No. 20-12665

In the United States Court of Appeals for the Eleventh Circuit

SUPPORT WORKING ANIMALS, et al.,

Plaintiffs–Appellants,

v.

ASHLEY MOODY,
ATTORNEY GENERAL, STATE OF FLORIDA

Defendant–Appellee.

BRIEF OF APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO. 4:19-CV-570-MW/MAF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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ORAL ARGUMENT STATEMENT

Defendant Ashley Moody, Attorney General for the State of Florida, agrees with Plaintiffs that oral argument is unnecessary. This case presents no issue that warrants argument. The "facts and legal arguments are adequately presented in the briefs and record," and this Court's precedent resolves "the dispositive issue"—whether Plaintiffs have standing to sue the Attorney General. *See* Fed. R. App. P. 34(a)(2).

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STATEMENT OF JURISDICTION

Plaintiffs allege that an amendment to the Florida Constitution which bans gambling on greyhound racing violates the U.S. Constitution. The district court properly dismissed Plaintiffs' claims for lack of standing on June 12, 2020. Plaintiffs filed a timely notice of appeal on July 13, 2020. Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Plaintiffs seek to enjoin enforcement of a recent amendment to the Florida Constitution. They contend that they have standing to sue the Attorney General because her predecessor served on the constitution revision commission that drafted the amendment. The amendment, however, does not assign the Attorney General authority to enforce it, nor has the Florida Legislature allocated enforcement authority to her.

Do Plaintiffs have standing to sue the Attorney General?

INTRODUCTION

Plaintiffs assert that reversal is required because the district court erred in dismissing their claims based on *Ex parte Young*, 209 U.S. 123 (1908). Init. Br. 14. But the court dismissed their claims for lack of Article III standing, not based on *Ex parte Young*. Order, Doc. 50 at 1. It held that Plaintiffs' alleged injuries are neither traceable to nor redressable by the Attorney General because she does not have the power to enforce the law that Plaintiffs challenge, a self-executing amendment to the Florida Constitution that bans gambling on greyhound racing.

Still, Plaintiffs all but ignore standing. They devote almost their entire brief to *Ex parte Young*, arguing that the Attorney General has "some connection" to the amendment, while raising just one standing argument: that they have standing to sue the Attorney General because her predecessor served on the 37-member commission that drafted the amendment. But that argument is meritless. The district court's decision should therefore be affirmed.

But even if Plaintiffs had standing, the district court did not commit reversible error in dismissing their claims. The claims fail for multiple reasons. Plaintiffs are wrong that they can satisfy *Ex parte Young*'s lower threshold, and all of their claims fail as a matter of law. *See* Order, Doc. 50 at 1 (stating that the claims suffer from "plenty" of infirmities).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND: THE FLORIDA ATTORNEY GENERAL

The Attorney General is Florida's chief legal officer and a member of the state cabinet, along with the Commissioner of Agriculture and the Chief Financial Officer. Art. 4, § 4(a), (b), Fla. Const.

As the State's chief legal officer, the Attorney General has authority to issue advisory opinions on questions of law to certain officials and to appear on behalf of the State in state and federal court. § 16.01(3), (4), (5), Fla. Stat. She does not have general authority to prosecute criminal offenses. Rather, the Florida Constitution provides that locally elected State Attorneys "shall be the prosecuting officer[s] of all trial courts," Art. 5, § 17, Fla. Const., and the Florida Statutes assign a Statewide Prosecutor jurisdiction over certain statutorily enumerated offenses that are "occurring, or [have] occurred" in multiple state judicial circuits, § 16.56(1)(a), Fla. Stat. While the Attorney General appoints the Statewide Prosecutor, who serves a four-year term, § 16.56(2), she exercises only "general superintendence and direction over" State Attorneys "as to the manner of discharging their respective duties," § 16.08.

