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Introductory Remarks

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OFFSETTING RISKS IN TORT LAW: THEORETICAL AND PRACTICAL DIFFICULTIES

Benjamin Schmueli

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WE COUNT TOO!
ENDING THE DISENFRANCHISEMENT
OF LIMITED ENGLISH PROFICIENCY VOTERS

Terin M. Barbas

VOLUME 37

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INTRODUCTORY REMARKS

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INTRODUCTORY REMARKS

SCOTT D. MAKAR

1999 was an even better year than what I thought at the time. As my wife, Nancy Hogshead-Makar, and I shared wedding vows on October 10, 1999, in Jacksonville, Florida, neither of us was aware that just a few months before, the Office of the Solicitor General had been established as a joint relationship between the Florida Attorney General's Office and the Florida State University College of Law. Little did we know that it would play an important role in our family's future.

Over the years, I came to know Florida's first Solicitor General, Tom Warner, and his successor, Chris Kise, as well as a number of their deputies. But the possibility of stepping into their shoes in the future did not occur to me—until the 2006 holiday season.

At that time, I was in the running for an appellate judgeship,¹ a position I have always held in high esteem and thought would be a natural extension of my background in appellate law, legal education, and bar and community service. I was not ultimately selected,² but it was one of those moments where one's life path is sent in another direction.

Around that same time, a friend mentioned that former United States Congressman Bill McCollum, who had just been elected Florida's Attorney General, was seeking applicants for a number of positions, including Solicitor General. I did not know Bill McCollum and had no political or personal connection with either him or his campaign. I was simply an appellate lawyer with a great job³ who was interested in a position in public service. So, I applied, feeling my chances were uncertain at best.

In early 2007, I met with General McCollum's transition team, interviewed with the General, and waited expectantly over the next few weeks. The phone call I received on Friday morning, February 16,

1. An interesting question arose about when the vacancy for retiring First District Court of Appeal Judge Richard Ervin III would occur, the resolution of which would effectively determine whether outgoing Governor Jeb Bush or incoming Governor Charlie Crist would make the appointment, resulting in an advisory opinion from the Florida Supreme Court on the matter. *See Advisory Opinion to Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090 (2006).

2. Judge Clay Roberts and I were neck-and-neck going into our interviews with Governor Crist, but his charisma won the day, and I did not seek a recount.

3. At the time, I was the chief of the appellate division of the Office of General Counsel for the Consolidated City of Jacksonville, a position that long-time General Counsel Rick Mullaney created and placed me in charge of in 2001. *See Mary Kelli Palka, Attorney's new post combines 2 passions: Teaching and state law*, FLA. TIMES UNION, Feb. 23, 2007, available at http://www.jacksonville.com/tu-online/stories/022307/met_8137506.shtml (last visited Sept. 17, 2009).

2007, changed my professional and personal life. “Scott, this is Bill McCollum. I’d like you to be my Solicitor General.” It resulted in one of the most professionally rewarding experiences an appellate lawyer can imagine, as Rachel Nordby’s article, *Florida’s Office of the Solicitor General: The First Ten Years*, makes readily apparent. Thank you so very much, General McCollum, for this opportunity. And thank you, Rachel, for your hard work and contribution to the history of this Office.

In addition to what Ms. Nordby has said in her exceptional article, a source of pride for me is the remarkably talented and dedicated attorneys and staff the office has had in its first ten years. It is a small group, comprised of eighteen lawyers and six staff over that time. Most of the staff continues to serve in various capacities either with this Office, the Governor’s Office, or important state agencies. Some of the lawyers are now top flight lawyers with private firms (one writing Florida’s first appellate blog),⁴ some are counsel to the Governor or state agencies, and others remain here. One former deputy was just appointed to the First District Court of Appeal, Judge T. Kent Wetherell, an alumnus of this law school.⁵ Notably, Chief Deputy Solicitor General (and former Acting Solicitor General) Lou Hubener, who has served with the Office of Solicitor General since its inception, deserves a major tip of the hat for his selfless dedication to the State of Florida and its legal matters for over 35 years, and for serving as a role model for all appellate lawyers.

That the Solicitor General holds the Richard W. Ervin Eminent Scholar Chair, and is required to teach each semester at Florida State University College of Law, is icing on the cake. It is a lot of work to prepare and teach courses each semester, but doing so provides great opportunities to explore interesting topics and expose students to cutting edge legal issues. My thanks to Dean Donald Weidner, who has been the consummate dean, scholar, and gentleman during my tenure. Thanks also to Academic Dean Wayne Logan and former Academic Dean Mark Seidenfeld for giving me the freedom to teach a wide range of courses.⁶ And thanks, of course, to Sandy D’Alemberte and Bob Butterworth for their visionary efforts to establish the Office and make it one of the best in the nation.

In conclusion, I recommend that whoever becomes Florida’s Attorney General in future years reads Ms. Nordby’s article and takes to

4. See Abstract Appeal (Webmaster Matt Conigliaro), <http://abstractappeal.com/> (last visited Sept. 17, 2009).

5. See Press Release: Governor Crist Appoints Rowe And Wetherell To First District Court Of Appeal, available at <http://www.flgov.com/release/11027> (last visited Sept. 17, 2009).

6. They, along with the Curriculum Committee, have allowed me to pursue my goal of offering a different course for the seven semesters I am scheduled to teach.

heart the importance of maintaining this Office's high calling, which is to serve the state's greater interests in the appellate courts. Unlike the United States Solicitor General, who is often known as the "Tenth Justice," the Florida Solicitor General has no statutory requirement to be "learned in the law"⁷ nor a longstanding and venerable tradition to uphold the rule of law against political or ideological trends.⁸ Instead, it comes down to the judgment of the Florida Attorney General to set the course for the Office every four years via the appointment of his or her Solicitor General. Ms. Nordby's article, which emphasizes the Office's traditions and ideals to date that seek to emulate the federal experience, provides sage guidance in that endeavor.

7. The statutory authority for the federal office, enacted in 1870, currently provides: "The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties." 28 U.S.C.A. § 505. *See also* Office of the Solicitor General, United States Dep't of Justice, <http://www.usdoj.gov/osg/> (last visited Sept. 17, 2009) (providing background on the Office's history and functions).

8. Much has been written in the last twenty years about the Office of the United States Solicitor General. *See, e.g.*, PETER N. UBERTACCIO, III, *LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL* (2005); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); RICHARD L. PACELLE, JR., *BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION* (2003); LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

FLORIDA’S OFFICE OF THE SOLICITOR GENERAL:
THE FIRST TEN YEARS

RACHEL E. NORDBY*

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It is my hope that our initial efforts to create and establish this office will emulate the success of the U.S. Solicitor General’s Office and become a resource that the courts will come to respect and rely on for exceptional legal work and “to establish justice” on behalf of the people of the State of Florida.

—Tom Warner, *First Solicitor General of Florida*¹

I. INTRODUCTION

Although Florida’s Office of the Solicitor General was established only a decade ago, it has made the most of those ten years.² This tenth anniversary benchmark provides a timely opportunity to reflect on the creation, development, and accomplishments of this unique office, which bears responsibility for advocating the interests of Florida and its citizens in a diverse array of appellate cases.

* J.D., Florida State University, 2008. Law Clerk to the Honorable Bradford L. Thomas, Florida First District Court of Appeal. I greatly appreciate everyone who provided assistance with the research, writing, and editing of this Article. Specifically, I want to thank Sandy D’Alemberte, Bob Butterworth, Tom Warner, Chris Kise, and Scott Makar, all of whom graciously contributed to this Article through interviews and helpful suggestions. Additionally, I would like to extend deeply felt thank-yous to Matt Conigliaro, who contributed greatly to the material in Part III.A, and Courtney Brewer, who provided much assistance with Part V.A. Lastly, I would like to recognize the individual without whom this Article would not have been written. During the Fall 2007 semester, an FSU law student was struggling to decide upon a topic for her class paper. Quickly recognizing that the student would never make up her mind, the professor promptly assigned her a topic about Florida’s Office of the Solicitor General. It was the most enjoyable class paper I ever worked on and has ultimately grown into this Article. Thank you, Professor Makar.

1. Tom Warner, *Office of the Florida Solicitor General: The Greatest Job for a Lawyer in Florida*, 75 FLA. B.J., July/Aug. 2001, at 32, 36.

2. *Id.* at 32; see also C.B. Upton, *The Office of the Florida Solicitor General: An Appellate Lawyer’s Field of Dreams*, THE RECORD, Fall-Winter 2009, at 14.

This Article will look back on the first ten years of Florida's Office of the Solicitor General. Part II will examine the creation of the position and the role of the office. Next, Parts III, IV, and V will look at the tenures of Florida's first three solicitors general. Then, this Article will propose in Part VI how the role of Florida's solicitor general could be further developed and expanded. Part VII briefly concludes the Article.

