UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Support Working Animals, Inc., et al.,

Plaintiff,

-vs.-

Ashley Moody, in her official capacity as Florida Attorney General,

Defendant.

Case No. 4:19-cv570-MW/MAF

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs are challenging The Act [the "Act"] which is nothing more than a wholesale prohibition of a minority class of Florida citizens' fundamental rights to use their property in the exercise of their commercial enterprise masquerading as a gambling regulation. Plaintiffs assert that there is no legitimate government purpose proffered for the blatant deprivation of their fundamental rights to use their property in the commercial businesses. The Act was deliberately targeted at the greyhound industry as out-of-state entities with great finances disseminated unverified information regarding the alleged mistreatment of greyhound racing dogs; all for the purpose of identifying the industry as a politically unpopular class. The Act serves absolutely no valid government interest and therefore should be stricken.

Argument

I. STATE ATTORNEY IS A PROPER DEFENDANT UNDER *EX PARTE YOUNG*

Plaintiffs assert a **pre-enforcement** challenge to the validity of the Act, **not** for compensatory relief, but for injunctive relief ECF 47 at 27-28. It is well settled in the Eleventh Circuit that under the doctrine enunciated in *Ex parte Young*, "a suit requesting injunctive relief on a prospective basis for a . . . constitutional violation against a state official in his or her official capacity is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011); *Bennett v. Langford*, 796 F. App'x 564, 569 (11th Cir. 2019). ECF 48 at 13.

State attorney attempts to buttress her claim that she is not a proper party to this action by citing to an inapposite case where the Secretary of State of Florida was named as a Defendant wherein plaintiffs challenged a 70-year old statute governing the order in which candidates appear on the ballot in general elections. *Jacobson v. Fla. Sec'y*, 957 F.3d 1193 (11th Cir. 2020)

The Jacobson Court held that plaintiffs did not prove an injury-in-fact (stating that just because plaintiffs were disappointed that their candidate lost, there is no judicially enforceable interest in the outcome of an election); thus, plaintiffs had no standing to pursue their claims.

The Court went further and ruled that even if plaintiffs did have standing the Secretary of State was not the proper party. In the present case, unlike *Jacobson*, where the only means of control the Secretary of State has over the Supervisors of Elections is through coercive judicial process by bringing "actions at law or in equity by mandamus or injunction to enforce the performance of any duties of a county supervisor of elections." Fla. Stat. § 97.012(14), the Attorney General has the **duty** to exercise . . . direction over the several state attorneys of the several circuits as to

the manner of discharging their respective duties. They *must* respond to the state attorney by giving their opinions upon any question of law. ECF 48 at 4.

Moreover, the Attorney General misinterprets the holding of this case by conflating two issues where it was stated that plaintiffs . . . "lack Article III standing to pursue their claims against the Attorney General" . . . ECF 48 at 7, 10. Because standing is jurisdictional, a dismissal for lack of standing, as in *Jacobson*, has the same effect as a dismissal for lack of subject matter jurisdiction[.]") (internal quotations omitted); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1251 (11th Cir. 2003). However, pursuant to Eleventh Circuit case precedence, Article III standing and the proper defendant under *Ex parte Young* are "[s]eparate[]" issues. *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1295 (11th Cir. 2019). at 1295.

It is well settled that Plaintiffs have alleged the requisite elements of standing. Plaintiffs have adequately pled an injury-in-fact and the case is ripe for review. ECF 46 at 4. Therefore, addressing subject matter jurisdiction is misplaced as the issue before the court is whether the Attorney General is the proper defendant.

To be a proper defendant under *Ex parte Young*—and so avoid an Eleventh Amendment bar to suit—a state official need only have "*some connection" with the enforcement of the challenged law*." *Jacobson v. Fla. Sec'y*.

In the case sub judice, the office of the Attorney General, not only has *some* connections, but rather had *deep* connections traceable to not only enforcement, but to the passage of the Act as well. The office of the Attorney General is an indispensable party to this constitutional attack as she is the *only* state officer that *must* be on the Constitution Revision Commission [the "CRC"]. Fla. Const. Art. XI § 7. 2(1).

Additionally, the former Attorney General used the office to demonstrate great support of the Act by placing a heavy governmental thumb on the scales to ensure

the passage of the Act acting in conjunction with other politicians and celebrities. ECF 47 at ¶ 39.

While it is clear that the Act will **not** provide a private right of action, it still remains unclear which state officers will ultimately be responsible for enforcing the provisions therein. The CRC abdicated its power to draft enforcement provisions for Amendment 13, unlike the Pregnant Pig Amendments passed through the CRC1, and instead directed the legislature to draft such civil and/or criminal penalties which has not yet been done. This has left Plaintiffs with only the ability to speculate about enforceability or in the alternative chill their right to challenge the constitutionality of the Act.