As a member of the Florida cabinet, the Attorney General serves on the board of a few state agencies, and her, the Governor, and the other cabinet members "constitute the agency head of the [Florida] Department of Law Enforcement"

(FDLE), with the Governor serving "as chair." Art. 4, § 4(e), (f), (g), Fla. Const. FDLE performs a number of statewide law enforcement functions, including assisting local law enforcement with counterterrorism efforts, § 4(g); maintaining the state's sex-offender registry, *see, e.g.*, § 943.0435, Fla. Stat.; and investigating financial crimes, cybercrime, and crimes against children, *see* § 943.041; § 943.0415.

B. Facts and Procedural History

1. In Florida, gambling is illegal, save certain exceptions. *See, e.g.*, § 849.08 (prohibiting "game[s] of chance . . . for money or other thing[s] of value"). Gambling on greyhound racing is one of them. The Florida Legislature permits it as a form of pari-mutuel wagering but regulates it. *See, e.g.*, § 550.0555; *Gulfstream Park Racing Ass'n v. Tampa Bay Downs*, 399 F.3d 1276, 1278 (11th Cir. 2005) ("Florida's pari-mutuel industry is highly regulated.").

Chapter 550 of the Florida Statutes imposes regulations on greyhound racing and charges the Florida Department of Business and Professional Regulation (DBPR) with enforcing them. The agency head of DBPR is the Secretary, who is appointed by the Governor and subject to confirmation by the Florida Senate. § 20.165(1), Fla. Stat. DBPR issues permits and licenses for greyhound racing, § 550.0251(3); monitors greyhound-racing facilities and excludes from them persons who violate applicable state laws and regulations, § 550.0251(6); imposes

administrative fines and other punishments on licensees, § 550.0251(10); and "supervis[es] and regulat[es] the welfare of racing animals at pari-mutuel facilities," § 550.0251(11).

But in 2021, Amendment 13 to the Florida Constitution will go into effect, and greyhound racing will no longer be exempted from Florida's ban on gambling. Art. 10, § 32, Fla. Const. A 37-member state constitution revision commission, which convenes every 20 years, drafted the amendment, Art. 11, § 2, and voters approved it in November 2018, Art. 10, § 32. The amendment states that "[t]he humane treatment of animals is a fundamental value of the people of the State of Florida," and it prohibits persons "authorized to conduct gaming or pari-mutuel operations" from racing "greyhounds . . . in connection with any wager for money." *Id.* The amendment establishes no penalties for violating that prohibition, though. *Id.* Instead, it states that the Florida Legislature "shall specify civil or criminal penalties for violations." *Id.*

The amendment imposes no deadline on the Legislature for enacting penalties, *id.*, and the Legislature has not enacted any, Init. Br. 24.

2. Plaintiffs "train[,] transport[,]" and "breed[]" racing greyhounds. Compl., Doc. 1 at 6. They commenced this action in 2019, alleging that Amendment 13 harms them because it impacts "their businesses and income." *Id.* The district court dismissed their initial complaint, allowed them to file an amended complaint, and

then dismissed that complaint for lack of standing. *See* Order, Doc. 50 at 1. This appeal arises from the second dismissal.

a. In their initial complaint,[1] Plaintiffs raised four claims: (1) Amendment 13 effects a taking under the Fifth and Fourteenth Amendments because it deprives them "of substantially all economically beneficial or productive use of their property," Compl., Doc. 1 at 11, (2) the amendment violates the Equal Protection Clause because it treats greyhound racing different than horse racing, *id.* at 11–12, (3) the amendment violates the Contract Clause because it "impair[s] the contracts of all people engaged in the business of dog racing" in Florida, *id.* at 12, and (4) the amendment violates substantive due process because it deprives Plaintiffs of their property rights, *id.* at 13.

Plaintiffs named as defendants Florida's Governor, Secretary of State, and Attorney General. *Id.* at 1. They requested only injunctive relief: an order enjoining the officials from enforcing Amendment 13. *Id.* at 13.

b. The officials moved for dismissal, arguing that they are not proper defendants under *Ex parte Young*, that Plaintiffs lack Article III standing, and that Plaintiffs failed to state a claim. 1st MTD, Doc. 33 at 3–4. "Article III standing and the proper defendant under *Ex parte Young* are separate issues." *Jacobson v. Fla.*

[1] The Attorney General refers to the initial complaint and the first amended complaint, Doc. 24, synonymously because the first amended complaint added additional plaintiffs but was otherwise materially identical to the initial complaint.