II. FLORIDA'S OFFICE OF THE SOLICITOR GENERAL

Florida's Office of the Solicitor General (OSG) is still a relatively young creation, having been established ten years ago in July 1999 at the request of Florida's then-Attorney General Robert "Bob" Butterworth.³ The Solicitor General has "plenary authority over all civil appeals for the State of Florida."⁴ This authority includes, subject to the authority of the Attorney General, (1) monitoring cases for potential appeals that will significantly affect the state's interests; (2) deciding whether cases should be appealed in a state or federal court; and (3) determining whether the state will file or join an amicus brief in pending cases that implicate state interests.⁵ Any such amicus briefs are filed in the name of the Attorney General and the Solicitor General based on the Attorney General's authority to speak on behalf of the state.⁶ Interestingly, the position has an additional role—that of educator. Florida's Solicitor General concurrently holds the position of the Richard W. Ervin Eminent Scholar Chair at the Florida State University (FSU) College of Law. The position of solicitor general is undoubtedly an appellate lawyer's dream and aptly has been called "the greatest job for a lawyer in the state of Florida."⁷

The first person to hold the position was Tom Warner, a former member of the Florida House of Representatives.⁸ His successor, Christopher Kise, was named in December 2002 by then-Attorney

3. *Id.* In comparison, the position of U.S. Solicitor General was created in 1870, when the Department of Justice was established. Act of June 22, 1870, ch. 150, §1, 16 Stat. 162. The Act directed that within the Department, there should be "an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general." *Id.* at § 2.

4. Warner, *supra* note 1, at 32. For a description of the types of courses that Florida's Solicitor General has taught, see Office of the Attorney General of Florida, Solicitor General, Richard W. Ervin Eminent Scholar Chair, <http://myfloridalegal.com/pages.nsf/main/8ac3c14443f4120285256cc6007a9be9!OpenDocument> (last visited Oct. 27, 2009) [hereinafter Richard W. Ervin Chair Website].

5. Warner, *supra* note 1, at 32-34. For a discussion of the OSG's early amicus activity, see Sylvia H. Walbot & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts*, 32 STETSON L. REV. 269, 283-86 (2003).

6. See generally FLA. STAT. § 16.01(4)-(5) (2008).

7. Warner, *supra* note 1, at 36. Tom Warner, Florida's first Solicitor General, made this declaration.

8. *Id.* at 32.

General Charlie Crist.⁹ Kise served in the position until July 2006, when he returned to private practice.¹⁰ His successor, Scott Makar, was appointed by Attorney General Bill McCollum in February 2007.¹¹

A. *From Concept to Creation*

The OSG was brought to fruition mainly through the efforts of two men—Talbot “Sandy” D’Alemberte and Bob Butterworth.¹² D’Alemberte served as Dean of the FSU College of Law from 1984 to 1989 and President of FSU from 1993 to 2003.¹³ He first envisioned the creation of Florida’s Solicitor General in the 1980s when U.S. Solicitor General Rex Lee visited Tallahassee to speak at the College of Law’s graduation ceremony.¹⁴ Years later, D’Alemberte discussed the idea with Attorney General Bob Butterworth.¹⁵

Both men worked towards making the idea a reality. Funding for the position was a key hurdle to overcome; however, D’Alemberte and Butterworth devised a unique resolution. The Attorney General’s Office endowed proceeds from a consumer fraud settlement agreement to FSU; the state provided matching funds.¹⁶ As a result, the Richard W. Ervin Eminent Scholar Chair was created at the FSU College of

9. Press Release, Attorney General-Elect Charlie Crist, Chris Kise Appointed Florida Solicitor General (Dec. 16, 2002), *available at* <http://myfloridalegal.com/newsrel.nsf/newsreleases/0468ECF94829F26685256C91005765C0>.

10. Press Release, Foley & Lardner, LLP, Florida Solicitor General Christopher Kise Joins Foley to Chair Firm’s National Appellate Practice (July 25, 2006) [hereinafter Foley Press Release], *available at* http://www.foley.com/news/news_detail.aspx?newsid=2276.

11. Press Release, Office of the Attorney General of Florida, McCollum Appoints Statewide Prosecutor, Solicitor General (Feb. 13, 2007) [hereinafter McCollum Press Release], *available at* <http://myfloridalegal.com/newsrel.nsf/newsreleases/0EB3CA6F00DC6AD2852572810064DC25>.

12. Warner, *supra* note 1.

13. Florida State University College of Law, Faculty Profiles, Talbot “Sandy” D’Alemberte, <http://www.law.fsu.edu/faculty/tdalemberte.html> (last visited Oct. 27, 2009).

14. Interview with Talbot “Sandy” D’Alemberte, former President, FSU, in Tallahassee, Fla. (Apr. 1, 2009) [hereinafter D’Alemberte Interview] (interview notes on file with author). Rex Lee served as U.S. Solicitor General from 1981 to 1985. U.S. Dep’t of Justice, Office of the Solicitor General, Rex Lee, <http://www.usdoj.gov/osg/aboutosg/rexbio.html> (last visited Oct. 27, 2009). At a national conference held soon after Lee’s death in 1996, Justice David Souter was asked about recent changes to advocacy before the U.S. Supreme Court. His response meaningfully described Lee’s service to the country in the role of solicitor general:

Well, I can tell you that the biggest change by far is that Rex Lee is gone. Rex Lee was the best Solicitor General this nation has ever had, and he is the best lawyer this Justice ever heard plead a case in this Court. Rex Lee was born to argue tough cases of immense importance to this nation. He set new standards of excellence for generations of lawyers and justices. No one thing has happened to change the nature of advocacy of this Court which has had as much impact as the loss of that one player.

Theodore B. Olson, *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1.

15. D’Alemberte Interview, *supra* note 14.

16. *Id.*

Law specifically for the Solicitor General.¹⁷ A portion of the Solicitor General's salary is paid by the funds from the endowment; accordingly, the Attorney General appoints the Solicitor General with the advice and approval of FSU.¹⁸

In this role as the Richard W. Ervin Eminent Scholar Chair, the Solicitor General is an adjunct faculty member of FSU's law school.¹⁹ Each fall and spring semester, the Solicitor General teaches a course to second- or third-year law students.²⁰ Course topics have ranged from Appellate Advocacy to White Collar Crime.²¹ By tying the position to FSU's College of Law, D'Alemberte and Butterworth established a lasting and beneficial relationship between the school and the Attorney General's Office, under which students enjoy direct access to the state's top appellate advocate.

B. *The Role and Procedure of the Office*

Florida's OSG is based on the theory that a unit within the Attorney General's Office should be devoted solely to appellate work involving the state's interests. By selecting cases to work on through careful analysis of the interests and legal questions at issue, the OSG keeps its caseload manageable and provides devoted attention to cases that significantly implicate Florida's interests.²² In the words of Florida's first Solicitor General, Tom Warner, "[t]he concept . . . is to infuse private legal expertise and experience into government practice, to elevate the state's appellate practice, and to provide coordination of both legal and policy issues in the state's most important cases."²³

The OSG monitors all new civil appellate cases opened in the Attorney General's Office.²⁴ Through this monitoring system, the office can review cases for a variety of factors, including: potential statewide importance, the triggering of novel or complex legal issues, and general or specific effects upon issues of great public interest.²⁵ With these factors in mind, the Solicitor General advises the Attorney

17. *Id.*; see also Warner, *supra* note 1, at 32; Upton, *supra* note 2, at 14.

18. Warner, *supra* note 1, at 32. Notably, Attorney General McCollum recently contributed an additional \$275,000 to the endowment pursuant to a settlement agreement. *Settlement Leads to Supplemental Funding for Law School Chair*, FLORIDA STATE LAW ALUMNI MAGAZINE, Spring 2009, at 21.

19. *Id.*; Upton, *supra* note 2, at 14.

20. The author of this Article was a student in Chris Kise's fall 2006 Appellate Advocacy class, Scott Makar's fall 2007 course on Florida, the Constitution & Supreme Court, and Scott Makar's spring 2008 class on Topics in Appellate Law.

21. Richard W. Ervin Chair Website, *supra* note 4; see also Upton, *supra* note 2, at 14-15.

22. See Warner, *supra* note 1, at 34 (discussing the monitoring process and factors used to determine if the Solicitor General's office might wish to appear in a case or assist others with preparations).

23. *Id.* at 32.

24. Kise Interview, *infra* note 82; see also Warner, *supra* note 1, at 34-35.

25. *Id.*

General on how certain cases may trigger legal or policy issues in which the state has an interest.²⁶ Ultimately, the Solicitor General plays a vital role in deciding whether the state should appeal or become involved with certain cases. Currently, in addition to the Solicitor General, the office is composed of a Chief Deputy Solicitor General and four deputy solicitors general.²⁷

It is this role as advocate for Florida's interests that introduced Tom Warner to the greatest job for an appellate lawyer in Florida, catapulted Chris Kise into the hallowed halls of One First Street, Washington D.C., thrice within an eighteen-month span, and elevated Scott Makar to the head of what is appropriately described as one of the most high-powered public law firms in the state.

