

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

ELVIN McCORVEY,

Plaintiff,

vs.

CASE NO.: 3:08cv138/MCR/MD

KURT BROWNING, in
his official capacity as
Secretary of State of the
State of Florida; and BILL
McCOLLUM, in his official
capacity as Attorney General
of the State of Florida,

Defendants.

DEFENDANT BILL McCOLLUM'S CORRECTED MOTION TO DISMISS
AS AN IMPROPER PARTY

The Defendant, BILL McCOLLUM, in his official capacity as Attorney General of the State of Florida, by undersigned counsel, hereby moves pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief can be granted. The Attorney General is not a proper party whenever a statute is challenged; it is only when the challenged statute bears upon an express and direct power vested in the Attorney General that makes him a proper party to a proceeding.

In the case at bar, Plaintiff challenges §103.101, Fla. Stat., contending that “(b)y purporting to require the Florida Democratic Party to choose delegates in a way that

the national Democratic Party would not approve, the State of Florida has violated the First Amendment (and Fourteenth Amendment) rights of Plaintiff, of other voters, and of the Florida Democratic Party.” Page 3, paras. 10 and 11 of Complaint. This provision is a part of the Florida Election Code, Chapters 97-106, Fla. Stat. See §97.011, Fla. Stat. By operation of §97.012, Fla. Stat., “(t)he Secretary of State is the chief election officer of the state.”

As demonstrated herein, it is improper to name the Attorney General as a party defendant in order to defend the constitutionality of a state statute. As a general principle, when an act is challenged, the party whose duty is to enforce it is the proper party defendant. ACLU v. The Florida Bar, 999 F. 2d 1486 (11th Cir. 1993); Socialist Workers Party v. Leahy, 145 F. 3d 1240 (11th Cir. 1998); Walker v. President of the Senate, 658 So. 2d 1200 (Fla. 5th DCA 1995). In Harris v. Bush, 106 F. Supp. 2d 1272 (N. D. Fla. 2000), the court held that the Governor could not be sued based solely on his status as the state’s chief executive officer designated to “take care that the laws be faithfully executed.” Here, the Attorney General’s status as the state’s chief legal officer is not sufficient to confer party status on him. There is no—and there can be no—claim that the Attorney General possesses any regulatory or enforcement authority with regard to the challenged statute.

Such constitutional defense of the statute is incorporated within the legal defense

of the appropriate enforcing official properly named as a defendant in the suit. Because the Attorney General is not a proper party to this litigation, he is entitled to an order of dismissal of all claims against him.

I. The Attorney General is not a Proper Party.

A. It is for the Attorney General to decide whether to appear in litigation challenging the constitutionality of a State statute.

Although the Attorney General has been named as a party defendant, this lawsuit is an action challenging the constitutionality of a state statute and seeking equitable relief in the form of a declaratory judgment and an injunction. It is not an action for damages arising out of the Attorney General's personal conduct or for equitable relief arising out of past or threatened official conduct by the Attorney General. Plaintiff's rationale in naming the Attorney General a party defendant to this lawsuit is based on the erroneous notion that he is Florida's chief law enforcement officer.

However, the Legislature has provided for the Attorney General's participation in a case challenging the constitutionality of a statute. By operation of §86.091, Fla. Stat., "if a statute ... is alleged to be unconstitutional, the Attorney General ... shall be served with a copy of the complaint and be entitled to be heard."

This provision is designed to give the Attorney General notice that there is a pending action challenging the constitutionality of a state law and to provide him with the

opportunity to be heard. See Watson v. Claughton, 34 So.2d 243 (Fla.1948). It is not a service of process provision mandating that plaintiffs make the Attorney General a party to this action, thereby subjecting him to the jurisdiction of this Court, which in turn would necessarily impose upon him all the accompanying burdens of being a party to this litigation.