This Court correctly stated that based on Supreme Court precedence, the "*Exparte Young* doctrine does not demand that Plaintiffs wait until their . . . businesses become illegal . . . before challenging the Act's validity. ECF 46 at 26. Plaintiffs have rightfully chosen the Attorney General, the party upon whom all constitutional challenges rest, to name as the proper defendant. As the court aptly stated, the Attorney General concedes that she is Florida's chief legal officer vested with broad authority to act in the public interest and when she deems necessary to defend statutes against constitutional attach. ECF 46 at 21. She has a statutory duty to appear in and attend to, on behalf of the state all suits or prosecutions. Fla. Stat. § 16.01(4)-(5) (2019).

---

1 Pregnant pig (d) A person who violates this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082(4)(a), Florida Statutes (1999), as amended, or by a fine of not more than $5000, or by both imprisonment and a fine, unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Section 828.13, Florida Statutes (1999). The confinement or tethering of each pig shall constitute a separate offense. The knowledge or acts of agents and employees of a person in regard to a pig owned, farmed or in the custody of a person, shall be held to be the knowledge or act of such person.

But even if the office of the Attorney General lacked the statutory powers, she "wields broad statutory and common law authority to enforce Forida law. She also has common power to institute lawsuits to protect the public interest. See *State of Florida ex rel. Shevin v. Exxon Corp*, 526 F. 2d 266, 274 (5thCir. 1976) (concluding, that the Attorney General of Florida retains the common law power to institute lawsuits to protect the public interest and this power extends to the initiation of lawsuits under federal law even though not specifically authorized by the governmental entity allegedly sustaining the injuries asserted). Consequently, because the Attorney General in his capacity as the head of the Department of Legal Affairs is endowed. *Florida v. Memberworks*, Inc., No. 8:03-cv-2267-T-26TGW, 2003 U.S. Dist. LEXIS 29130, at *8-9 (M.D. Fla. Dec. 23, 2003)

Contrary to the claims advanced by the Attorney General that this Court erred in the reading Fla. Stat. §16.08, which provides that the Attorney General is statutorily granted *only* a general superintendence and direction over the several state attorneys, "the fact that various statutes delegate specific portions of Florida's litigation power to state's attorneys in no way indicates an abrogation of the Attorney General's common law powers as to *other* types of litigation; those powers still obtain in the absence of express legislative provision to the contrary." *Fla. ex rel. Shevin v. Exxon at* 268-69 (The duties and powers of the Attorney General of our states typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, (s)he typically may exercise all such authority as the public interest requires.)

In Florida the office of Attorney General is in many respects judicial in character, and (s)he is clothed with considerable discretion. *State ex rel. Davis v. Love*, 99 Fla. 333, 126 So. 374, 376 (1930). "The Attorney-General is the attorney and legal

guardian of the people. When occasion arises "it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people." *Id*. "The Attorney General is the principal law officer of the state." *State ex rel. Davis v. Love* at 377. Based on the foregoing the Attorney General is the proper defendant in the present constitutional challenge her argument to the contrary should be dismissed.

II. THE ACT IS UNCONSTITUTIONAL UNDER BOTH EQUAL PROTECTION AND EQUAL PROTECTION BASED ON ANIMUS

Plaintiffs challenge the statutory classification implicated in the Act that singles out the greyhound racing industry from all others similarly situated and governed under Fla. Stat. Chapter 550 Pari-mutuel Wagering for a deprivation of their fundamental rights.

Attorney General can offer no justification for the classification and simply repeats the conclusory statement that "the Act passes muster." ECF 48 at 14. Even in the ordinary equal protection case calling for the most deferential of standards, a court insists on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause. *Romer v. Evans,* 517 U.S. 620, 623, 116 S. Ct. 1620, 1623 (1996).

Plaintiffs assert that the Act is a violation of the Equal Protection Clause as the Act is discriminatory on its face. To prevail on a facial attack based on Equal Protection, a plaintiff must prove that there is "no rational relationship" between the regulatory classification and a legitimate governmental goal; however, if a suspect class or fundamental right is at issue, the level of scrutiny is heightened. *Hope for Families & Cmty. Serv. v. Warren*, 721 F. Supp. 2d 1079, 1135 (M.D. Ala. 2010).

Moreover, the classification deliberately targets only the greyhound industry for disparate treatment because of baseless allegations of greyhound abuse. Plaintiffs have repeatedly alleged, there was no evidence was presented to the CRC to validate

the claims of greyhound abuse. ECF 47 AT 42., 43, 44, 45. Yet this unverified rhetoric was repeated for the calculated purpose of generating hostility towards the greyhound racing industry.