III. SOLICITOR GENERAL TOM WARNER AND THE GREATEST JOB

In 1999, Representative Tom Warner was preparing for a new job—his time as a state legislator was coming to an end.²⁸ The next stage of his professional career would prove to be unique. Attorney General Butterworth approached Warner to serve as Florida's first Solicitor General.²⁹ Warner was well-suited to assume such a role. His professional background as a lawyer, coupled with his experience as a state representative dealing with the wide-ranging public interests of the state and its citizens, would prove valuable.³⁰

Being the first person to hold a newly-created position had its challenges. Fortunately, Warner had resources from which to draw ideas in making the OSG a significant part of the Attorney General's Office. Warner looked to other state solicitors general and the United States' Solicitor General for ideas in establishing an office that would enhance the appellate practice of the Attorney General's Office.³¹

Importantly, Warner and Butterworth wanted to enhance the appellate work of the Attorney General's Office.³² The position was broadly envisioned as a supervisory and coordinating role to ensure coherency and quality in the appellate efforts of the Attorney General's Office around the state.³³ An initial challenge in defining the scope of the position was creating a workable system that would al-

26. Office of Program Policy Analysis and Government Accountability, Office of the Attorney General (Department of Legal Affairs): Constitutional Legal Services, <http://www.oppaga.state.fl.us/profiles/1030/right.asp?programnum=1030#Solicitor> (last visited Oct. 27, 2009).

27. Upton, *supra* note 2, at 15.

28. Interview with Tom Warner, former Fla. Solicitor General, (Mar. 24, 2009) [hereinafter Warner Interview] (interview notes on file with author).

29. *Id.*

30. Warner, *supra* note 1, at 32 n.a.1.

31. Warner Interview, *supra* note 28.

32. *Id.*

33. *Id.*

low the OSG to function within and enhance the Attorney General's Office.³⁴ Specifically, Butterworth and Warner wanted to avoid disrupting the already established divisions and units within the office.³⁵ As a result, the Solicitor General was given authority over only civil appeals.³⁶

Warner remembers his time as solicitor general as an interesting and rewarding experience, not only due to his work in numerous cases on behalf of the state of Florida, but also due to his role as an adjunct professor at the FSU College of Law.³⁷ Warner would engage his students in the work of the OSG, often having them write research memoranda on pending legal issues and hold moot court arguments.³⁸ As a result, the students were exposed to a variety of state and federal legal issues, as evidenced by the spectrum of notable cases handled by the OSG during Warner's tenure.

A. Notable Cases Under Warner

Florida's Solicitor General first appeared in rulemaking and other procedural cases³⁹ as well as cases addressing the sufficiency of proposed constitutional amendments.⁴⁰ Among the constitutional amendment cases was *Armstrong v. Harris*, the only Florida Supreme Court decision to hold invalid a constitutional amendment approved by voters based on what the court subsequently found to be a misleading ballot summary.⁴¹

In 2000, Solicitor General Warner represented the Attorney General in the original *Bush v. Holmes* appeal to the First District Court of Appeal.⁴² The appellants in that case contested a trial court's ruling that Florida's recently created Opportunity Scholarship Program violated Article IX, section 1, of the Florida Constitution by providing students at failing public schools with tuition vouchers that could be used at private schools.⁴³ The First District reversed the trial court's ruling,⁴⁴ but the case would continue on for many years, with both So-

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *E.g.*, In re Amendments to Fla. Evidence Code, 782 So. 2d 339, 339 (Fla. 2000); Amendments to Fla. R. Crim. P. 3.851, 3.852 and 3.993, 772 So. 2d 532, 532 (Fla. 2000).

40. *E.g.*, *Kainen v. Harris*, 769 So. 2d 1029, 1030 (Fla. 2000) (denying relief in a mandamus proceeding challenging the language of a ballot summary).

41. 773 So. 2d 7, 21-22 (Fla. 2000).

42. 767 So. 2d 668, 670 (Fla. 1st DCA 2000), *disapproved by* *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

43. *Bush*, 767 So. 2d at 675-76.

44. *Id.* at 677.

licitor General Warner and his successor, Chris Kise, becoming greatly involved with the litigation.⁴⁵

In 2001, the OSG entered the high-profile public records litigation surrounding the autopsy photographs of well-known racecar driver Dale Earnhardt.⁴⁶ Earnhardt died in February 2001 in an accident during the annual Daytona 500 race.⁴⁷ The local medical examiner conducted an autopsy as required by Florida law.⁴⁸ A legal battle quickly ensued over whether the autopsy photographs and recordings were public records subject to general disclosure. Earnhardt's survivors filed suit to block disclosure of the materials, and the Legislature quickly passed a new law generally exempting autopsy photographs and recordings from public records disclosure.⁴⁹ Various persons intervened to challenge the new law and obtain the records, and the Solicitor General intervened to defend the law on behalf of the Attorney General and the State of Florida. A circuit court blocked disclosure of the records at issue and held the new law constitutional.⁵⁰ The case proceeded to the Fifth District Court of Appeal, which likewise held the law constitutional.⁵¹ The Florida Supreme Court ultimately denied review.⁵²

In that same time period, Solicitor General Warner began what would become a regular and successful practice of appearing on behalf of the State of Florida as an amicus curiae in state and federal litigation. Solicitor General Warner filed one of the first such amicus briefs in *Betts v. Ace Cash Express, Inc.*, a Fifth District Court of Appeal case addressing a consumer suit against a check-cashing company for allegedly charging usurious interest rates on short-term loans.⁵³ The Solicitor General, on behalf of the Attorney General, maintained that the transactions at issue were loans subject to Florida's usury laws.⁵⁴ A divided Fifth District disagreed.⁵⁵ Judge Griffin dissented with a written opinion in which she expressly agreed with the Attorney General's position.⁵⁶ Several years later, in another case, the Florida Supreme Court disapproved the Fifth District's opi-

45. *Bush*, 919 So. 2d at 396.

46. *Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388, 391-92 (Fla. 5th DCA 2002).

47. *Id.* at 391.

48. *Id.*; see FLA. STAT. § 406.11(1)(a) (2001).

49. Ch. 2001-1, Fla. Laws (2001) (codified at FLA. STAT. § 406.135 (2001)); *Earnhardt v. Volusia County*, No. 2001-30373-CICI, 2001 WL 992068, at *1-4 (Fla. Cir. Ct. July 10, 2001).

50. *Volusia County*, 2001 WL 992068, at *6.

51. *Campus Commc'ns, Inc.*, 821 So. 2d at 403.

52. *Campus Commc'ns, Inc. v. Earnhardt*, 848 So. 2d 1153 (Fla. 2003).

53. 827 So. 2d 294, 295-96 (Fla. 5th DCA 2002), *disapproved by* *McKenzie Check Advance, LLC v. Betts*, 928 So. 2d 1204 (Fla. 2006).

54. *Betts*, 827 So. 2d at 299 (Griffin, J., dissenting).

55. *Id.* at 297-99 (majority opinion).

56. *Id.* at 299 (Griffin, J., dissenting).

nion and embraced Judge Griffin's dissent—the Attorney General's position ultimately prevailed.⁵⁷

The Solicitor General's amicus efforts soon extended to cases of national importance. One such matter was *Zelman v. Simmons-Harris*, a high-profile United States Supreme Court case that addressed whether Ohio's public school tuition voucher program violated the Establishment Clause.⁵⁸ The program allowed parents of students in failing schools to use publicly funded scholarships at participating private schools, including religious private schools.⁵⁹ Florida had a significant interest in the case due to its own recently enacted Opportunity Scholarship Program.

The Sixth Circuit had declared Ohio's program unconstitutional and emphasized the high percentage of Ohio voucher recipients who elected to use their vouchers at religious schools.⁶⁰ Solicitor General Warner's amicus brief asserted that such percentages should be irrelevant because they are ultimately tied to how many private schools in a given area are religious.⁶¹ The brief developed this argument, including statistical data involving Ohio, Florida, and other states.⁶² Six states joined the brief.⁶³ The Supreme Court ultimately reversed the Sixth Circuit and ruled that Ohio's program did not violate the Establishment Clause.⁶⁴ The Court's opinion twice cited the Solicitor General's brief in support of the conclusion that religious school participation rates in the case were constitutionally insignificant.⁶⁵

Another noteworthy case involving the OSG's early amicus efforts was *Shaw v. Murphy*, in which the United States Supreme Court addressed whether a prisoner has a First Amendment right to provide legal assistance to other prisoners, and also whether, based on concerns about prison security and safety, states could limit the amount of communications and contact between inmates.⁶⁶ Solicitor General Warner submitted an amicus brief on behalf of Florida and several other states.⁶⁷ The brief was in the style of a "Brandeis brief"⁶⁸—it

57. *McKenzie Check Advance, LLC*, 928 So. 2d at 1210.

58. 536 U.S. 639, 643-44 (2002).

59. *Id.* at 644-45.

60. *Simmons-Harris v. Zelman*, 234 F.3d 945, 958-61 (6th Cir. 2000).

61. Brief for State of Florida et al. as Amici Curiae Supporting Petitioners at *13, *Zelman*, 536 U.S. 639 (No. 00-1751).

