IN THE

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT

Case No. 20-12665

SUPPORT WORKING ANIMALS, et al.,
***Plaintiff/Appellant*,**

versus

FLORIDA ATTORNEY GENERAL,
ASHLEY MOODY,
Defendant/Appellee.

On Appeal from the United States District
Court for the Northern District of Florida
District Court Case No. 4:19-cv-570-MW/MAF

BRIEF OF APPELLANT

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Certificate of Interested Persons and Corporate Disclosure Statement

The Appellant, Support Working Animals, Inc., et al., by and through their undersigned counsel and pursuant to 11th Circuit Court Rule 26.1-1, hereby submits the following list of all trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Certificate of Interested Persons

1. Alba, Dawn Marie, Attorney for Appellant/Plaintiff
2. Brannon, Magistrate Judge Dave Lee, Florida Southern District Court/West Palm Beach Division
3. Calvo, Anthony Appellant/Plaintiff
4. Capabal Kennel, Inc., Appellant/Plaintiff
5. Davis, Ashley, General Counsel Secretary of State Laurel Lee
6. DeSantis, Governor Ron
7. Dippel, Sharon, Appellant/Plaintiff
8. Don Jarrett Greyhound Transportation, Appellant/Plaintiff
9. Gerard, Michael, Appellant/Plaintiff
10. Jan George Kennels, LLC, Appellant/Plaintiff
11. Kacer Kennel, LLC, Appellant/Plaintiff

12. Lee, Laurel, Florida Secretary of State

13. Malbouef, Donna Hahn, Appellant/Plaintiff

14. Marcoux, Richard, Appellant/Plaintiff

15. Marsella Racing, Inc., Appellant/Plaintiff

16. McVay, Brad, General Counsel for Secretary of State Laurel Lee

17. Melody Alves Kennel, Appellant/Plaintiff

18. Middlebrooks, Judge Donald M., Florida Southern District Court/West Palm Beach Division

19. Moody, Ashley, Florida Attorney General

20. Morse, Greg, Appellant/Plaintiff

21. Primrose, Nicholas Allen, Deputy General Counsel for Governor Ron DeSantis

22. Richard Alves Kennel, Appellant/Plaintiff

23. Support Working Animals, Inc., Appellant/Plaintiff

24. Seminole Animal Supply, Inc., Appellant/Plaintiff

25. Stampelos, Magistrate Judge Charles A., Florida Northern District Court/Tallahassee Division

26. Testa, Jamie, Appellant/Plaintiff

27. Thomas, Gloria, Appellant/Plaintiff

28. Trzecaik, Kurt, Appellant/Plaintiff

29. Uthmeier, James, Deputy General Counsel for Governor Ron DeSantis

30. Walker, Judge Mark E., Florida Northern District Court/Tallahassee

Division

31. Winship, Blaine H., Special Counsel for Attorney General Ashley Moody

Corporate Disclosure Statement

The undersigned certifies that no Appellant in this action has a parent corporation and no publicly held corporation owns any stock of any Appellant.

By: _____
Dawn M. Alba, Esq.
Attorney for the Appellant

Statement Regarding Oral Argument

Appellant, Support Working Animals, Inc., et al., does not request oral argument in this matter. It is respectfully suggested that the parties will adequately explain their positions to this Court in the written briefs and that oral argument will not significantly add to the Court's understanding of the case.

Statement Regarding Record References

- "ECF[Electronic Case Filing]:[Page Number]" shall refer to the entries on the Civil Docket for Case No. 9:19:cv-81364 in the United States Federal Court for the Southern District of Florida and Civil Docket for Case No. 4:19-cv-570 in the United States Federal Court for the Northern District of Florida followed by the document number and page numbers.

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JURISDICTIONAL STATEMENT

This matter was originally filed in the United States Federal Court for the Southern District of Florida: Case Number: 9:19:cv-81364 and later transferred by joint stipulation of the parties to the United States Federal Court for the Northern District of Florida: Case Number 4:19-cv-570. The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C.A. § 1983 as the case involves a federal question which grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States" against state actors based upon a deprivation of rights and privileges protected by the Constitution of the United States. The court had discretionary jurisdiction of this case under the Declaratory Judgment Act, 28 U.S.C. § 2201.

The United States Federal Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291, has jurisdiction over this appeal from a final order granting judgment against Plaintiff/Appellant. Judgment was rendered on June 12, 2020 upon the Court's Order Granting Defendant's Motion to Dismiss and Plaintiffs thereafter timely filed their Notice of Appeal on July 13, 2020.

STATEMENT OF ISSUES

1. Whether the trial court erred in dismissing Florida's Attorney General for lack of subject matter jurisdiction citing that she lacked sufficient connection to enforcement of the challenged law to make her a proper defendant.

2.Whether the trial court misinterpreted case law by comparing Florida's Secretary of State's duties and powers with those of the Attorney General leading to the erroneous conclusion that:

a. since the Secretary of State had no connection to the challenged statute, then the Attorney General in the present case has no connection to the challenged Act;

b. since the Secretary of State has no authority over the County Supervisors, then the Attorney General, by extension had no control over the State Attorneys;

3. Whether the trial court erred by dismissing the state's chief legal officer in this action when she is an indispensable party to either defend the action or declare its unconstitutionality.

a. Whether the trial court erred by not recognizing that the Attorney General, by virtue of her office, is subject to suit based on traceability to the actions of her office in connection with the challenged law.

b. Whether the trial court erred by not finding that the Plaintiffs had proven traceability and redressability to the Attorney General.

STATEMENT OF THE CASE

This appeal arises from a proceeding brought by Plaintiffs/Appellants, the greyhound racing industry (hereinafter referred to as "Plaintiffs" or "greyhound racing industry") against the Florida Attorney General (hereinafter referred to as "Defendant" or "Attorney General") based on 42 U.S.C. § 1983 and for injunctive relief under the Declaratory Judgment Act 28 U.S.C. § 2201.

In the November 2018 General Election, the electors of the State of Florida approved Amendment 13, now codified as Fla. Const. art. X, § 32 (hereinafter referred to as "the Act" or "Amendment 13") that states:

> The humane treatment of animals is a fundamental value of the people of the State of Florida. After December 31, 2020, a person authorized to conduct gaming or pari-mutuel operations may not race greyhounds or any member of the *Canis Familiaris* subspecies in connection with any wager for money or any other thing of value in this state, 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. The failure to conduct greyhound racing or wagering on greyhound racing after December 31, 2018, does not constitute grounds to revoke or deny renewal of other related gaming licenses held by a person who is a licensed greyhound permitholder on January 1, 2018, and does not affect the eligibility of such permitholder, or such permitholder's facility, to conduct other pari-mutuel activities authorized by general law. By general law, the legislature shall specify civil or criminal penalties for violations of this section and for activities that aid or abet violations of this section.

