IN THE SUPREME COURT OF FLORIDA

Case No.: SC11-396

THAD ALTMAN and
ARTHENIA L. JOYNER,

Petitioners,

v.

HON. RICHARD SCOTT, GOVERNOR,

Respondent.

_____/

# REPLY TO RESPONDENT'S RESPONSE TO EMERGENCY PETITION FOR WRIT OF QUO WARRANTO, OR IN THE ALTERNATE, FOR WRIT OF MANDAMAUS, OR OTHER EQUITABLE RELIEF

## INTRODUCTION

Respondent seriously mischaracterizes the argument made and the relief requested by the Petitioners. Respondent has set up a fake argument just in order to tear it down. Petitioners are not asking this Court to direct the Respondent how to manage the construction of the high speed rail in Florida. Instead, the Petitioners are simply asking this Court to direct the Respondent that he does not have the jurisdiction or authority as granted by the laws of this State (which he is obligated to faithfully execute) to take the action he has taken in rejecting a

specific appropriation of $130.8 million; federal grants amounting to $2.4 billion subject to statutory authority; dedicated funding pursuant to the Florida Rail Act of $60 million per year; and thus the entire high speed rail project. So it is clear, the Petitioners are not asking this Court to direct the Respondent how to manage those matters over which he has the authority, as permitted and limited by statutes or by the Constitution.

In making his argument, Respondent has admitted that he claims that he can exercise the powers expressly allocated to the Legislature regarding the budget. He admits that he alone is refusing to spend $130.8 million that was expressly appropriated by the Legislature for high speed rail. Additionally, and amazingly, he claims he is not an "official" or an officer, and that he can ignore the express laws enacted by the Legislature in order to protect what he perceives are the finances of this State.

First and foremost, this Court in *Florida House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008), has recently defined the respective functions of the Governor and the Legislature. This Court held that the "necessary business" clause of Article IV, Section 1, of the Florida Constitution "does not authorize the governor to execute compacts contrary to the expressed public policy of the state or create exceptions to the law. Nor does it change our conclusion that 'the legislature's exclusive power encompasses questions of fundamental policy and the

articulation of reasonably definite standards to be used in implementing those policies.'" *Id.* at 613 (quoting *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994)). Statutes enacted by the Legislature set forth the public policy of this State. In the present case, the Legislature expressly set forth in the Florida Rail Act the public policy of this state regarding high speed rail. The Respondent has, by his own admission in his Response, admitted that he does not intend to comply with the procedures and directives of the Florida Rail Act.

Additionally, in *Florida House of Representatives v. Crist*, this Court stated that "the Governor is a state officer." *Christ*, 999 So. 2d at 607. As Black's Law Dictionary states, an official is "an officer." *Black's Law Dictionary* 1236 (4th ed. rev. 1968). Incredibly, Respondent claims that he is not an "official" who is bound by the Florida Rail Act. Further, Respondent ignores that the Florida Rail "enterprise," as expressly set forth in the Florida Rail Act, has the authority to deal directly with the planning, financing, and construction of high speed rail – and not the Governor. The Legislature, by enactment of the Florida Rail Act, significantly restricted the Governor's involvement and powers relating to high speed rail. Simply stated, subject to statutory authority, the Governor has no power to reject the federal grants that relate to funding and appropriations necessary for high speed rail.

As this Court held in *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991), "[u]nder any working system of government, one of the branches must be able to exercise the power of the purse, and in our system it is the legislature, as representative of the people and maker of laws, to whom that power is constitutionally assigned. We do not today state that the Governor and Cabinet have no role to play in the budgetary process. For example, section 216.292, Florida Statutes, provides for limited transfers within budget entities under specific circumstances." *Id.* at 267. In the present case, the Respondent certainly does not have the power to reject federal funds granted in prior years—years in which he was not governor—when such funds have been appropriated and spoken pursuant to the Legislature's previous appropriations and the express directives of the Florida Rail Act, an entity whose funding belongs exclusively to the Legislature.

The Respondent is further in serious error regarding nature of the federal grants of $2.4 billion during 2010 and thereafter. These are continuing appropriations pursuant to Chapter 216.011, Fla. Stat., et seq. Since the Florida Rail had the authority to accept the federal grant monies without those funds ever going into the Florida treasury, then there is no need to have further appropriations by the Legislature. This Court should simply look to Exhibit "E" and see that the grants were actually being made directly from the federal government to the Florida Rail Enterprise – not to the Governor. That is the very reason that the $1.5

billion grant was also being made in the fall of 2010 to the Florida Rail Enterprise. As such, the Respondent is completely wrong about the grants not being an appropriation by the Legislature. They are a continuing appropriation for which no further appropriation is needed.

