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

REPLY 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 there is no Appellant in this action that has a parent corporation and there is no publicly held corporation that owns any stock of any Appellant.

Type

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

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I. INTRODUCTION

Plaintiffs, Support Working Animals, et al., [hereinafter, "S.W.A.", "Plaintiffs" or "Appellants"] asserted a pre-enforcement challenge to Fla. Const. art. X section 32 [hereinafter, the "Act" or "Amendment 13"] which seeks to prohibit persons in this state from wagering money on live greyhound races occurring in the state of Florida. Plaintiffs originally filed its complaint against the Governor, Secretary of State and the Attorney General [hereinafter, the "A.G."] in the Southern District Florida; subsequently transferred to the Northern District Florida.

In an in-depth analysis on Defendants' Motion to Dismiss, the lower court held that the Plaintiffs had established standing, but issued a dismissal as to the Governor and the Secretary of State based on sovereign immunity. DE 46. In the same ruling, however, the court held that the A.G. had sufficient connection to enforcement of the challenged Act to make her a proper defendant. *Id*.

Two days after the lower court's dismissal as to the Governor and the Secretary of State, this Court ruled on *Jacobson;* reversing the Northern District Court's holding that the Secretary of State was a proper party to a suit challenging a Florida law. *Jacobson v. Fla. Sec'y,* 957 F.3d 1193 (11th Cir. 2020) vacated 974 F.3d 1236 (11th Cir. 2020). Plaintiffs thereafter filed their Amended Complaint this time only against the A.G. The lower court then categorically reversed its earlier decision

that the A.G. was the proper defendant based wholly upon this Court's ruling in *Jacobson*, and dismissed under 12(b)(1) holding that Plaintiffs lacked "standing as to Defendant" A.G. DE 50 at 3.

This appeal follows based purely on the issue as to whether or not the A.G. is the proper defendant in this pre-enforcement constitutional challenge for injunctive relief.

II. ARGUMENT

A. DESPITE THE A.G.'S ARGUMENTS, S.W.A. HAS ESTABLISHED ARTICLE III STANDING TO PURSUE THEIR CLAIMS

The A.G. has continually misapprehended Article III requirements for a pre-enforcement challenge to a law for injunctive relief. Perhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement is that of standing. *Alabama Power Co. v. U.S. Dept. of Energy*, 307 F.3d 1300, 1308 (11th Cir. 2002).

In *Reproductive Health*, the court held that to satisfy the requirements for Article III standing to challenge an alleged unconstitutional law, the plaintiffs must establish that "(1) [they have] suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the operation of the [statute]; and (3) a favorable judgment is likely to redress the injury." *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1311 (M.D. Ala. September 2, 2016).

S.W.A. has established the requisite elements of standing and "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).

i. S.W.A. Has Established the Requisite "Injury In Fact"

A plaintiff must establish that she has suffered an "injury in fact" — that is, "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or *imminent*, not conjectural or hypothetical." (emphasis added) *Reprod. Health Servs. at* 1311, *14-15, (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

S.W.A. includes individuals and entities involved in the greyhound racing industry in the state of Florida; some of whom operate third and fourth generation businesses. S.W.A. has established a fundamental property interest which will be implicated by enforcement of the Act. If the challenged Act is enforced, S.W.A. will lose their constitutionally protected right to use their own personal property for its specific purpose; this historic industry will cease to exist; wholly erasing the legacy and heritage of a hundred-year-old sport. The Plaintiffs/Appellants stand to lose everything that they have worked for; most will have no other form of income when the challenged law becomes enforceable thereby making their industry extinct.

Many will not have the financial wherewithal to move from the state of Florida to another state, leaving no recourse except to rely on the state for income.