The most egregious part of this attempt to identify greyhounds as an unpopular group was that this campaign against the industry was promulgated by none other than the former Attorney General, Pam Bondi, who tipped the scales in Florida by promoting these meritless claims. ECF 47 at 63, 64, 65. (even though the former AG was invited to the kennels to tour the facilities to see for herself that greyhounds were not treated inhumanely, she rejected the invitation). ECF 47 at 15. A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *Romer v. Evans*, at 1623. The Act must be stricken as it was based on an impermissible exercise of animus toward the greyhound racing industry.

Even if Attorney General believes that animus did not exist and that dog racing should be singled out for different treatment than all other pari-mutuel license holders, she still bears the burden to prove the legitimate purpose for that classification. A classification of persons undertaken for its own sake is something the Equal Protection Clause does not permit. Class legislation is obnoxious to the prohibitions of the U.S. Const. amend. XIV. *Id.*

Attorney General suggests this legislation regulates gambling under police power which demands a deferential basis for review ECF 48 at 11. While that statement may be true for thoroughbred racing, harness racing and jai-alai, which are governed under the police powers of the state of Florida to protect the health, safety, and welfare [of the public] and are regarded as highly regulated Fla. Stat. 550.09511, 555.09512, 555.0915, **no such express grant of police powers to govern the greyhound racing industry exists**. To determine legislative intent, the courts look primarily to the language of the statute and its plain meaning. *License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1139 (Fla. 2014).

The language of Fla. Stat. Chapter 550 is clear and unambiguous and conveys a clear and definite meaning that since greyhound racing permit holders are not governed under the state's police power, deferential review is inapplicable and the Attorney General's analysis is incorrect. If any such classification was proposed by the state of Florida, it should have afforded the greyhound racing industry *greater* protection of their fundamental rights, *not less*.

Additionally, Attorney General continues to ignore the fact that a fundamental right is implicated by the Act and that strict scrutiny should therefore apply. ECF 48 at 28. In *Moreno*, the Supreme Court invalidated a classification that prevented able bodied persons shirking work (hippies) from receiving food stamps. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The receipt of food stamps, however, is not a fundamental right, unlike the validly asserted fundamental right asserted here which rests on one of the bedrock principles in the United States, the right to one's property.

In *Moreno*, even though there was a legitimate government interest implicated: alleviation of hunger and malnutrition, the Supreme Court held that the classification was without any rational basis. *Id*. Here, the classification which singles out only greyhound racing permit holders from all others similarly governed under Fla. Stat. Chapter 550 for less protection is wholly without reasoning, especially considering the fact that the Florida Statutes provide greater protection to the greyhound racing industry. The only reason the greyhound racing industry was singled is because they have been declared an unpopular group.

The present case is more analogous to *Romer* where the Supreme Court invalidated legislation which was based on nothing more than animus towards homosexuals. The Court held that the amendment on its face served no other purpose other than depriving homosexuals of government protections afforded every other class. Since the classification bore no relationship to any legitimate state

interest it was stricken down as invalid based on animus of a politically unpopular group. *Romer v. Evans*, at 1623. The Plaintiffs in the case at bar assert that there is no purpose for singling them out as a class of citizens from amongst all others similarly situated and governed under Florida law to be deprived of their fundamental rights.

By requiring that a classification bear a rational relationship to an independent and legitimate legislative end, courts ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. *Romer v. Evans* at1623. Since the classification involves a fundamental right to one's property, strict scrutiny should apply. Since no such justification was proffered by the Attorney General, and in fact, no justification exists for this disparate treatment except bare hostility towards the greyhound racing industry, the Act must be stricken for a violation of Equal Protection.

III. DEFENDANT IMPERMISIBLY GOES OUTSIDE THE FOUR CORNERS OF THE COMPLAINT

Plaintiffs' factual allegations demonstrate a plausible claim to relief because the operation and impact of the Act inequitably bars the individuals involved in the greyhound racing industry from control over their own property under a completely impermissible use of police power. In an attempt to forestall relief to the Plaintiffs, Attorney General improperly ignores that Plaintiffs have asserted facial challenge of the Act and instead attack the substantive arguments for a takings claim.

Attorney General impermissibly attacks the merits of the case by seeking evidence of specific examples of diminution of property which is wholly outside the four corners of the complaint. ECF 48 at 15-18. The Court cannot resolve factual disputes and consider matters outside the complaint's four corners through a motion to dismiss. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003) (holding that under Rule 12(b)(6), a "district court would not be permitted to weigh

facts but would instead be required to resolve disputed factual issues" in the plaintiff's favor).

Attorney General is blatantly attempting to dodge its duty to answer Plaintiffs' complaint and instead offers nothing but *ipse dixit* justification. This Court should not entertain such substantive arguments on a motion to dismiss, especially arguments that do not go to the alleged causes of action, much less make a dispositive determination on the merits at this stage.

There is a distinction between the power of eminent domain and the police power:[T]he former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest. J. Sackman, *Nichols' The Law of Eminent Domain* § 1.42, at 1-133 to 1-134 (rev. 3rd ed. 1988) (footnotes omitted, emphasis in original). *Joint Ventures, Inc. v. DOT*, 563 So. 2d 622, 624-25 (Fla. 1990).

