**SUPREME COURT OF FLORIDA**

**DIVISION OF WORKERS' COMPENSATION**

**Appellant,**

**vs.** **CASE NO. SC05-220**

**RICARDO CAGNOLI, ET AL.**

**Appellees.**
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# REPLY BRIEF OF APPELLANT DIVISION OF WORKERS' COMPENSATION

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On Appeal of a Decision of the
District Court of Appeal
First District, State of Florida

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## Summary of Reply

Appellant, Division of Workers' Compensation, has standing to maintain this appeal pursuant to Fla. R. App. P. 9.180(e), Fla. Stat. The Division became a party upon intervening in the district court, and its status as party continues for purposes of appealing the decision of the district court.

If the Florida workers' compensation system required claimants to provide their social security numbers (SSN) by statute or administrative regulation in effect prior to 1974, the system is exempt from the federal privacy act. *Schwier v. Cox*, 340 F. 3d 1284, 1293 (11th Cir. 2003). The applicability of the Federal Privacy Act being expressly fact-dependent, *Id*. at n. 6, it was improperly raised for the first time in the district court. *Sasso v. Ram Property Management,* 431 So. 2d 204 (Fla. 1st DCA 1983), aff'd 452 So. 2d 932 (Fla. 1984) (only facial challenges can be raised in the appeals court); *Cf. Sarnoff v. Florida Dept. of Highway Safety and Motor Vehicles*, 825 So. 2d 351 (Fla. 2002)(direct-file exception to exhaustion doctrine applicable only to facial challenges). The Answer Brief concedes the fact-dependency of the determination by taking the unusual step of appending an affidavit making new factual claims before the Supreme Court. The district court should have dismissed the appeal as premature or remanded for fact-finding at the trial level. This court should vacate the district court's premature invalidation of a state statute, remanding for determination upon a complete record.

There is insufficient basis on this record for a challenge to the statute as applied to this claimant. The claimant has not even alleged he has a social security number, and thus would not have standing to assert that he was denied anything on account of "refusal to disclose his social security account number." 5 U.S.C. s. 552 (note). Although claimant argued at length before the district court and the administrative tribunal that illegal aliens are entitled to benefits despite their lack of SSNs, he has not claimed illegal alien status. Claimant nevertheless remains free to refile his Petition without such a number, so long as he alleges he is ineligible to obtain one. No trier of fact has ever been presented with the factual assertions this claimant must make if he is to carry his burden of proving the statute invalid.

## Argument

I. The Division is the Appellant before this court and has standing to maintain this appeal under Rule 9.180(e), Fla. R. App. P. and Section 440.271, Florida Statutes.

The Division becomes a party to a case before the district court by filing a notice of intervention as an Appellee. Fla. R. App. P. 9.180(e)(1); Section 440.271, Fla. Stat. (2004). The Division is statutorily authorized to "take positions on any relevant matters." *Id*. In this case, the Division filed a notice of intervention in the district court and took the position that the statute under attack is constitutional and valid. Having intervened pursuant to statute and rule and thus

becoming a party Appellee in the proceedings below, the Division properly took an appeal to this court.

Appellee asserts "the rights of an intervenor are conditional in that they exist only so long as the litigation continues between the parties" citing to *Fairfield Communities v. Florida Land and Water Adjudicatory Comm'n*, 522 So. 2d 1012 (Fla. 1st DCA 1988). However, the *Fairfield* court expressly disavowed the proposition: "The issue of whether intervenors may still maintain their appeal before FLWAC, even though the only party with standing to appeal pursuant to section 380.07(2) has withdrawn or dismissed its challenge, was not briefed nor argued below, and is not an issue before this court." Id at 1015.

It appears that Appellee intended to rely on *Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates, Inc.* 857 So. 2d 207 (Fla. 1st DCA 2003), because the Answer Brief's quoted language does appear in that opinion at page 211, albeit in a context not remotely applicable here. In *Environmental Confederation*, the Department of Environmental Protection concluded the appellants lacked standing to challenge a proposed environmental permit, permitting them to participate in the proceedings as intervenors rather than parties, under Section 403.412(5), Fla. Stat. (2002). The appellees moved to dismiss the appeal, claiming the appellants could adequately protect their interests as intervenors. The court denied the motion because an intervenor under Section 403.412(5), Fla. Stat. is specifically not permitted to institute a request for relief.

