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NEWS RELEASE # 3

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **19th day of January, 2005**, are as follows:

BY CALOGERO, C.J.:

2004-CA-2147 GREATER NEW ORLEANS EXPRESSWAY COMMISSION v. HONORABLE REBECCA M. OLIVIER, JUDGE FIRST PARISH COURT, DIVISION "A" AND HONORABLE GEORGE W. GIACOBBE, JUDGE FIRST PARISH COURT, DIVISION "B" (Parish of Jefferson)
The district court's holding that the defendant judges had standing to challenge the constitutionality of La. Rev. Stat. 32:57 is reversed, and its judgment finding the statute unconstitutional and denying the Commission's petition for writ of mandamus is vacated and set aside. In light of our ruling in this case, it becomes unnecessary for the court to decide the constitutional issue at this time. We remand the case to the district court with instructions to find that defendants did not have standing to raise the constitutional issue as a defense, and to permit the litigation to go forward.
VACATED, SET ASIDE, AND REMANDED.

JOHNSON, J., dissents and assigns reasons.
WEIMER, J., concurs and assigns reasons.

01/19/05

SUPREME COURT OF LOUISIANA
No. 04-CA-2147

GREATER NEW ORLEANS EXPRESSWAY COMMISSION

VERSUS

HONORABLE REBECCA M. OLIVIER, JUDGE FIRST PARISH COURT, DIVISION "A" and HONORABLE GEORGE W. GIACOBBE, JUDGE FIRST PARISH COURT, DIVISION "B"

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF JEFFERSON
HONORABLE KERNAN A. HAND, JUDGE

CALOGERO, Chief Justice

This case presents the issue of whether Louisiana law permits a judge to refuse to perform a statutory duty that is ministerial in nature, presumably in order to precipitate a mandamus action in which the judge will have the opportunity to argue that the statute is not constitutional. We hold that a judicial officer, like any other public officer, lacks standing to raise the constitutionality of a statute as a defense in a mandamus action seeking to compel the performance of duties that are mandated by statute and ministerial in nature. Thus, defendants here were without standing to raise the issue of the constitutionality of La. Rev. Stat. 32:57(G), and the district court erred in considering this argument.

FACTS AND PROCEDURAL HISTORY:

The plaintiff in this case, Greater New Orleans Expressway Commission ("the Commission"), is responsible for policing the Huey P. Long Bridge and operating, maintaining, and policing the Lake Ponchartrain Causeway Bridge. In December 2001, the Commission filed a petition for writ of mandamus against the defendants, two First Parish Court judges, to compel them to collect costs from certain traffic violators, as required by La. Rev. Stat. 32:57(G). The judges had refused to collect

this cost, believing that the statute was unconstitutional.

Under La. Rev. Stat. 32:57(G)(1), a "cost" of five dollars[1] shall be collected from "any person who is found guilty, pleads guilty, or pleads nolo contendere to any motor vehicle offense when the citation was issued for a violation on the Huey P. Long Bridge or the Lake Pontchartrain Causeway Bridge or approaches to and from such bridges." The five dollar cost only applies, however, where the citation was issued by Commission police officers. *Id.*[2] The proceeds are initially to be deposited in the state treasury, then later moved into a "special fund" known as the Greater New Orleans Expressway Commission Additional Cost Fund. *Id.* (G)(2). The statute then directs the legislature to appropriate all money in the special fund to the Commission to "supplement the salaries of P.O.S.T. certified officers and for the acquisition or upkeep of police equipment." *Id.*

The district court denied the Commission's petition for mandamus. In its reasons for judgment, the court found that the defendants had standing to question the constitutionality of the statute, and that the statute violated several provisions of the constitution.[3] The Commission appealed this judgment directly to this court. We held that we lacked jurisdiction to hear the appeal under La. Const. art. V, § 5(D), because the district court's declaration of unconstitutionality appeared only in the reasons for judgment, and not in the judgment itself. *Greater New Orleans*

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[1]Although the statute labels the five dollars violators are charged a "cost," one of the central issues defendants have raised is whether this "cost" is actually a disguised tax.

[2]This five dollar cost is in addition to the base court costs and the actual fine a traffic violator already must pay. Defendants note that, in First Parish Court, each person who commits a traffic violation is already responsible for paying $78 in base court costs even before assessment of the extra five dollar statutory cost.