Analytically, the two have been discussed in different terms. Regulation is analyzed in terms of the exercise of police power, whereas acquisition is analyzed in terms of the state's power of eminent domain. *Joint Ventures, Inc. v. DOT* at 625 citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987).

Here, contrary to Attorney General's claims, Plaintiffs have not asserted a claim for compensation based on eminent domain, that is, Plaintiffs are not asserting that the state is confiscating its property. ECF 48 at 15. Plaintiffs do, however, assert that the Act *could lead to a regulatory taking* since the greyhound racing community will lose all beneficial use of their investment backed property should the Act be allowed to stand.

The state must pay when it confiscates private property for common use under its power of eminent domain. Second, the state must pay when it regulates private

property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property. *Joint Ventures, Inc. v. DOT* at 624. The Fifth Amendment applies to **personal property** as well as real property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. *Horne v. Dep't of Agric.*, 576 U.S. 351, 352, 135 S. Ct. 2419, 2422 (2015).

But this analysis is premature at this stage because Plaintiffs have asserted a pre-enforcement challenge seeking injunctive relief, not compensatory relief under the Takings Clause. Therefore, Attorney General's lengthy analysis thereunder should be stricken as irrelevant.

IV. PLAINTIFFS ASSERTS A PRE-ENFORCEMENT CHALLENGE THEREFORE A TAKINGS ANALYSIS IS IRRELEVANT

As previously mentioned, Plaintiffs assert a **pre-enforcement** challenge to the validity of the Act, **not** for compensatory relief, but for injunctive relief ECF 47 at 27-28. Attorney General tries to misdirect this Court by dedicating much of her motion to the "classic takings" analysis when no such action was raised by Plaintiffs.

There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council*, Inc. v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 324, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). *Horne v. Dep't of Agric. a*t 357-58; 2425-26.

Here, however, Attorney General's analysis is irrelevant as Plaintiffs have not asserted that their property is being confiscated nor have they alleged that they are being compelled to surrender their property. Rather Plaintiffs have claimed that an impermissible restraint *will be* applied to plaintiffs' use of their commercial property

and are seeking a declaratory judgment from this Court that the Act is unconstitutional and are requesting injunctive relief **not** compensatory.

Even if Plaintiffs had raised a cause of action alleging an unconstitutional taking, Attorney General's analysis would be premature at this stage. In regard to claim for a deprivation of property without due compensation, a fact intensive inquiry and some degree of discovery would probably be required to piece together a sufficient record to decide the matter on summary judgment." *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 995 (11th Cir. 1990) (holding § 1983 challenge asserting Fifth and Fourteenth Amendment violations required fact-intensive analysis more properly resolved at summary judgment).

Moreover, a regulatory takings analysis is *peculiarly* fact dependent, involving essentially ad hoc, factual inquiries. As a general matter, in determining whether a regulation goes too far and results in a compensable taking of property, the courts look at (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Carney v. AG*, 451 Mass. 803, 804, 890 N.E.2d 121, 123 (2008).

At this stage, no answer has been filed, no documents have been exchanged and no depositions have been taken. Attorney General's premature analysis must be stricken as irrelevant.

V. THE ACT IS UNCONSTITUTIONAL UNDER A PRE-ENFORCEMENT CHALLENGE

As noted, Plaintiffs have mounted a pre-enforcement or facial challenge to the constitutionality of the Act through a Declaratory Judgment and allege that the Act *does not substantially advance a legitimate state interest* no matter how it is applied. This is a substantive due process claim based on the exercise of power without reasonable justification. ECF 47 at 15.

The due process challenge asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. *Electronic Data Systems Corp v Flint Twp*, 253 Mich. App. 538, 549; 656 N.W.2d 215 (2002). An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. *Id.* The substantive protections of the Due Process Clauses "secure the individual from the arbitrary exercise of governmental power. *Id*.

To adequately state a substantive due process claim, Plaintiff must allege that (1) it had a federal constitutionally protected interest property interest and that (2) government officials abused their power by acting arbitrarily and capriciously. In other words, Plaintiff must allege that the government's action is arbitrary, having no substantial relation to the public health, safety, morals, or general welfare. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993).

Plaintiffs assert, and this Court agrees, that they have adequately alleged a constitutionally protected property interest in their businesses and income and their dogs, along with the property that is functionally integrated by nature. ECF 48 at 28. The deprivation of the right to use property itself for a specific purpose, is protectable, and the United States Constitution gives protection under a substantive due process claim based upon the arbitrary and capricious action of the government in adopting the regulation. *Consol. Waste Sys., LLC v. Metro Gov't of Nashville,* No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382, at *1 (Ct. App. June 30, 2005)

Attorney General, without even providing a rational basis for the imposition of the Act, claims that Plaintiffs may be deprived of the use of their property in their businesses and that fundamental rights do not include . . . the right to maintain a business. ECF 48 at 21. This is a dangerous statement from the state's chief legal

officer that without having broken any law or regulatory provisions one can be deprived of their legal business.

