IN THE SUPREME COURT OF FLORIDA

THE CROSSINGS AT FLEMING ISLAND COMMUNITY DEVELOPMENT DISTRICT,	)	
Appellant,	)	Case No. SC07-1556
v.	)	
LISA REINHARDT ECHEVERRI, ETC., ET AL.,	)	LT No. 1D06-2026 1D06-2158
Appellees.	)	

_____/

BRIEF OF FLORIDA CHAMBER OF COMMERCE,
SUBMITTED BY LEAVE OF COURT,
AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

_____

On Appeal from the District Court of Appeal,
First District, State of Florida

_____

Roy C. Young (FB # 098428)
Young van Assenderp, P.A.
Gallie's Hall
225 South Adams Street
Post Office Box 1833
Tallahassee, FL 32302-1833
(850) 222-7206
(850) 561-6834 (fax)

Victoria L. Weber (FB # 266426)
Sarah M. Doar (FB # 040935)
Hopping Green & Sams
123 South Calhoun St. (32301)
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 (fax)

Attorneys for Amicus Curiae
Florida Chamber of Commerce

Table of Contents

Table of Citations

Other Authorities **Page**

Statement of Interest

Amicus Curiae Florida Chamber of Commerce ("FCC") is a Florida not-for-profit corporation and non-profit trade association whose membership encompasses Florida's largest federation of businesses, chambers of commerce and business associations with its principal place of business at 136 South Bronough Street, Tallahassee, Florida 32301. FCC's more than 139,000 member businesses are located throughout every county in Florida. FCC's membership reflects the diversity of Florida's businesses from the size to the sector of the business.

FCC members are property taxpayers throughout Florida who are affected by the administration of property tax across the counties and benefit from uniform application of state laws and have a special interest in the orderly and consistent administration of the state's property tax laws. Individual FCC members have through the years experienced differing tax treatment across counties as a result of some property appraisers' refusal to apply duly-enacted tax laws. Some FCC members have been required to litigate to force property appraisers to apply property tax laws. FCC routinely advocates on behalf of its members with respect to property tax issues before the Florida Legislature and the executive and judicial branches in the State of Florida. FCC files this brief in support of the taxpayer, an Appellant in this case.

Summary of the Argument

FCC member businesses should be entitled to rely upon the existence of a uniform statewide system of property taxation as contemplated by Article VII of the Florida Constitution. Instead, dictum in *Fuchs v. Robbins,* 818 So.2d 460 (Fla. 2002) (*Fuchs III*), based upon dictum in *Department of Education v. Lewis*, 416 So.2d 455 (Fla. 1982), has wrought the confusion Justice Bell foreshadowed in his special concurrence in *Sunset Harbour Condominium Ass'n v. Robbins*, 914 So.2d 925, 933 (Fla. 2005). This confusion has resulted in some property appraisers refusing to apply various laws that they themselves have deemed unconstitutional without any benefit of a judicial determination of same.

Longstanding precedent established in *State ex rel. Atlantic Coast Line Railway Co v. State Board of Equalizers*, 94 So. 681 (Fla. 1922), and affirmed by *Turner v. Hillsborough County Aviation Authority*, 739 So.2d 175 (Fla. 2d DCA 1999), approved by this Court in *Fuchs III*, precludes the property appraiser from challenging the constitutionality of a Florida statute, whether offensively or defensively. Therefore, that precedent should be reaffirmed and this Court should reject once and for all the illogical notion that a public official can bring himself within the parameters of a legitimate defensive challenge by disobeying the law and then "defending" against a lawsuit when called to answer for that disobedience.

Argument

Under *State ex rel. Atlantic Coast Line Railway Co.*, and under *Turner*, as adopted by this Court in *Fuchs III*, the property appraiser lacked standing to challenge the constitutionality of section 189.403(1), Florida Statutes, and, for the sake of future clarity in property tax administration, prior dicta suggesting otherwise should be expressly rejected by the Court.