The lower court, in its comprehensive 55-page ruling, held that Plaintiffs had "sufficiently established standing to bring their claims." DE 46 at 9. Under Florida law, Plaintiffs possess a cognizable Fifth Amendment property interest in their personal property, including their dogs and other dog racing-related personal property. DE 46 at 28. Plaintiffs' "economic loss resulting from their impending inability to operate businesses in the pari-mutuel dog racing industry" establish the injury-in-fact. *Ford v. Strange*, 580 F. App'x 701, 710 (11th Cir. 2014) (inferring economic harm to employees and associated businesses caused by state law eliminating gambling operations.) DE 46 at 6. *See Adinolfe v. United Techs. Corp*, 768 F.3d 1161, 1172 (11th Cir. 2014) ("Economic harm . . . [is] a well-established injury[y]-in-fact under federal standing jurisprudence.") DE 46 at 9.

Most importantly, S.W.A. has repeatedly asserted that the Act fails to advance a legitimate government interest. DE 49 at 12, 13, 14, 16, 25. The putative "legitimate purpose" of the Act is to protect Plaintiffs' personal property at the expense of depriving Plaintiffs of their right to use that very same property for its specific purpose in their trade. DE 24 at 3.

S.W.A.'s injury in this case will not occur at "some indefinite future time, instead, the date is definitely fixed in the Act and will occur on January 1, 2021. *See ACLU*

of Fla., Inc. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1194 (11th Cir. 2009) (standing shown in pre-enforcement challenge where the claimed injury was "pegged to a sufficiently fixed period of time"); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.") DE 46 at 7

As the lower court averred in its ruling on Defendants' Motion to Dismiss, Plaintiffs have established "a realistic danger of sustaining a direct injury as a result of [Amendment 13]'s operation or enforcement that is reasonably pegged to a sufficiently fixed period of time and which is not merely hypothetical or conjectural." *See Fla. ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1147 (N.D. Fla. 2010) (citation and quotation omitted). DE 46 at 7

ii. S.W.A. has Established the Requisite Traceability

The A.G. urges this Court to consider a misapplied analysis of the second element of Article III standing. She posits the apocryphal contention that S.W.A.'s injury must be fairly traceable to the A.G. Appellee Br. at 16. Here, however, S.W.A. asserts a pre-enforcement challenge and it is well established in the Eleventh Circuit that to satisfy the second element of Article III standing, a plaintiff must establish

that the injury is "fairly traceable to the *operation of the [statute]*." (emphasis added) *Harrell v. Fla. Bar*, 608 F.3d 1241, 1253 (11th Cir. 2010).

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.]* (emphasis added). *Reprod. Health Servs.,* 204 F. Supp. 3d 1300, 1318; (quoting *Georgia Latino Alliance for Human Rights v. Governor of Ga.,*691 F.3d 1250,1259 (11th Cir. 2012)). DE 46 at 8.

The Supreme Court and the Eleventh Circuit, have not hesitated to consider pre-enforcement impending and more than a hypothetical possibility. Because the issues in this case are fully framed, [n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality of [the statute]. *Florida v. United States HHS*, 716 F. Supp. 2d 1120, 1150 (N.D. Fla. October 14, 2010).

S.W.A. has repeatedly demonstrated the irreparable damage to their businesses, livelihoods and heritage if the Act is enforced; which will effectively prohibit them from their fundamental right to use their own real and personal property for its specific purpose. When, as here, S.W.A. have filed a pre-enforcement constitutional challenge to the Act, the injury requirement may be satisfied by establishing a

realistic danger of sustaining *direct injury as a result of the statute's operation or enforcement.*") (emphasis added). *Georgia Latino Alliance at* 1257–58.

iii. Plaintiffs' Injuries Will Redressed by An Order Declaring the Act Unconstitutional

The A.G. continues to misunderstand the redressability requirements under a pre-enforcement challenge by suggesting that S.W.A. must demonstrate that the A.G. must have the power to redress their injuries. Appellee Br. at 19. The third element of standing is redressability. A plaintiff must establish that a *favorable judgment* is likely to redress the injury." (emphasis added) *Reprod. Health Servs., at* 1318; (quoting *Harrell,* at 1253 (11th Cir. 2010)).