The analysis required under a facial challenge is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. *Nollan v. Cal. Coastal Com*, 483 U.S. 825, 837 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 530, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992). The standard requires that the ordinance "**substantially advance**" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 934 (Tex. 1998).

Attorney General argues that Plaintiffs have asserted a fundamental right in their pari-mutuel licenses. ECF 48 at 21. Plaintiffs have made no such claim as it is understood that the issuance of an occupational license for any business does not create a property right because of its revocable nature. Plaintiffs have asserted, however, a valid deprivation of a fundamental right to their real and personal property ECF 48 at 28 unlike the Plaintiffs in *Carney* who asserted a property interest in their pari-mutuel dog racing license. *Carney v. AG,* at 890; 125, Similarly, in *Set Enterprise* plaintiff asserted a property right in its occupational license in a challenge to a regulation that could suspend or revoke an adult entertainment club's license if it was located within 2500 feet of a school. The statute's purpose was to prevent the documented history of widespread prostitution, drug use and sales revealed by an undercover investigation resulting in numerous arrests. In *Set Enterprise*, there was a legitimate government interest in protecting the safety, health, welfare and morals of the citizens because there was probable cause of criminal activity, the statute was held to be a valid exercise of police power. *Set Enters. v. City of Hallandale Beach*, No. 09-61405-CIV-ZLOCH/ROSENBAUM, 2010 U.S. Dist. LEXIS 154062, at *42 (S.D. Fla. Dec. 30, 2010). Similarly, in *Prettyman*, plaintiff asserted a challenge

based on an alleged property right in his real estate broker's license. *Harry E. Prettyman, Inc. v. Fla. Real Estate Com.*, 92 Fla. 515, 517, 109 So. 442, 443 (1926). The Courts in *Carney, Set Enterprise* and *Prettyman* held that none of the Plaintiffs had a protected property interest in the benefits conferred by a license. Inapposite to these cases, Plaintiffs here assert that their pari-mutuel licenses are not at risk of being revoked by the Act as there are no provisions in the Act calling for revocation. Plaintiffs here have alleged a valid property interest, including but not limited to their dogs, kennels, real property, and property functionally integrated in the use thereof, ECF 47 § 70, so Attorney General's argument on this issue is irrelevant and must be stricken.

The Act's unambiguous government interest is the "humane treatment of greyhound dogs." ECF 47 ¶ 60. Contrary to what most people believe and this Court has correctly pointed out "dogs owned by citizens of th[e] State . . . [are] personal property . . . and shall be placed on the same guarantees of law as other personal property." *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 700, 17 S. Ct. 693, 694 (1897). ECF 46 at 28. The asserted fundamental purpose of the Act is protecting personal property to the detriment of those that actually have the fundamental rights to use that property. Contrary to what the Attorney General suggests, protecting the welfare of racing dogs, or rather personal property, is not a valid exercise of Florida's police power. ECF 48 at 18.

Attorney General continually fails to put forth any justification for the use of police power in regulating the use of Plaintiffs' property and instead repeats the apocryphal statement that "whether [the Act's] purpose is to protect the health and welfare of racing dogs. . . [it has satisfied the test]. ECF 48 at 14, 15, 18. In other words, the Attorney General makes the outrageous claim that if legislature is put forth to protect the *health and welfare of personal property*, even though it deprives

Florida citizens of their use of that real and/or personal property, it passes constitutional muster.

Attorney General misremembers the fact that "regardless of whatever standard of scrutiny applies, the government still bears the burden of proving the constitutionality of its actions." *Ezell v. City of Chi.*, 651 F.3d 684, 703 (7th Cir. 2011); *see also United States v. Alvarez*, 567 U.S. 709, 715–17 (2012)*; Alabama Democratic Conference v. Attorney Gen. of Alabama*, 838 F.3d 1057, 1063 (11th Cir. 2016); *Ray v. Comm'r, Alabama Dep't of Corr.*, 915 F.3d 689, 698 (11th Cir. 2019). It is no wonder that the Attorney General fails to bear the burden of proving the constitutionality of the Act because there can be no legitimate government interest in protecting the **health and welfare of property** while simultaneously depriving people of their fundamental right to use said property.