Article VII of the Florida Constitution contemplates that assessment of property and application of property tax classifications and exemptions will be uniform statewide, subject to the few exceptions that are expressly authorized therein. As such, taxpayers are entitled to expect a uniform system of property tax administration statewide; an expectation unmet when county property appraisers are allowed to determine which property tax statutes they will and will not apply.

Property appraisers are constitutional officers who have no constitutional duties. Their only duties are set by law. *See* Art. VIII, § 1(d), Fla. Const. *See also Burns v. Butscher*, 187 So.2d 594, 595 (Fla. 1966). They assess the value of property. *See* §192.001(3), Fla. Stat. (2007). They do not impose, levy, collect or refund taxes. *See* § 200.065(2), Fla. Stat. (2007); § 192.001(4), Fla. Stat. (2007); § 197.182, Fla. Stat. (2007). They are not responsible for enacting tax laws or prescribing tax policy; that is a duty of the Legislature. Art. III, § 1; Art. VII, § 1(a), Fla. Const. And they are not responsible for declaring acts of the Legislature invalid. That is the province of the judiciary. Art. V, Fla. Const.

However, once again, a property appraiser has refused to follow a statute enacted by the Legislature regarding the assessment of property. *Zingale v. Crossings at Fleming Island Community Development District*, 960 So.2d 20 (Fla. 1st DCA 2007). Once again, the appraiser argues that the statute should be ignored because it is unconstitutional. And once again, this Court confronts a case posing the question of whether a property appraiser – or any other public officer – may refuse to follow the law as declared by the legislative branch and seek after-the-fact vindication by asking the judicial branch to affirm his foray into the province of the judiciary and his initial declaration that the law is unconstitutional. [1]

A similar dispute was before this Court in *Fuchs v. Robbins*, 818 So.2d 460 (Fla. 2002) (*Fuchs III*). There, this Court resolved a conflict among the district courts of appeal by reversing a decision of the Third District in *Fuchs v. Robbins*, 738 So.2d 338 (Fla. 3d DCA 1999) (*Fuchs II*), and adopting the contrary opinion of the Second District in *Turner v. Hillsborough County Aviation Authority*, 739 So.2d 175 (Fla. 2d DCA 1999).

In so doing, this Court confirmed the continuing vitality of *State ex rel. Atlantic Coast Line Railway Co. v. State Board of Equalizers*, 94 So. 683 (Fla.

[1] It should be noted at the outset that property appraiser standing is not necessary in order to entertain challenges to tax statutes. Any citizen or taxpayer—including a property appraiser—can bring such an action in her individual capacity. *See Jones v. Dept. of Revenue*, 523 So.2d 1211, 1214 (Fla. 1st DCA 1988). The issue here is whether a property appraiser (or other public official) should be allowed to bring such an action in her official capacity and at public expense.

1922) (a defensive challenge), on which the Second District's decision in *Turner* (an offensive challenge) was grounded. Thus, the Court held that a property appraiser may not challenge the constitutionality of a statute he is charged with enforcing, whether offensively or defensively. Indeed, *Turner* explicitly recognized that when a property appraiser's disobeyance of the law provokes the litigation, he cannot be considered to be in a defensive posture.

However, dictum in *Fuchs III* has wrought the very confusion Justice Bell foreshadowed in his special concurrence to *Sunset Harbour Condominium Ass'n v. Robbins*, 914 So.2d 925, 933 (Fla. 2005). Justice Bell explained at length the source of the confusion. *Id.* at 935-937. But because the issue of standing was not properly preserved below, the majority of the *Sunset Harbour* Court did not reach the question of whether a property appraiser may raise a "defensive" challenge to the constitutionality of a statute and the *Fuchs III* dictum was not rejected by a majority of the Court. *Id.* at 928.

Now, based on the dictum of *Fuchs III* and despite Justice Bell's *Sunset Harbour* concurrence, the First District has conferred standing on a property appraiser to challenge a property tax statute via an "affirmative defense"[2] in a lawsuit brought by the taxpayer after the appraiser refused to obey the law.