S.W.A. urges this Court to follow the lower court's previous holding that "the A.G. has the authority to enforce Amendment 13." DE 46 at 8. "Plaintiffs' injuries are directly traceable to the passage of Amendment 13," *Id*. . . . [and they] suffer "a realistic danger of sustaining direct injury as a result of [the A.G.'s] enforcement of the Act [which is] fairly traceable to the operation of the statute." *Id*. "Each injury is directly traceable to the passage of [the Act] and would be redressed by enjoining each provision."). *Id*. at 7-8.

The lower court aptly pointed out, "the fact that the [A.G.] by virtue of her 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 24. Accordingly, even though the Act

itself does not specifically direct the A.G. with enforcement, she has the requisite authority, by virtue of her office, to enforce the Act. Consequently, as the lower court noted, S.W.A.'s injuries would be redressed by an order of a court of competent jurisdiction issuing an injunction to enforcement. *Id*. at 8.

iv. The A.G. Concedes That She Has Direct Connection to the Challenged Law

The A.G. does not dispute the fact that she has a direct connection to enforcement of the Act through her Office of the Statewide Prosecutor; responsible for prosecuting gambling offenses statewide, the type of offense contemplated by the Act. Fla. Stat. § 16.56. Instead, she argues that it is "merely speculative." Appellee Br. At 17.

The A.G. once again misdirects the court by continually citing to *Lewis* which is inapposite to the case at bar. *Lewis v. Governor*, 944 F.3d 1287 (11th Cir. 2019) In *Lewis*, the Court held that the Alabama General Attorney was held to be immune from suit because **the challenged law contemplated only private enforcement.** (emphasis added). Appellee Br. At 12, 13, 17, 18, 20, 48, 50, 51. The lower court indicated that the concerns raised by the Eleventh Circuit in *Lewis* are not present here. DE 46 at 24. "Here, unlike the challenged law in *Lewis*, the Act does not provide a private right of action." *Id*.

The case at bar is however, indistinguishable from *Reproductive Health*, where the court held that plaintiffs had established their injury was fairly traceable to the

operation of the statute and that based on [the A.G.'s] authority to superintend and direct prosecutions, plaintiffs demonstrated a realistic danger of sustaining direct injury as a result of the defendants' enforcement of the Act. *Reprod. Health Servs., at* 1318.

Here, S.W.A. has not only cited to the statutory authority of the A.G. to superintend and direct the State Attorneys in the manner in which they discharge their duties, (Appellant Br. At 26, 44-45) but also have established the direct connection to enforcement of the Act through the A.G.'s Office of the Statewide Prosecutor who is responsible for prosecuting gambling offenses statewide. *Id* at 24, 26, 28, 35-36, 42, 45. The *Reproductive Health Court* found the requisite connection to enforcement of the challenged law **only** through the A.G.'s authority to superintend and direct prosecutions, *a fortiori* the A.G. here should be held to be the proper defendant for not only her authority to superintend and direct the State Attorneys **but also** her direct authority over the Office of the Statewide Prosecutor responsible for prosecuting gambling offenses; the type of offenses the Act contemplates as well as her duty to serve as the head of the Florida Department of Law Enforcement. Appellant Br. at 25, 28, 36.

B. THE A.G. INCORRECTLY CLAIMS S.W.A. HAS RAISED A NEW ISSUE FOR THE FIRST TIME ON APPEAL

Despite the A.G. conceding that she has a direct connection to the enforcement of the Act through her Office of the Statewide Prosecutor; thus, satisfying the *Ex parte Young* requirement that a state actor have "some" connection with the challenged law, she instead argues that S.W.A. has waived the argument. Appellee Br. at 23. Even though the A.G. correctly claims that an **issue** raised for the first time in an appeal will not be considered absent exceptional conditions, *Id*., S.W.A. contends that this is not an issue raised first time on appeal.

