IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

GAINESVILLE RESIDENTS UNITED, INC., et al.,

Plaintiffs,

v. **Case No. 1:23-cv-176-AW-HTC**

RON DESANTIS, in his official capacity as Governor of the State of Florida, and CITY OF GAINESVILLE,

Defendants.
_____/

ORDER GRANTING MOTION TO DISMISS

Gainesville Regional Utilities ("GRU") has long provided utility service to those in and around Gainesville. Until recently, the Gainesville City Commission controlled GRU. But through a new enactment (H.B. 1645, or the "Act"), the Florida Legislature created the Gainesville Regional Utility Authority (the "Authority"), which now controls GRU. Under the Act, "[t]he Authority shall operate as a unit of city government and, except as otherwise provided [in the Act], shall be free from direction and control of the Gainesville City Commission." H.B. 1645, § 2, Art. VII, § 7.01.

Plaintiffs—Gainesville Residents United, Inc., and six GRU customers—strongly oppose the Act. They sued several state officials and the City of Gainesville to challenge it under state and federal law. ECF No. 1 (Cmpl.). They contend the Act

infringes their First Amendment rights, violates Florida's special law and referendum requirements, impermissibly invests unelected officials with legislative powers, diminishes Plaintiffs' right to vote under Florida law, and impairs one Plaintiff's municipal bond contract.

Plaintiffs voluntarily dismissed their claims against the Attorney General and Secretary of State. *See* ECF No. 36. The Governor, one of two remaining defendants, now moves to dismiss. ECF No. 28. This order grants that motion.

I.

First, the Governor contends Plaintiffs have not established this court's jurisdiction because they have not shown standing. *See Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (noting that standing is an essential element of subject matter jurisdiction). To establish standing, Plaintiffs must show "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). At the pleading stage, a plaintiff need only allege facts that would support each of these elements. *See Lujan*, 504 U.S. at 561; *see also Stalley ex rel. U.S.*, 524 F.3d at 1233 (noting the need to "sufficiently allege[] a basis" for each element).

An injury in fact is "an invasion of a legally protected interest" that is (1) concrete and particularized and (2) actual or imminent. *Lujan*, 504 U.S. at 560-61. When, as here, plaintiffs seek prospective relief, they must plausibly allege that threatened injuries are "certainly impending." *City of S. Miami v. Governor*, 65 F.4th 631, 636 (11th Cir. 2023) (quoting *Jacobson*, 974 F.3d at 1245).

Plaintiffs contend that Gainesville Residents United and the individual Plaintiffs have standing to raise their First Amendment challenges. ECF No. 35 at 25.[1] Deprivation of a First Amendment right can undoubtedly qualify as a concrete injury, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119 (11th Cir. 2022), but Plaintiffs here have not plausibly alleged that any of them face an impending and particularized First Amendment injury.

The "fundamental question" in determining standing for a free speech claim "is whether the challenged policy 'objectively chills' protected expression." *Speech First, Inc.*, 32 F.4th at 1120. Plaintiffs have not shown that it does. There is nothing in the Act's language prohibiting Gainesville Residents United, its members, or

[1] Gainesville Residents United can have standing either in its own right (organizational standing) or through its members (associational standing). *See City of S. Miami*, 65 F.4th at 637. It claims to have both. Cmpl. ¶ 10. But it alleges essentially the same injuries as its members, namely the inability to bring concerns before the Authority and have those concerns considered. *See* ECF No. 35 at 22-25; Cmpl. ¶¶ 57-58, 70-109. As this order explains, these alleged injuries are insufficient to establish Article III standing for the free speech and right to petition claims. Thus, the entity lacks standing under either an organizational or associational theory.

anyone else from speaking about "social, political, or ideological interests," either at Authority meetings or elsewhere. Instead, the Act only prohibits the Authority's consideration of those interests when making utility decisions. Plaintiffs thus have not plausibly alleged that the Act "objectively chills" their speech and thus have not plausibly alleged standing on the free speech claims.