[2] Arguably, this "affirmative defense" is not an affirmative defense at all but is instead a counterclaim or cross-claim because it calls for affirmative relief in the form of a declaration that a law is unconstitutional. *See Haven Federal Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991); Fla. R. Civ. P. 1.110 (b) and (d).

Zingale, 960 So.2d at 28. *Atlantic Coast Line Railway Co.*, again, provides the rule of decision. There, the Supreme Court disapproved just such a defensive challenge to a statute by public officers.

Atlantic Coast Line Railway Co. articulated a clear rule of law grounded upon sound policy considerations, and it should be reaffirmed. Likewise, *Turner's* suggestion that a property appraiser may not do indirectly what he may not do directly should be reaffirmed. No policy rationale supports a rule of law that would prohibit a public officer from filing a constitutional challenge to a statute, but would allow that same officer to challenge the statute via an "affirmative defense" after he first disobeyed the law and then was called before a court to answer for that disobedience.

The Court also should refrain from allowing this challenge under the so-called "public funds" exception. Once limited to those officers constitutionally charged with the control and disbursement of public funds, several cases have applied the exception to the mere 'expenditure' of public funds. Applying that exception to these facts would swallow the general rule set forth in *Atlantic Coast Line Railway Co.* because every public officer expends public funds. A public officer who is not allowed to challenge the laws he is duty bound to administer should not be allowed to do so by way of artifice.

A. This Court's holding in *Atlantic Coast Line Railway Co.* is controlling and prohibits the property appraiser from questioning the constitutionality of section 189.403(1), even if doing so in an allegedly "defensive" matter.

The Court relied on both *Atlantic Coast Line Railway Co.* and *Barr v. Watts*, 70 So.2d 347 (Fla. 1953) in *Fuchs III*, a case which resolved a conflict between the district courts of appeal (*Fuchs II* and *Turner*). *Atlantic Coast Line Railway Co.*, as recently affirmed in *Fuchs III*, remains a sound precedent and prohibits a public officer from challenging the constitutionality of a statute she is charged with implementing.

In *Atlantic Coast Line Railway Co.*, a taxpayer challenged the Comptroller's assessment and valuation of its railroad property and appealed to the State Board of Equalizers, composed of the Governor, Attorney General and Treasurer. The Board refused to accept the appeal. The taxpayer filed a petition for a writ of mandamus, and the Board defended by challenging the constitutionality of the statute that gave it appellate jurisdiction. The Court ruled against the Board, holding that the Board's defensive challenge to the statute violated the separation of powers doctrine because it impermissibly asserted "the right of a branch of the government, other than the judiciary, to declare an act of the Legislature to be unconstitutional." *Atlantic Coast Line Railway Co.*, 94 So. at 682.[3]

[3] This same separation of powers issue is not implicated when a public official exercises a power directly derived from the Florida Constitution.

In support of its decision to issue the writ of mandamus requiring the Board to accept the taxpayer's appeal, the Court reasoned:

> The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is, I think without merit. The fallacy in it is that every act of the Legislature is presumptively constitutional until judicially declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution not as the officer decides, but as judicially determined.

Id. at 682-683 (e.a.).

The Court emphasized that the State Board of Equalizers – like the property appraiser in this case – did not have a sufficient stake in the outcome of the litigation to challenge the constitutionality of the statute. It held that the Board lacked "any material interest, personal or pecuniary, that would be injuriously affected or prejudiced by the act in question, entitling [the Board] to question [the statute's] constitutionality." *Id*. at 684 (e.a.).