62. *Id.* at *14-17.

63. *See id.*

64. *Zelman*, 536 U.S. at 644.

65. *Id.* at 657-58.

66. 532 U.S. 223, 225, 228 (2001).

67. Brief for the State of Florida et al. as Amici Curiae Supporting Petitioner, *Shaw*, 532 U.S. 223 (No. 99-1613). The other states included Alabama, Arkansas, Delaware, Illinois, Iowa, Kansas, Louisiana, Commonwealth of Massachusetts, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Utah, Vermont, and Commonwealth of Virginia. *Id.*

provided the Court with information about how people were using prison “law clerks” to pass messages and objects to inmates in solitary confinement.⁶⁹ The brief even included evidence and pictures of the types of items being passed along.⁷⁰ Notably, the Supreme Court cited Florida’s brief in its unanimous opinion,⁷¹ which held that prisoners do not have a First Amendment right to provide legal assistance.⁷²

In 2002, the OSG led another significant effort to support a fellow state in the United States Supreme Court. *Washington State Department of Social and Health Services v. Guardianship of Keffeler* began as a low-profile class action suit in Washington state court against the state agency that provided care to foster children.⁷³ The state supreme court held that the agency’s practice of using foster children’s federal benefits to pay foster care costs violated the Social Security Act’s anti-attachment provision.⁷⁴ In light of that decision, the state agency would have been required to return to the state’s foster care children millions of dollars that had been expended on those children’s care. Washington requested review by the United States Supreme Court and sought amicus support at the certiorari stage to demonstrate the potential national impact of the state supreme court’s decision.

Solicitor General Warner and the OSG provided that much-needed support. Florida had a significant interest in the case on account of the tens of thousands of children in its own foster care system. The Solicitor General prepared an amicus brief on Florida’s behalf that twenty-five other states and the Commonwealth of Puerto Rico joined, urging the Supreme Court to grant certiorari.⁷⁵ The Supreme Court did so, and the Solicitor General later filed an amicus brief urging reversal on the merits.⁷⁶ Thirty-eight states, the Commonwealth of Puerto Rico, and the Territories of the Virgin Islands and American Samoa joined that amicus merits brief.⁷⁷ The Supreme

68. A “Brandeis brief” provides more than just legal arguments or reasoning; it often will include policy arguments, scientific data, or other evidence to support its position and persuade the court. See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 340, 340 n.150 (2008).

69. Warner Interview, *supra* note 28.

70. *Id.*

71. *Shaw*, 532 U.S. at 231.

72. *Id.* at 225.

73. 537 U.S. 371, 379 (2003).

74. *Guardianship of Keffeler v. Wash. Dep’t of Soc. & Health Servs.*, 32 P.3d 267, 279 (Wash. 2001), *rev’d*, 537 U.S. 371 (2003).

75. Brief for the State of Florida et al. as Amici Curiae Supporting Petitioner’s Petition for Writ of Certiorari, *Wash. State Dep’t of Soc. and Health Servs.*, 537 U.S. 371 (No. 01-1420).

76. Brief for the State of Florida et al. as Amici Curiae Supporting Petitioner, *Wash. State Dep’t of Soc. and Health Servs.*, 537 U.S. 371 (No. 01-1420).

77. *See id.*

Court ultimately reversed the Washington Supreme Court's decision, again citing the amicus brief submitted by Florida.⁷⁸

The OSG appeared successfully in many other high-profile cases through the end of 2002, when Tom Warner stepped down as solicitor general. For instance, the Solicitor General defended the constitutionality of Florida's 1999 tort reform legislation in *State v. Florida Consumer Action Network*.⁷⁹ The Solicitor General also defended the Legislature's authority to regulate endangered and threatened species of marine life, most particularly manatees and sea turtles, in *Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Commission*.⁸⁰ Further, the Solicitor General intervened in *Media General Convergence, Inc. v. Chief Judge of Thirteenth Judicial Circuit* to ensure that sexual harassment records received or generated by a circuit court chief judge concerning a fellow judge were considered public records.⁸¹

Warner returned to private practice after his tenure as solicitor general. As demonstrated by the variety of cases handled under Warner, the fledgling office was establishing itself as an active and effective locus of appellate litigation involving state interests. The reputation of the office would continue to grow as a new solicitor general, Chris Kise, arrived at the helm.

IV. SOLICITOR GENERAL CHRIS KISE GOES TO WASHINGTON

He would not call it "lucky," but the red and blue bowtie that Chris Kise is often seen wearing is what he wore to almost every oral argument as Florida's solicitor general.⁸² It was also the source of some consternation the day before his first oral argument at the United States Supreme Court.⁸³ Unsure if he could wear the bowtie during oral arguments at the formal high court, he travelled around Washington D.C. in a taxicab the evening before his argument looking for a menswear shop to buy a traditional necktie.⁸⁴ The next day, he arrived at the Court and learned that not only was it acceptable for him to wear his bowtie at oral argument, but that Justice Stevens himself wears bowties on the bench.⁸⁵

78. *Wash. State Dep't of Soc. and Health Servs.*, 537 U.S. at 391-92.

79. 830 So. 2d 148, 150 (Fla. 1st DCA 2002), *rev. denied*, 852 So. 2d 861 (Fla. 2003).

80. 838 So. 2d 492, 494 (Fla. 2003).

81. 840 So. 2d 1008, 1009-10 (Fla. 2003).

82. Interview with Chris Kise, Former Fla. Solicitor General, in Tallahassee, Fla. (Oct. 17, 2007) [hereinafter Kise Interview] (digital recording on file with author).

83. *Id.*

84. *Id.*

85. *Id.* Another interesting fact that Chris Kise learned the day of his first appearance before the Supreme Court was that the Court maintains a wardrobe closet full of ties, shirts, suit jackets, and other such formal apparel in case counsel ever showed up for arguments and had a wardrobe "emergency." *Id.*

Chris Kise was only the second person to serve as Florida's solicitor general, yet he played a significant role in further establishing the OSG as a key part of any appellate litigation involving Florida's interests.

Prior to holding the position, Kise had almost fifteen years of appellate experience.⁸⁶ He served until July 2006, when he returned to private practice. After Charlie Crist was elected Governor of Florida in November 2006, he named Kise as Counsellor to the Governor.⁸⁷ In November 2007, Kise again returned to private practice but remained the Special Advisor to the Governor on Energy and Climate Change.⁸⁸

A. Notable Cases Under Kise

Under Kise, the OSG continued to be involved in a variety of cases, most notably three cases involving federal habeas corpus claims, which Kise argued before the United States Supreme Court in an eighteen-month span.

It was not until April 2005, almost six years after the creation of the position, that Florida's Solicitor General first appeared at oral arguments before the United States Supreme Court in *Gonzalez v. Crosby*.⁸⁹ This first appearance was quickly followed by a second appearance in February 2006 (for *Day v. McDonough*)⁹⁰ and a third appearance in October 2006 (for *Lawrence v. Florida*).⁹¹ Interestingly, all three cases involved questions relating to the application and interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁹² AEDPA was legislation "[d]esigned to promote 'comity, finality, and federalism,' " and the statutory scheme "sought to extricate federal courts from a tangled, 'tutelary relation' with state courts."⁹³ Accordingly, as so often happens with comprehensive legis-

86. *Id.* Prior to being appointed Solicitor General, Chris Kise was a partner with the Gray Harris law firm in the Tampa office. *Kise Named Solicitor General*, FLA. BAR NEWS, Jan. 1, 2003, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/23CAD2B9D9AC668A85256C98005A51D5>.

87. Press Release, Florida Governor-Elect Charlie Crist, Christopher Kise Named Counsellor [sic] to the Governor (Nov. 21, 2006), available at <http://www.cristtransition.com/news/2006/11/22/christopher-kise-named-counsellor-to-the-governor/>.

88. Press Release, Florida Governor Charlie Crist, Governor Charlie Crist Announces Special Advisor on Energy and Climate Change (Nov. 2, 2007), available at <http://www.flgov.com/release/9606>.

89. 545 U.S. 524, 525 (2005).

90. 547 U.S. 198, 202 (2006).

91. 127 S. Ct. 1079 (2007).

92. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

93. *The Supreme Court, 2006 Term – Leading Cases: "Clearly Established Law" in Habeas Review*, 121 HARV. L. REV. 335, 335 (2007) (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)).

lation affecting such broad issues, states became enmeshed in the interpretation and application of specific provisions of the Act. Because state interests were implicated, Florida's Solicitor General appeared in a line of cases involving AEDPA's application.⁹⁴

Gonzalez centered on AEDPA's restrictions on "second or successive" habeas corpus petitions.⁹⁵ Twelve years after beginning to serve a ninety-nine year sentence for one count of robbery with a firearm, Petitioner Gonzalez filed two unsuccessful postconviction motions for relief in state court.⁹⁶ Three years later, Gonzalez filed a federal habeas petition in U.S. District Court.⁹⁷ This petition was dismissed under Eleventh Circuit precedent as barred by AEDPA's statute of limitations,⁹⁸ which provides a one-year limitation on the filing of "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."⁹⁹

Approximately two years after Gonzalez's federal habeas petition was dismissed, the United States Supreme Court held that "an application for state postconviction relief can be 'properly filed' even if the state courts dismiss it as procedurally barred."¹⁰⁰ Several months after that ruling, Gonzalez filed a pro se motion invoking Federal Rule of Civil Procedure 60(b), which allows a court to provide relief from a final judgment under a limited set of circumstances including mis-

94. Solicitor General Kise and his office became involved in the cases through the Attorney General's Office. Kise Interview, *supra* note 82. The Attorney General's Office represents the state in almost all criminal appeals and "systemic" appeals (appeals that involve the interpretation of the structure and functioning of the criminal justice system; this category includes habeas appeals). *Id.* Mr. Kise noted that some state attorney's offices in Florida are large enough to require a dedicated appellate staff to handle appeals. For the most part, however, the Attorney General's Office works on the state's criminal appeals. *Id.*; see also Office of the Attorney General of Florida, Criminal Appeals, <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/7295a759cf3fb5c985256cc600587a33> (last visited Oct. 27, 2009). Since the three habeas cases were classified as collateral criminal instead of civil, as the cases progressed through the appeals process, they were not tracked by the Solicitor General's case monitoring system. The OSG did not become involved in the cases until the United States Supreme Court had already granted certiorari in them. Kise Interview, *supra* note 82. At that point, Solicitor General Kise, along with then-Attorney General Crist, had to decide a threshold question of which unit within the Attorney General's Office would handle the case in the United States Supreme Court—the OSG, the criminal appeals division, or a combination of both. *Id.* Ultimately, attorneys from both offices collaborated on the briefs and preparation for *Gonzalez* and *Day*. See Brief of Respondent, *Day v. McDonough*, 547 U.S. 198 (2006) (No. 04-1324); Brief of Respondent, *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (No. 04-6432). For *Lawrence*, the OSG played the primary role in preparing the case. See Brief of Respondent, *Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (No. 05-8820). By the time *Lawrence* progressed to oral argument, Chris Kise had already returned to private practice; however, he continued to work on the case and argued it before the United States Supreme Court. Kise Interview, *supra* note 82.

95. 28 U.S.C. § 2244(b) (2000).

96. *Gonzalez v. Crosby*, 545 U.S. 524, 526 (2005).

97. *Id.*

98. *Id.* at 527.

99. § 2244(d)(1).

100. *Gonzalez*, 545 U.S. at 527 (citing *Artuz v. Bennett*, 531 U.S. 4 (2000)).

take, fraud, and newly discovered evidence.¹⁰¹ The Court of Appeals for the Eleventh Circuit affirmed the denial of Gonzalez's rule 60(b) motion as a second or successive habeas petition, which requires pre-certification by the court of appeals before it can be filed under AEDPA.¹⁰² The Supreme Court granted certiorari to review the denial of Gonzalez's motion.¹⁰³

Florida Solicitor General Kise briefed and argued the case on behalf of the Secretary of the Florida Department of Corrections.¹⁰⁴ In its decision, the Court ruled that the provisions of AEDPA are triggered when a prisoner applies for a writ of habeas corpus.¹⁰⁵ The Court determined that Gonzalez's rule 60(b) motion was not a habeas petition since it did not advance a claim seeking relief on the merits from a state court conviction.¹⁰⁶ Instead, Gonzalez's motion alleged that the federal courts had misapplied AEDPA's statute of limitations, which was an attack on the *technical integrity* of the proceedings, not an attack on the *substantive ruling*.¹⁰⁷ Turning to the substance of Gonzalez's rule 60(b) motion, the Court held that Gonzalez had not met the requirement of "a showing of 'extraordinary circumstances.'" ¹⁰⁸ Accordingly, the Supreme Court affirmed the denial of Gonzalez's motion.¹⁰⁹

Day arose when a U.S. District Court dismissed a prisoner's habeas petition sua sponte.¹¹⁰ AEDPA sets a one-year statute of limitations for filing federal habeas petitions.¹¹¹ The one-year period begins on "the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review*."¹¹² Petitioner Day was convicted of second-degree murder.¹¹³ A state court affirmed his sentence on appeal, and he did not appeal the decision to the United States Supreme Court.¹¹⁴ Day unsuccessfully sought state postconviction relief 353 days after his time for seeking direct review from the United States Supreme Court lapsed.¹¹⁵ Sub-

101. *Id.* at 527-28.

102. *Id.* at 528.

103. *Id.*

104. Transcript of Oral Argument at 2, *Gonzalez*, 545 U.S. 524 (No. 04-6432), available at 2005 WL 1047257 [hereinafter *Gonzalez* OA Transcript]. An attorney from the U.S. Solicitor General's Office also argued in support of Respondent. *Id.*

105. *Gonzalez*, 545 U.S. at 530.

106. *Id.* at 532, 535-56.

107. *Id.*

108. *Id.* at 536-38.

109. *Id.* at 544.

110. *Day v. McDonough*, 547 U.S. 198, 202 (2006).

111. 28 U.S.C. § 2244(d) (2000).

112. § 2244(d)(1)(A) (emphasis added).

113. *Day*, 547 U.S. at 203.

114. *Id.*

115. *Id.*

sequently, thirty-six days after being denied postconviction relief in state court, Day petitioned for federal habeas relief.¹¹⁶

A magistrate judge found the petition to be proper and ordered the State to file its answer.¹¹⁷ The State calculated that Day's petition had been filed after 352 days of untolled time, which fell within the one-year limit set by AEDPA.¹¹⁸ If the State had followed Eleventh Circuit instructions on computing elapsed time, it would have realized that over one year had passed—388 untolled days (352 plus 36)—between the time Day's conviction became final and his filing of the federal habeas petition.¹¹⁹

Eventually, a newly assigned magistrate judge became aware of the miscalculation.¹²⁰ Day's petition was dismissed, and the Eleventh Circuit affirmed the dismissal.¹²¹ The United States Supreme Court granted certiorari to resolve "the division among the Circuits on the question whether a district court may dismiss a federal habeas petition as untimely under AEDPA, despite the State's failure to raise the one-year limitation in its answer to the petition or its erroneous concession of the timeliness issue."¹²²

Solicitor General Kise briefed and argued the case on behalf of the Interim Secretary of the Florida Department of Corrections.¹²³ The Court, in a five to four opinion authored by Justice Ginsburg,¹²⁴ held that district courts could consider sua sponte the timeliness of habeas petitions filed by state prisoners; however, the courts would not be required to make this consideration.¹²⁵ The Court affirmed the Eleventh Circuit's decision, and Solicitor General Kise was now two-for-two on Florida cases before the United States Supreme Court.

Lawrence, like *Day*, involved AEDPA's one-year statute of limitations. At issue was whether the limitation period was tolled while a petition for certiorari was pending in the United States Supreme Court.¹²⁶ AEDPA provides that the statute of limitations is tolled

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 204.

121. *Id.*

122. *Id.* at 205.

123. Transcript of Oral Argument, *Day*, 547 U.S. 198 (No. 05-8400), available at http://www.oyez.org/cases/2000-2009/2005/2005_04_1324/argument/. Once again, an attorney from the U.S. Solicitor General's Office also argued in support of the Respondent. *Id.* See Brief of Respondent, *Day*, 547 U.S. 198 (No. 04-1324).

124. Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined in Justice Ginsburg's majority opinion. See *Day*, 547 U.S. at 200. Justice Stevens filed a dissent in which Justice Breyer joined. See *id.* at 211. Justice Scalia also filed a dissent in which Justices Thomas and Breyer joined. See *id.* at 212.

125. *Id.* at 209.

126. *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007).

while an “application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.”¹²⁷ Petitioner Lawrence was convicted of several crimes, including first-degree murder, and sentenced to death.¹²⁸ He filed a petition for certiorari with the United States Supreme Court directly appealing his conviction and sentence.¹²⁹ The Court denied the petition, and 365 days later, Lawrence filed an application seeking state postconviction relief.¹³⁰ Florida courts denied the postconviction application.¹³¹ Lawrence then petitioned a second time for certiorari in the United States Supreme Court to review this denial of postconviction relief.¹³² While this second certiorari petition was pending, he filed a habeas petition in federal district court.¹³³ The district court dismissed the petition as untimely under AEDPA’s one-year statute of limitations since 364 days had lapsed before he filed the postconviction application and an additional 113 days had lapsed since the Florida Supreme Court had affirmed the denial of his postconviction application.¹³⁴ The Supreme Court thus had to decide whether Lawrence’s second petition for certiorari had tolled AEDPA’s one-year period.