Sec'y of State, ___ F.3d ___, 2020 WL 5289377, at *13 (11th Cir. 2020) (quotations omitted). "To be a proper defendant under *Ex parte Young*—and so avoid an Eleventh Amendment bar to suit—a state official need only have 'some connection' with the enforcement of the challenged law." *Id.* (quoting *Ex parte Young*, 209 U.S. at 157). "In contrast, Article III standing requires that the plaintiff's injury be 'fairly traceable' to the [official] and redressable by relief against" her. *Id.*

In their response to the officials' motion, Plaintiffs focused on the merits but also argued that they can sue the Attorney General because she is the State's chief legal officer. *See* Resp. to 1st MTD, Doc. 39. at 9.

The district court dismissed all of Plaintiffs' claims. 1st MTD Order, Doc. 46 at 54–55. It held that Plaintiffs have standing, but it dismissed their claims against the Governor and Secretary of State based on *Ex parte Young*. *Id.* at 9, 16, 20. As for the Attorney General, the court held that she is a proper defendant because "she is Florida's chief legal officer" and because she has "authority to superintend and direct" State Attorneys to enforce "the forthcoming statutory penalties for violations of Amendment 13." *Id.* at 20–21.

The court therefore considered whether Plaintiffs stated a claim. *Id.* at 26–54. It concluded that they did not, finding that Amendment 13 satisfies rational-basis review, which applies to Plaintiffs' equal protection and substantive due process claims, *id.* at 43, 53; that Plaintiffs failed to allege a compensable taking, *id.* at 39;

and that they failed to "allege the existence of a specific contract impaired by Amendment 13," *id.* at 47.

The court, however, allowed Plaintiffs to file an amended complaint, which they did. *Id.* at 54–55; 2d Am. Compl., Doc. 47.

c. The amended complaint named only the Attorney General, included a second equal protection claim (that political animus against greyhound racing motivated Amendment 13), and added a few new allegations in support of Plaintiffs' substantive due process and takings claims. 2d Am. Compl., Doc. 47 at 1, 22, 25, 27.

The Attorney General again moved for dismissal. 2d MTD, Doc. 48 at 1. She first asserted that under this Court's recent decisions in *Jacobson* and *Lewis v. Governor of Ala.*, 944 F.3d 1287 (11th Cir. 2019) (en banc), the district court should revisit its rulings that she is a proper defendant and that Plaintiffs have standing. *Id.* at 3–10. She also argued that Plaintiffs have still failed to state a claim because their amended complaint includes no allegations that cure the deficiencies in their prior complaint. *Id.* at 10–22.

Plaintiffs countered that they can sue the Attorney General because she has general superintendence over State Attorneys and is the State's chief legal officer. Resp. to 2d MTD, Doc. 49 at 2–6. They also stated in passing that they can sue her because her predecessor was a member of the constitution revision commission that

drafted Amendment 13. *Id.* at 3. They did not assert that the Attorney General can enforce Amendment 13 through FDLE or the Statewide Prosecutor. *See id.* at 2–6.

The district court granted the Attorney General's motion, holding that Plaintiffs lack standing to sue her. Order, Doc. 50 at 1 ("Leaving aside any other infirmity in the [amended] [c]omplaint, and there are plenty, this Court concludes Plaintiffs lack standing to bring this action against [the Attorney General]."). The court determined that under *Jacobson*, the "injuries Plaintiffs allege . . . are neither traceable to nor redressable through" the Attorney General. *Id.* at 2.

This appeal followed.

STANDARD OF REVIEW

This Court reviews "a district court's grant of a motion to dismiss . . . de novo, accepting the factual allegations in the complaint as true." *Boyd v. Warden*, 856 F.3d 853, 863–64 (11th Cir. 2017) (quotations omitted). "A complaint need not contain detailed factual allegations but must include enough facts to raise a right to relief above the speculative level." *Id.* at 864 (quotations omitted).