[3]The district court found that the statute violated the Louisiana constitution in several respects: (1) the statute was unconstitutionally vague; (2) the statute imposed a tax in violation of the separation of powers doctrine; (3) the statute created an unconstitutional classification in violation of the equal protection doctrine; and (4) the statute impermissibly allocated collected funds.

Expressway Comm'n v. Olivier, 2002-2795 (La. 11/18/03), 860 So. 2d 22, 24. Because this court lacked jurisdiction, we transferred the appeal to the Fifth Circuit Court of Appeal. *Id.* The Fifth Circuit held that, although it possessed appellate jurisdiction over the case, it could not consider the district court's determination that the statute was unconstitutional because this determination did not appear in the court's judgment. *Greater New Orleans Expressway Comm'n v. Olivier*, 04-79 (La. App. 5 Cir. 5/26/04), 875 So. 2d 876, 878.[4] Thus, the Fifth Circuit dismissed the appeal and remanded to the district court to modify its judgment to incorporate the declaration of unconstitutionality. *Id.*

On remand, the district court amended its judgment to state that "La. R.S. 32:57 (G) is unconstitutional for the reasons set forth in the Court's Reasons for Judgment dated March 5, 2002." The Commission has appealed to this court, challenging the district court's judgment on three grounds: (1) the court improperly held that defendants had standing to raise the issue of the constitutionality of the statute; (2) the court erred in declaring the statute unconstitutional; and (3) the court erred in denying the Commission's petition for writ of mandamus. Because the district court declared La. Rev. Stat. 32:57 unconstitutional, we have appellate jurisdiction pursuant to La. Const. art. V, § 5(D) to consider the propriety of the trial court's judgment.

DISCUSSION:

Before addressing the district court's holdings that La. Rev. Stat. 32:57 is unconstitutional and that the Commission was not entitled to mandamus relief, we must first consider the court's determination that these judges, as defendants in a mandamus proceeding, had standing to challenge the constitutionality of the statute.

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[4]We express no opinion concerning the correctness of the court of appeal's reasoning.

This is so because this court may only consider a constitutional issue where "'the procedural posture of the case and the relief sought by the appellant demand that [it] do so.'" *State v. Mercadel*, 2003-3015 (La. 5/25/04), 874 So. 2d 829, 834 (quoting *Ring v. State, DOTD*, 2002-1367 (La. 1/14/03), 835 So. 2d 423, 428). Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise a constitutional challenge. *Id.* The requirement of standing serves to facilitate deference to the legislature in matters within the legislature's purview. Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation, and legislative acts are presumed constitutional "until declared otherwise in proceedings brought contradictorily between interested persons." *State v. Bd. of Supervisors, La. State Univ. & Agric. & Mechanical College*, 84 So. 2d 597, 600 (1955).

This court has explained that a party has standing to argue that a statute violates the constitution only where the statute "seriously affects" the party's own rights. *Mercadel*, 874 So. 2d at 834 (quoting *Latour v. State*, 2000-1176 (La. 1/29/01), 778 So. 2d 557, 560); *see also Bd. of Supervisors*, 84 So. 2d at 600 ("[A] litigant not asserting a substantial existing legal right is without standing in court."). To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to "third parties in hypothetical situations." *Whitnell v. Silverman*, 95-0112 (La. 12/6/96), 686 So. 2d 23, 29 (citing cases).

On several occasions, this court has considered how the doctrine of standing applies to a public official who is a party to a mandamus action seeking performance

of statutory duties, and who attempts to justify his or her nonperformance on the grounds that the statute violates the constitution. In *State ex rel. New Orleans Canal & Banking Co. v. Heard*, 18 So. 746, 746 (La. 1895), the relators sought a writ of mandamus to compel certain state executive officers, including the State Auditor and the State Treasurer, to warrant and pay amounts owed from the surplus interest fund of 1889, as required by statute. The relators claimed that they, acting as fiscal agents of the state, paid $2,616 apiece to holders of interest coupons on consolidated bonds issued by the state, and sought reimbursement of these payments pursuant to Concurrent Resolution No. 182 of the General Assembly of 1894. *Id.* In defense of their failure to reimburse relators from the surplus interest fund, the executive officers argued that Concurrent Resolution No. 182 was unconstitutional. *Id.* at 746. After reviewing relevant jurisprudence, the court concluded that the executive officers did not have standing to assert the unconstitutionality of Concurrent Resolution No. 182. *Id.* at 751. The court stated:

> [W]e feel fully confirmed in the correctness of the conclusion[] . . . that executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established; for in a well-regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance. Were it not so, the most inextricable confusion would inevitably result, and 'produce such collision in the administration of public affairs as to materially impede the proper and necessary operations of government.' It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it. The result of this conclusion is that respondents are without right to urge the unconstitutionality of the concurrent resolution which is involved.