*Id*. at 210. The snippet of language quoted in the Answer Brief is the part of the opinion in which the court observed that section 403.412(5) intervention was analogous to intervention under Fla. R. Civ. P. 1.230, which by its terms is "subordinate" to the principal litigation.

This case, in contrast, implicates intervention under rule Fla. R. App. P. 9.180(e), which by *its* terms provides that the Division becomes a party upon intervening, and authorizes the Division to take "positions on any relevant matters."

The only other authority cited by Appellee is similarly taken out of context. The appellant in *Humana of Florida, Inc. v. Department of Health and Rehabilitative Services*, 500 So. 2d 186 (Fla. 1st DCA 1986) had intervened in an administrative "certificate of need" proceeding. After a preliminary decision, one party timely sought a hearing, and a second party sought to intervene some 11 months later. The first party withdrew its petition, and the court held the administrative agency was at that point without jurisdiction to review the preliminary decision, as the only timely filed petition for review had been withdrawn, relying on Section 381.494(8)(e), Fla. Stat. (1986). Id. at 187-88. It is inappropriate to generalize from an administrative law case specifically predicated on a different agency's organic statute to erect a general principle of law that would prevail over the rules the Supreme Court has adopted for appellate procedure. In this case, the legislature and the court rules specifically authorize the

Division to appear *as a party* in the district court, while the intervenor in *Humana* had no such specific authority.

It is not unusual for administrative law statutes to impose duties to act *sua sponte* on officials that also serve as adjudicators in disputed cases, but in other contexts the officials are usually explicitly made parties to cases in the appeals courts. E.g., *South Florida Hosp. and Healthcare Ass'n v. Jaber*, 887 So. 2d 1210, 1212 (Fla. 2004)(Public Service Commissioners made party to appeal; court held "the PSC properly initiated the proceeding below on its own motion for the purpose of ensuring the reasonableness of FPL's rates.") The workers' compensation statute imposes on administrative judges certain duties to take actions that may aggrieve *both* parties - the best example is the duty to examine attorneys' fees for compliance with the statutory formula, even when counsel for both sides agree the fee is proper. Section 440.34, Fla. Stat. If a judge determines the "agreed" fees are excessive and that order is appealed, there is no one to answer in the appellate court as a party appellee.

This case arose from another OJCC duty requiring *sua sponte* action. The 2003 amendments to Chapter 440, Fla. Stat., assigned OJCC the responsibility for initially screening petitions and rejecting those that lack the information required under Section 440.192, Fla. Stat. The initial screening process is designed to protect the OJCC's (and Division's) need for keeping proper records and managing cases. It is not intended to stop the progress of the case but rather to advance its

ultimate resolution by correcting technical defects at an early stage. It does not advance the position of the employer/carrier in defending the claim. Thus, appeals from the *sua sponte* OJCC petition screening orders typically elicit no opposition from the appellee. E.g., *Martinez v. Nightshift Temps, Inc. and CNA ClaimPlus, Inc.*, 30 Fla. L. Weekly D374 (Fla. 1st DCA Feb 8, 2005)(Order Striking Insufficient Petition Reversed); *Torres v. Service Management System and Gallagher Bassett Services, Inc.*, 890 So. 2d 1239 (Fla. 1st DCA 2005)(Order Striking Insufficient Petition Reversed); *Butterman v. Broward County School Board and Gallagher Bassett*, No. 1D05-0350 (Fla. 1st DCA April 12, 2005).