SUMMARY OF THE ARGUMENT

1. The district court correctly held that Plaintiffs lack standing. Their injuries are neither traceable to nor redressable by the Attorney General because she has no authority to enforce Amendment 13. Plaintiffs assert that their injuries are traceable to the Attorney General because her predecessor served on the constitution revision

commission that drafted Amendment 13. But even if that novel theory of traceability had merit, Plaintiffs have made no showing that the Attorney General has the power to redress their injuries.

Nor can Plaintiffs rely on their *Ex parte Young* arguments to establish standing. First, standing and *Ex parte Young* are separate issues. Second, none of the arguments demonstrate traceability or redressability. Plaintiffs assert that the Attorney General is a proper defendant because at some point in the future she will have authority to enforce criminal penalties for greyhound racing. But whether the Florida Legislature will enact criminal, rather than only civil penalties, is purely speculative. And even if the Legislature were to enact criminal penalties, Plaintiffs have not shown that the Attorney General would have power to enforce them. Florida's State Attorneys prosecute criminal offenses, and they are locally elected, independent constitutional officers; the Attorney General's role as Florida's chief legal officer is not sufficient to confer standing on Plaintiffs; and Plaintiffs' theories based on FDLE and the Statewide Prosecutor are not only unavailing but also waived.

2. Plaintiffs have also failed to state a claim. *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."). For substantially the same reasons that the district court set forth in its first dismissal

order, Plaintiffs' equal protection, substantive due process, takings, and Contract Clause claims fail as a matter of law. *See* 1st MTD Order, Doc. 46 at 26–54.

ARGUMENT

I. PLAINTIFFS LACK STANDING BECAUSE THEIR ALLEGED INJURY IS NEITHER TRACEABLE TO NOR REDRESSABLE BY THE ATTORNEY GENERAL.

A. The former Attorney General's service on the constitution revision commission does not establish traceability or redressability.

To establish Article III standing, a plaintiff must show both traceability and redressability. *Lewis*, 944 F.3d at 1296. First, she must demonstrate "a causal connection between her [alleged] injury and the challenged action of the defendant—i.e., the injury must be fairly traceable to the defendant's conduct." *Id.* (quotations omitted). Such a connection exists only if the defendant has "authority to enforce the complained-of provision." *Id.* at 1299 (quotations omitted). Second, "the plaintiff must show that it is likely, not merely speculative, that a favorable judgment will redress [the] injury." *Id.* at 1296. If the defendant lacks authority to enforce the complained-of provision, a judgment "against her will not redress [the] injury." *Jacobson*, 2020 WL 5289377, at *12.

The former Attorney General's service on the 37-member commission that drafted and proposed Amendment 13 for consideration by Florida voters establishes neither traceability nor redressability. First, it does not somehow afford the Attorney General power to enforce the amendment. Plaintiffs do not even claim that it does.

They assert that their injuries are traceable to the Attorney General because her predecessor was "intimately involved with the passage of the" amendment. Init. Br. 40. But that is irrelevant. *See Lewis*, 944 F.3d at 1299; *Jacobson*, 2020 WL 5289377, at *14 (concluding that, if a state official's role in crafting regulations "were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it"); *cf. Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (rejecting argument that the Florida governor was a proper party because he signed the challenged statute into law).

Second, Plaintiffs do not explain how the former Attorney General's service establishes redressability. They begin their discussion of the commission by declaring that the Attorney General can redress their injuries, but they go on to address only traceability. Init. Br. 39–42. Because Plaintiffs have failed to develop an argument on redressability, they have waived any argument that the former Attorney General's service on the commission establishes it. *See Flanigan's Enters. v. Fulton Cty.*, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (holding that the appellants waived an argument because "they fail[ed] to elaborate or provide any citation of authority in support of" it).