Plaintiffs are challenging constitutionality of the Act which *purports* to prohibit gambling on live greyhound racing in the state of Florida. This claim is brought pursuant to 42 U.S.C. § 1983 which provides in pertinent part that state actors, acting under color of law, may be liable for depriving citizens of constitutional rights based on a violation of the Equal Protection Clause by Unconstitutional Animus, the Equal Protection Clause, the Takings Clause of the Fifth and Fourteenth Amendments, Impairment of Contracts, and Substantive Due Process. The Plaintiffs sought injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 seeking a binding judgment from the court that the challenged amendment is unconstitutional and enjoining the state actors from enforcement thereof.

i. Court proceedings and disposition of the court below.

Plaintiffs filed their Declaratory Complaint in the Federal Court for the Southern District of Florida on October 4, 2019: Case number 9:19-cv-81364 [ECF 1] against Governor Ron DeSantis, Secretary of State Laurel Lee and Attorney General Ashley Moody alleging *inter alia* a deprivation of federal and state constitutional rights under 42 U.S.C. § 1983.

Defendants filed their Consolidated Motion to Dismiss or in the Alternative to Transfer Venue on October 31, 2019. [ECF 16]. Plaintiffs filed their First Amended Complaint on November 18, 2019 stipulating to transfer venue of the

case to the Federal Court for the Northern District of Florida. [ECF 24, 26].

Defendants thereafter filed their Consolidated Motion to Dismiss Plaintiffs' First Amended Complaint on November 26, 2019. [ECF 33]. On April 27, 2020 the United States Federal Court for the Northern District of Florida held that Plaintiffs had proven the requisite injury-in-fact and their case was ripe for review. [ECF 46 at 5]. However, the Court dismissed the case against Governor Ron DeSantis and Secretary of State Laurel Lee [*Id*. at 5, 16, 20] for lack of subject matter jurisdiction, holding that they were entitled to eleventh amendment sovereign immunity but concluded that Attorney General was a proper defendant. [*Id.* at 26].

The district court held that the Attorney General was the proper defendant based on *inter alia* her own concession that she is Florida's chief legal officer and is "vested with broad authority to act in the public interest and . . . to defend statutes against constitutional attack," [ECF 33 at 11] and her inescapable historic duty as chief legal officer . . . to defend . . . in any litigation . . . proceeding . . . involv[ing] a legal matter of compelling interest. [ECF 46 at 22]. The Court concluded that based on decades of Supreme Court precedent she has sufficient connection with the enforcement of the Act. [ECF 46 at 25-26].

Plaintiffs filed their Second Amended Complaint against only the Attorney General on May 11, 2020. [ECF 47]. A Motion to Dismiss Plaintiffs' Second

Amended Complaint was filed by Florida's Attorney General on May 26, 2020. [ECF 48]. The district court then rendered its judgment granting Attorney General's Motion to Dismiss on June 12, 2020 for lack of subject matter jurisdiction citing eleventh amendment immunity that, *now*, she was *not* the proper defendant. [ECF 50].

This subsequent dismissal was based wholly upon *Jacobson v. Fla. Sec'y of State,* 957 F.3d 1193, (11th Cir. 2020), whereby the Eleventh Circuit Court of Appeals reversed a decision of the Northern District Court of Florida involving the Florida Secretary of State. The Eleventh Circuit held that she was not a proper defendant and dismissed for lack of jurisdiction based upon Eleventh Amendment immunity.

The lower court dismissed the present case by gleaning that this Court's decision in *Jacobson* stripped the Secretary of State of her powers over election laws and authority over County Supervisors and thus, by extension, the Attorney General in the present case, wielded no power over law enforcement or the State Attorneys who might be charged with prosecution of violations of the Act. The lower court concluded that the statutory delineations and assignments of the Florida Attorney General's powers are not meaningfully distinguishable from that of the Florida Secretary of State's powers and duties. [ECF 50 at 3] and that if the Secretary of State was entitled to Eleventh Amendment Immunity in

Jacobson, then the Attorney General should be entitled to immunity in the case at bar.

This appeal follows.

ii. Statement of Facts

The instant appeal involves a question of great importance to the state of Florida presenting a legal issue of first impression. The challenged constitutional amendment sets forth no enforcement provisions. Consequently, the lower court has held that no state actor can be named as a proper defendant for the lack of sufficient connection to enforcement of the Act.

Plaintiffs in the instant appeal challenge the constitutionality of an amendment placed in the state's constitution in 2018 which *purports* to prohibit greyhound racing. Fla. Const. art. X § 32. Amendment 13 came to be placed on the ballot in 2018 through the Constitution Revision Commission, (hereinafter referred to as the "CRC" or "the Commission") *not* the Florida Legislature.

The CRC was created in 1968 and placed in the state of Florida's Constitution with its first commission being formed in 1978.[1] Fla. Const. art. XI, § 2. [ECF 47 at 10 ¶ 31]. The CRC is an ad hoc entity that meets once every twenty years. *Id.* The original purpose of the CRC was to hold hearings

[1] https://crc.law.fsu.edu/about/history.htmlt

throughout the state where *Florida citizens* would attend and share ideas and feedback on potential proposals for the ballot.[2] *Id.* The 2017-18 CRC was the third of its kind in the state of Florida's history.

Pursuant to Fla. Const. art. XI, § 2, the Constitution Revision Commission shall be comprised of the following appointed members:

- Governor appoints 15 commissioners and selects the Chair;
- The Senate President and the House Speaker each appoints 9 commissioners;
- Supreme Court Chief Justice appoints 3; and
- **The Attorney General of Florida is an automatic member of the Commission** (emphasis added)

The painstaking process the Florida legislature undertakes in passing a bill is in stark contrast to that imposed on an idea reaching the ballots through the CRC. The Florida Legislature meets once a year for 60 days to address the needs of the state whereby bills are filed by representatives and senators for consideration during the session.[3] When a bill is filed in the Florida legislature it is referred to several committees to be reviewed by smaller groups of members. [4] The bill is discussed and debated and amendments or changes can be added to the bill. *Id*. If the bill passes in one house, it is sent to the other house for review. *Id*.

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[2] https://www.floridacore.org/about-us/revision-commission/

[3] https://www.flsenate.gov/Session#:~:text=The%20Florida%20Legislature%20meets%20in,of%20each%20even%2Dnumbered%20year.