Id. at 751. Having found that the executive officers lacked standing, the court did not consider their constitutional challenge to the statute.

In *Dore v. Tugwell*, 84 So. 2d 199 (La. 1955), we revisited the issue of a public official's standing to raise a constitutional challenge in a mandamus action seeking to compel the performance of statutory duties. The widows of two judges applied for mandamus to compel the State Auditor and State Treasurer to pay them widows' pensions as required by La. Rev. Stat. 13:5. *Id.* at 200. The state officers argued that the statute authorizing payment of the pensions was unconstitutional. *Id.* at 201. This court observed that the rule established in *Heard* "represent[ed] the majority view in this country," and concluded that the instant case was indistinguishable from *Heard*. *Id.* Thus, the state officers were without standing to question the constitutionality of the statute at issue.

Again, in *Smith v. Flournoy*, 115 So. 2d 809 (La. 1959), this court rejected a public official's attempt to assert the unconstitutionality of a statute in a mandamus action seeking to compel performance of statutory duties. In *Smith*, two registered voters sought a rule directing the registrar of voters to show cause why she should not be required to mail notices to, and publish the names of, eight illegally registered voters as required by La. Rev. Stat. 18:133. *Id.* at 810. The registrar filed numerous exceptions, all of which were overruled, and the registrar then applied for various writs to stay the proceedings below. *Id.* In support of her position that she was not required to mail notices or publish names, the registrar argued that the statute directing her to do so violated the state and federal constitutions. *Id.* at 812. The court declined to consider the registrar's constitutional argument, because it found, relying on *Heard* and *Dore*, that "relator is without interest to assert the unconstitutionality of the statute as a defense to a suit to compel the performance of

ministerial duties imposed on her by law." *Id.* The court further rejected the registrar's argument that *Heard* did not apply to her because she had sworn an oath to support the constitution and performance of the statutory duties at issue would force her to violate this oath. *Id.* at 813. The court noted that all state officers were required to take the same oath, and that to permit all state officers to question the constitutionality of statutes merely because of this oath would abrogate the *Heard* rule entirely. *Id.* The court also rejected the registrar's argument that she had standing to challenge the statute because she could potentially be subject to fines and imprisonment for violation of the registration laws. *Id.* The court determined that the possibility of future prosecution for violating the statute was not enough reason to disregard the rule that a party must have standing to challenge the constitutionality of a statute. *Id.* [5]

This court has applied the standing requirements articulated in *Heard* not only to executive officials, but to members of the judicial branch as well. In *State ex rel. Hall v. Judge of the Tenth Judicial District*, 33 La. Ann. 1222, 1881 WL 8805, at *1 (La. 1881), a case that predated *Heard*, a district attorney brought a mandamus action seeking to compel a judge to allow him to file an information charging a defendant with violating Act No. 8 of the Extra Session of 1870. The judge had refused to permit the district attorney to file the information, because the judge believed the statute was unconstitutional. *Id.* This court found that the judge lacked standing to invoke constitutional concerns in refusing to allow a bill of information to be filed. *Id.* at *2. We reasoned that permitting judges such discretion would result in inconsistent application and enforcement of the criminal law:

[5] *See also La. Motor Vehicle Comm'n v. Wheeling Frenchman*, 103 So. 2d 464, 468 (La. 1958) ("As a general rule, a public officer or body is without interest or right to question the constitutionality of a statute which he or it is entrusted to administer.").

> Such a latitude would present cases where, in a certain district, an accused could be charged, tried and punished for an offence under a statute recognized as binding by the judge of that particular district, when at the same time, in an adjoining district, the accused would be protected from prosecution for a similar offence, on the ground that the same statute would be held unconstitutional by the judge of the latter district.