B. Plaintiffs cannot rely on their *Ex parte Young* arguments to establish standing.

Because "Article III standing and the proper defendant under *Ex parte Young* are separate issues," Plaintiffs cannot rely on their *Ex parte Young* arguments to establish standing. *See Jacobson*, 2020 WL 5289377, at *13 (quotations omitted). The arguments do not address traceability or redressability, which require a more rigorous analysis of the relationship between a state official and a plaintiff's injuries than *Ex parte Young*'s "some connection" test. *See id.*; Init. Br. 38 (recognizing that Article III standing is a "higher threshold" than *Ex parte Young*).

Even so, the arguments do not help Plaintiffs. Plaintiffs assert that the Attorney General is a proper defendant because, in their view, at some point the Florida Legislature will enact criminal penalties for greyhound racing and the Attorney General will have authority to enforce them. According to Plaintiffs, she will have that authority because (1) she "serves as the head of" FDLE, Init. Br. 14–15; (2) she has a "direct connection" to the Statewide Prosecutor, *id.* at 14; (3) she has general superintendence and direction over State Attorneys, *id.* at 33; and (4) she is Florida's chief legal officer, *id.* at 16–17. Each theory is either waived, foreclosed by this Court's precedent, or both. None establish that the Attorney General has

some connection to Amendment 13, much less that Plaintiffs' injuries are traceable to and redressable by the Attorney General.[2]

1. Plaintiffs waived both the issue whether FDLE and whether the Statewide Prosecutor establishes a connection to Amendment 13.

a. For the first time on appeal, Plaintiffs assert that the Attorney General has a connection to Amendment 13 because (1) the Statewide Prosecutor "is under [her] direct purview" and will have the power to enforce any criminal penalties that the Florida Legislature enacts, and (2) "as a Cabinet member, [she] is charged with the duty to serve as the head of" FDLE and therefore has "the requisite connection to law enforcement." Init. Br. 25–26. Both theories are waived. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered" absent "exceptional conditions." *Access Now v. Sw. Airlines*, 385 F.3d 1324, 1331–32 (11th Cir. 2004) (quotations omitted).

And no exceptional conditions are present here. First, waiver will not result in a miscarriage of justice, particularly "given the weakness of [Plaintiffs'] claims." *See Tobinick v. Novella*, 848 F.3d 935, 944 (11th Cir. 2017). Second, Plaintiffs were not denied an opportunity "to raise the new theor[ies] in district court." *See Access Now*, 385 F.3d at 1331. They "had every opportunity to raise" them but "chose not to do so." *See id.* at 1333. They briefed standing and *Ex parte Young* twice but argued

[2] Plaintiffs' claims thus fail not only for lack of standing but also because the Attorney General is not a proper defendant under *Ex parte Young.*

only that the Attorney General can enforce Amendment 13 because she is the State's chief legal officer, she has general superintendence over State Attorneys, and her predecessor participated in the constitution revision commission.

b. At any rate, even if Plaintiffs had not waived the theories, neither would establish standing. For starters, FDLE is "not subject to the [Attorney General]'s control," so any injury caused by FDLE is not traceable to her. *See Jacobson*, 2020 WL 5289377, at *11; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (plurality op.) (standing is lacking where the agency at issue is not "bound by the" defendant's directives). Contrary to Plaintiffs' suggestion, the Attorney General does not "serve as the head of" FDLE. Init Br. 26. She is just one member of a four-person body that heads it. "The head of [FDLE] is the Governor and Cabinet," which comprises the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. § 20.201(1), Fla. Stat.; Art. 4, § 4(a), (g), Fla. Const. As just one member of that four-person body, the Attorney General does not control it or FDLE. *See Women's Emergency Network*, 323 F.3d at 949 ("Governor Bush's only connection with [the law] is that he, along with six members of the cabinet, are

responsible for the [agency]. Governor Bush's shared authority over the [agency] is simply too attenuated.").[3]