Kise, for a third time in eighteen months, represented the state before the United States Supreme Court¹³⁵ (although this time, he was no longer appearing as Florida’s solicitor general because he had recently returned to private practice).¹³⁶ The Court, in a five to four decision authored by Justice Thomas, agreed with Florida’s argument that the phrase “other collateral review” referred only to state reviews, a category under which petitions for certiorari before the United States Supreme Court do not fall.¹³⁷ The Court then reviewed Lawrence’s equitable tolling claim and found that the requisite “extraordinary circumstances” were not present.¹³⁸ The Court affirmed the judgment of the Eleventh Circuit. Chris Kise had, in short order, won three consecutive cases before the United States Supreme Court and officially ended his tenure as Florida’s solicitor general on a very high note. Through his success with *Gonzalez, Day*, and *Lawrence*, Kise helped further solidify the OSG as a key part to any high-level appeal handled by the state.

127. 28 U.S.C. § 2244(d)(2) (2000).

128. *Lawrence*, 127 S. Ct. at 1081.

129. *Id.*

130. *Id.* at 1081-82.

131. *Id.* at 1082.

132. *Id.*

133. *Id.*

134. *Id.*

135. Transcript of Oral Argument, *Lawrence*, 127 S. Ct. 1079 (No. 05-8820) [hereinafter *Lawrence* OA Transcript].

136. See Foley Press Release, *supra* note 10.

137. *Lawrence*, 127 S. Ct. at 1083.

138. *Id.* at 1085-86.

While these cases were not the high-profile, glamorous cases sometimes heard at the Supreme Court—Kise remembers that “the Anna Nicole Smith case” was argued at the Supreme Court the day after he argued *Lawrence*¹³⁹—they were important cases in the sense that they affected important issues of comity and finality in relation to federal habeas review of state court decisions.

In addition to the trio of habeas corpus cases, the OSG handled a number of other important cases during Kise’s tenure. Although not successful in every case, the OSG further asserted itself as an active player in any high-stakes or high-profile appellate litigation involving a state or public interest.

In the realm of state constitutional law, litigation over the state’s Opportunity Scholarship Program extended from the Warner era into Kise’s tenure. Although the Florida Supreme Court ultimately ruled that the program violated the Florida Constitution, the OSG was an active force in the high-profile litigation.¹⁴⁰

With regard to election law, the OSG successfully defended the constitutionality of a state statute requiring a voter to be eligible and registered in the precinct in which he or she casts a provisional ballot.¹⁴¹ In public records litigation, the OSG represented the Department of Children and Families in a case involving a newspaper’s attempt to gain access to confidential records maintained by the agency.¹⁴² The OSG also represented the state in a mandamus action brought to compel the city of Clearwater, Florida, to release emails sent to or from two city employees.¹⁴³ Additionally, the office was involved in defending the constitutionality of the state’s Sexual Predators Act, which contains a sex offender registration and public notice requirement.¹⁴⁴

In federal courts, Kise represented the state as an intervening party in a suit brought by states and local governments challenging the U.S. Army Corps of Engineers’ allocation of reservoir water stored in Georgia’s Lake Lanier.¹⁴⁵ Additionally, Kise worked with the Attorney General’s Office, along with thirteen public hospitals,

139. Kise Interview, *supra* note 82.

140. See *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004); *Bush v. Holmes*, 867 So. 2d 1270 (Fla. 1st DCA 2004).

141. *AFL-CIO v. Hood*, 885 So. 2d 373, 375-76 (Fla. 2004).

142. *Fla. Dep’t. of Children & Families v. Sun-Sentinel, Inc.*, 865 So. 2d 1278, 1280 (Fla. 2004).

143. *State v. City of Clearwater*, 863 So. 2d 149, 150-51 (Fla. 2003).

144. *Milks v. State*, 894 So. 2d 924, 925 (Fla. 2005).

145. *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1121 (11th Cir. 2005); *Georgia v. U.S. Army Corps of Eng’rs*, No. 04-14864, 2005 WL 2270846 (11th Cir. 2005).

in bringing suit against a hospital for intentional inflation of service fees.¹⁴⁶

Chris Kise's tenure as solicitor general was primarily important for two reasons. First, under his watch, the relatively new office oversaw three successful appeals before the United States Supreme Court. Second, institutionally, Solicitor General Kise further demonstrated that the role of solicitor general in Florida could be effective beyond its initially envisioned role of overseeing civil appeals—the office could play a major part in coordinating and heading up cases in any court, ranging from a state trial court to the United States Supreme Court.

V. SOLICITOR GENERAL SCOTT MAKAR: FOCUSING ON THE FUTURE

Above current Solicitor General Scott Makar's desk hangs a large, blown-up poster, which displays the following: "State Tax Provisions: The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."¹⁴⁷ When asked about this uncommon choice of office décor, Makar jokingly explained that it served as a constant reminder that an attorney never knows when an arcane provision of a little-known statute will trigger his or her dream case.¹⁴⁸

Since February 2007, Makar has served as solicitor general under Attorney General Bill McCollum.¹⁴⁹ Prior to his appointment, Makar was chief of the appellate division for the Office of General Counsel for the consolidated City of Jacksonville from 2001-2007, and before that, a capital partner at Holland & Knight, where he worked from 1989-2001.¹⁵⁰ The federal statute decorating his wall was at issue in a 2008 case, *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*,¹⁵¹ which Makar successfully argued before the United States Supreme Court. As soon as Makar learned that he would be involved in the case before the nation's highest appellate court, he had the statutory provision at issue blown-up and hung above his computer monitor in order to quickly memorize the language.¹⁵² It has hung there ever since.

146. Fla. Office of the Attorney Gen. v. Tenet Healthcare Corp., 420 F. Supp. 2d 1288 (S.D. Fla. 2005).

147. 11 U.S.C. § 1146(a) (2000).

148. Interview with Scott Makar, Fla. Solicitor General, in Tallahassee, Fla. (Apr. 15, 2009) [hereinafter Makar Interview] (interview notes on file with author).

149. McCollum Press Release, *supra* note 11.

150. Upton, *supra* note 2, at 14; see Florida State University College of Law, FSU Faculty Profiles, Scott D. Makar, <http://www.law.fsu.edu/faculty/smakar.html>.

151. 128 S. Ct. 2326, 2328 (2008).

152. Makar Interview, *supra* note 148.

His tenure as solicitor general has been an active one. When Makar assumed the role, only one deputy solicitor general remained from Chris Kise's team.¹⁵³ Makar quickly had to restaff the office, begin to brief cases, and handle requests to appear in oral arguments.¹⁵⁴ In his time as solicitor general, Makar has handled a variety of cases in a range of jurisdictions. In only a six-month span, Makar argued cases before the Second Circuit in and for Leon County (the seat of Florida's government), the First District Court of Appeal of Florida, the Florida Supreme Court, the U.S. Eleventh Circuit Court of Appeals, and the United States Supreme Court.¹⁵⁵ This experience was yet another example of why the role of solicitor general lives up to Warner's label of "the greatest job."¹⁵⁶

A. Notable Cases Under Makar

Just over two years into Makar's tenure, the OSG already has participated in numerous cases implicating a variety of state and public interests.

In the area of constitutional law, the office has addressed cases involving individual and property rights. In *Frazier ex rel. Frazier v. Winn*, a high school student challenged the facial constitutionality of Florida's Pledge of Allegiance statute, section 1003.44(1), Florida Statutes.¹⁵⁷ On behalf of the Florida Department of Education and the State Board of Education, the OSG appealed the district court's decision, which found the statute unconstitutional.¹⁵⁸ Specifically, the district court held that the statute was facially unconstitutional because 1) it required parental consent to be excused from reciting the pledge, which "rob[bed] the student of the right to make an independent decision whether to say the pledge," and 2) it required an excused student to stand during the pledge.¹⁵⁹ On appeal, the Eleventh

153. *Id.*

154. Makar Interview, *supra* note 148.

155. Upton, *supra* note 2, at 15.

156. Warner, *supra* note 1, at 36.

157. 535 F.3d 1279, 1281 (11th Cir. 2008). The statute at issue provided that:

The pledge of allegiance to the flag . . . shall be rendered by students . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes

FLA. STAT. § 1003.44(1) (2008).

158. *Frazier*, 535 F.3d at 1281-82.

159. *Id.*

Circuit reversed in part, concluding that the interest of the State in protecting a parent's right to control a child's upbringing outweighed the infringement on the students' First Amendment rights.¹⁶⁰ The court also held that the provision requiring a student to stand at attention during the pledge's recitation, even if the parents consented to the student's non-participation, was unconstitutional, and severed that portion of the statute.¹⁶¹

In the area of property rights, the office represented the Department of Environmental Protection in its appeal to the Florida Supreme Court in *Florida Department of Environmental Protection v. Stop the Beach Renourishment, Inc.*¹⁶² At issue was the constitutionality of provisions of the Beach and Shore Preservation Act, which provide for the establishment of an erosion control line in beach renourishment projects.¹⁶³ This line becomes the boundary between publicly owned land and privately owned upland.¹⁶⁴ An association of six beachfront property owners challenged the Act, arguing that it resulted in an unconstitutional taking of upland owners' littoral rights to receive accretions and to maintain direct contact with the water.¹⁶⁵ The Florida Supreme Court concluded that the Act did not create an unconstitutional taking, and the Act effectuated the State's constitutional duty to protect Florida's beaches in a way that reasonably balanced public and private interests.¹⁶⁶ The United States Supreme Court granted review in the case, which presents the question of whether the Florida Supreme Court's decision is a "judicial taking."¹⁶⁷ The case will be heard in the Court's 2009-2010 Term.