This general rule which prohibits a public officer from challenging a statute, whether offensively or defensively, has been applied in other cases. In *Barr v. Watts* the Court disallowed a defensive challenge to a statute by the State Board of Law Examiners. There, an applicant for admission to practice law in Florida brought a mandamus proceeding against the State Board of Law Examiners to allow her to take the examination pursuant to conditions specified by the Legislature in a statute. The Board defended its actions by challenging the

constitutionality of the statute. The Court held that the Board lacked standing to challenge the law as a defense, and any argument that adherence to such law would cause Board members to violate their oath of office had been settled by *Atlantic Coast Line Railway Co.*

The Court's most recent statement of the rule was made while resolving a conflict between the Third and Second Districts. *Fuchs II* involved a constitutional challenge to section 192.042(1), Florida Statutes, which provides that real property shall be assessed on January 1st if it is "substantially complete," meaning that it "can be used for the purpose for which it was constructed." § 192.042(1), Fla. Stat. (2007).[4] The property appraiser of Miami-Dade County refused to apply this statutory rule to a partially constructed hotel building, and the taxpayer challenged the assessment. The Value Adjustment Board ("VAB") ruled for the taxpayer, and the appraiser filed a lawsuit challenging the VAB's decision and the validity of the statute.

A panel of the Third District ruled that the appraiser had standing to challenge the constitutionality of the statute defensively, *Fuchs II*, 738 So.2d at 339-340, and that the statute was constitutional. *Id.*, at 340-341. On rehearing en banc, the Third District ruled that the statute was unconstitutional. The en banc court adopted the panel's decision and rationale on standing, *Fuchs II*, 738 So.2d at

[4] This is the statute declared constitutional by this Court in *Sunset Harbour*.

341 n. 1, thus also holding that the appraiser was acting in a defensive posture even thought the appraiser had filed the initial complaint (after the Value Adjustment Board sided with the taxpayer) and the appraiser defended his assessment by challenging the constitutionality of section 192.042(1).

In *Turner*, a similar dispute, the Second District held that the property appraiser of Hillsborough County did not have standing to challenge the constitutionality of a property tax statute in what the property appraiser attempted to characterize as a defensive posture. The Second District first rejected Turner's contention that he was in a defensive position, and then reasoned:

> [I]f the property appraiser had followed the law initially, as *State ex rel. Atlantic Coast Line Railway Co.* dictates he is obligated to do, the taxpayer would not have been forced to petition the VAB and set the litigation in motion. It both defies logic and violates the rule of *State ex re. Atlantic Coast Line Railway Co.* to suggest that Turner can ignore the law by denying an exemption based on his belief that it is unconstitutional and then be allowed to ask the court to approve his disobedience by upholding his denial.

Turner, 739 So.2d at 178 (e.a.). The Second District noted that its decision was in conflict with the en banc decision in *Fuchs II*, "wherein the Third District characterized a property appraiser's complaint filed pursuant to section 194.036 as a defensive action." *Turner*, 739 So.2d at 178 (e.a.).

In a unanimous per curiam decision, this Court held that "we approve the decision in *Turner*, and reverse the decision in *Fuchs*." *Fuchs III*, 818 So.2d at 464. The Court reinforced section 194.036(1)(a), Florida Statutes, which prohibits

a property appraiser from initiating a constitutional challenge to a property tax statute, explaining:

> As aptly observed by the Second District in *Turner*, "[t]his statutory prohibition of constitutional challenges by property appraisers is in accord with the general common law principle denying ministerial officers the power to challenge the constitutionality of statutes." 739 So.2d at 179-80 (citing *State ex rel. Atlantic Coast Line Ry. Co. v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (1922), and *Barr v. Watts*, 70 So.2d 347, 351 (Fla. 1953)).

Fuchs III, 818 So.2d at 464.

Thus, *Fuchs III* and *Turner* both are grounded on *Atlantic Coast Line Railway Co.*, the polestar decision on the issue of whether a public officer may challenge the constitutionality of a statute he is obligated to enforce. And it is to *Atlantic Coast Line Railway Co.* that the Court should turn to decide the present dispute.

There is no difference between the State Board of Equalizers' <u>defensive</u> challenge to the taxation statute in *Atlantic Coast Line Railway Co.* and the constitutional challenge to section 189.403(1), Florida Statutes, which the property appraiser brought as a purported <u>defense</u> in this case.