The only issue in this appeal is whether the A.G. is a proper Defendant based on a pre-enforcement challenge to an allegedly unconstitutional law. The A.G. attempts to misdirect this Court by claiming that S.W.A.'s proffer of state and constitutional law in support of their argument is a new issue raised for the first time in this Court. However, the issue regarding the A.G.'s powers are now and have always been the very essence of S.W.A.'s argument.

The A.G. cites *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1326-1327 (11thCir. 2004) to support their proposition that S.W.A.'s supporting evidence constitutes an issue raised first time on appeal. In *Access Now* the Court was unable to reach the merits of the plaintiffs' claim because the appellate court was faced with a wholly different case than was brought to the district court. *Id.* at 1326-1327. The *Access Now* plaintiffs asserted a Title III claim that Southwest.com, a

website, was itself a place of public accommodation and the district court held that according to "the plain and unambiguous language of the statute and relevant regulations internet websites are not included in the definitions of 'places of public accommodation.'" *Id.* at 1318. On appeal, however, Plaintiffs argued for the first time that Southwest Airlines itself [is a place of accommodation because it] maintains many physical locations throughout the United States. *Id.* at 21. Plaintiffs wholly abandoned their argument that Southwest.com, the website was a "place of accommodation. *Id.* at 1329. These factual averments were never made in district court. *Id.*

Here, unlike *Access Now*, S.W.A. has consistently argued that the A.G. is the proper defendant in this case. The powers and duties of the office of the A.G. in Florida are so numerous and varied that it has not been the policy of the Legislature to specifically enumerate them. *State ex rel. Landis v. S. H. Kress & Co.*, 115 Fla. 189, 199-200, (Fla. 1934). It would therefore be impossible to cite each and every power belonging to the A.G., especially whereas here, the lower court clearly had established that the A.G. was the proper defendant under this pre-enforcement challenge. DE 46

S.W.A. has repeatedly highlighted the A.G.'s statutory powers under Florida. Statutes Chapter 16 [DE 49 at 4, 5] and that "Florida case law instructs that the A.G. is the only true indispensable party to an action attacking the constitutionality of

Florida legislation. *Brown v. Butterworth*, 831 So.2d 683, 689-90 (Fla. 4th DCA 2002) Appellant Br. 36-37. S.W.A. has not raised a new issue in this Court and therefore, the A.G.'s argument should regarding such should be dismissed.

C. EVEN IF THIS COURT FINDS THAT FLORIDA LAW IS A NEW ISSUE ON APPEAL, THIS COURT SHOULD CONSIDER THIS TYPE OF SUPPORTING EVIDENCE BECAUSE IT FITS THE EXCEPTIONS TO THE RULE

While it clearly established that an appellate court will not consider an issue raised first time on appeal, the decision whether to consider an argument first made on appeal . . . is left primarily to the discretion of the courts of appeals to be exercised on the facts of the individual cases. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984). *See also United States v. Southern Fabricating Co.,* 764 F.2d 780, 781 (11th Cir.1985) (observing that "the decision whether to consider" an argument raised for the first time on appeal is left to the appellate court's discretion.") The courts of appeals have identified certain exceptional circumstances in which it may be appropriate to exercise this discretion and deviate from this rule of practice. *Dean Witter at 360.*

i. An appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. *Id.*

S.W.A.'s opening brief underscores the power of the A.G.'s under Florida statutory, constitutional, and common law including specific grants of authority over the Office of the Statewide Prosecutor under Fla. Stat. § 16.56 and her statutory duty to serve as head of law enforcement under Fla. Stat. § 20.201(1). Appellant Br. At 14, 15, 25, 26, 32.