The OSG also has handled cases involving the administration of justice in Florida. In one such case, *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, the office represented the Department of State in a challenge involving alleged fraud in the signature-gathering process for a citizens' constitutional amendment ballot initiative.¹⁶⁸ The case was appealed from the First District Court of Appeal, which heard the case en banc before twelve of the court's fifteen judges.¹⁶⁹ In the en banc opinions, six of the judges concurred in certifying the case to the Florida Supreme Court

160. *Id.* at 1285-86.

161. *Id.* at 1283. As of August 2009, a petition for certiorari filed by the student is currently pending before the United States Supreme Court. See Petition for Writ of Certiorari, *Frazier v. Smith*, No. 08-1351 (Apr. 23, 2009).

162. 998 So. 2d 1102, 1104 (Fla. 2008).

163. *Id.* at 1108.

164. *Id.*

165. *Id.* at 1106 n.5, 1107.

166. *Id.* at 1121.

167. See *id.* at 1104, *cert. granted*, 129 S. Ct. 2792 (2009).

168. 967 So. 2d 832, 833-34 (Fla. 2007).

169. *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 954 So. 2d 553, 554, 562 (Fla. 1st DCA 2006).

as raising a question of great public importance.¹⁷⁰ Interestingly, this triggered a question of whether the Florida Supreme Court had discretionary jurisdiction to hear the case.¹⁷¹ The Florida Supreme Court agreed with the OSG's argument that the Court lacked jurisdiction since the six judges did not create a majority of the twelve-judge panel, as is required to establish certified question jurisdiction under Article V, section 3(b)(4) of the Florida Constitution.¹⁷²

In the area of government structure and functions, the Solicitor General has handled numerous cases addressing the role and limits of various governmental bodies. In a pair of cases—*Ford v. Browning*¹⁷³ and *Florida Department of State v. Slough*¹⁷⁴—the OSG defended the constitutionality of amendments proposed by the Taxation and Budget Reform Commission.¹⁷⁵ In *Ford*, the Florida Supreme Court concluded that the Commission exceeded its authority to propose constitutional amendments dealing with taxation or the state budgetary process by proposing revisions to the freedom of religion and public education provisions in the Florida Constitution.¹⁷⁶ In *Slough*, the Court concluded that the ballot title and summary for a proposed amendment addressing ad valorem taxes were misleading.¹⁷⁷

Under Solicitor General Makar, the office has continued the tradition of handling cases at the trial level. In *Hersh v. Browning*, on a motion for summary judgment, the OSG successfully argued that the Legislature had the power to limit local government authority to levy ad valorem taxes.¹⁷⁸ However, the trial court also concluded that the ballot summary for an amendment proposed by Senate Joint Resolution 4-B relating to the Florida “Save Our Homes” provision was misleading and could not be placed on the ballot.¹⁷⁹ The State's appeal of the latter holding was voluntarily dismissed.¹⁸⁰

Another highlight of Makar's tenure has been *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, which he successfully argued

170. *Floridians for a Level Playing Field*, 967 So. 2d at 833-34.

171. The limited jurisdiction of the Florida Supreme Court has been described as part of a “Byzantine” arrangement due to the intricate dictates on the Court's discretionary and mandatory jurisdiction set forth in the Florida Constitution. DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, PERSONNEL* 445 (2d ed. 2006). The Florida Constitution addresses the state's judicial branch in Article V. The jurisdiction of the Florida Supreme Court is set forth in Art. V, section 3(b).

172. *Floridians for a Level Playing Field*, 967 So. 2d at 834.

173. 992 So. 2d 132 (Fla. 2008).

174. 992 So. 2d 142 (Fla. 2008).

175. The Commission is established in Art. XI, § 6 of the Florida Constitution.

176. *Ford*, 992 So. 2d at 141.

177. *Slough*, 992 So. 2d at 149.

178. No. 37-2007-CA-1862 (Fla. 2d Cir. Ct. Sept. 24, 2007).

179. *Id.*

180. *Hersh v. Browning*, 969 So. 2d 1011 (Fla. 2007) (table op.).

before the United States Supreme Court.¹⁸¹ On behalf of the Florida Department of Revenue, Makar argued that a federal statute providing for a stamp-tax exemption did not apply to transferred assets under a bankruptcy plan that was not confirmed until after the transfer was made.¹⁸² The federal Bankruptcy Code provides an exemption for any asset transfer “under a plan confirmed under [Chapter 11]” of the Code.¹⁸³ The Supreme Court acknowledged that Florida’s reading of the statute was the most natural—the word “confirmed” is a past participle and that “a transfer made prior to the date of plan confirmation cannot be subject to, or under the authority of, something that did not exist at the time of the transfer—a confirmed plan.”¹⁸⁴ The Court also determined that this reading was consistent with the context of the statute and the Court’s obligation to construe the exemption narrowly.¹⁸⁵

In addition to briefing and arguing cases, the office has actively engaged in cases via the filing of amicus briefs. In *Strand v. Escambia County*, the Florida Supreme Court receded from its own precedent and held that, under the state constitution, Escambia County could not pledge tax increments for repayment of bonds without approval of the electorate by referendum.¹⁸⁶ Subsequently, the OSG filed an amicus brief, asserting that the Court should clarify its decision because the change of law “potentially affect[ed] billions of dollars in existing construction projects financed with bonds that, although validly issued under prior law, [were] not explicitly included in the Court’s statement.”¹⁸⁷ The Court thereafter revised its opinion and affirmed its precedent, holding that the bonds could be validated without a referendum.¹⁸⁸

More recently, in *Department of Children and Family Services v. Chapman*, the OSG submitted an amicus brief to the Second District Court of Appeal on behalf of the State of Florida in support of DCF as to whether the state agency was liable for the criminal acts of its licensee, a substance abuse counselor.¹⁸⁹ The amicus brief argued that a decision holding a state agency liable would expand the duty of care owed by a governmental entity beyond what Florida tort law allows.¹⁹⁰

181. 128 S. Ct. 2326 (2008).

182. *Id.* at 2339.

183. 11 U.S.C. § 1146(a) (2000).

184. *Piccadilly*, 128 S. Ct. at 2331-32.

185. *Id.* at 2338.

186. 992 So. 2d 150, 156 (Fla. 2008).

187. Brief of Attorney General as Amicus Curiae Supporting Clarification, *Strand*, 992 So. 2d 150 (No. 06-1894).

188. *Strand*, 992 So. 2d at 156.

189. Brief of State of Florida as Amicus Curiae in Support of Appellant, Dep’t of Children & Family Servs. v. Chapman, 9 So. 3d 676 (Fla. 2d DCA 2009) (No. 2D07-4978).

190. *Id.*

The Second District agreed and concluded that DCF did not owe a duty of care in tort to individual members of the general public.¹⁹¹

The OSG has likewise continued to take the lead in amicus efforts before the United States Supreme Court. In *Arizona v. Gant*, the OSG submitted an amicus brief joined by twenty-four states.¹⁹² The brief asserted the states' interests in the Court's adherence to its precedent regarding warrantless searches of vehicles incident to arrest.¹⁹³ Although the states' position did not prevail,¹⁹⁴ Florida's amicus effort was notable for the amount of states that joined in the brief.

In *Rivera v. Illinois*, the Supreme Court addressed whether the Due Process Clause of the Fourteenth Amendment required automatic reversal of a defendant's conviction where a trial court erroneously denied the defendant's peremptory challenge to the seating of a juror.¹⁹⁵ Again, Florida's OSG filed an amicus brief joined by a sizeable amount of states—twenty-nine—which urged the Court to find that such an error did not require overturning the conviction.¹⁹⁶ The Court ruled that the conviction would stand: “[b]ecause peremptory challenges are within the States’ province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution.”¹⁹⁷

A third notable amicus effort by the OSG was in *Bartlett v. Strickland*, which required the Court to interpret a section of the Voting Rights Act of 1965.¹⁹⁸ The OSG filed an amicus brief on behalf of the Florida House of Representatives, arguing for the Court's affirmance of the North Carolina Supreme Court's holding that a minority group must show that it makes up a numerical majority of the voting-age population to state a claim under section two of the Voting Rights

191. *Chapman*, 9 So. 3d at 676. The case certified the following as a question of great public importance to the Florida Supreme Court: After the Legislature created a statutory duty requiring DCF to license and monitor the activities of substance abuse counselors, does a duty in tort arise, owing by DCF to a counselor's client: (1) when DCF negligently licenses the counselor, (2) when the counselor harms a client, and (3) when the client has no relationship with DCF greater than that of any other citizen? *Id.* at 686.

192. Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (No. 07-542).

193. *Id.*

194. See *Gant*, 129 S. Ct. at 1710 (2009).

195. 129 S. Ct. 1446, 1450 (2009).