[4] https://www.flsenate.gov/About/HowAnIdeaBecomesALaw

A bill can go back and forth between the houses until a consensus is reached. *Id.* This process allows the idea to be thoroughly discussed and debated by the legislators, the public and those specific people who the bill will affect.[5]

Unlike the Florida Legislature which is composed of elected lawmakers, the CRC allows for unelected persons to draft proposed law by filing a lobbyist registration with the State of Florida. [ECF 47 at 11 ¶ 35]. The proposal to end greyhound racing that was placed on the 2018 general ballot was drafted by out-of-state special interest groups represented by lobbyists. Florida Legislators claimed that the 2017-18 CRC was hijacked by out-of-state lobbyists representing special interest groups such as Grey2K and the Humane Society of the United States ["HSUS"]. [ECF 47 at 10 ¶ 33].

Grey2K was founded in 2001 in the state of Massachusetts: they are a political lobbying organization dedicated to ending dog racing.[6] HSUS was founded in 1954 and is based in Washington, D.C.[7] Grey2K formed a Florida political committee; "Committee to Protect Dogs," sponsored by the HSUS.[8]

These two out-of-state groups special interest groups, represented by their

[5] https://www.flfamily.org/issues-research/legislative-update/how-a-bill-becomes-a-florida-law
[6] https://en.wikipedia.org/wiki/Grey2K_USA
[7] https://www.humanesociety.org/
[8] https://www.grey2kusa.org/flvictory/

lobbyists, partnered with the Attorney General of the State of Florida to promote the passage of Amendment 13, later codified as the Act. The Florida Attorney General, the only state actor required to hold a seat on the commission, actively endorsed the Act and attended highly publicized fundraisers hosted by political heavyweights such as Matt Gaetz and Lara Trump, resulting in millions of dollars in donations to Grey2K and HSUS for media purchases to be used against the Florida greyhound racing industry.[9] [ECF 47 at 11 ¶ 38]. Despite the fact that the Attorney General held a seat on the commission, the CRC never requested an advisory opinion from her office as to the constitutionality of the Act before it was placed on the ballot in the 2018 general election.

The 2017-18 Commission possessed the authority to draft enforcement provisions, but ultimately abrogated that right and instead directed the Florida Legislature to do so. The Act's concluding sentence, as codified in the Florida Constitution Article X, § 32 reads:

> "By general law, *the legislature shall specify civil or criminal penalties* for violations of this section and for activities that aid or abet violations of this section." (emphasis added)

Notably, since the Florida Legislature is directed by the constitutional

[9] https://www.palmbeachpost.com/news/20190209/gop-stars-lara-trump-pam-bondi-matt-gaetz-back-greyhound-adoptions

amendment to draft the enforcement provisions for violations of the Act, then *only* the Florida Legislature may do so. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Transamerica Mortg. Advisors v. Lewis*, 441 U.S. 11, 19-20 (1979). This mandate from the CRC to the Florida Legislature is problematic however, based on the history of animosity between the State of Florida Legislature and the Constitution Revision Commission.

Case in point, during the 2019 session, the Florida legislature; both democrats and republicans, representatives and senators alike, remarkably stood in solidarity drafting bills to abolish the CRC "because it is too powerful and lacks accountability." [ECF 47 at 11. 14, 15]. Even the Governor of the state of Florida announced his support for the repeal of the CRC. [ECF 47 at 14 ¶ 54].

Even though the Act was codified in the State of Florida's Constitution in 2018, the Florida legislature has not broached the subject of drafting enforcement provisions for violations of the Act which becomes enforceable on January 1, 2021. Consequently, the date of enactment is rapidly approaching and the greyhound racing industry's future remains uncertain because the lower court has held that no state actor is a proper defendant in this action.

The Attorney General of the state of Florida contends, and the District Court agrees, that the greyhound racing industry has no clear path to challenge the

constitutionality of the Act because no enforcement provisions have been drafted leaving no state actor with the requisite connection to the enforcement thereof. [ECF 48, ECF 50]. The lower court asserted that "there is no reason whatsoever to doubt that Amendment 13's prohibitions will come into effect on January 1, 2021." [ECF 46 at 11]. However, this statement is a patently impossible.

The glaring problem with the lower court's assertion is that the Florida Legislature begins its session in March 2021; months after the Act becomes officially enacted on January 1, 2021. Moreover, considering the Florida Legislature's and the Governor's collective animosity of the CRC, their open criticism of their actions, and the united front to abolish its very existence, the command from the CRC to the Legislature to draft the penalty provisions may never be forthcoming. According to the lower court's holding, Plaintiffs will therefore be prevented from mounting a challenge to an allegedly unconstitutional amendment in the Florida Constitution.

The greyhound racing industry is now confronted with the untenable choice of losing their livelihoods, challenging the constitutionality of the Act or flouting the Act altogether. They have boldly chosen to challenge the constitutionality of the language and purpose of the Act, which has evaded review due to the lower court's dismissal of all state actors based on the CRC's failure to draft enforcement provisions.

Plaintiffs challenge the lower court's decision to dismiss the Attorney General of the state of Florida as a proper defendant and assert that she has the requisite connection with enforcement of the Act to be the proper defendant in this case. Plaintiffs submit that this Court should reverse the lower court's ruling.

SUMMARY OF THE ARGUMENT

The instant appeal challenges the District Court's Order Dismissing Attorney General of the state of Florida's as the proper defendant under the *Ex parte Young* doctrine. Plaintiffs allege that the lower court erred because pursuant to the *Ex parte Young* doctrine, it is not necessary that the Act expressly charge the Attorney General with enforcement duties, as long as she has some connection with enforcement of the Act by virtue of her office.

Contrary to the lower court's holding that the Attorney General lacks sufficient connection to enforcement of the Act, Florida Statutes provide for a direct connection through the Attorney General's Office of the Statewide Prosecutor. The Office of the Statewide Prosecutor is charged with investigating and prosecuting gambling offenses; the type of violation contemplated by the Act. Fla. Stat. § 16.56.

Additionally, the lower court erred by not recognizing that the Attorney General also has a direct connection to enforcement of the Act through the several State Attorneys should they be charged with enforcement of the Act. Fla. Stat. § 16.08; *See Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988) (finding final authority to direct Georgia's Attorney General residual power to institute and prosecute on behalf of the state made him subject to suit under § 1983). Moreover, as a member of the Florida Cabinet, the Attorney General serves as the head of

the Florida Department of Law Enforcement thus providing a direct connection to law enforcement should the Florida Legislature draft criminal penalties associated with violation of the Act. Fla. Stat. § 20.201(1).