Here, S.W.A. has merely cited once again to the authority of the A.G. under Fla. Stat. Chapter 16. The Eleventh Circuit Court of Appeals succinctly emphasizes that federal courts take judicial notice of the laws of every state in the Union; this simply means that one relying upon the law of a foreign state **need not formally plead** or prove it, (emphasis added). *Continental Technical Services, Inc. v. Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991). The United States Supreme Court has held that the law of any State of the Union is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Lamar v. Micou*, 114 U.S. 218, 223, 5 S. Ct. 857, 859, 29 L. Ed. 94, 95. *See Covington Drawbridge Co. v. Shepherd,* 61 U.S. 227, 231 (1858) (The court found that the statute under which the company was incorporated was a public law, of which the court and the circuit court were bound to take judicial notice, *without its being pleaded or offered in evidence*) (emphasis added). Here, S.W.A. will suffer a grave

miscarriage of justice if this Court dismisses this supporting evidence because they will be denied an opportunity to challenge a patently unconstitutional law. S.W.A. relies on the Supreme Court's instruction to the federal courts to take judicial notice of S.W.A.'s pure law under Florida Statutes Chapter 16 regarding the powers of the A.G.

ii. The rule may be relaxed where the appellant raises an objection which he had no opportunity to raise at the district court level. *Dean Witter at 360*

The lower court had previously dismissed the case as to the Governor and the Secretary of State, but held that the A.G. was the proper defendant in its expansive 55-page ruling, wherein the court laid out a thorough analysis of the A.G.'s statutory, constitutional and residual common law powers concluding that she was the proper defendant in this constitutional challenge. DE 46 at 20-26.

Following that order of dismissal, this Court ruled on *Jacobson* effectively reversing a case from Northern District Court. *Jacobson*, 957 F.3d 1193 (11th Cir. 2020), vacated 974 F.3d 1236 (11th Cir. 2020). In *Jacobson*, the lower court held that the Secretary of State was a proper defendant where plaintiffs challenged a procedural rule regarding the placement of candidates' names on the voting ballot; a function which was explicitly charged to the Supervisors of Elections who were not made a party to the suit. Even though the Supervisors were not named as defendants, the Northern District issued a ruling that the challenged law was

unconstitutional and issued an injunction against not only the Secretary but also against the Supervisors, even though they were not made party to the suit. *Id*., at 1212. Appellant Br. At 39.

On appeal, the Eleventh Circuit Court held that the injunction was invalid as to the Supervisors because they were not a party to the suit. *Id.* Additionally, the Secretary had no power to enforce the challenged law because that function was specifically granted to the Supervisors of Elections. *Jacobson,* 974 F.3d 1236 (11th Cir. 2020). The Court further held that even if the Secretary of State was a proper defendant, the plaintiffs had demonstrated no injury-in-fact as there is no property right in the outcome of an election; only in the right to cast your vote. *Id.*

Here, the lower court properly held in its first ruling on the Defendants' Motion to Dismiss that the A.G. was the proper defendant under the circumstances. DE 46. Especially here, where the challenged law fails to provide enforcement provisions; stating that the A.G. had sufficient "connection" to the challenged act through her superintendence and direction over the several state attorneys in the manner in which they discharge their duties. DE 46 at 20. *See Ex parte Young,* 209 U.S. 123,158 (1908) (sufficient connection might exist by reason of the general duties of the officer to enforce . . . [the challenged law] as a law of the state")

Surprisingly, however, the lower court, relying on a misunderstanding of *Jacobson*, wholly reversed its earlier decision and summarily dismissed as to the

A.G. which. could not have been anticipate nor argued in light of the court's previous ruling.