Unless the OJCC's *sua sponte* duties are to be excised from the statute by failure to defend them, it would be a necessary part of the statutory scheme that someone appear and present argument in support of the result. When Section 440.271, Fla. Stat., and Rule 9.180(e), Fla. R. App. P. were first enacted, the Division and the OJCC were housed together administratively, and it was logical to expect the Division to defend the OJCC's *sua sponte* actions. The two entities were separated in 2001, but the statute and rule still afford the Division the authority to intervene of right in the district court for all purposes. Because this case implicates the administrative functioning of its coordinate entity, the Division has a "direct and immediate interest," *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004), conveyed by statute and has not only right but reason to intervene. In addition, the Division's own recordkeeping systems use SSNs to uniquely identify claimants,

making exceptions for illegal aliens just as OJCC does, and its functioning is potentially subject to similar disruption if the system cannot require SSNs. Accordingly, since the Division intervened and became a party (Fla. R. App. P. 9.180(e)(3)) at the district court, it had standing as a party to appeal the district court's decision.

II. The district court did not observe the procedural requisites designed to prevent haste in deciding constitutional questions.

A. The statutory scheme is not facially unconstitutional.

Courts are required to concede every presumption in favor of the validity of a statute. One who challenges the constitutionality of a statute has the burden of demonstrating its invalidity. Only a clear and demonstrated usurpation of power will authorize judicial interference with legislative action. It is therefore the duty of an appellate court to uphold the validity of a statute in all cases where that result can be lawfully reached. *Natural Parents of J.B v. Florida Dept. of Children and Families*, 780 So. 2d 6, 8 (Fla. 2001) *quoting with approval, Department of Children & Family Services v. Natural Parents of J.B.*, 736 So. 2d 111, 113-14 (Fla. 4th DCA 1999).

The facial constitutionality of a statute is a "pure question of law." *American Federation of Labor and Congress of Industrial Organizations v. Hood,* 885 So. 2d 373, 374 (Fla. 2004). A facial challenge could thus be raised in the absence of a factual record, but only if the nature of the challenge was such that no reference to factual matters was required. In the first district, for a facial challenge to prevail,

"the challenger must establish that no set of circumstances exists under which the statute would be valid." *Cashatt v. State*, 873 So. 2d 430 (Fla. 1st DCA 2004).

The applicability of the Federal Privacy Act is fact-dependent: the statute under attack in this case would be valid if the Florida workers' compensation system "maintain[ed] a system of records" that required provision of social security numbers "under statute or regulation adopted prior to [January 1, 1975] to verify the identity of an individual." 5 U.S.C. s. 552 (note). Thus, the court's cases imposing on the statute's challenger the burden of showing unconstitutionality as a matter of law would require the challenger to conclusively establish that Florida did not maintain a system requiring SSNs prior to 1975 by statute *or regulation*. Before the district court, Cagnoli simply kept silent about the possibility that the state had required SSNs *by regulation* prior to 1975, and the Division's brief pointed out that the challenger had not carried his burden. Because the district court had ruled it would proceed by appeal rather than by certiorari, it would not have been appropriate for the Division to advert to factual matters outside the record. Upon being surprised by the district court's decision, the Division located a decision of this Court that made reference to the existence of a history of requiring SSNs by administrative regulation, unsuccessfully bringing the same to the district court's attention via Motion for Rehearing.

The eleventh circuit viewed the existence of an administrative regulatory history of SSN requirements as a question of fact. *Schwier v. Cox*, 340 F. 3d 1284,

1293 (11th Cir. 2003). The Division notes that Cagnoli in his brief implicitly acknowledges the factual possibility of a historical chain of regulations requiring SSNs, but seeks to have it discounted on the basis that it did not actually require SSNs in Florida, or did not actually use them "to verify the identity of individuals." In support of the latter proposition, Cagnoli appended an affidavit to his brief, thus demonstrating the contention is factual in nature. The Division respectfully submits that the applicability of the grandfather clause is fact-dependent and as such not a proper basis for facial invalidation of the state statutory scheme.

B. An as-applied challenge requires the party challenging the statute to perfect the record before raising the issue in the appeals court.

Seeking to distinguish the general rule that questions not raised at the trial level are not maintainable on appeal, the Appellee cites *Sasso v. Ram Property Management,* 431 So. 2d 204 (1st DCA 1983), aff'd 452 So. 2d 932 (Fla. 1984), and two cases following it. However, *Sasso* expressly predicated its ruling on the facial nature of the challenge before it, and all the cases citing it consisted of facial challenges that were rejected on the merits or as-applied challenges that were rejected because the records were insufficient.

