this motion, (2) award Plaintiffs their appellate attorneys' fees, (3) remand this matter to the trial court for a determination of the recoverable amount of attorneys' fees, and (4) grant such other and further relief as is just and proper.

Respectfully submitted,

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[6] Before *Arnold* and *Montanans*, Arizona and Montana courts had generally discussed the private attorney general doctrine, but had not taken a position on whether it was the law in their states. *Kadish v. Ariz. State Land Dep't*, 747 P.2d 1183, 1196-97 (Ariz. 1987), *aff'd sub nom. ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *Matter of Dearborn Drainage Area*, 782 P.2d 898, 900 (Mont. 1989).

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