S.W.A. does not raise a new issue; they simply cite to the laws of the state of Florida to demonstrate proof that the A.G. has the requisite connection to enforcement of the Act through her Office of the Statewide Prosecutor who is responsible for prosecuting gambling offenses statewide and through her duty to serve as the head of the Florida Department of Law Enforcement. Appellant Br. At 24-25. S.W.A. has consistently presented evidence under Florida Statutes Chapter 16 to demonstrate the powers of the A.G. in its Response to Defendants' Motions to Dismiss, (DE 49 at 4, 5). S.W.A. has not raised a new issue for the first time on appeal but if this Court determines otherwise, it should still consider this supporting evidence as Plaintiffs had no opportunity to expound on the A.G.'s powers in light of the court's previous ruling establishing that she was the proper defendant.

iii. The rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake, where the proper resolution is beyond any doubt, and the issue presents significant questions of general impact or of great public concern. *Dean Witter* at 360

Here, the Act and its impact on S.W.A. has been ignored by all state actors, including the Governor, the Secretary of State and the Attorney General, the Florida Legislature and the federal court. Enforcement of the Act will have a devastating impact, not only on the appellants before this Court, but also thousands of

unrepresented Floridians who face absolute financial annihilation as a direct result of enforcement of the Act. Even more outrageous is the fact that they have been deprived access to the courts for lack of a proper defendant. The state of Florida, through the Constitution Revision Commission [hereinafter, the "CRC"], is responsible for this legislation which bypassed Florida's legislature. The CRC abrogated its power to draft the enforcement provisions leaving that duty to Florida's legislative representatives. The Florida Legislature may never draft such penalties, as they spent the 2019 session drafting bills to abolish the very entity which brought about this law; the CRC. Appellant Br. at 11, 12. DE 47 at 11, 14, 15.

The elected representatives of Florida have completely distanced themselves from this law; claiming to have no connection to enforcement. It is unconscionable that countless Floridian's livelihoods will be severely impacted and no state actor will defend the CRC's actions.

The appellate court is justified in resolving this issue as to whether the A.G. has a direct connection to the enforcement of the Act through her Office of the Statewide Prosecutor as well as serving as the head of Florida Department of Law Enforcement because of its significance to the state of Florida, substantial injustice is impending and it is without doubt that this Court will find the A.G.'s requisite connection to enforcement of the Act for purposes of this pre-enforcement challenge.

D. THIS COURT SHOULD AFFIRM THAT THE A.G. IS THE PROPER DEFENDANT BASED ON THE RECORD

The A.G. contends that this Court can affirm based on the record of this case. Appellee Br. At 11. *See Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020) ("We can affirm on any basis supported by the record, regardless of whether the district court decided the case on that basis.").

The lower court issued its extensive 55-page ruling in regard to the inherent powers of the A.G. finding that "her authority to superintend and direct the state attorneys constitutes a sufficient connection to the enforcement of the forthcoming statutory penalties for violations of Amendment 13 for purposes of *Ex parte Young*. DE 20.

The court aptly pointed out that the A.G. "concede[d], she is Florida's chief legal officer and is vested with broad authority to act in the public interest . . . to defend statutes against constitutional attack. DE 46 at 21. Additionally pointing out that the A.G. "has the statutory duty to appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested. DE 46 at 21 The court went on to assert that "even absent an express grant of statutory authority, the A.G. has "the common law power to institute lawsuits to protect the public interest. See *Teltech Sys., Inc. v. McCollum*, No. 08-61664-CIV (S.D. Fla. June 30, 2009); *see also 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 Nebraska constitutional amendment invalidating same-sex marriages because the Attorney General possessed "broad powers to enforce the State's constitution and statutes," DE 46 at 21.

The lower court properly held that the A.G. was the proper defendant under *Ex parte Young* in its previous ruling. DE 46. This Court should affirm that the A.G. is the proper defendant here based on the record.

E. A.G. IMPERMISSIBLY BRIEFS ISSUES NOT BEFORE THE COURT

The lower court's order dismissing S.W.A.'s Second Amended Complaint, held that Plaintiffs lack standing *as to Defendant, A.G.* (emphasis added) DE 50. *See Thomas v. U.S. Postal Serv.*, 364 F. App'x 600, 601 n.3 (11th Cir. 2010) ("[A] dismissal on sovereign immunity grounds should be pursuant to Rule 12(b)(1) because no subject-matter jurisdiction exists.").