## JURISDICTION OF COURT

Article V, Section 3(b)(8) of the Constitution of the State of Florida, authorizes this Court to issue writs, including writs of quo warranto, to "state officers and state agencies." Art. V, § 3(b)(8), Fla. Const. The writ of quo warranto "historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the State," and because the Governor is a state officer, this Court has jurisdiction. *Fla. House of Rep. v. Christ*, 999 So. 2d 601, 607 (Fla. 2008); *see also Chiles v. Phelps*, 714 So. 2d 453, 457 (Fla. 1998) ("[T]his Court historically has taken jurisdiction of writ petitions where members of one branch of government challenged the validity of actions taken by members of another branch."); *Martinez v. Martinez*, 545 So. 2d 1338 (Fla. 1989) (quo warranto petition by house member challenging governor's authority to include within call for special session consideration of an issue listing in call of previous special session). As such, this Court unquestionably has jurisdiction over these issues.

## STANDING

The Plaintiffs are suing in their capacities as citizens, taxpayers, and members of the Senate of the State of Florida. This Court has previously stated that "members of the legislature have standing as citizens and taxpayers to challenge alleged unconstitutional acts of the executive branch." *Phelps*, 714 So. 2d at 456; *see also Fla. House of Rep. v. Martinez*,555 So. 2d 839, 843 (Fla. 1990) (stating that members of the Florida House of Representatives, as taxpayers of the state, "[u]nquestionably" had standing to challenge alleged violations of the state constitution by the governor); *Thompson v. Graham*, 481 So. 2d 1212, 1213 n. 2 (Fla. 1985) (stating that because Speaker of the House of Representatives was "a citizen and taxpayer of the state," he "clearly has standing to bring … suit"); *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980) (holding that citizens and taxpayers can mount constitutional attacks upon legislature's taxing and spending power "without having to demonstrate a special injury").

Article IV, section 1(a) of the Constitution of the State of Florida states that "[t]he governor shall take care that the laws be faithfully executed…." As the legislature has previously appropriated funds and passed the Florida Rail Act, Governor Scott violates his duties under the Florida Constitution by failing to faithfully execute the laws of the State of Florida as duly enacted by the state legislature. Accordingly, Petitioners have a clear legal right, and the requisite standing, to request that the Governor carry out his constitutional duties.

Further, Respondent argues that Petitioners do not have standing to bring the action for writ of mandamus because the Petitioners have alleged a generalized grievance. Resp. Brief, p. 7 (citing *School Bd. of Volusia County v. Clayton*, 691 So. 2d 1066, 1067 (Fla. 1997)). Thia argument is an egregious mischaracterization of the case law. In *School Board of Volusia County*, the Court stated that a taxpayer seeking standing in a mandamus action must allege "a 'special injury' **or** a 'constitutional challenge.'" 691 So. 2d at 1067. (emphasis added). It is unquestionable that Petitioners have presented a "constitutional challenge" in the case at hand, and as such Petitioners have standing to maintain an action for a writ as requested in this case.

MERITS OF THE PETITION

"[T]he legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994). Further, "fundamental and primary policy decisions shall be made by members of the legislature." *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 925 (Fla. 1978). Unquestionably, Governor Scott treads on the legislative branch's authority to enact fundamental and primary policy decisions that have been articulated through the enactment of the Florida Rail Act when he unilaterally rejects federal funding. This is a question for the legislature; a question that has been previously addressed

and answered in the affirmative. If the legislature wishes to now amend or repeal its prior legislation, that is the prerogative of the legislative branch of the government, **not the executive branch**. The executive branch is to carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives, not to unilaterally decide the policies of the State of Florida. Until such time as the legislative branch acts to amend or repeal its laws, Respondent has a constitutional mandate to "take care that the laws be faithfully executed."

Further, Respondent repeatedly mischaracterizes Petitioners' legal argument by injecting polemic such as "Petitioners . . . imply, absurdly, that the FRE is self-financing, a sort of fiscal juggernaut that has the inherent ability to finance a high-speed rail system and which cannot be 'interfered' with by the Governor or, apparently, by the Legislature itself," and "[c]ontrary to Petitioners' claims, the FRE is clearly not beyond the control of the Governor and the Legislature . . . " (Resp. Brief p. 17). Petitioners have made no such claim that the FRE cannot be "interfered" with by the legislature or that the FRE is beyond the reach of the legislature. Instead, Petitioners' constitutional argument is that the Legislature, not the Governor, must act to amend or repeal prior validly enacted laws of the State. As the legislature has previously voted to appropriate $130 million dollars to the building of the High Speed Rail system and has passed into law the Florida Rail

Act, the Respondent does not have the constitutional authority to post-hoc veto the laws of the State of Florida simply because he does not agree with the laws.