The district court's ruling was based on a misinterpretation of *Jacobson v. Sec'y of State,* 957 F.3d 1193 (11th Cir. 2020), a recent case decided by the Eleventh Circuit Court of Appeals which reversed the judgment of the Northern District of Florida. The Eleventh Circuit in *Jacobson* held that Florida's Secretary of State was entitled to immunity from suit because the challenged law expressly charged the County Supervisors of Florida with enforcement, not the Secretary of State.

The lower court's misreading of *Jacobson* lead to the erroneous conclusion that the Secretary of State and the Attorney General's powers and duties are not meaningfully distinguishable; [ECF 50 at 2] that if the Secretary of State had no authority over the County Supervisors then the Attorney General, by extension, had no authority over the State Attorneys should they be tasked with the duty to enforce the Act. *Id*.

However, this assertion is contrary to a compelling body of Florida case law, constitutional as well as statutory law demonstrating that the sources from which the Secretary of State and the Attorney General derive their powers are inapposite. The Secretary of State is bound by statutory construction compared to

the Attorney General's whose powers are older than the United States, emanating from the crown to include constitutional, statutory, and residual common law powers.

Although the Secretary of State has power over election laws, she does not possess the power to control the actions of the County Supervisors and may only bring actions at law or in equity by mandamus or injunction to enforce the performance of any duties of a county supervisor of elections. Consequently, the Jacobson Court held that the Secretary of State was entitled to immunity from suit because she had no enforcement connection to the challenged law. On the other hand, the Attorney General in the case at bar, has direct connection to enforcement of the challenged law by her control over the appointment and retention of the Statewide Prosecutor as well as her statutory duty to superintend and control the manner in which the State Attorneys discharge their duties.

Particularly material to this case, the Attorney General concedes that she is Florida's chief legal officer and is vested with broad authority to act in the public interest and when she deems it necessary, to defend statutes against constitutional attack. [ECF 33 at 11]. She is the legal guardian of the people and it is a legal presumption that she will do her duty for the protection of the people in matters of public concern. *Florida ex rel. Shevin v. Exxon Corp*., 526 F.2d 266, 270. By Florida judicial decisions, the grant of specific state powers to the Attorney

General does not deprive him of the powers belonging to him under common law" . . . *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983), *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (holding Nebraska's Attorney General was proper defendant to suit challenging a Nebraska constitutional amendment invalidating same-sex marriages because the Attorney General possessed "broad powers to enforce the State's constitution and statutes,") abrogated on other grounds by *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).

Importantly, Plaintiffs in this case have satisfied even a heightened standing requirement under Article III by alleging their injuries are directly traceable to the office of the Attorney General's actions while sitting as a member of the Commission while using the power of her office to actively promulgate the passage of the Act. She also possesses the power of redress by a declaration from her office that the Act is unconstitutional and enjoining other state actors from enforcement thereof.

Greyhound racing is as iconic to the State of Florida as are palm trees and beaches and has been legal in the state for almost one hundred years. The Plaintiffs own businesses directly involved with the greyhound racing industry; many of whom are third and fourth generation tax-paying family enterprises. To claim that the stakes are high for thousands of Floridians involved in the greyhound racing

industry is a woeful understatement. On January 1, 2021, according to Florida's constitutional law, licensed Florida pari-mutuel operators will be forbidden from racing any dog in Florida in connection with a wager and all persons in Florida will be prohibited from wagering on live dog races which occur in Florida. Even though the lower court aptly observed, "the *Ex parte Young* doctrine does not demand that Plaintiffs wait until their dog racing businesses become illegal on January 1, 2021 to see which state official brings an enforcement action before challenging Amendment 13's validity," [ECF 46 at 26] Plaintiffs have been denied access to the court to challenge this patently unconstitutional law because the district court has held that no state actor has sufficient connection with enforcement of the Act due to the CRC's failure to draft enforcement provisions.

Implementation of the Act is a matter of great concern and will affect thousands of Floridians while placing a gaping hole in Florida's economy. Plaintiffs allege that the lower court erred because the Attorney General has the requisite connection to enforcement of the Act directly through her Office of the Statewide Prosecutor as well as the several State Attorneys. As the head of the Florida Department of Law Enforcement she can direct law enforcement's actions should criminal penalties be drafted. As the chief legal officer, and guardian of the people, it is a legal presumption that she will do her duty for the protection of the people in matters of public concern. Consequently, the Florida Statutes

demand that when constitutionality of a law is challenged, or declaratory relief is sought, the Attorney General is to be named and notified to participate. Fla. Stat. § 86.091. Based on the foregoing, Plaintiffs respectfully submit that this Court should reverse the district court's order granting Attorney General's Motion to Dismiss for lack of subject matter jurisdiction.

i. Standard of Review

This is an appeal from the Federal Court for the Northern District of Florida's dismissal of Plaintiffs' Second Amended Complaint for lack of subject matter jurisdiction. [ECF 50 at 3]. Accordingly, Plaintiffs respectfully submit that this Court should review the district court's Order as a question of law subject to de novo review.

The district court in the present case granted Defendant, Attorney General's Motion to Dismiss under 12(b)(1); lack of subject matter jurisdiction. Questions of subject matter jurisdiction are reviewed de novo. *Pillow v. Bechtel Const., Inc*., 201 F.3d 1348, 1351 (11th Cir. 2000).

Specifically, the district court dismissed Plaintiffs' Complaint against Defendant Attorney General based on sovereign immunity which is also reviewed under the de novo standard. *See Tamiami Partners, Ltd. by & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians,* 177 F.3d 1212, 1224 (11th Cir. 1999) (The issue of a sovereign's immunity from suit is a question of law that we

review *de novo*. *See Tinney v. Shores,* 77 F.3d 378, 383 (11th Cir.1996)); *See also Babicz v. School Bd. of Broward County*, 135 F.3d 1420, 1422 (11th Cir.1998) (per curiam) (We review the district court's order granting Delta's motion to dismiss for lack of subject matter jurisdiction de novo.) We review dismissals for lack of subject matter jurisdiction de novo, viewing the facts in the light most favorable to the plaintiff. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465 (11th Cir. 1998)**.** *See also Welch v. Laney*, 57 F.3d 1004, 1008 (11th Cir.1995) (we view the facts in the light most favorable to the plaintiff.) "De novo" review, which is a Latin expression that means "of new" or "from the beginning," expands the appellate court's review of the issue as if it was seeing it for the first time. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004) (internal quotations omitted). The standard of review "is the same for the appellate court as it was for the trial court." *Id*. Thus, based on the foregoing, Plaintiffs respectfully submit that this Court should review this appeal under the de novo standard of review.

ARGUMENT

Plaintiffs brought their constitutional challenge of the Act under the Declaratory Judgment Act, 28 U.S.C. § 2201, which is a binding judgment from a court defining the legal relationship between parties and their rights in a matter before the court and 42 U.S.C. § 1983 which asserts that a state actor, under color of law, shall be liable for the deprivation of rights, privileges or immunities secured by the Constitution and laws.