> <u>B. The dictum in *Department of Education v. Lewis*, as cited in *Fuchs III*, does not provide a basis for the property appraiser to challenge this statute because there is no legal support for a defensive posture exception to *State ex rel. Atlantic Coast Line Railway Co.*</u>

The only plausible basis for the property appraiser to assert standing here is dictum in *Department of Education v. Lewis*, 416 So.2d 455 (Fla. 1982), coupled

with acceptance of the illogical notion that a property appraiser is acting in a defensive posture even when it is his refusal to obey the law that sets the litigation in motion. The *Fuchs III* Court seemed to leave the door open for a defensive action, even though that was exactly the disallowed posture in *Atlantic Coast Line Railway Co.* Quoting *Lewis*, 416 So.2d at 458, the *Fuchs III* Court said a property appraiser may "raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment." *Fuchs III,* 818 So.2d at 464. Neither the circumstances in *Lewis* nor the cases cited by *Lewis* support such a sweeping exception to settled law. The Court's statement in *Fuchs III* is dictum based upon dictum that should not be elevated to a rule of law.

Lewis involved a lawsuit by the State Department of Education and others to the constitutionality of appropriations proviso language. The Court held in *Lewis* that the Department of Education lacked standing to initiate a challenge to the statute because the "agency [did] not have a sufficiently substantial interest or special injury to allow the court to hear the challenge." *Lewis*, 416 So.2d at 458. During its discussion, the Court observed that "[i]f, on the other hand, the operation of a statute is brought into issue in litigation by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality." *Id.* In the same paragraph, the Court goes on to note:

> [t]he comptroller is one officer that has been allowed by Florida courts to initiate litigation in his official capacity seeking to establish the

> unconstitutionality of a statute …. The comptroller, as the state's chief officer for disbursement of funds, would have standing to challenge a proviso in an appropriations bill. But the Department of Education, the State Board of Education, and the Commissioner of Education in his official capacity, do not.

Id. In the very same paragraph from which the troublesome *Fuchs III* language derives, *Lewis* ties the defensive posture dictum to the disbursement of funds.[5]

Regardless, in support of its defensive posture dictum, the *Lewis* Court cited three cases: *State ex rel. Harrell v. Cone*, 177 So. 854 (1937); *State ex rel. Florida Portland Cement Co. v. Hale*, 176 So. 577 (1937), *overruled in part sub. nom., Hale v. Bimco Trading*, 306 U.S. 375 (1939); and *City of Pensacola v. King*, 47 So.2d 317 (Fla. 1950). All three involved defensive challenges to statutes. However, all three turned upon the fact that the public officer questioning the constitutionality of a statute was required by its terms to expend public funds in furtherance of the statute. Thus, the claimed right under the dictum in *Lewis* and now *Fuchs III* for a public officer to defensively challenge the constitutionality of a statute is nothing more than an overly broad assertion of the narrower "public funds" exception.

---

[5] Because *Lewis* involved an offensive challenge to a statute by a state agency, any statement in *Lewis* regarding a defensive challenge is dictum and "non-binding in the instant case." *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339, 344 (Fla. 1986), *cert. denied, Mobil Oil Corp. v Board of Trustees of Internal Improvement Trust Fund of Florida*, 479 U.S. 1065 (1987). *See also Adams v. Aetna Cas. & Sur. Co.*, 574 So.2d 1142, 1153 n. 10 (Fla. 1st DCA 1991), *rev. dismissed*, 581 So.2d 1307 (Fla. 1991).