Further, Petitioners would agree completely with the statement "[a] legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law," as cited by Respondent regarding past legislatures inability to bind future legislatures. *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985). In so arguing, Respondent inherently validates the entire constitutional argument forwarded by Petitioners in the initial brief; namely, that it is the province of the legislature, not the governor, to amend any laws of the State of Florida. Clearly, the legislature has the constitutional authority to amend past legislation.

Despite Respondent's suggestion that the Petitioners are asking the Court to micromanage a large transportation infrastructure project (a request that the Petitioners most emphatically are not making), the remedy that the Petitioners are seeking in this case is simply that the Respondent apply and accept the funds which have been previously approved by appropriation of the Florida legislature and to develop the High Speed Rail Project in accordance with the previously enacted laws of the state. Namely, to fund the High Speed Rail Enterprise and to allow the High Speed Rail Enterprise to operate as designed by statute. State law mandates that the High Speed Rail Enterprise, not the Governor, "… shall locate,

plan design, finance, construct, maintain, own, operate, administer, and manage the high-speed rail system in Florida." § 341.822(1) Fla. Stat. Respondent cannot escape such specific, unambiguous language.

Had the Legislature intended for the Governor to exercise significant control of the HSR System, it would have simply delegated authority over the system to the Secretary of the Florida Department of Transportation, the Governor, or the Executive Office of the Governor. Instead, except for the power to hire and fire the Department's secretary and the secretary's authority to hire or fire the Florida Rail Authority's executive director, the Legislature specifically removed such authority and power from the Governor.

The people of Florida established certain core constitutional principles for the conduct of the public's business. In Article III, the people assigned to the legislature the power to budget and appropriate the funds of the state of Florida. In approving their scheme of budgeting and appropriating public funds, the people adopted Article III, Section 19 of the Florida Constitution. This Section establishes the process for budgeting, planning, and appropriating the funds for the State of Florida. This key provision of the Constitution linked the crucial budgeting, planning, and appropriation process in the government of the State of Florida.

Section 19 (h) requires the state to enact a general law which provides for a long-range planning document. It states the governor shall recommend to the

legislature biennially any revisions to the long-range state plan. This constitutional provision requires all departments and agencies of the state to develop plans that identify strategic goals and objectives, consistent with the long-range state plan. The long-range plan must include projections of future needs and resources of the state which are consistent with the long-range financial outlook for the state.

Chapter 187 is the State Comprehensive Plan which was enacted by general law to provide the long-term policy guidance for the State of Florida in the conduct of its government. The Plan in its transportation element set out as a matter of policy that a high speed rail system should be developed which links the Tampa Bay area with Orlando. § 187.201(19) (b) Fla. Stat.

The State of Florida implemented this policy when it passed the Florida Rail Act that the High Speed Rail Enterprise "… shall locate, plan design, finance, construct, maintain, own, operate, administer, and manage the high-speed rail system in Florida," § 341.822(1) Fla. Stat., and the Florida legislature further appropriated funds for this major infrastructure project. The prior governor lawfully applied for and was awarded the grants to construct the project. The State of Florida appropriated funds for the project, executed agreements and commenced work on the project.

A newly elected governor cannot unilaterally extirpate all the long-range planning for the State of Florida which is codified by statute, the statutory direction

to construct a high rail system; the appropriations of the Florida legislature, and the legal acts of his predecessor by simply electing "…not to go forward…" with a major infrastructure project because he wishes to spend the public's money on projects other than those approved in the appropriation process by the U. S. Congress and the legislature of the State of Florida. (See Respondent's letter marked as Exhibit "H" attached to the original Petition and this Response and incorporated herein.)

The purpose of the separation of powers doctrine is to establish a system of checks and balances among the branches of government. One branch of government may derive an immediate advantage from some action, but the action may affect the public business of the government as a whole. The Constitutional separation of powers is the people's bulwark against one branch engaging in the "politics of the moment" in the conduct of the public's business.

The planning, financing, and construction of major infrastructure projects often require long time periods which transcend the terms of office of many elected officials, particularly with term limits imposed for elected officials. The financing and bonding of these large infrastructure projects necessarily require stability in government. The constitutional separation of powers doctrine produces long-term stability for government, as a consensus must develop among the branches to budget and execute the functions of government.

"[T]he 'people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives.'" *Crossings At Fleming Island Comm. Develop. Dist. v. Echeverri*, 991 So. 2d 793, 799 (Fla. 2008) (quoting *Barr v. Watts*, 70 So. 2d 347, 351 (Fla 1953)). "[T]o allow a public official to refuse to obey a law would be 'the doctrine of nullification, pure and simple.'" *Id.* at 798.