When a district court has pending before it both a 12(b)(1) motion and a 12(b)(6) motion, the generally preferable approach, is for the court to find jurisdiction for a federal cause of action under 12(b)(1) and then decide the 12(b)(6) motion. *Jones v. State of Ga.*, 725 F.2d 622, 623 (11th Cir. 1984). *See Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) (where "a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack **before** addressing any attack on the merits."

(citing *Hitt v. City of Pasadena,* 561 F.2d 606, 608 (5th Cir. 1977)). In the present case, the lower court ruled on the A.G.'s 12(b)(1) arguments holding that she was entitled to sovereign immunity. DE 50. *See Thomas v. U.S. Postal Service,* 364 Fed. App'x 600, 601 (11th Cir. 2010) ("[A] dismissal on sovereign immunity grounds should be pursuant to Rule 12(b)(1) because no subject-matter jurisdiction exists." (citing *Bennett v. United States,* 102 F.3d 486, 488 n.1 (11th Cir. 1996)); *See also Harris v. Bd. of Trs. Univ. of Ala.*, 846 F. Supp. 2d 1223, 1231 (N.D. Ala. February 27, 2012) ((“Rule 12(b)(1) of the Federal Rules of Civil Procedure provides a vehicle for the dismissal of actions for lack of subject matter jurisdiction.)

The A.G. attempts to misdirect this Court's attention by arguing the merits of S.W.A.'s claims; an issue not properly before this Court. On a motion to dismiss, the court must accept all the alleged facts as true and take all the inferences from those facts in the light most favorable to plaintiff. *United States HHS*, 716 F. Supp. 2d at 1150-1151; (quoting *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994)). Although the Federal Rules do not require plaintiffs to set out in detail the facts on which they base their claim -- Rule 8(a) only requires a "short and plain statement" showing that the plaintiff is entitled to relief -- the complaint's "factual allegations must be enough to raise a right to relief above the speculative level." *Id*.

At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that

general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. 555, 561. *See United States HHS* at 1144 ("mere allegations of injury" are sufficient to withstand a motion to dismiss based on lack of standing. (quoting *Dep't of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 329, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999)); *accord Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance,* 304 F.3d 1076, 1081 (11th Cir. 2002) (noting "at the motion to dismiss stage [the plaintiff] is only required to generally allege a redressable injury caused by the actions of [the defendant] about which it complains"). *Id*.

The lower court, in its prior ruling, held that Plaintiffs ha[d] standing, their claims [we]re ripe for review, and the Eleventh Amendment d[id] not bar Plaintiffs' claims against the A.G. DE 46 at 5. *See Cambridge Christian,* 942 F.3d at 1252. (Plaintiffs have established the requisite elements of standing and have plausibly pled enough in their complaint to get into the courthouse and be heard.) Surprisingly, in the lower court's subsequent ruling on Defendant's Motion to Dismiss, the court held that the A.G. was not a proper defendant based on this Court's holding in *Jacobson v. Fla. Sec'y* of State. DE 50 at 1-2.

Even if the lower court had dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), dismissal would have been premature as S.W.A.'s complaint raised fact-intensive questions regarding a violation of civil rights under

42 U.S.C. § 1983 implicating the Fifth, Tenth, and Fourteenth, Amendments, the Equal Protection Clause and Equal Protection/Unconstitutional Animus, Impairments of Contracts, and Violation of Substantive Due Process.

For example, in *Cambridge Christian* Plaintiffs brought a variety of claims arising under the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions. *Cambridge Christian*, 942 F.3d at 1222. The trial court dismissed the entirety of Cambridge Christian's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Id*. The Eleventh Circuit reversed the district court, holding that it was too quick to dismiss all of Cambridge Christian's claims out of hand, holding that taking the complaint in a light most favorable to the plaintiff, their claims had been adequately and plausibly pled. *Id.* Further concluding that there were too many open factual questions to say with confidence that the allegations could not have been proven as a matter of law. *Id.* at 1223.