The lower court held that Plaintiffs had established the requisite injury requirement thus satisfying the standing requirement for a pre-enforcement challenge to a state statute, but dismissed the Attorney General for lack of subject matter jurisdiction. [ECF 50]. The only issue before this Court is whether the Attorney General of Florida is the proper defendant in this action. For a state actor to be a proper defendant it must be demonstrated that the state actor has some enforcement connection with the challenged provision, or whose actions are directly traceable to the alleged injury. *Ex parte Young*, 209 U.S. 123, 158 (1908).

The district court in the instant case erred in (1) failing to recognize that the Attorney General has direct enforcement connection with the Act, (2) dismissing the Attorney General based on an improper reading of case law, and (3) failing to determine that Attorney General was an indispensable party to the

action under the historical powers of her office.

1. **The District Court failed to recognize that the Attorney General has not only *some* connection with, but rather a *direct* statutory connection with enforcement of the Act.**

Plaintiffs appeal the decision of the district court dismissing the Attorney General of Florida as a proper defendant for lack of subject matter jurisdiction; holding specifically that she is entitled to Eleventh Amendment immunity for lack of connection with enforcement of the challenged law.

Plaintiffs' constitutional rights have been and will continue to be violated as a result of the Act's prohibition of wagering on live greyhound racing and they have boldly chosen to challenge the constitutionality of the Act. The district court has erred by divesting Plaintiffs of the right to mount a legal challenge; charging that no state officer has the requisite connection with enforcement of the challenged law. [ECF 46, 50].

"The Eleventh Circuit, following the United States Supreme Court jurisprudence, has recognized that [p]otential litigants suffer substantial hardship if they are forced to choose between foregoing lawful activity and risking substantial legal sanctions." *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995) (citing *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (The "hapless plaintiff" should not have to risk placing himself "between the Scylla of intentionally flouting [the] law and the Charybdis of forgoing what

he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.") *Life Partners, Inc. v. McCarty*, Case Number 4:08-cv-147-DRH/WCS (N.D. Fla. December 1, 2008) 2008 U.S. Dist. LEXIS 128728.

While Plaintiffs are aware that "under the Eleventh Amendment, 'a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress,'" there is an exception to the exception. *Osterback v. Scott*, 782 F. App'x 856, 858 (11th Cir. 2019) (quoting *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011)). A state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit. *Ex parte Young*, at 161.

Young involved a challenge to a state statute that imposed monetary penalties and fines, to be collected by the state, on anyone who charged excessive rates. *Id.* at 127. Because the Minnesota Attorney General had a duty under Minnesota law to initiate judicial proceedings against "any corporation whenever it shall have offended against the laws of the state[,]" the Court concluded that the Attorney General was "sufficiently connected … with the duty of enforcement to make him a proper party to a suit . . . before the United States circuit court for prospective injunctive relief without violating the Eleventh Amendment. *Id.* at 161.

To be a proper defendant under *Ex parte Young*, the state officer in question "must, at a minimum, have some connection with the enforcement of the provision at issue." *Socialist Workers Party v. Leahy,* 145 F.3d 1240, 1248 (11th Cir. 1998). It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. *Young,* at 158. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists. *Id.,* at 142.

The Act that Plaintiffs are challenging in the case at bar seeks to prohibit gambling on live races in the pari-mutuel dog racing industry, and expressly directs Florida's legislature to draft civil or criminal penalties for the violations. Notwithstanding the fact that the Florida Legislature has yet to draft enforcement provisions for the Act as directed by the CRC, the Attorney General, by virtue of her office, is directed under Florida law to investigate and prosecute the offenses contemplated by the Act. The district court placed unwarranted reliance on Attorney General's false assertion that her office "lacks enforcement duties with respect to any gambling-related activities in Florida," [ECF No. 33 at 6] or that "any such presumption [that she would have a connection to enforcement] would be the product of sheer speculation rather than well-reasoned inference." [ECF 48

at 9]. Contrary to the Attorney General's assertion, however, no speculation is required because Florida law expressly provides for direct enforcement connection to her office.

There is created [with]in the office of the Attorney General the position of Statewide Prosecutor. Fla. Const, art. IV 4(b). The Attorney General is authorized to appoint the Statewide Prosecutor who "investigate[s] and prosecute[s] gambling offenses." Fla. Stat. §16.56. The Office of Statewide Prosecution is authorized to act throughout Florida and works closely with law enforcement and State Attorneys to coordinate the prosecutions of multi-circuit violations of state law. Notably, the Attorney General may "remove the statewide prosecutor prior to the end of his or her term." Fla. Stat 16.56(2). The Office of Statewide Prosecutor, tasked with the duty of working with law enforcement and the State Attorneys to enforce the types of offenses contemplated by the Act, is under the direct purview of the Attorney General, thus, providing sufficient connection to enforcement of the challenged Act.

Moreover, the Act is a state-wide mandate purportedly prohibiting gambling on the outcome of live greyhound pari-mutuel races. The Office of Statewide Prosecution, under the Attorney General's powers and duties is responsible for the prosecution of multi-circuit violations of gambling offenses. Fla. Stat. §16.56. It is undisputed that violations of the Act would occur across

the state of Florida and would undoubtedly span multi-circuits within the state.

Additionally, the Act instructs Florida's Legislature to draft civil or criminal penalties, thus providing no private right of action, so duty of enforcement, whether it be civil or criminal, shall be borne by state actors. The Attorney General, as a Cabinet member, is charged with the duty to serve as the head of the Florida Department of Law Enforcement. Fla. Stat. § 20.201(1). ("There shall be a cabinet composed of an attorney general . . . they shall exercise such powers and perform such duties as may be prescribed by law.). Fla. Const. art. IV, § 4(b) Thus, should criminal penalties be promulgated, the Attorney General shall have the requisite connection to law enforcement.

Consequently, by virtue of her office, the Attorney General has the requisite connection of enforcement to the challenged law through her Office of the Statewide Prosecutor and as the head of law enforcement, thus satisfying the causal connection requirement under *Ex parte Young*. The assertion that the Attorney General lacks connection to the challenged act is manifestly inconsistent with Florida statutory and constitutional law, therefore, the district court's Order dismissing the Attorney General as the proper defendant must be reversed.