Id. Thus, we stated, it was better left to criminal defendants actually charged with violating a statute, and not to judges in a criminal cases, to raise the issue of a statute's constitutionality. *Id.*

Similarly, in *Crespo v. Viola*, 95 So. 256 (La. 1922), this court again held that a judge lacked standing to attack the constitutionality of a statute as a defendant in a mandamus proceeding which sought to procure his compliance with the statute. In *Crespo*, a trial judge ordered the defendant in a case pending before him to pay the court stenographer, and threatened to decide the case without all testimony having been filed if he did not. *Id.* at 256. The defendant brought a mandamus action against the judge to prohibit him from deciding the case without considering all testimony. *Id.* In defense, the judge argued that a statute that would have compelled the plaintiff in the pending action to pay the stenographer was unconstitutional. *Id.* at 257. We held that the judge was not entitled to raise the issue of the constitutionality of the statute in this manner. *Id.*[6]

Thus, we reject defendants' attempt to distinguish *Heard* as applying only to executive officers. Although the officials involved in *Heard*, *Dore*, and *Smith* were members of the executive branch, those decisions did not turn upon this fact. And, more significantly, the *Hall* and *Crespo* cases applied the same standing requirements to members of the judiciary as were applied to the executive branch in *Heard* and its

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[6]Both *Hall* and *Crespo* are cited in *Dore*, 84 So. 2d at 203 n.4, as standing for the proposition that "a Judge is without interest in raising the constitutionality of a statute."

progeny. Moreover, we find that some of the policy concerns we articulated in *Heard* with respect to the executive branch apply with equal force when the public officer at issue is a member of the judiciary. Although it is uniquely the province of judges to interpret the law, it is essential that they constrain themselves to do so only when an appropriate case is presented to them for adjudication. To condone defendants' refusal to comply with a presumptively constitutional legislative act, when no litigant had challenged the act's validity, would tend to hasten the "inextricable confusion" and "collision in the administration of public affairs as to materially impede the proper and necessary operations of government" that *Heard* foretold.

Also, the dangers of inconsistent enforcement that we predicted in *Hall* have become reality in this case. While defendants have refused to collect the statutory cost, the judges of the Second Parish Court for the Parish of Jefferson and the 22nd Judicial District Court for the Parish of St. Tammany have imposed the cost. Thus, whether a violator is charged the cost depends upon the fortuity of which court he happens to find himself in, a result that we do not countenance.

Just as we noted in *Hall*, 1881 WL 8805, at *2, that a criminal defendant is better situated to challenge the constitutionality of a criminal statute he is accused of violating, a challenge to the validity of La. Rev. Stat. 32:57(G) would be better left to a party against whom the five dollars had actually been assessed. These judges have not demonstrated that they meet the basic standing requirement of a serious adverse effect on their own rights, as opposed to the rights of another party. Nor is there any merit to defendants' argument that their rights are seriously affected by this statute because performance of their statutory duties would violate their judicial oath to uphold the constitution. This court rejected the same argument in *Smith*, 115 So. 2d at 813. As we reasoned in *Smith*, to permit judges the discretion to refuse to

enforce any statute about which they may have question because of their judicial oaths would do away with the *Heard* standing requirement entirely. In addition, the judicial oath requires judges to support not only the Louisiana constitution, but also "**the Laws** of this State." Thus, defendants owe an equal duty to apply and enforce this presumptively constitutional legislative act as they do the state constitution.

Moreover, we find that defendants', and the court of appeal's, reliance upon *Safety Net for Abused Persons v. Segura*, 96-1978 (La. 4/8/97), 692 So.2d 1038, as establishing a precedent for judicial nullification like that defendants have engaged in, is unavailing. In *Safety Net*, a mandamus action was brought to compel a city court judge and clerk of court to collect an additional fee in certain cases as required by La. Rev. Stat. 13:1906. *Id.* at 1039. The defendants asserted in response that this statute was unconstitutional. *Id.* The trial court rejected the defendants' constitutional challenge and issued a writ of mandamus. *Id.* The court of appeal vacated and set aside the writ, holding that the statute violated the constitution. *Id.* This court heard the case as an appeal. **Without considering the issue of the judge's standing to attack the constitutionality of the statute**, presumably because this issue was not raised, we proceeded to affirm the court of appeal's determination that the statute was unconstitutional. *Id.* at 1040-45.