Cone involved a case in which the Comptroller refused to disburse road funds to Washington County, was sued in mandamus, and defended by challenging the constitutionality of the law requiring disbursement of the funds. After analyzing the Comptroller's constitutional duties to "examine, audit, adjust, and settle the accounts of all officers of the state," the Court concluded that the Comptroller was constitutionally charged with disbursement of public funds to a degree that gave him an adequate personal interest, *Cone*, 177 So. at 856-857. So too did the Comptroller and the Treasurer have such personal interests in *Board of Public Instruction for Santa Rosa County v. Croom*, 48 So. 641 (Fla.1909), the first of the cases that evolved into the "public funds" exception to *Atlantic Coast Line Railway Co.*[6]

Infringement on the powers of the judiciary in not an issue in cases such as *Cone* and *Croom*, where a public officer is exercising powers granted by the Constitution and necessarily must challenge a statute that impinges upon those independent and constitutionally derived powers. Later cases erroneously interpret

[6] In *Atlantic Coast Line Railway Co.*, the Court distinguished its decision from *Croom* by reasoning that the Treasurer's interest in *Croom* was directly affected because he was "under a heavy bond," and either he or his bondsman would have to make good on any money paid out of the Treasury pursuant to an unconstitutional statute. *Atlantic Coast Line Railway Co.*, 94 So. at 684. "His right to raise the question of the constitutionality of the act involved did not grow out of the obligation of his oath of office, nor out of his official position, but because he was liable to be injured pecuniarily." *Id.* No such personal exposure was evident in *Atlantic Coast Line Railway Co.*, so the general rule was controlling.

Cone more broadly, suggesting that it permits any public officer, including those whose powers are defined in statute, to challenge a statute if it authorizes the expenditure of public funds. Such an expansive reading of *Cone* indirectly sanctions violation of the separation of powers doctrine.

Hale was one of those overly expansive cases. Decided within months of *Cone,* it involved a petition for writ of mandamus brought against the State Road Department to coerce compliance with a statute requiring inspection of cement imported from outside Florida. In defense, the State Road Department challenged the validity of the inspection law. The Court reasoned there was "no material difference between the status of the State Road Department in the instant case and the status of Mr. Croom as Comptroller and Mr. Knott as State Treasurer in that case" because both were required to expend public funds. *Hale*, 176 So. at 585. However, there was in fact a material difference in the status of the parties: Croom, the comptroller, and Knott, the treasurer, exercised powers granted by the Constitution; the State Road Department did not. Perhaps because the standing issue was not briefed, *see Hale*, 176 So. at 584, the separation of powers doctrine which provided the crucial constitutional distinction between *Atlantic Coast Line Railway Co.* and *Cone* was not addressed.

King, another overly broad holding, involved a challenge by the Railroad and Public Utilities Commission to a statute authorizing the City of Pensacola to

regulate taxicabs. The Court allowed the Commission to challenge the statute based upon the fact that the Commission would have to expend public funds administering the law. However, all public officers expend or disburse public funds to administer laws. Surely that was no less true for the Board of Equalizers in *Atlantic Coast Line Railway Co.* or for the Board of Law Examiners in *Barr*.

King and *Cone* both included dicta allowing an official to bring and defend an action if enforcing the statute would be a violation of the officer's oath to protect the constitution. *See Cone*, 177 So. at 856; *King*, 47 So.2d at 319. But, as explained by the Second District in *Turner*,

> [s]hortly after *King* was decided, the supreme court rejected this same argument, distinguished the dictum in *King* and re-affirmed the rule of *State ex rel. Atlantic Coast Line Railway Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681 (1922), that the "right to declare an act unconstitutional ... cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution."

Turner, 739 So.2d at 178 (*citing Barr*, 70 So.2d at 350-351). *Hale* and *King* should not be relied on because to do so would swallow the rule of *Atlantic Coast Line Railway Co.*

Thus, the dictum in *Fuchs III* relies upon the dictum in *Lewis* for a defensive posture exception. However, based on the cases cited, both truly refer to a narrow exception to the rule in *Atlantic Coast Line* that a public officer may challenge the constitutionality of a statute he is charged with enforcing – offensively or

defensively – if the challenge is grounded upon the public officer's own independent and constitutionally established duties which provide the necessary personal stake in the litigation, including a duty to distribute public funds.