In *Sasso*, the district court entertained the merits of a constitutional attack raised for the first time in the appellate court, recognizing a "very narrow exception to the rule ... requiring preservation of an issue for appellate review" when "the issue on appeal involves facial constitutionality of the statute." *Id*. at

207. In order to forestall any abuse of the limited exception it was recognizing, the court qualified its holding at length: “it must be shown that the issue is ripe for adjudication … an insufficiently developed record might negate the possibility of appellate review … the record should clearly demonstrate the appellant’s standing to raise the issue of the facial unconstitutionality of a specific section of the law.” *Id*. The court observed that undisputed record facts established the appellant’s standing to raise the claim, in particular that it was clear that he was adversely affected by operation of the challenged statute. Substantively, the court upheld the statute and the Supreme Court affirmed.

In *Harrell v. Florida Const. Specialists*, 834 So. 2d 352 (Fla. 1st DCA 2003), the court cited *Sasso* to permit the constitutional challenge to be raised. The face of the opinion reveals no facts specific to the appellants other than their ages, and the fact that the JCC had applied Section 440.15(1)(e), Fla. Stat. to limit their benefits on account of their ages, enough to establish standing. Thus, the court conducted only a facial analysis, and it upheld the statute under attack. Although the district court recited the facts extensively in *B&B Steel Erectors v. Burnsed*, 591 So. 2d 644 (Fla 1st DCA 1991), its analysis of the challenge to Section 440.02(13)(d)(4), Fla. Stat. (1990) focused on the terms of the enactment under the rational basis test, upholding the law against a facial equal protection challenge.

In *Hensley v. Punta Gorda*, 686 So. 2d 724 (Fla. 1st DCA 1997), the claimant contended that the Americans with Disabilities Act pre-empted Section

440.02(1), Fla. Stat. (1994). Although the opinion in that case characterizes it as one "where appellant is asserting her rights under the ADA, rather than making a facial constitutional challenge to a portion of the Florida Workers' Compensation Law," it did not actually reach the merits of an as-applied challenge, finding the record insufficient to support one, and disposing of the challenge because, as a matter of law, a person claiming total disability could not also assert rights under the ADA. That is, the court looked to the question of standing, required for facial analysis under *Sasso*. Thus, it is questionable whether *Hensley* really approves raising as-applied challenges for the first time in the appellate court, but to the extent it might, it would be inconsistent with the strictures of *Sasso,* which was approved by the Supreme Court.

The only case in which the district court invoked *Sasso* to entertain a true as-applied challenge to the workers' compensation statute was *Polk County v. Special Disability Trust Fund*, 791 So. 2d 581 (Fla. 1st DCA 2001). The issue was whether a statutory amendment shortening a limitations period could be applied to a case involving an accident occurring before the effective date of the amendment. The court held the amendment valid as applied. The opinion's footnote 1 states that the JCC acknowledged the constitutional issue and correctly did not rule upon it. Obviously, the issue was raised at the trial level, and that apparently provided for creation of a record sufficient to allow the district court to reject the challenge.

The only challenges to the constitutionality of the workers' compensation law that have been upheld in the Supreme Court have originated in circuit court or in original proceedings. In *De Ayala v. Florida Farm Bureau*, 543 So. 2d 204 (Fla. 1989), the Supreme Court voided a provision of the workers' compensation act on equal protection grounds, as it discriminated on the basis of alienage. The fourth district had expressly approved declaratory judgment actions in circuit court for as-applied challenges such as De Ayala's. *Florida Farm Bureau v. Ayala*, 501 So. 2d 1346, 1348 (Fla. 4th DCA 1987).

The court struck part of the workers' compensation law in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) on the basis of the single subject rule. The court recognized that a declaratory judgment in circuit court was the proper method of challenging the constitutionality of a statute, Id at 1174 n. 6, but emphasized that the court does not decide abstract questions, rejecting all of the attacks except the one that was facially sustainable. *Orr v. Trask*, 464 So. 2d 131 (Fla. 1985) also was commenced in circuit court. The Supreme Court held that the appropriations act could not constitutionally "abolish statutory offices through an appropriations act which amends or nullifies substantive law." *Id* at 135.