In order to sidestep actual justification for this illegitimate action, the Attorney General deceptively substitutes the purpose of the Act from protecting the welfare of property to regulating gambling. ECF 48 at 14, 15. However, a plain reading of the text of the Act demonstrates otherwise. Here, the stated unambiguous government interest asserted in the Act is the "humane treatment of greyhounds." ECF at 16 ¶60. This deliberate substitution implies that because gambling is heavily regulated then any restriction, even prohibition would be constitutional. As previously mentioned, there is no express mention in the Florida Statutes that provide for police power to govern the greyhound racing industry. Plaintiffs do concede however that their industry is well regulated and the individuals involved in the industry welcome regulation with open arms as their treatment of the greyhound racing dogs should be transparent. The Plaintiffs also point out that Florida has a legitimate pecuniary interest in racing because of the substantial revenue it receives from pari-mutuel betting. *License Acquisitions, LLC v. Debary* at 1148.

Contrary to Attorney General's suggestion though that heavily-regulated businesses are at the mercy of the state's police power, ECF 48 at 18, there are limits to the government's interference even in businesses which are highly regulated. For instance, the Supreme Court invalidated a Pennsylvania statute directed at a heavily-regulated industry; coal mining. The statute required coal miners to leave a certain amount of coal in the ground to *protect homes, streets or buildings* (property) from damage caused by mining operations. The Court held that the statute was *not exercised for the benefit of the public generally*. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412, 43 S. Ct. 158, 159 (1922)

The Supreme Court's reasoning in *Mahon* is instructive and applies here as well. In the present case, the Act's putative government interest is protecting *property*, *not persons*, and therefore represents an invalid use of police power. In *Mahon*, the purpose of the statute was to protect surrounding properties from the effects of mining, but was invalidated because it did not serve the public, even though it did serve to protect structures and homes; *a fortiori*, the Act here should be stricken as it provides no benefit to the public whatsoever but it annihilates the fundamental rights of the greyhound racing industry to use their property.

Plaintiffs understand that property ownership and usage are not absolute and can be regulated for the health, morals or safety of the community, as in *Wilson v. Sarasota County,* No. 8:10-cv-0489, 2011 WL 5117566, at *2 (M.D. Fla. October 25, 2011). The Wilson Court clearly stated that the seizure of abandoned or neglected animals constitutes a legitimate use of police power to *protect the health or safety of the public*. The Court held that the statute served a legitimate interest in protecting people *not property* Fla. Stat. § 828.073 (authorizes law enforcement officers to remove "a neglected or mistreated animal... from its present custody.") *Wilson v. Sarasota Cty.* at *1.

Similarly, an ordinance regulating puppy mills was enacted to prevent the cost to the public of sheltering of animals abandoned by puppy mills. *Maryeli's Lovely Pets, Inc. v. City of Sunrise*, No. 14-61391, 2015 WL 11197773, at *4 (S.D. Fla. June 25, 2015). Even though the ordinance regulated property rights of individuals, it served a legitimate interest in serving the public.

Plaintiffs also understand that the valid exercise of the police power could pose a prohibition of something injurious to the public. For instance, an owner of dangerous drugs may, under the police power, be restricted from selling them without a license, or without a prescription, or may even be prohibited from selling them at all *for the public health and safety*. *Pa. Coal Co. v. Mahon* at 412; 159.

But no claim has ever been raised that the greyhound racing industry's use of their personal and/or real property has been injurious *to the public health, safety or welfare of the citizens* of the state of Florida for which interference by the government would be necessary. On the contrary, "Florida has a legitimate pecuniary interest in racing **because of the substantial revenue it receives from pari-mutuel betting**." *See Sanford-Orlando Kennel Club*, 434 So. 2d at 881, *License Acquisitions, LLC v. Debary at* 1148.

In the present case, there can be no legitimate claim that preventing the rights of greyhound owners to use their racing dogs protects the public health, safety or morals of the citizens of the state of Florida. It only serves to deprive these individuals in this industry of their fundamental right to use their investment-backed property for their legal and thriving, almost one-hundred-year-old Florida businesses. The common theme underlying legitimate uses of police power is that the challenged law regulating the use of property actually serves the best interest of persons *not* property. The Act in the present case serves no legitimate purpose in protecting the safety, welfare, or health of persons and should be stricken as an arbitrary use of police power. The remedy for a successful facial attack is must be

injunctive and declaratory; and means the statute is wholly invalid and cannot be applied to anyone. *Ezell v. City of Chi*. at 689.

VI. ATTORNEY GENERAL APPLIED AN INCORRECT ANALYSIS TO A FACIAL CHALLENGE UNDER SUBSTANTIVE DUE PROCESS

The classic statement of the rule in *Lawton* is still valid today: To justify the State interposing its authority in behalf of the public,

> it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Goldblatt v. Hempstead, 369 U.S. 590, 594-95, 82 S. Ct. 987, 990 (1962); *Nollan v. Cal. Coastal* at 843 n.1; 3152 citing *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501 (1894).