2. <u>The district court based its Order of Dismissal based solely on a misinterpretation of case law leading to erroneous conclusions of law.</u>

On April 27, 2020 the United States Federal Court for the Northern District

of Florida, Chief Judge Walker rendered his decision that Plaintiffs had standing, their claims were ripe for review and the Eleventh Amendment did not bar Plaintiffs' claims against the Attorney General. [ECF 46 at 5]. Basing his decision on an in-depth analysis of the historic powers of the Attorney General, he held that she was the proper defendant under *Ex parte Young* because she had "the authority to enforce Amendment 13," [later codified as the Act] "Plaintiffs' injuries [we]re directly traceable to the passage of Amendment 13" and Plaintiffs' injury would be redressed by a judgment [from the Attorney General] declaring Amendment 13 unconstitutional and enjoining its enforcement," that she is "vested with broad authority to act in the public interest . . . and to defend statutes against constitutional attack." [ECF 46 at 8-9, 21].

The district court further explained that the Attorney General had sufficient connection with the enforcement of the Act because "she could independently institute such prosecutions" [for violations of the Act]. Chief Judge Walker concluded by stating that the Attorney General as a proper party was "consistent with decades of Supreme Court precedent finding standing in pre-enforcement constitutional challenges to state laws." *Id*. at 25.

Surprisingly, on June 12, 2020, Chief Judge Walker wholly reversed his earlier decision and summarily dismissed the case against the Attorney General for lack of standing, holding that her 1) "supervisory authority over the State

Attorneys is insufficient to render [her] a proper defendant" [ECF 50 at 1-2] and 2) "if injuries arising from Florida's election laws are not traceable to nor redressable through Florida's Secretary of State, the injuries Plaintiffs allege in this case are neither traceable to nor redressable through Florida's Attorney General." [ECF 50 at 2].

The district court based its holding entirely on a case decided on April 29, 2020 where the Eleventh Circuit Court of Appeals reversed a decision of the Florida Northern District Court of Florida. *Jacobson,* 957 F.3d 1193 (11th Cir. 2020). In *Jacobson*, the plaintiffs, Democratic organizations and voters, alleging political bias, filed a complaint against the Florida Secretary of State to enjoin her enforcement of a 70-year-old statute, which provides:

> "the names of [candidates] shall be printed by the *supervisor of elections* upon the ballot in their proper place as provided by law." Fla. Stat 99.121 (emphasis added)

The challenged statute, however, specifically tasked the County Supervisors with enforcement of the challenged law, *not* the Secretary of State. *Jacobson*, at 1207. Following a bench trial, the district court held the statute unconstitutional and enjoined the Secretary *and* the Supervisors of elections, who were not named as defendants, from enforcing Fla. Stat. § 99.121. *Id*. at 1200.

The Eleventh Circuit Court reversed the lower court's decision holding that

Jacobson should have been dismissed for lack of standing being that the Secretary of State was the only named defendant but Florida law expressly tasks the County Supervisors with the duty of carrying out the challenged law. *Jacobson*, at 1212. The Jacobson Court held that the lower court erred in reaching the merits [of the case] . . . instructing that it is beyond the power of the federal courts [to] issu[e] an injunction against nonparties whom it had no authority to enjoin. *Id*.

Notably, the Eleventh Circuit underscored that the *Jacobson* Plaintiffs offered no evidence to satisfy the causation requirement of standing yet the district judge who presided over the litigation "dismissed weighty challenges [from the Secretary repeatedly arguing that she was not the right defendant] as "hodgepodge" of "[p]reliminary [m]iscellanea."" *Jacobson*, at 1201 Moreover, the County Supervisors could not be enjoined because they were not made a party to the action. ((Walker, C.J.) (rejecting the Secretary's argument that "he has no relevant power over the county supervisors of elections") *Id*. at 1211.

In the present case, the district court, in Granting Attorney General's Motion to Dismiss, determined that, based on this Court's holding in *Jacobson*, "Florida's election laws are not traceable to nor redressable through Florida's Secretary of State," [hence] "the injuries Plaintiffs allege in the present case are neither traceable to nor redressable through Florida Attorney General." [ECF 50 at 2].

The lower court misinterpreted this Court's holding in *Jacobson* leading to two erroneous points of conclusion:

1. The court erred in holding that the Secretary of State was divested of powers over election laws and that by extension, the Attorney General lacked the requisite enforcement connection with the Act; and
2. that the Attorney General and the Secretary of State's powers are not meaningfully distinguishable holding that since the Secretary has no power over County Supervisors then the Attorney General has no power over State Attorneys.

a. <u>The District Court misread *Jacobson* and erroneously concluded that the Secretary of State lacked control over election laws and by extension the Attorney General lacked the requisite enforcement connection with the Act.</u>

Contrary to the lower court's holding in the present case, Florida's Secretary of State was not divested of her power over elections laws in *Jacobson*; she simply not the proper defendant under the challenged law. Even though the district court correctly established that the Florida Secretary of State is charged with general supervision and administration of the election laws," [ECF 50 at 2] the court then makes an inconsistent assertion that "Florida election laws are not traceable nor redressable through Florida's Secretary of State." *Id*. The lower court makes a conclusory jump by asserting that if the Secretary of State was not the proper defendant in *Jacobson*, then by extension, the Attorney General was not the proper party in the case at bar. [ECF 50 at 2].

The Eleventh Circuit Court in *Jacobson* clarified that the plaintiffs

challenged a law that specifically tasked the County Supervisors with the contested action, *not* the Secretary of State. Despite the fact that the Secretary of State had no connection with the challenged law in *Jacobson*, the holding does not support the lower court's conclusion that "election laws are not traceable . . . through the Florida Secretary of State" [ECF 50 at 2] nor does the holding in *Jacobson* eradicate a comprehensive body of case law establishing the Secretary of State's statutory authority over election laws. *See Socialist Workers Party,* at 1241 (Plaintiffs sought to enjoin the Secretary of State's enforcement of a state election law bonding requirement alleging that the law was unconstitutional. On appeal, the court found the Secretary had apparent authority to enforce the challenged requirement, and the case met Art. III justiciability requirements); *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. July 17, 1970) (The court enjoined the Florida Secretary of State from enforcing the provisions of a disputed electoral statute); *Scott v. Roberts,* 612 F.3d 1279, 1298 (11th Cir. 2010) (Court enjoined Secretary of State of Florida from enforcing the unconstitutional provisions of Florida Election Campaign Financing Act).

The holding in *Jacobson* does not in any way contravene the powers of the Secretary of State over election laws. More importantly, the case has no relation whatsoever to the Attorney General of Florida nor does the holding somehow eradicate the direct statutory connection to the Attorney General which charges

her office with enforcement of the Act. The Attorney General is directly charged with enforcement by serving as the head of law enforcement, through her Office of the Statewide Prosecutor to investigate and prosecute multi-circuit gambling offenses throughout the State of Florida as well as her direct superintendence and control over the several State Attorneys in discharging their duties. Fla. Stat. §§ 16.08, 16.56, 20.201.

b. The district court erred by holding that the Attorney General has no authority over the several State Attorneys.