Safety Net does not stand for the proposition that a judge may question the constitutionality of a statute in a mandamus proceeding in which he is a party, because this court did not consider or decide that precise question in the case. The *Safety Net* court merely proceeded to the constitutional question without considering the threshold issue of standing. This case does not provide a blueprint for judges seeking to mount challenges to the constitutionality of statutes in the future.[7]

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[7]Neither does *State v. Judge of the Fifth Judicial District*, 5 La. Ann. 756, 1850 WL 3912,(La. 1850), support defendants' argument that they have standing. Again, as in *Safety Net*

Although we find that *Safety Net* does not support defendants' contention that they have standing, we note that the constitutional issue defendants have identified in this case is not an insignificant one. *Safety Net*, 692 So. 2d 1041, established the principle that the legislature may not use the courts to raise revenue to fund causes, like, in that case, funds to aid victims of family violence, that are unrelated to support of the court or court system. While we reserve for another day the issue of whether La. Rev. Stat. 32:57 runs afoul of the standard we established in *Safety Net*, we observe that the concerns that prompted defendant judges' refusal to impose the five dollar cost were in fact real.

Thus, we hold that defendants' lacked standing to challenge the constitutionality of La. Rev. Stat. 32:57(G) as parties to a mandamus proceeding which seeks to compel them to perform statutory duties that are ministerial in nature. Because we find that the threshold requirement of standing is not met in this case, we do not consider the correctness of the district court's judgment that the statute is unconstitutional.

DECREE:

The district court's holding that the defendant judges had standing to challenge the constitutionality of La. Rev. Stat. 32:57 is reversed, and its judgment finding the statute unconstitutional and denying the Commission's petition for writ of mandamus is vacated and set aside. In light of our ruling in this case, it becomes unnecessary for the court to decide the constitutional issue at this time. We remand the case to the district court with instructions to find that defendants did not have standing to raise the constitutional issue as a defense, and to permit the litigation to go forward.

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for Abused Persons, the court proceeded to decide the constitutional issue without considering the preliminary issue of standing. The court's failure to address the judges' standing should not be interpreted as an implicit finding that standing existed.

VACATED, SET ASIDE, and REMANDED.

01/19/05

SUPREME COURT OF LOUISIANA

04-CA-2147

Greater New Orleans Expressway Commission

v.

Honorable Rebecca M. Olivier,
Judge, First Parish Court, Division "A"
and Honorable George W. Giacobbe,
Judge, First Parish Court, Division "B"

ON APPEAL FROM THE 24th JUDICIAL DISTRICT COURT,
FOR THE PARISH OF JEFFERSON,
HONORABLE KERNAN A. HAND, JUDGE

JOHNSON, J. dissents, assigning reasons:

I respectfully dissent from the majority opinion that the defendant judges do not have the authority to plead the alleged unconstitutionality of La. Rev. Stat. 32:57(G) as a defense to a mandamus action.

Our jurisprudence has long recognized that a court may not *sua sponte* declare a statute unconstitutional. This Court in *State v. Brewster*, 00-1266 (La. 6/30/00), 764 So.2d 945, *citing Board of Com'rs of Orleans Levee Dist. v. Connick*, 94-3161, (La. 3/9/95), 654 So.2d 1073 stated:

> As a general rule, courts should not reach the question of a statute's constitutionality when its unconstitutionality has not been placed at issue by one of the litigants. *See Vallo v. Gayle Oil Co. Inc.,* 94-1238, (La. 1994), 646 So.2d 859. Unless a statute as drawn is clearly unconstitutional on its face, it is preferred that the parties to a dispute uncover any constitutional defects in a statute through the dialectic of our adversarial system; for a court *sua sponte* to declare a statute unconstitutional is a derogation of the strong presumption of constitutionality accorded legislative enactments.

The sole exception to this general rule is that a court may reach the constitutional question on its own motion when its jurisdiction is affected. *State v. Brewster*,

supra. This exception has typically been applied in cases where a legislative enactment interferes with or curtails the plenary power of the reviewing court. *Id*.

The defendants in this matter, two First Parish Court judges, argue that this case does not present a *sua sponte* determination that a statute is unconstitutional. Rather, the judges were specifically named as defendants in this mandamus action, brought explicitly to have the district court order them as judicial officers to enforce the statute at issue. The judges, in their role as defendants, raised the issue of the constitutionality of La. R.S. 32:57(G). They contend that as defendants, they, like any party litigant, have the right to assert any defense to an action naming them personally and seeking an order compelling them to act in a manner contrary to their oath. Defendants argue further that under federal and Louisiana law, a party has standing to challenge the constitutionality of a statute if the statute adversely affects his or her own right. *Whitnell v. Silverman*, 95-0112 (La. 12/6/96) 686 So.2d 23, 29 (*citing County of Ulster v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979)).