196. Brief for State of Florida et al. as Amici Curiae Supporting Respondent, *Rivera*, 129 S. Ct. 1446 (No. 07-9995).

197. *Rivera*, 129 S. Ct. at 1454.

198. 129 S. Ct. 1231, 1238 (2009).

Act.¹⁹⁹ The Supreme Court ultimately affirmed the North Carolina court's ruling.²⁰⁰

On the horizon, as of August 2009, the OSG is handling three cases before the United States Supreme Court in its 2009-2010 term. Along with *Stop the Beach Renourishment*, the office will represent the state in *Graham v. Florida*²⁰¹ and *Sullivan v. Florida*,²⁰² a pair of cases involving issues related to the constitutionality of sentencing a juvenile to life imprisonment without the possibility of parole for the commission of a non-homicide crime.

Under Makar, the OSG continues to engage in strong advocacy for the State of Florida and its citizens. Like Warner and Kise, Makar's time as solicitor general has placed him at the helm of many high-profile and significant cases, including *Piccadilly*, which was Makar's first oral argument before the United States Supreme Court. Makar aptly describes the OSG as the state's most high-powered public law firm.²⁰³ In the past decade, it has been involved with an array of complex and critical cases involving the state's interests. Looking forward to the next decade and beyond, the OSG can even further develop as the top appellate litigation resource for the state.

VI. THE FUTURE OF FLORIDA'S OFFICE OF THE SOLICITOR GENERAL

The past ten years have witnessed the creation and development of Florida's OSG. At this tenth anniversary benchmark, it is important to reflect on what can be gleaned from the past decade and look forward to further developing the potential of the OSG.

Since July 1999, the office has grown into what it was originally envisioned as—a high-powered, appellate-focused unit within the Attorney General's Office that supervises all civil appeals. In just the handful of cases this Article has covered, it is undeniable that the OSG has played a key role in explaining and advocating the state and public interests at issue. Although the office does not win every case, its presence as a party or amicus curiae ensures that the judicial body charged with resolving the case is exposed to the state's perspective on how the area of law at issue functions and what impact the court's decision might have, not only in the case at hand, but in subsequent cases.

199. Brief of the Fla. House of Representatives as Amicus Curiae Supporting Respondents, *Bartlett*, 129 S. Ct. 1231 (No. 07-689).

200. *Bartlett*, 129 U.S. at 1240.

201. 982 So. 2d 43 (Fla. 1st DCA 2008), *cert. granted*, 129 S. Ct. 2157 (2009).

202. 987 So. 2d 83 (Fla. 1st DCA 2008) (table op.), *cert. granted*, 129 S. Ct. 2157 (2009).

203. Makar Interview, *supra* note 148.

There are concrete benefits to having a state solicitor general.²⁰⁴ First, appellate law and practice requires its own skill set—this includes not only familiarity with brief writing and oral arguments, but an awareness of rules of appellate procedure, state appellate jurisdiction, and other niche legal concepts. By attracting active and skilled appellate lawyers from all experience levels, the OSG employs a staff of lawyers capable of handling a variety of appellate work in all jurisdictions, from the trial level to the highest appellate court in the nation.

Second, because the office represents the state's interests, it can take a broad approach to a case rather than just looking at the narrow interests presented in a particular case. This is important in deciding when to appeal a case, or—equally important—when not to appeal a case. It also provides flexibility that allows the office to advance only those arguments that are deemed important versus raising every conceivable issue. Further, in supervising all civil appeals cases, the Solicitor General can assist the Attorney General in ensuring that the state is taking consistent positions in a range of cases throughout the entire state.

Third, the office is available to handle any critical cases that may arise. By having a unit solely devoted to appellate work, the Attorney General's Office has the resources necessary to engage in expedited or complex appellate litigation.

Lastly, as Makar has noted, the office has an overriding objective of building and maintaining its reputation among any courts in which the office appears.²⁰⁵ From Makar's perspective, the office is not just another law firm that can be hired to handle an appeal; the "office has a higher duty to the state, its [citizens], and agencies to not merely advance a political, agenda-driven position."²⁰⁶ To meet this reputational goal, the office is driven to be thorough and accurate as well as having a broad perspective on the development and direction of the law.²⁰⁷ Under Makar, the office has a "judicial" mindset, reflected in its structure (all new deputy solicitors general have judicial clerkship experience), process (thirty-page limit on briefs whenever feasible), and public service (deputies are strongly

204. For a comprehensive discussion of state solicitors general and their benefits, see *Should States Establish and Expand SG Offices?*, Panel Discussion at the University of Texas Review of Litigation Symposium: The Rise of Appellate Litigators & State Solicitors General (Jan. 23, 2009) (featuring speakers Dan Schweitzer, Supreme Court Counsel, Nat'l Ass'n of Attys. General, Hon. Gregory S. Coleman, former Solicitor General of Texas, and Hon. Julie Caruthers, former Solicitor General of Texas) (videorecording available at http://www.utexas.edu/law/journals/trol/sym/videos_01_23_09_part1.html).

205. Makar Interview, *supra* note 148.

206. *Id.*

207. *Id.*

encouraged to publish, teach, and participate in appellate CLE and bar functions).²⁰⁸

Looking forward to the next ten years and beyond, there are two main avenues the State of Florida might pursue in further developing and strengthening the role of solicitor general. First, consideration should be given to expanding the formal scope of the position to supervise not only all civil appeals within the Attorney General's Office, but also all criminal appeals so that all appeals handled by the Attorney General's Office are reviewed by the OSG. This approach, used in the State of Texas with its solicitor general,²⁰⁹ would unify the strengths of the criminal appeals division with the resources of the OSG. Additionally, such a change would promote consistency and further ensure that the criminal appeals division was bolstered with appellate support in any significant or critical cases. However, a downside is that the criminal appeals division has more than 100 appellate attorneys litigating over 10,000 cases a year.²¹⁰ The day-to-day oversight of such a large staff would be daunting and could dilute the primary role of the OSG. As an alternative, the scope of the position might be formalized to reflect the general current practice of the OSG having primary responsibility for all appeals and amicus matters, civil or criminal, before the United States Supreme Court (excluding capital appeals, which involve highly specialized issues).

Second, similar to the relationship between the United States Supreme Court and U.S. Solicitor General, the Florida Supreme Court should view Florida's Solicitor General as a resource when cases arise that implicate public or state interests. To further the relationship, the Florida Supreme Court should consider inviting the Solicitor General to file jurisdictional briefs or memoranda of law in cases in which the State is not a party but may have some interest. This would ensure that the State has a voice in all significant cases and, in some cases, could assist the Supreme Court in deciding whether to exercise its discretionary jurisdiction.

As a model of this practice, the United States Supreme Court regularly issues orders which "call[] for the views of the United States Solicitor General" (CVSG).²¹¹ Similarly, the Supreme Court of Ohio has a rule addressing when that court may invite the state solicitor general

208. *Id.*

209. Attorney General of Texas, Office of Solicitor General, http://www.oag.state.tx.us/agency/solicitor_general.shtml (last visited Oct. 27, 2009).

210. Office of the Attorney General of Florida, Criminal Appeals, <http://myfloridalegal.com/pages.nsf/Main/7295a759cf3fb5c985256cc600587a33> (last visited Oct. 27, 2009).

211. For an informative discussion of the United States Supreme Court's issuance of CVSGs, see David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 270-73 (2009).

to express the views of the state before a determination of jurisdiction is made.²¹² Additionally, the Texas Supreme Court has begun to issue formal CVSG's, doing so for the first time in December 2008.²¹³

Although the OSG has flourished in its first decade of existence, as these two suggestions indicate, it has the potential to develop even further as an advocate for the state and its citizens.

VII. CONCLUSION

From the minds and efforts of D'Alemberte and Butterworth to the challenges and successes faced by the first three solicitors general of Florida, the OSG has had a unique and active first decade. As anticipated by Warner in his 2001 article on the role of Florida's solicitor general, the OSG has come to represent an appellate lawyer's dream job—it provides an opportunity for lawyers to “use [their] skills and experience . . . to work on Florida's most interesting and challenging cases, and to participate in the legal and policy decisions regarding important issues to Florida and the nation”²¹⁴ Now on the threshold of its second decade, the OSG is poised to continue its strong and vital advocacy on behalf of the state and its citizens.

212. Supreme Court of Ohio Rule III, Section 6(E) provides that: “In any claimed appeal of right or discretionary appeal in which the state is not a party but nevertheless may have an interest, the Supreme Court may invite the state solicitor to file a jurisdictional memorandum expressing the views of the state before making its determination of jurisdiction.”

213. Order, *Texas v. \$281,420.00 in United States Currency*, Case No. 08-0465 (Tex. Dec. 19, 2008) (stating that “[t]he Solicitor General is invited to file a brief in this case expressing the views of the State”); *see also* Order, *In the Interest of J.O.A., T.J.A.M., T.J.M., and C.T.M., Children*, Case No. 08-0379 (Tex. Mar. 27, 2009) (stating the same).

214. Warner, *supra* note 1, at 36.