In this instance the chief executive of the State of Florida has elected not to proceed with a project for which the legislature has appropriated funds, been authorized by state statute, and said state statute has articulated definite standards by which it is to be implemented. The power of the executive branch of government cannot be permitted to ascend over the constitutional prerogatives of the legislature if the people of Florida are to preserve the separation of the powers in their government. The people of Florida require strict adherence to the separation of powers in carrying on the public business of the State of Florida.

## DEADLINE

The Petitioners agree with the Respondent that the March 4, 2010 deadline should be considered the relevant deadline for the purposes of this matter as a result of the announcements of the Secretary of Department of Transportation.

## CONCLUSION

The Petitioners respectfully submit that the laws of the State of Florida and all duly enacted legislation provide a clear duty for the Respondent to accept the ARRA funds and apply the funds appropriated by Congress and the Florida Legislature for the Florida High Speed Rail Project. As such, Petitioners respectfully request that this Court grant their Petition and order the Respondent to expeditiously accept the federal funds and apply such funds as previously appropriated by the Florida Legislature and in compliance with the Florida Rail Act.

McClelland, Jones, Lyons, Lacey &
Williams, L.L.C.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing has been furnished by e-mail and U.S. Mail this 2nd day of March, 2011, to: Charles M. Trippe, Jr., Executive Office of Governor Rick Scott, The Capitol, Tallahassee, FL 32399-0001.

_____
CLIFTON A. McCLELLAND, JR.

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Petition complies with Rule 9.100(l), *Florida Rules of Appellate Procedure*.

_____
CLIFTON A. McCLELLAND, JR.
Florida Bar No. 119792

# EXHIBIT

# "H"

RICK SCOTT
GOVERNOR

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THE CAPITOL
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850-488-7146
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February 16, 2011

The Honorable Ray LaHood
Secretary
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Dear Mr. Secretary:

Since my election as Florida governor last November, I have been focused on those initiatives and investments that create the best opportunities for job creation over the long-term. In that regard, I am grateful for the time you and your team have spent discussing with me President Obama's high-speed rail program and the rationale for investment both in Florida and across the country.

As you know, my focus has been to ensure that transportation investments in our State reflect the diversity of needs we face – from port facilities and highway and rail connections that drive domestic commerce and International trade, to investments in aviation and transit.

I believe that the dollars being made available for proposed high-speed rail projects are better invested in higher yield projects, like those we have discussed in the past few weeks and that are listed below.

- Dredging improvements to the Jacksonville Port Authority
- Intermodal Container Transfer Facility at Port Everglades
- Dredging improvements at the Port of Miami
- I-295/SR 9A interchange at Heckscher Drive in Duval County
- Improvements to US 331, including a new bridge east of the existing bridge over Choctawhatchee Bay
- Widening I-95 in Martin, St. Lucie, Brevard and Volusia Counties
- Widening I-4 in Orange County
- Improvements to I-395 in Miami-Dade County
- Widening I-275 in Hillsborough County

The long-term job creation opportunities from these projects are greater, the private investment stronger and the economic yield more permanent. Given the limited dollars available, federal investments, rather than generating temporal job

creation, must be directed toward those projects offering real long-term growth potential and a broader return on investment for our economy and our citizens.

The high-speed rail project now targeted for Florida requires the federal government to invest $2.4 billion in taxpayer money for an 84-mile line from Tampa to Orlando that would likely not pay for itself. Conventional wisdom suggests that this line, like the vast majority of passenger rail lines, will not be economically sustainable, but that potential concessionaires will bid on the line to obtain a right of first refusal to operate the prospective line from Orlando to Miami. However, given that actual rider ship will not be known until well after the capital investment is made, the potential for significant capital and operating cost overruns and the nominal difference in travel times between the cities, it is likely that even with financial guarantees from a private sector builder/operator, moving forward with such a project would likely lead to a financial obligation by the state of Florida in the future. Moreover, there is no indication this investment will provide any meaningful job creation beyond the construction phase, nor will it result in sustainable economic growth opportunities. Put simply, the proposed high-speed rail line is far too uncertain and offers far too little long term benefit for me to consider moving forward and ultimately putting taxpayers at risk during an already challenging fiscal climate.

For the reasons outlined, Florida will not move forward with the high-speed rail project from Tampa to Orlando. However, I do look forward to our continued work together in meeting the broad array of transportation needs in our state as we seek to strengthen our economy for the long-term.

Sincerely,

Governor Rick Scott