On top of that, it is "merely speculative" that an injunction impacting FDLE or the Statewide Prosecutor would provide Plaintiffs relief. *See Lewis*, 944 F.3d at 1296. Both theories depend on speculation about future legislative action. *See I.L. v. Alabama*, 739 F.3d 1273, 1280 (11th Cir. 2014) ("[T]he contingency of legislative action makes the redress of [an] injury speculative." (quotations omitted)); *cf. Clapper v. Amnesty Int'l*, 568 U.S. 398, 413 (2013) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). As Plaintiffs concede, injunctive relief will provide them no redress now because there are currently no criminal penalties that FDLE or the Statewide Prosecutor can enforce against them. *See* Init. Br. 24–25. And Plaintiffs' assertion that the Legislature will enact criminal penalties at some point in the future is speculation. *Id.* The Legislature might never enact criminal penalties. Amendment 13 does not require it to enact them—it directs the Legislature to "specify civil *or* criminal penalties" for those who violate it, affording

[3] Effective January 7, 2003, the people of Florida amended their Constitution to reduce the cabinet from six members to three. *See* Florida Cabinet Website, *available at* https://www.myflorida.com/myflorida/cabinet/structurehistory.html (last visited Oct. 6, 2020).

the Legislature discretion to enact only civil penalties. Art. 10, § 32, Fla. Const. (emphasis added).

Plaintiffs' FDLE and Statewide Prosecutor theories thus require multiple levels of speculation: that *sometime* in the future the Legislature *might* enact criminal penalties which FDLE and the Statewide Prosecutor have authority to prosecute or investigate. That proves too much. *See Lewis*, 944 F.3d at 1296; *I.L.*, 739 F.3d at 1280.

2. Plaintiffs' remaining Ex parte Young *arguments fare no better.*

a. The Attorney General's "general superintendence and direction over" State Attorneys establishes neither redressability nor traceability. *See* § 16.08, Fla. Stat. First, as with FDLE and the Statewide Prosecutor, it is "merely speculative" that an injunction against State Attorneys would provide Plaintiffs relief, because the Legislature might never enact criminal penalties. *See Lewis*, 944 F.3d at 1296.

Second, no causal connection exists between injuries caused by State Attorneys and the Attorney General because the Attorney General does not have direct control over State Attorneys. *See Jacobson*, 2020 WL 5289377, at *11–12. Under the Florida Constitution, State Attorneys are independently elected constitutional officers who serve as "the prosecuting officer[s] of all trial courts in [each judicial] circuit." Art. 5, § 17, Fla. Const.; *cf. Valdes v. State*, 728 So. 2d 736, 738 (Fla. 1999). While the Attorney General exercises "general superintendence and

direction over" State Attorneys, § 16.08, Fla. Stat., she does not have the power to suspend or remove them, as she does the Statewide Prosecutor, *see* § 16.56(2).[4] Nor does the Florida Constitution designate State Attorneys as a component of the "office of the attorney general," as it does the Statewide Prosecutor. *See* Art. 4, § 4(b), Fla. Const.

Under *Jacobson*, because State Attorneys are locally elected, independent officials, and the Attorney General does not have the power to suspend or remove them, injuries caused by a State Attorney are not traceable to the Attorney General. *Jacobson* held that injuries caused by Florida's Supervisors of Elections are not traceable to the Secretary of State even though the Secretary has "general supervision and administration of the election laws." *Jacobson*, 2020 WL 5289377, at *12 (quotations omitted). That holding "rest[ed] on the reality that the Supervisors are independent officials under Florida law who are not subject to the Secretary's control." *Id.* at *11. The Supervisors, the Court explained, "are constitutional officers who are elected at the county level by the people of Florida," and the Secretary can neither suspend nor remove them. *Id.*

[4] The Florida Constitution states that *the Governor* has the power to suspend State Attorneys. *See* Art. 4, § 7, Fla. Const. ("[T]he governor may suspend from office . . . any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony.").

b. Nor does the Attorney General's role as chief legal officer establish redressability or traceability. As chief legal officer, she has authority to bring civil actions in the public interest and to defend the constitutionality of state laws, when she deems it necessary. *See State of Fla. v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976). This Court has repeatedly held that such general executive authority is insufficient to confer standing to sue a state official. *See, e.g.*, *Lewis*, 944 F.3d at 1300 (rejecting the plaintiffs' argument that they had standing to sue the Alabama Attorney General because he has broad authority to act in the public interest); *Jacobson*, 2020 WL 5289377, at *12 (concluding that the Florida Secretary of State's "position as the chief election officer of the state with general supervision and administration of the election laws d[id] not" confer standing to sue her); *cf. Women's Emergency Network*, 323 F.3d at 949 ("A governor's 'general executive power' is not a basis for jurisdiction in most circumstances.").