It is well-settled that it is for the Attorney General alone to decide when to get involved in law suits where a party claims a state statute is unconstitutional. State ex rel. Attorney General v. Gleason, 12 Fla. 190, 212-215 (Fla. 1869), writ of error dismissed, 76 U.S. 779 (1870); Mayo v. National Truck, 220 So.2d 11 (Fla. 1969)(Attorney General has right not to participate in lawsuit that alleges a state statute is unconstitutional); State ex rel. Shevin v. Kerwin, 279 So.2d 836 (Fla. 1973)(upholding right of Attorney General to seek to intervene **after** a statute has been held to be unconstitutional in order to appeal the determination). See also Mallory v. Harkness, 923 F.Supp. 1546, 1553 (S.D. Fla. 1996), Aff'd without opinion, 109 F.3d 771 (11th Cir. 1997)(“It has long been recognized that the [Attorney General] is not a necessary party each time the constitutionality of a statute is drawn into question ... The [Attorney General] is thus not affirmatively required to intervene every time an entity challenges the constitutionality of a statute.”)(citations omitted); Rosenfeld v. Lu, 766 F.Supp. 1131, 1133-4 (S.D. Fla. 1991)(Attorney General, having been given notice

of constitutional challenge to Florida statute, declined opportunity to be heard); Florida East Coast Railway Company v. Martinez, 761 F.Supp. 782, 784 (M.D. Fla. 1991)(Attorney General not proper party where the statute in question neither obligates nor authorizes Attorney General to perform duties); Hobbs v. Tom Norton Motor Company, 373 F.Supp. 956, 960 (S.D. Fla. 1974)(“Plaintiff maintains that the Attorney General has a duty to attack the constitutionality of a statute which is patently offensive; however, this duty does not require the Attorney General to be a defendant to every suit attacking the validity of state statutes.

The fact that the State of Florida may intervene as a matter of right in certain actions compel the Attorney General to intervene in every lawsuit attacking state statutes. In summary, the Attorney General is not a necessary or proper party to this action, and he cannot be compelled to join or intervene at the instance of the plaintiff.”); Florida ex rel. Shevin v. Exxon, 526 F.2d 266 (5th Cir. 1976)(noting the breadth of the Attorney General’s discretion to determine what course of action is in the public interest), cert. denied, 429 U.S. 829 (1976).

B. It would violate the separation of powers mandated by the Florida Constitution for the Court to require the Attorney General to defend the challenged statute.

The Attorney General is the attorney and legal guardian of the people, whose duties pertain to the Executive Branch, and it is his duty, when the occasion

arises, to use means most effective to the enforcement of the laws and protection of the people. State ex rel Attorney General v. Gleason, 12 Fla. at 212. In Gleason, the Florida Supreme Court noted the following about the Office of the Attorney General:

The office of the Attorney General is a public trust. It is a legal presumption that he will do his duty, that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control.

* * *

The office of the Attorney General is, in many respects, judicial in its character, and he is clothed with a considerable discretion. The appropriate and proper function of courts is to hear causes that the citizen of the State may see proper to institute, and there are but few cases in which they can exercise a discretion to refuse to hear them. The Attorney General being intimately associated with the other departments of the Government, being as well the proper legal adviser of the Executive as the Legislative department of the Government, it is highly proper, whenever the right to a public office is to be tried, that he should be clothed with a discretion in the premises which should be exercised at least independently of the courts

Id. at 213, 225 (citations omitted).

If a Court were to interfere with the Attorney General exercising his discretion as a member of the Executive Branch, such action would violate the separation of powers doctrine under Article II, §3 of the Florida Constitution. State ex rel Attorney General v. Gleason, 12 Fla. at 215.

Because of the separation of powers doctrine, a Court may not order the

Attorney General when to exercise his right to intervene or when to remain as a defendant or be removed as a defendant in a constitutional challenge, because it is the right and discretion of the Attorney General to determine when he needs to be a party defendant to properly protect the public interest.

C. Being Chief Legal Officer of the State of Florida does not vest the Attorney General with enforcement powers over the statute in question.