The two cases that emanated from original proceedings before this court and resulted in holdings that parts of Chapter 440 were unconstitutional involved facial inconsistencies between statutory provisions and the principles of separation of

powers. *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474 (Fla. 2004); *Jones v. Chiles*, 638 So. 2d 48 (Fla. 1994).

In the usual administrative law context, the doctrine of exhaustion of remedies precludes resort to judicial review until the issues have been presented to, and decided by, the administrative agency. A "direct file" exception is recognized for cases involving facial unconstitutionality claims, *Department of Revenue v. Nemeth*, 733 So. 2d 970 (Fla. 1999), because in such cases "the administrative process can have no impact on the constitutional issues presented to the court." *Sarnoff v. Florida Department of Highway Safety*, 825 So. 2d at 354. In as-applied challenges, by contrast, the court requires adherence to the exhaustion of remedies doctrine, because until the administrative process is concluded, it cannot be determined how the statute has actually been applied, thus the constitutionality of its application cannot be accurately assessed: "where an as-applied challenge to a rule is raised, courts have held that an individual must exhaust administrative remedies before proceeding to circuit court." *Id*. While *Sarnoff* is not directly applicable because OJCC is not a Chapter 120 agency, Section 440.021, Fla. Stat. (2004), the same principle applies. Fact-dependent constitutional challenges require thorough development of their factual underpinnings in an appropriate proceeding.

Analyzed in light of the Supreme Court's cases, the result below is deficient in several respects. No record was developed at the trial level on the pivotal

question of the existence by administrative regulation of a social security number requirement before 1975. The burden of showing the statute's unconstitutionality belongs on the challenger, but the lower court placed it on the state, not waiting for the administrative process to conclude with a final order.

III. The administrative tribunal's order was non-final and non-appealable; hence the district court lacked jurisdiction to entertain the appeal.

The Appellee's finality argument rests on mischaracterization of the order under review. Appellee was not faced with the choice between supplying a social security number, admitting to unlawful employment, or foregoing his claim to workers' compensation benefits as he asserts. All he had to do is provide an explanation that was sufficient to convince the designated administrative authority that he fit within the exception to the SSN requirement. The administrative official went so far as to give a specific example of a means to claim the exemption without expressly admitting illegal activity - that the claimant sought a social security number and was rejected. To this day, Appellee may refile his Petition, and if he accompanies it with a verified motion for assignment of substitute identification number it will be processed along with others that perfect their petitions in that manner.

All of the authorities cited in the answer brief for the proposition that an order is final when it marks the "end to judicial labor" were cases dismissing appeals because motions dismissing claims with leave to refile them *do not* mark an end to judicial labor. Most specifically, *Croes v. University Community*

*Hospital*, 886 So. 2d 1040 (Fla. 1st DCA 2004) specifically held that an order dismissing a Petition for Benefits without prejudice and with leave to refile was non-final and non-appealable, and that exercise of certiorari jurisdiction regarding it was unwarranted. *Croes* cited to *Augustin v. Blount, Inc.*, 573 So. 2d 104: "If claimant is unwilling or unable to amend his claim to correct the defects raised in the motion to dismiss, his proper course is to so advise the Judge of Compensation Claims and request entry of a final order of dismissal with prejudice which may be appealed."

## Conclusion

It is respectfully submitted that this matter should be remanded to the trial court for development of a full factual record and issuance of a final order.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished by U.S. Mail on this 18th day of April, 2005 to the following: Andrea Cox, Esquire, 9130 South Dadeland Boulevard, Suite 1619, Miami, Florida 33156; Thomas Hodas, Esquire, 250 Tequesta Drive, Suite 301, Tequesta, Florida 33469; JoNel Newman, Esquire, 3000 Biscayne Boulevard, Suite 450, Miami, Florida 33137.

________________________________
David D. Hershel, Esq.

## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that the foregoing was prepared using Times New Roman 14-point font, and meets the requirements of Fla. R. App. P. 9.210.

________________________________
David D. Hershel, Esq.