The majority has held that judges, when named defendants to a mandamus action, have no right to question the constitutionality of the statute sought to be enforced as a defense to the action. The majority has relied upon several cases which address the issue of standing in regard to a public official's constitutional challenge to a statute or ordinance raised as a defense in a suit to compel the official's performance, most notably *State ex rel. New Orleans Canal & Banking Co. v. Heard* and its progeny. However, *State v. Judge of Fifth Judicial District Court,* 5 La. Ann. 756, 1850 WL 1912 (La. 1850) pre-dates all of the above cited cases and is cited in *Heard*. In *Judge of Fifth Judicial District Court*, this Court addressed a judge's right to challenge the constitutionality of a statute as a defense

to a mandamus action. The statute in dispute in *Judge of Fifth Judicial District Court*, provided that, if a district judge is recused from a case, that the district judge shall refer the case to the judge of the adjoining district, and the judge to whom the case is referred shall hold a special court for the trial of the case. In accordance with that statute, the district judge in the Fourth Judicial District recused himself from hearing certain cases and referred the cases to the district judge in the adjoining district. The district judge in the adjoining district, however, refused to comply with the statute and hold the special court. The plaintiffs in the referred cases filed a rule to show cause why a mandamus should not issue commanding the referral judge to try the case. In defense, the judge asserted that the statute was unconstitutional. Ultimately, we addressed the argument of constitutionality and held that the statute was unconstitutional.

The *Heard* court made the following reference to the *Judge of the Fifth Judicial District Court* case:

> [I]n *State v. Judge of Fifth Judicial District Court*, 5 La. Ann. 756, where the act of the legislature providing for the trial of causes in which a district judge shall be recused by the judge of an adjoining district was alleged to be unconstitutional by the respondent, and held to be valid by the court, it being a question *in which the judge had an interest*, and which was a necessary issue to be disposed of. In that case, the judge was called upon to test the constitutionality of the law *as a matter of defense*.

Heard, 47 La. Ann. at 1688, 18 So. at 750. (Emphasis added).

The most recent decision from this Court involving a constitutional challenge by members of the judiciary as a defense to a mandamus action is *Safety Net for Abused Persons v. Segura*, 96-1978 (La. 4/8/97), 692 So.2d 1038. In *Safety Net*, a nonprofit corporation which provided support and counseling for victims of family violence ("SNAP"), sued a city court judge and clerk of court requesting an order compelling them to collect, pursuant to statute, additional fees

in criminal and civil cases to be deposited in a special account for the corporation's use. This Court ultimately held that the fees imposed pursuant to the statute were unconstitutional. However, the issue of standing was not raised by the parties. Thus, the merits of the case was decided without reaching the issue of whether the judges had standing to raise the constitutionality as a defense in the mandamus action.

In my mind, one of the functions of judicial officers is to pass upon the constitutionality of laws. This is unlike the role of executive officers, whose duty it is to simply execute a law and perform their ministerial duties in accordance with the laws of the state until its constitutionality is determined by the judiciary. I cannot agree with a ruling that establishes a bright line rule that in every case involving a judicial officer as a defendant in a mandamus action, the officer may never raise the constitutionality of the statute as a defense. In most cases the judge does not have a direct interest in the particular statute at issue. However, where a judge has been mandated to enforce a statute which is either unconstitutional on its face or an abrogation of a court's plenary power; the judge should be permitted to plead unconstitutionality as a defense.

01/19/05

SUPREME COURT OF LOUISIANA

NO. 04-CA-2147

GREATER NEW ORLEANS EXPRESSWAY COMMISSION

VS.

HONORABLE REBECCA M. OLIVIER, JUDGE FIRST PARISH COURT, DIVISION "A" AND HONORABLE GEORGE W. GIACOBBE, JUDGE FIRST PARISH COURT, DIVISION "B"

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

WEIMER, J., concurring.

The judges in this case provoked the mandamus action after making a determination without a hearing, without submission of evidence or legal argument, and without the dissent of an adversary, that they would not collect certain costs. In making this statement, I do not suggest they were not sincere in their concerns. I would not establish a rule which prohibits a judge from invoking a defense of unconstitutionality in all cases, but would limit our holding that these judges lack standing in this case.