In the case below, the majority of the First District refused to look past the *Lewis* dictum to the cases on which the overly expansive language was originally based and determined that the *Fuchs III* Court "explicitly ruled that the Appraiser may bring a constitutional challenge in a defensive posture." *Zingale*, 960 So.2d at 28. The First District ignored the fact that both *Turner* and *Fuchs* arose from property appraisers filing offensive complaints and that the *Fuchs III* Court was not at liberty to "rule" on affirmative defenses.

Judge Kahn dissented in part from the majority in *Zingale*, instead finding Justice Bell's *Sunset Harbour* concurrence "an accurate and persuasive exposition of the law" and that Justice Bell's opinion "amply establishes that the so-called defensive posture exception to standing is aberrational and not a controlling principle of Florida law." *Zingale*, 960 So.2d at 29. To quote Justice Bell: "I believe we are not bound to and should expressly disavow the dictum in *Lewis* and *Fuchs III*. There is no defensive posture exception to the *Atlantic Coast Line* rule." *Sunset Harbour*, 914 So.2d at 938.

Now that the issue of raising constitutionality of a statute as an affirmative defense is properly before it, the Court should adopt Justice Bell's *Sunset Harbour*

concurrence and Judge Kahn's *Zingale* partial dissent, and finally and unequivocally state that there is no defensive posture exception.

C. The "disbursement of public finds" exception does not apply in this case, nor is it likely to apply to any property appraiser, because property appraisers do not have a constitutional duty to disburse public funds.

This Court has never ruled on the question of whether a property appraiser may challenge a tax statute under the "public funds" exception. Again, dictum in *Fuchs III* appears to say the exception is available and in the interest of judicial economy, that dictum should be clarified now.

A close reading of *Cone* reflects that the "public funds" exception is bottomed on a demonstration of a public officer's personal stake in the litigation under limited circumstances, including being constitutionally "charged with the control and disbursement of public funds." *Cone*, 177 So. at 856. As previously explained, property appraisers have no constitutional duties. If this Court was to hold that the mere expenditure of "public funds" allows an officer of the executive branch to determine the constitutionality of a duly enacted statute, and refuse to perform a statutory duty without a personal stake in its outcome, the exception to the rule of *Atlantic Coast Line Railway Co.* would eviscerate the rule.

Therefore, the Court should reaffirm the rule of law in *Atlantic Coast Line Railway Co.*

Conclusion

For the foregoing reasons, FCC respectfully requests that this Court reverse the decision of the First District Court of Appeal, adopt Justice Bell's special concurrence in *Sunset Harbour*, and hold that the Appraiser may not bring a constitutional challenge to section 189.403(1), Florida Statutes, whether by means of a claim included in a complaint or other initial pleading or as an affirmative defense in an answer or other responsive pleading.

Respectfully submitted this 10th day of January, 2008.

Roy C. Young
(Fla. Bar # 098428)
Young van Assenderp, P.A.
Gallie's Hall
225 South Adams Street
Post Office Box 1833
Tallahassee, FL 32302-1833
(850) 222-7206
(850) 561-6834 (fax)

Victoria L. Weber
(Fla. Bar # 266426)
Sarah M. Doar
(Fla. Bar # 040935)
Hopping Green & Sams P.A.
Post Office Box 6526
123 South Calhoun St. (32301)
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 (fax)

Attorneys for Amicus Curiae
Florida Chamber of Commerce

Certificate of Service

I hereby certify that a true and correct copy of this brief was provided by United States Mail, postage pre-paid, on this 10th day of January, 2008, to:

Don H. Lester, Esq.
Lester & Mitchell
1035 Lasalle Street
Jacksonville, Florida 32207-2911

Robert M. Bradley, Jr., Esq.
Kopelousos & Bradley, P.A.
P.O. Box 562
Orange Park, Florida 32067-0562

Scott Makar, Esq.
Louis F. Huber, III, Esq.
Office of the Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050

Larry E. Levy, Esq.
The Levy Law Firm
1828 Riggins Road
Tallahassee, Florida 32308

Certificate of Compliance

I further certify that this brief is presented in 14-point Times New Roman and complies with the font requirements of Fla. R. App. P. 9.210.

_____
Attorney