Plaintiffs fare no better on the right to petition claim. That claim is essentially that the City Commission no longer controls GRU and that the new Authority will be less responsive to Plaintiffs. Cmpl. ¶¶ 70-80. Even if the Authority's lack of political responsiveness constituted an injury in fact, it is not sufficiently particularized. "An injury is particularized if it 'affect[s] the plaintiff in a personal and individual way.'" *Garcia-Bengochea v. Carnival Corp.*, 57 F.4th 916, 923 (11th Cir. 2023) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)). It must be more than a "generalized grievance," and when it "is shared in substantially equal measure by a large class of citizens,' it is not a particularized injury." *Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) (cleaned up).

The inability "to remove unresponsive representatives" or have the Authority act upon their "social, political, or ideological interests," Cmpl. ¶ 75, are not harms affecting Plaintiffs in a personal and individual way. Instead, these harms affect everyone in the community the same way. Plaintiffs' complaint, which includes many references to how others share their injuries, reflects this reality. *See, e.g.*, *id.*

¶ 17 ("[Plaintiff Hutchinson] shares concerns regarding Gainesville Regional Utilities in common with thousands of utility customers . . . ."); *id.* ¶ 50 ("Historically, residents of Gainesville, and any other interested persons, have brought a wide variety of concerns regarding GRU directly to their elected representatives at public meetings of the Gainesville City Commission."); *id.* ¶ 76 ("The Special Law eliminates Plaintiffs' and others' rights to petition the Board for redress of grievances pertaining to social, political, environmental, and ideological issues . . . ."). In short, Plaintiffs have not alleged facts showing a cognizable injury.

Even if Plaintiffs had alleged injury, they would still lack standing because they have not alleged facts supporting redressability or traceability. As the parties recognize, these two elements "often travel together." *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021). An injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Jacobson*, 974 F.3d at 1253 (quoting *Lujan*, 504 U.S. at 560). And it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (cleaned up).

Even assuming Plaintiffs face injury from no longer having a politically responsive board governing their local utilities, that injury is not tied to action the Governor took (or would take)—whether by making appointments to the Authority

or otherwise. The injury would arise from the Authority's independent action of choosing to not respond to Plaintiffs' concerns. Tying the injury to the Governor requires assuming the Governor would use his authority to appoint or remove Authority members who are unresponsive to Plaintiffs, but Plaintiffs allege no facts to support such an assumption. *Cf. City of S. Miami*, 65 F.4th at 643 (noting how even when a challenged law included a suspension provision allowing the governor to suspend officials for cause, "the organizations still had to prove that the governor's ability to suspend officials for violations of [the challenged law] would contribute to their alleged harm").

Plaintiffs highlight the Governor's authority to initiate judicial proceedings against municipal officers to "enforce compliance" with their prescribed duties. ECF No. 35 at 29. But the Eleventh Circuit has rejected the argument that this authority establishes traceability. *See City of S. Miami*, 65 F.4th at 643 (noting that "if the governor's ability to suspend officials for cause established traceability, then the governor 'would be a proper defendant in any challenge to State or local policy'").

To the extent H.B. 1645 affects speech at all, those injuries would be traceable to the actions of the Authority, not the Governor. And while "a plaintiff need not demonstrate anything 'more than a substantial likelihood' of redressability" to establish standing, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126-27 (11th Cir. 2019) (cleaned up) (quoting *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438

U.S. 59, 79 (1978)), Plaintiffs have not plausibly alleged that enjoining the Governor from appointing or removing Authority members would have any impact on Plaintiffs' speech rights.

The federal claims against the Governor are dismissed for lack of standing. Although it is unlikely that Plaintiffs have standing to bring their state-law claims against the Governor, because the Eleventh Amendment clearly precludes those claims, I decline to separately address standing for those claims.[2]

II.

The Governor asserts Eleventh Amendment immunity, which generally precludes suits against states—or state officers sued in their official capacities—in federal court. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011); *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (noting that for Eleventh Amendment purposes, a suit against a state official in his official capacity constitutes a suit against the state). But the *Ex parte Young* exception allows suits against state officers when plaintiffs seek only prospective relief, *Summit Med. Assocs., P.C.*, 180 F.3d at 1336-37, as Plaintiffs do here, *see* ECF No. 35 at 14 n.7. The exception applies, though, only if the official sued has "'some connection' with the

[2] Courts may resolve Eleventh Amendment immunity issues without addressing standing. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

enforcement of the challenged law." *Jacobson*, 974 F.3d at 1256 (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). Thus, the Governor is a proper defendant here only if he is sufficiently connected to the Act's enforcement. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (citing *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1998)); *see also Grizzle*, 634 F.3d at 1319 ("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.").