No reliable evidence has ever presented to the CRC or the general public that demonstrated the need to prohibit greyhound racing because the regulatory provisions were not working. In fact, Commissioner Coxe questioned the *lack of evidence* of the claim that greyhounds were inhumanely treated. ECF 47 at 12. He went on to say that the CRC was not presented with testimony from the *alleged* hundreds of people who complained about the abuses to the animals. *Id*. Commissioner Schifino never heard from law enforcement individuals who would have been responsible for investigating any claims. Id. No hearings were held to gather facts under oath about the unverified allegations. ECF 47 at 23.

No allegations have been proffered that greyhound racing was a nuisance or injurious to health, safety or moral of the public as compared the adult entertainment industry. The state has the power to prohibit property use that is prejudicial to the health, the morals, or the safety of the public. *Goldblatt v. Hempstead* at 988. The government must base its inferences on *substantial evidence* and "must be able to

adduce either empirical support or at least sound reasoning on behalf of its measures"(citations omitted); *Turner Broad Sys., Inc., v. F.C.C. (Turner I), 512 U.S. 622, 667–68 (1994) see Ezell*, at 709. There was absolutely no credible evidence presented that demonstrated the necessity for the government interference in the first place and therefore, the Act fails the first prong of the rule of *Lawton*

It is clear that the putative objective of the Act is to prohibit greyhound racing, but the plain language of the Act miserably fails to achieve that objective.

After pruning out the dependent clauses and the language that is irrelevant to this case, the Act provides that

> "After December 31, 2020, a person authorized to conduct . . . pari-mutuel operations and persons in this state may not wager money or any other thing of value on the outcome of a ***live dog race occurring in this state.*** In other words, pari-mutuel operations and persons *outside* this state *may* wager on the outcome of a live dog race occurring in this state.

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 20, 100 S. Ct. 242, 247 (1979). Therefore,

> The Act allows the sport to continue as long as bets on the outcome of the live dog race occurring in this state are placed by persons *not* from this state.
>
> A facility hosting a live dog race from this state may simulcast the race to an out-of-state facility where wagers are not prohibited by this amendment.
>
> Additionally, Amendment 13 does not prohibit wagering on the outcome of greyhound races in Florida that are simulcast from other states. ECF 47 at 21.

Attorney General even seems to agree that the Act fails to prohibit greyhound racing when she asserts that "alternative forms of racing" will continue. ECF 48 at 18.

The Act fails this prong of the rule of Lawton in that the means used do not achieve the objective. The Act only deprives the state of Florida from receiving tax revenue. ECF 47 at 2. The Act fails both prongs of rule in *Lawton,* and therefore this Court should grant injunctive relief to the Plaintiffs.

VII. FLORIDA CASE LAW SUPPORTS PLAINTIFFS' PROPOSITION THAT THE ACT WOULD BE VIOLATIVE OF THE FIIFTH AMENDMENT TAKINGS CLAUSE

Contrary to the Attorney General's claims, *Basford* serves as a roadmap for a case almost identical to the present case in which the Court held there was a violation of Fifth Amendment Takings based on an as-applied challenge to the "Pregnant Pig Amendment."

Attorney General makes the preposterous claim that the cases should be distinguished because: the plaintiff's claims in *Basford* were based on a constitutional amendment whose fundamental purpose was "**humane treatment of pregnant pigs**," which are wholly unlike the present case in which the fundamental purpose of the constitutional amendment is "**the humane treatment of dogs**." ECF 48 at 17. Attorney General stated that *Basford* should be distinguished because it did not implicate an industry that was heavily regulated. *Id*. This statement is clearly deceptive as the Agriculture, Horticulture, and Animal Industry is heavily regulated under Florida Statute Chapter 570. In reality, these two cases could not be more identical in nature; the only difference being the effect on the greyhound racing community in the present case will affect thousands, unlike *Basford* which affected one farmer. *State v. Basford*, 119 So. 3d 478 (Fla. 1st DCA 2013).

Conversely, *Basford* is not instructive for the analysis under the Bert Harris Act, which relates to real property because the *Basford* plaintiff failed to properly comply with the filing procedures set forth in the Act and therefore the court dismissed the cause of action for deprivation of real property.

The Basford Court ruled that personal property was at issue and not only the gestation crates but all other inextricably intertwined property that was rendered useless required compensatory relief from the state. *A fortiori* here, as Plaintiffs *will* assert real **and** personal property including but not limited to bleachers, stands, ticket counters, greyhound dogs, kennels, etc. But as mentioned previously, Plaintiffs have not asserted an action for compensatory relilef . . yet.

VIII. THE ACT VIOLATES THE CONTRACTS CLAUSE BECAUSE IT UNJUSTLY IMPAIRS PLAINTIFFS' CONTRACTUAL OBLIGATIONS

The severity of the impairment is both the focus of the first step and a means to calibrate the second step; that is, the more severe the impairment, the higher the level of scrutiny a court will apply. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 n.31, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987). In the present case, the greyhound racing industry has been a legal and thriving business in the state of Florida for almost one hundred years. The Act annihilates Plaintiffs' contracts with kennels and racing facilities and deprives them of all investment-backed property in their contracts. Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid. *Contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20 (1917).