Lewis is on point. There, too, the plaintiffs challenged a law that had no enforcement provision and named as a defendant the state attorney general (the Alabama Attorney General). *See Lewis*, 944 F.3d at 1299–1300. The plaintiffs alleged that the Alabama Attorney General had the power to enforce the law because he has authority "to institute and prosecute . . . all civil actions and other proceedings necessary to protect the rights and interests of the state." *Id.* at 1300 (quotations omitted). But this Court, sitting en banc, rejected that argument, concluding that it

"prove[d] entirely too much." *Id.* If the Alabama Attorney General's broad authority to act in the public interest "were sufficient to confer standing to sue" him, the Court stated, he "could be made a proper party defendant under innumerable" state laws. *Id.*

The same is true here. A plaintiff's injuries from a Florida law are not traceable to and redressable by the Attorney General simply because she is the State's chief legal officer. More is required to establish Article III standing. *See id.*

II. ALTERNATIVELY, PLAINTIFFS HAVE FAILED TO STATE A CLAIM.

Plaintiffs have not alleged facts sufficient to state an equal protection, substantive due process, takings, or Contract Clause claim.

1. Plaintiffs have failed to state an equal protection claim because Amendment 13 satisfies rational-basis review, which applies since Amendment 13 "neither proceeds along suspect lines nor infringes fundamental constitutional rights." *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Amendment 13 does not target a suspect class or stifle any fundamental right; it simply prohibits people from racing "greyhounds . . . in connection with any wager for money." *See* Art. 10, § 32, Fla. Const. Therefore, it "must be upheld against [Plaintiffs'] challenge if there is any reasonably conceivable" basis for it. *Beach Commc'ns*, 508 U.S. at 313. And

there is: ensuring "[t]he humane treatment of" greyhounds. *See* Art. 10, § 32, Fla. Const.

2. Rational-basis review also applies to Plaintiffs' substantive due process claims, so they too fail. "Substantive due process challenges that do not implicate fundamental rights are" subject to rational-basis review, and Plaintiffs have identified no fundamental right that Amendment 13 infringes. *See Kentner v. City of Sanibel*, 750 F.3d 1274, 1280 (11th Cir. 2014).

Their assertion that it infringes their "fundamental right to one's own property and earn a livelihood" is misguided. 2d Am. Compl., Doc. 47 at 19. First, Amendment 13 infringes no fundamental right to property. It affects only a state-created privilege—the privilege to race greyhounds in connection with wagering—and "state-created rights" and privileges are "not fundamental rights." *See Kentner*, 750 F.3d at 1280; *State ex rel. Biscayne Kennel Club v. Stein*, 178 So. 133, 135 (Fla. 1938) (holding that the "racing [of dogs] in Florida is not a right but a privilege" and "[a] license" to race dogs is not a "property right" (quotations omitted)). Second, there is no fundamental right to earn a livelihood by gambling on greyhound racing. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (plurality op.) ("[T]he 'liberties' protected by substantive due process do not include economic liberties."); *see also Carroll v. State*, 361 So. 2d 144, 147 (Fla. 1978) ("There is no constitutional right to conduct a gambling business.").

3. For several reasons, Plaintiffs have failed to state a takings claim. First, they seek only injunctive relief but they cannot obtain such relief under the Takings Clause because they have an adequate remedy at law—a claim for just compensation. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176 (2019) ("[A]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking.").