The Cambridge Christian plaintiffs raised heavily fact-intensive questions under free speech claims similar to the present case where S.W.A. has capably pled putative violations of their fundamental rights. The lower court held that Plaintiffs h[ad] sufficiently established standing to bring their claims at this stage of the proceedings as discussed supra. DE 46 at 9.

Here, the A.G. impermissibly goes well beyond the four corners of the complaint. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 624, 109 S. Ct. 2037, 104 L. Ed.

2d 696 (1989) (standing does not "'depen[d] on the merits of [a claim]'"). *Davis v. United States*, 564 U.S. 229, 249 (2011). Many fact issues remain to be considered especially given the fact that while the other Florida pari-mutuel license holders (thoroughbred racing, harness racing and jai-alai) are governed under the explicit grant of police powers to protect the health, safety and welfare [of the public] under Fla. Stat. §§ 550.09511, 555.09512, 555.0915, **no such express grant of police powers governs the greyhound racing industry. Contrary to the A.G.'s claims, this specific grant of police power does not exist.** Appellee Br. at 31-33. Even after Plaintiffs had briefed on this issue in their Response in Opposition to A.G.'s Motion to Dismiss, the A.G. knowingly continues to assert this erroneous claim. DE 48 at 14, 15,16,17,18,19, 20, 22.

Moreover, S.W.A. has not asserted a claim for compensatory relief, instead they have asserted a pre-enforcement challenge to the validity of the Act. Plaintiffs have asserted that there is no legitimate public purpose for the Act. DE 49 at 1, 16, 18, 24. *See Electronic Data Systems Corp. v. Twp*. Of *Flint,* 253 Mich. App. 538, 549, 656 N.W. 2d 215 (2002) (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.)

S.W.A. has adequately pled a constitutionally protected fundamental right to utilize their personal and real property which will be violated by enforcement of the

Act, and the lower court concurred. DE 46 at 6. 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. (Ct. App. June 30, 2005).

S.W.A. has repeatedly asserted that the Act is an illegitimate use of police power and the government has thus far failed to bear the burden of proving that any legitimate government interest exists in depriving one of the right to utilize their own personal property for its specific purpose in order to protect that very same personal property.

Instead of carrying her burden to prove that there is a legitimate government interest advanced by the Act, she continues to ignore that the Act impinges a fundamental right and repeats a baseless conclusion that the rational basis test should apply. Appellee Br. at 21, 22. Similar to the plaintiffs in *Cambridge Christian*, the Eleventh Circuit reversed the district court's dismissal of plaintiff's complaint because there were too may open factual questions, this Court should dismiss A.G.'s Rule 12(b)(6) argument as this issue is not squarely before this Court on appeal and S.W.A. here has raised fact-intensive inquiries that remain unanswered.

Moreover, the Attorney General continues to conflate a claim for compensation under the Takings Clause and a pre-enforcement constitutional attack seeking injunctive relief. Appellee Br. at 23. S.W.A. has repeatedly asserted that the Act serves no legitimate government interest, that it is arbitrary and capricious and has filed a pre-enforcement challenge. Based on the allegations demonstrating the unconstitutionality of the Act, S.W.A. seeks injunctive relief against the A.G., the state actor charged with enforcement of the Act. DE 49 at 12.

Accordingly, this Court should strike A.G.'s argument based on the merits of Plaintiffs' Complaint in its entirety as this issue is not a question properly brought before this Court.

III. CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing, S.W.A. respectfully prays that this Court reject the A.G.'s arguments and reverse the district court's order dismissing Florida's Attorney General as the proper defendant in this case as she has the requisite connection to enforcement of the challenged Act by and through statutory, constitutional and residual common law powers.

IV. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six (6) copies of the foregoing Reply 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 October 27, 2020 and on the same day, the foregoing Reply Brief 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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V. CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)(ii) 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)(ii), the word count is 6,047.