In order for the state's impairment of contracts to be legitimate, there must be a significant and legitimate pubic purpose to justify the impairment of contractual obligations. *Keystone Bituminous Coal Ass'n v. DeBenedictis* at 505; 1252. A court must also satisfy itself that the legislature's "adjustment of 'the rights and

responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)). Here there has been no justification for the drastic prohibition of Plaintiffs' contracts. Therefore, Plaintiffs will be unduly burdened financially if the Act is deemed constitutional.

Attorney General impermissibly seeks information outside the four corners of the complaint by demanding evidence in regard to contracts that will be invalidated by the Act. ECF 48 at 20. This is inappropriate in a motion to dismiss. *Morrison v. Amway Corp.*, at 924 (holding that under Rule 12(b)(6), a "district court would not be permitted to weigh facts but would instead be required to resolve disputed factual issues" in the plaintiff's favor).

Additionally, Attorney General claims that the police power is implicated implying greater latitude to the state. ECF 48 at 20. Here, this argument is inapposite based on the plain reading of the laws governing greyhound racing pari-mutuel permit holders. Since there is an absence of express grant of police power to govern the greyhound racing permit-holders under Fla. Stat. Chapter 550, then Attorney General's argument is misplaced and should be stricken and irrelevant and premature.

"The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. 21st Century Oncology, Inc. v. Moody, 402 F. Supp. 3d 1351, 1358 (N.D. Fla. 2019). Here, Plaintiffs' contracts spanning decades will have to be cancelled and Plaintiffs

cannot ascertain at this point if they will be responsible for defaulting long-lasting contracts.

In the second step of the Contracts Clause analysis, the issue is whether the Act serves a significant, legitimate public purpose. In the context of the Contracts Clause, a public purpose is "significant" in the context of its relation to the state's exercise of its police powers. *See Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38-41, 60 S. Ct. 792, 84 L. Ed. 1061 (1940) (weighing the impairment of a contract against the exercise of the "power of the state to protect its citizens by statutory enactments affecting contract rights"). The legitimacy of an asserted public purpose supporting the impairment of a contract can be undercut by a showing that the challenged law is intended to confer a private benefit to special interest groups rather than serving the proffered legitimate interest. *See Energy Reserves*, 459 U.S. at 412; *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 861 (8th Cir. 2002); 21st Century Oncology, Inc. v. Moody, 402 F. Supp. 3d 1351, 1360 (N.D. Fla. 2019). The passage of the Act served no other purpose except to deprive the greyhound racing industry of its livelihood, its heritage and its property rights. The only benefit conferred by The Act was to out-of-state special interest groups who raise funds based on greyhound racing prohibitions. This Act should be reviewed under strict scrutiny as contracts are viewed as Plaintiffs' property, the interference is severe and as well-stated, there is no legitimate state purpose obtained by the Act. Additionally, conferring a great benefit to an out-of-state special interest group should be at the very least enough to survive a motion to dismiss as Plaintiffs are entitled to conduct discovery as to this matter and plead and prove the deprivation of contracts asserted herein.

CONCLUSION

The Act needs to be stricken as invalid under the Equal Protections Clause as it impermissibly singles out the greyhound industry for disparate treatment without

a rational basis, especially whereas, here, the greyhound industry has been specifically targeted as an unpopular political group. The Act fails the Substantive Due process and Impairment of Contracts Challenges because it fails to serve any legitimate purpose and only serves to deprive the greyhound racing individuals of their fundamental right to use their property and their contracts. Moreover, the language of the Act fails to serve even the putative objective of prohibiting greyhound racing. The regulatory provisions in the Act will lead to a takings action because the provisions are not based on a legitimate use of police power. The remedy for this unconstitutional Act is an immediate injunction.

WHEREFORE, Plaintiffs plead and pray that this Court deny Attorney General's Motion to Dismiss, grant Plaintiffs injunctive relief and any other relief this Court deems proper and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 9th day of June, 2020.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I HEREBY CERTIFY, that the foregoing complies with the size, font, and formatting requirements of Local Rule 5.1(C) and that this memorandum, at 7,794 words, complies with the 8,000 word limitation set forth in Local Rule 7.1(F).

Respectfully Submitted,

Dawn M. Alba
Alba Law Office, PA
3714 South Olive Avenue
West Palm Beach, FL 33405
(561) 584-0023

Signed: Dawn M. Alba, Esq.
Fla. Bar Number: 112814
Dawn@Albalawoffice.com

SERVICE LIST:

Blaine H. Winship (FBN 356913)
Special Counsel
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Tel.: (850) 414-3300
Fax: (850) 488-4872
Blaine.Winship@myfloridalegal.com
Counsel for Attorney General Ashley Moody