Second, their claims fail because Amendment 13 does not interfere with a property right under Florida law. Under the Fifth and Fourteenth Amendments, a taking occurs only if a regulation interferes with a property right that is recognized under state law. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163–64 (1998); *Quinn v. Bd. of Cty. Comm'rs for Queen Anne's Cty.*, 862 F.3d 433, 439 (4th Cir. 2017) (explaining that "the analysis in a takings case necessarily begins with determining whether the government's action actually interfered with the [plaintiff's] antecedent bundle of rights," which is determined by "state law"). But Amendment 13 affects only a privilege under Florida law, not a property right. *See Biscayne Kennel Club*, 178 So. at 135.

Third, the police-power doctrine forecloses Plaintiffs' claims. The doctrine provides that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot . . . be deemed a taking." *Mugler v. Kansas*, 123 U.S. 623, 668–

69 (1887); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 & n.22 (1987) (citing *Mugler* and explaining that the police-power doctrine is well-established). And Amendment 13 merely prohibits Plaintiffs from using their property for a particular activity (greyhound racing connected to wagering) that Florida has deemed "injurious to the health, morals, or safety of the community." *See Mugler*, 123 U.S. at 668–69; *Keystone*, 480 U.S. at 492 n.22 (noting that no taking occurs when the State "abat[es] a nuisance"); *Pompano Horse Club v. State*, 111 So. 801, 811 (Fla. 1927) ("[T]he maintenance of a [facility] where persons congregate for the purpose of making bets and wagers on horse races . . . is a public nuisance.").

Fourth, even if Plaintiffs could obtain injunctive relief, and even if Amendment 13 interfered with a property right, and even if the police-power doctrine were inapplicable, Plaintiffs' claims would fail because Amendment 13 did not effect a regulatory taking of their personal property.[5]

There are two types of takings: "per se" takings and as-applied, or "regulatory," takings. *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F.3d 1427, 1430–31 (11th Cir. 1998). A per se taking occurs only when the government physically invades property or deprives a person of all economically beneficial uses of her land.

[5] Plaintiffs allege that Amendment 13 effected a taking of their "bleachers, tracks, stands, ticket booths, [and] kennels." 2d Am. Compl., Doc. 47 at 25.

See id. Plaintiffs have alleged neither, *see* 2d Am. Compl., Doc. 47 at 24–25, so they must show that Amendment 13 effected a regulatory taking of their property. But they cannot do so.

In determining whether a regulatory taking has occurred, courts consider "the character of the governmental action," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the economic impact of the regulation on the claimant." *Penn Central Transp. v. New York City*, 438 U.S. 104, 124 (1978). Applying those factors, courts have repeatedly held that laws like Amendment 13 which regulate the gambling industry do not effect a taking because (1) they are "a classic exercise of state police power" and (2) gambling is "heavily regulated and highly contentious," so investors in the industry have limited investment-backed expectations. *See, e.g.*, *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 410–11, 411 n.2 (4th Cir. 2007) (holding that a law banning video-poker machines did not effect a regulatory taking); *Hawkeye Commodity Promotions v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (holding that a law banning a lottery game did not effect a regulatory taking); *North Shore Kennel of Lynn v. Commonwealth*, 965 N.E. 2d 899, 899 (Mass. App. Ct. 2012) (holding that Massachusetts's greyhound-racing ban did not effect a regulatory taking).

4. Finally, under the Contract Clause, a plaintiff must establish that a change in law substantially impaired a pre-existing contract to which she is a party. *GMC v.*

Romein, 503 U.S. 181, 186 (1992). But Plaintiffs have not identified a specific contract that Amendment 13 impairs, much less alleged that it substantially impairs a pre-existing contract. They merely assert that Amendment 13 impairs "the contracts of all people engaged in the business of dog racing in the State of Florida." 2d Am. Compl., Doc. 47 at 26–27. That "conclusory statement[]" is insufficient to state a Contract Clause claim. *See Boyd*, 856 F.3d at 864.

CONCLUSION

Because Plaintiffs have failed to establish that they have standing to sue the Attorney General, the district court's decision should be affirmed. In the alternative, this Court should remand with instructions to dismiss for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on October 7, 2020, I served the above brief to all counsel of record by electronic filing and email. I also delivered via regular mail an original and six copies of the brief to the Clerk's Office for the U.S. Court of Appeals for the Eleventh Circuit.

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