As previously noted, when the constitutionality of a statute is being challenged, the proper party defendant is the state agency or official charged with enforcing the statute. Diamond v. Charles, 476 U.S. 54, 64 (1986); ACLU v. The Florida Bar, 999 F.2d 1486, 1490 (11th Cir. 1993). It is essential that the party defendant in a declaratory action be the party whose interests will be affected by the decree. Retail Liquor Dealers v. Dade County, 100 So.2d 76 (Fla. 3d DCA 1958). The Attorney General is not a necessary party to any declaratory action challenging the constitutionality of a state statute. The Florida Supreme Court noted that Florida's declaratory judgment law "does not prescribe that the Attorney General shall be a necessary party when the constitutionality of an act is assailed." Watson v. Claughton, 34 So.2d at 246. Rather, it provides an avenue for the interests of the State to be represented by the Attorney General when, in the exercise of his discretion, he concludes his appearance is necessary to protect the interests of the State. Id.

The general duty to defend the constitutionality of state statutes does not constitute the enforcement of a statute. Although a state attorney general may have a general duty to support the constitutionality of a challenged state statute, he “does so, not as an adverse party, but as a representative of the State’s interest in asserting the validity of its statutes.” Mendez v. Heller, 530 F.2d 457, 460 (2nd Cir. 1976).

1st Westco Corporation v. School District of Philadelphia, 6 F.3d 108 (3rd Cir. 1993) is illustrative. In 1st Westco, the Third Circuit was called upon to decide who the proper party was when a state statute was challenged as being unconstitutional. Pennsylvania had a statute which required “school districts to include employee residency requirements in contracts in which they entered for construction, alteration, or repair of school buildings.” Id. at 111. The statute permitted the school district to refuse payment if a contractor violated the statute. Id. at 112. The school district requested the Pennsylvania Secretary of Education to render an opinion about the constitutionality of the statute; the Secretary in turn sought an opinion from the Attorney General. Id. The Attorney General advised the Secretary that the statute was presumptively valid and that it should be enforced; the Secretary in turn passed that advice on to the school district. Id. Three years later, the school district entered into a contract with 1st Westco Corporation to renovate various school buildings. When the company utilized New Jersey residents to perform the work, the school district

instructed it to cease work because it was in violation of the state statute. Id. at 112. The company complied by replacing the New Jersey workers with Pennsylvania residents, but filed suit in federal district court against the school district and the Commonwealth of Pennsylvania. Id. at 111-12. The school district then filed a third party complaint against the Secretary of Education and Attorney General. The officials moved to dismiss, asserting that they neither had the authority to enforce the statute nor had threatened to enforce the statute. Id. at 111. The district court denied the motion.

On appeal, the Third Circuit reversed, holding that the Secretary lacked power to enforce the statute against the school district and that a general duty to uphold the laws of Pennsylvania was insufficient to impose liability upon the Commonwealth officials. Id. at 113-14. The Third Circuit concluded:

If we were to allow Westco to join the Commonwealth Officials in this lawsuit based on their general obligation to enforce the laws of the Commonwealth, we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it. Such a result is undesirable, a drain on resources of time and money, and contrary to [law].

Id. at 116.

The Attorney General is not the enforcing officer of the subject law being challenged, has not taken any action on the challenged statute, has not threatened to

take any action and has not been vested by the Legislature with any authority regarding this statute. Thus, the Attorney General is neither a necessary party nor a proper party to this action.

The undersigned certifies that, pursuant to N.D. Fla. Loc. R. 7.1(B), he attempted to confer with counsel for the opposing party on April 29, 2008 by leaving a detailed telephone message with a secretary. However, as of the date below, there has been no return of that call; therefore, the undersigned has been unsuccessful in conferring with counsel.

CONCLUSION

For the reasons set forth above, the Attorney General must be dismissed as a party defendant in this action.

Respectfully Submitted,

BILL McCOLLUM
ATTORNEY GENERAL

S/ George Waas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 1, 2008, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system which generates a notice of filing to the following: Mary E. Olsen, J. Cecil Gardner and Gregory B. Stein, counsel for plaintiff. I further certify that a true and correct copy of the foregoing was furnished this day by U. S. Mail.

S/George Waas

George Waas