The district court misinterpreted the holding in *Jacobson* to somehow conclude that the Attorney General's and Secretary of State's powers are not "meaningfully distinguishable." [ECF 50 at 2]. The lower court made this assumption based on the fact that the Secretary of State has statutory "general supervision and administration of the election laws," and the Attorney General has "superintendence and direction of the State Attorneys," [ECF 50 at 2] thereby implying that since the Secretary of State had no authority over the County Supervisors, then the Attorney General has no authority over the State Attorneys.

This conclusion is wholly inconsistent with the holding in *Jacobson* as well as Florida's statutory, constitutional, common and case law.

The District Court compared Fla. Stat. § 15.13 which provides:

> Administration of certain laws – The Department of State shall have general supervision and administration of the

> election laws, corporation laws and such other laws as are placed under it by the Legislature and shall keep record of same.

with Fla. Stat. § 16.08 which provides:

> Superintendence and direction of the state attorneys – The Attorney General shall exercise a general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the state attorneys, shall give them her or his opinion upon any question of law.

The lower court was mistaken by equating the terms "general superintendence and direction" with a lack of authority. The lower court held that "such supervisory authority is insufficient to render" [the Attorney General as a proper defendant.] [ECF 50 at 2]. However, a plain reading of the statutory terms governing the Attorney General's duties over the State Attorneys under Fla. Stat. § 16.08 verifies her authority.

In order to determine the meaning of the Attorney General's duties under Florida Statutory law with respect to the State Attorneys, the terms "general," "superintendence" and "direction" should be reviewed under their dictionary definitions and/or synonyms.

Black's Law Dictionary defines "management" control, superintendence, act of managing by direction or regulation, or administration, as management of. *Black's Law Dictionary* 865 (5th ed. 1979). "Direction" is defined as "the act of

governing; management; superintendence;" *Id*. at 414; and "control" is defined as "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." *Id*. at 298.

Thus, under the definitions of the statutory terms governing the Attorney General's duties, she has the power to control, regulate and govern the manner in which the state attorneys discharge their duties. See *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1318 (M.D. Ala. 2016) (finding Alabama Attorney General's "statutory authority to 'superintend and direct' criminal prosecutions statewide and the responsibility to instruct the [Alabama district attorneys]" made him subject to suit under § 1983 "in light of the criminal enforcement provision" of the challenged statute).

More importantly, the authority of the Attorney General over the State Attorneys is inapposite to that of the Secretary of State over the County Supervisors. Statutory law is clear, the Secretary of State, through the Department of State, has general supervision and administrative duties over the *election laws*, not the County Supervisors. The only means of control the Secretary has over the Supervisors is through coercive judicial process; she may bring "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 fact that the Secretary of State must resort to judicial process underscores her lack of authority over the

County Supervisors. They are independent and not subject to the Secretary's control whereas the Attorney General has overall control and authority over the State Attorneys in discharging their duties.

A precise reading of the holding in *Jacobson*, demonstrates that the Secretary of State was entitled to Eleventh Amendment immunity because the Florida statute plaintiffs sought to enjoin expressly tasked the County Supervisors with the challenged action, and *not* because the Secretary of State lacked enforcement over election laws. [ECF 50 at 2].

In the case at bar, the Attorney General not only has the power to direct the manner in which the State Attorneys discharge their duties, but she also has the power of appointment and removal of the Statewide Prosecutor who is charged by Florida law to investigate and prosecute gambling offenses state-wide; the types of violations which are contemplated by the Act. The Attorney General has direct connection with enforcement whether it is through the several State Attorneys or through the Office of the Statewide Prosecutor, thus making her a proper defendant under *Ex parte Young.*

3. **The Attorney General is the only indispensable party to this action and the lower court erred in holding that the Attorney General and the Secretary of State's powers are not meaningfully distinguishable, concluding that if the Secretary of State is entitled to Eleventh Amendment Immunity, then by extension, the Attorney General would be entitled to immunity from suit in the case at bar.**

Florida law clearly establishes that the sources from which the Attorney General and the Secretary of State's derive their powers are unmistakably dissimilar. The Secretary of State is bound by statutory authority. *See Advisory Opinion to the Ag Re Term Limits Pledge*, 718 So. 2d 798, 800 (Fla. 1998) (Florida statutes, not the Florida Constitution, establish the Secretary of State as the chief election officer of the state. Fla. Stat. § 97.012 (1997)).

The office of the Attorney General of Florida, by comparison, "wields broad statutory and common law authority to enforce Florida law." [ECF 46 at 23]. The office of Attorney General is older than the United States. *Shevin, at* 268. Unlike the Secretary of State, the powers and duties of the office of the Attorney General are so numerous and varied that it has not been the policy of the Legislature of the States to specifically enumerate them; that a grant to the office of some powers by statute does not deprive the Attorney General of those belonging to the office under the common law. *State ex rel. Landis v. S. H. Kress & Co*., 115 Fla. 189, 199-200, (Fla. 1934).

As the chief law officer of the State, it is his duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time. *Id*. Florida case law instructs that the Attorney General is the "only truly indispensable party to an action attacking the constitutionality of Florida legislation." *Brown v. Butterworth*,

831 So.2d 683, 689–90 (Fla. 4th DCA 2002) (emphasis added). Additionally, under Fla. Stat. § 86.091,

> When declaratory relief is sought . . . if [a] statute is alleged to be unconstitutional, the Attorney General . . . shall be served with a copy of the complaint and be entitled to be heard.

The Attorney General mistakenly claims that the interests of the citizens of this state are too "attenuated" [ECF 48 at 6] for her to appear on behalf of the state to defend its actions in implementing the Act. But pursuant to Florida law, she has a duty by virtue of her office to act as the legal guardian of the people to either declare the Act unconstitutional or defend its constitutionality. The office of the Attorney General is a public trust. *Shevin,* at 270 It is a legal presumption that [s]he will do h[er] duty . . . [for] the protection of the people . . . in matters of public concern. *Id*. She is the attorney and legal guardian of the people, or of the crown. *Id*. .

In the present case, implementation of the Act will have a devastating and irreparable financial impact on the State of Florida and its citizens. This is a matter of great public concern where thousands of Florida citizens will face absolute devastation of their businesses, livelihoods and heritage.

The Act's constitutionality has never been vetted despite the Attorney General holding a seat on the Constitution Revision Commission. Plaintiffs

"ha[ve] plausibly pled enough in [their] [C]omplaint to get into the courthouse and be heard." *See Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n., Inc.*, 942 F. 3d 1215, 1252 (11th Cir. 2019). Plaintiffs seek pre-enforcement review and injunctive relief and the Attorney General's office is the proper defendant as she has the enforcement connection as well as the ability to enjoin other state actors from enforcement thereof.

a. Plaintiffs' injuries are irreparable and can be traced directly to the actions of the office of the Attorney General while holding a seat on the Commission thus satisfying the higher threshold of Article III standing vs. *Ex parte Young.*

Plaintiffs have established even a heightened pleading standard under Article III in their challenge to the constitutionality of the Act. Article III standing and the proper defendant under *Ex parte Young* are "[s]eparate[]" issues. *Lewis v. Governor*, 944 F.3d 1287, 1295 (11th Cir. 2019). To be a proper defendant under *Ex parte Young*, the state officer in question "must, at a minimum, have *some* connection with the enforcement of the provision at issue." *Id.* (quoting *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998)). "Unless the state officer has *some* responsibility to enforce the statute or provision at issue, the 'fiction' of *Ex parte Young* cannot operate." *Id.* at 859 (quoting *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999)).

Ex parte Young, requires only *some* connection with enforcement while

Article III standing requires a plaintiff to prove "they have suffered an injury in fact which is fairly traceable to the defendant's conduct and which is likely to be redressed by a decision in their favor." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "[T]here is a common thread between Article III standing analysis and *Ex parte Young* analysis[.]" (*Planned Parenthood of Idaho, Inc. v. Wasden*, 3976 F.3d 908, 919 (9th Cir. 2004); *Cressman v. Thompson*, 719 F. 3d 1139, 1146 n.8 (10th Cir. 2013) "The requirements of *Ex parte Young* overlap significantly with the last two standing requirements – i.e., causation and redressability." *Doe v. Holcomb*, 883 F. 3d 971, 975-76 (7th Cir. 2018).

b. <u>Plaintiffs injuries are traceable to and are redressable by the Attorney General's Office thus satisfying a heightened Article III pleading standard.</u>

Here, the injury inflicted upon Plaintiffs is directly traceable to the actions of the Attorney General in connection with the passage of the Act. Most importantly, Plaintiffs injuries would be redressed by a judgment by the Attorney General declaring the Act unconstitutional and enjoining its enforcement. *See Ga. Latino All. v. Governor of Ga*, 691 F.3d 1250, 1260 (11th Cir. 2012) (plaintiff's injuries are directly traceable to the passage of the challenged provision and would be redressed by enjoining each provision); *See also Reprod. Health Servs.*, at 1319 (finding redressability element satisfied where "an order can be fashioned to declare the challenged portions of the Act

unconstitutional and/or enjoin the defendants from enforcement against plaintiffs.) *See also Jacobson,* at 1209 (The court may enjoin executive officials from taking steps to enforce a statute from a favorable declaratory judgment.) *But see Lewis,* at 1299 (the Eleventh Circuit rejected plaintiffs' assertion that the Attorney General was the proper party because the challenged statute contemplated only private lawsuits between employers and employees.)

During the 2017-18 CRC, Commission Member, Attorney General, became intimately involved with the passage of the Act by teaming up with the two out-of-state special interest groups that hijacked the CRC to promote Amendment 13; Grey2K and HSUS against the greyhound racing community. [ECF 47 ¶¶ 33, 34, 38, 35, 36, 37, 38, 39].

The Attorney General's office officially endorsed the Act and actively participated in the media storm, attending highly publicized fundraisers and galas with political heavyweights such as Lara Trump and Matt Gaetz, all funded by the proponents of the Act; out-of-state special interest groups Grey2K and HSUS. [ECF 47 at ¶¶ 39] While the Attorney General is the only state actor required to hold a seat on the commission, she never vetted the amendment for constitutionality prior to its placement on the 2018 general ballot; [ECF 47 ¶¶ 34, 55] and rejected the opportunity to visit greyhound racing facilities and explore opposing viewpoints of the Act. [ECF 47 ¶ 15]. The Attorney General's

office placed a heavy thumb on the scales by throwing the full weight and support of the office behind getting Amendment 13 passed. The Attorney General cannot now escape her duty to defend the constitutionality of the Act that her office actively endorsed. Plaintiffs assert that their injuries are a result of the Act and, as particularly relevant here, directly traceable to the Attorney General's conduct with respect to the passage of the Act.

"In the context of this pre-enforcement challenge to a legislative enactment, the causation element does not require that the defendants themselves have 'caused' [plaintiffs'] injury by their own acts or omissions in the traditional tort sense; rather it is sufficient that the 'injury is directly traceable to the passage of [the Act].'" *Reprod. Health Servs.,* at 1318 (emphasis added). But here, Plaintiff's injuries are directly traceable to the defendant's actions, and "not the result of the independent action of some third party not before the court." *Lewis*, 944 F.3d at 1296. The Attorney General used her office to fight for the out-of-state lobbyists in derivation of Floridians' rights, thus causing their impending injuries, and therefore, satisfying an even heightened pleading standard.

Here, Plaintiffs' alleged current and future injuries associated with the passage of the Act are directly traceable to the Attorney General because of her actions in connection to the passage of the Act. Despite the fact that the *Ex parte Young* pre-enforcement pleading standard does not require traceability to the

state actor's actions to prove the causal connection, the Attorney General's actions in this case are directly traceable to Plaintiffs' injuries by her conduct associated with the passage of the Act thereby making her a proper party even under the heightened standing requirements under Article III, a *fortiori* she is the proper party under the *Ex parte Young* doctrine.

CONCLUSION AND PRAYER FOR RELIEF

Plaintiffs pray that this Court reverse the district court's order dismissing Florida's Attorney General for lack of subject matter jurisdiction. The Attorney General has the requisite connection to enforcement of the challenged Act through her Office of the Statewide Prosecutor, her direct superintendence of the several State Attorneys and as the head of the Florida Department of Law Enforcement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six (6) copies of the foregoing Brief of Appellant were mailed to Clerk of Court, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303, via Federal Express on September 7, 2020 and on the same day, the foregoing Brief of Appellant was electronically filed through the Eleventh Circuit Court of Appeals' ECF System, and one copy was emailed to the following attorneys at the following email addresses, and mailed via U.S. Mail, first class postage prepaid to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), undersigned counsel certifies that this brief complies with the Court's type-volume limitation. The brief is typed in proportionally-spaced Times New Roman 14-point font or larger, double- spaced, and, based upon the word processing counter of Word 2003 or 2007 including the text, footnotes, headings, and quotations using the formula stated in Fed. R. App. P. 32(a)(7)(B)(iii), the word count is 10,945.