Neither the Governor's signing H.B. 1645 nor his general executive power constitutes enforcement for these purposes. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003). But Plaintiffs point to the Governor's role in selecting the Authority's members. They note that the Governor can seek candidates through public notices, can appoint members, and can remove them. ECF No. 35 at 15, 28. The question here, then, is whether the Governor's enumerated appointment and removal authority and duties constitute sufficient enforcement to make him a proper *Ex parte Young* defendant. They do not.

Courts have repeatedly found a governor's appointment authority insufficient to qualify as enforcement under *Ex parte Young*. *See, e.g.*, *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 966-68 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021) (finding the governor an improper party where the governor had appointment authority over a board charged with enforcing the challenged law); *Church v.*

Missouri, 913 F.3d 736, 750 (8th Cir. 2019) (discussing how the governor's appointment authority over a commission was administrative and did not create the required *Ex parte Young* connections); *Osterback v. Scott*, 782 F. App'x 856, 856-59 (11th Cir. 2019) (finding the governor insufficiently connected to the challenged provision despite serving as the chair of the body that appoints the director who oversees the enforcement of the statute); *see also N.C. State Conf. of NAACP v. Cooper*, 397 F. Supp. 3d 786, 801-02 (M.D.N.C. 2019) (discussing how "neither appointment power nor general supervisory power over persons responsible for enforcing a challenged provision will subject an official to suit"); *Women's Emergency Network*, 323 F.3d at 949 (affirming dismissal of the governor where his only connection to the challenged law was shared authority over the department that enforced the law); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1175 (D. Ariz. 2001) (finding the governor lacked sufficient enforcement connections despite having the power to appoint director who would serve at the "pleasure of the governor").

The Governor's appointment and removal authority does not make him responsible for enforcing the Act. Therefore, the *Ex parte Young* exception does not apply, and the Eleventh Amendment precludes Plaintiffs' claims against the Governor.

Even if the *Ex parte Young* exception applied, it would not allow Plaintiffs' state-law claims. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106

(1984). Claims based on state law do "not vindicate the supreme authority of federal law" and thus pose a great risk of "intrusion on state sovereignty." *Id.*; *see also Doe as Next Friend of Doe #6 v. Swearingen*, 51 F.4th 1295, 1303 n.1 (11th Cir. 2022) ("[T]he Eleventh Amendment prohibits federal courts from intruding on state sovereignty by instructing state officials on how to comply with state law." (citing *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106)). Such claims are barred "even when . . . they are brought into federal court as pendent claims coupled with suits raising federal questions." *Waldman v. Conway*, 871 F.3d 1283, 1290 (11th Cir. 2017) (citing *Pennhurst State Sch. & Hosp.*, 465 U.S. at 120-21)).

I have not overlooked Plaintiffs' argument that the Governor counts as a municipal officer—and not a state official—when exercising authority H.B. 1645 grants him. Eleventh Amendment immunity does not extend to municipalities or other similar state subdivisions. *Lightfoot v. Henry Cnty. Sch. Dist.*, 771 F.3d 764, 768 (11th Cir. 2014) (citing *Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990)). And it applies to a state entity only when it acts as "arm of the state." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003).

But Plaintiffs point to no authority suggesting a Governor acts as anything other than a state official when he appoints local officials pursuant to state law authorizing him to do so. Instead, there is strong support under Florida law for finding appointments and removals by the Governor to be part of his state executive

power. *See, e.g.*, Fla. Const. art. III, § 17(b) (allowing governor to fill by appointment the office of an officer impeached by the house of representatives until completion of trial); Fla. Const. art. IV, § 7(c) (granting governor authority to suspend any elected municipal officer who is criminally indicted "and the office filled by appointment for the period of suspension").

Plaintiffs apply the *Manders* factors, *see Austin v. Glynn Cnty.*, 80 F.4th 1342, 1347 (11th Cir. 2023), to argue the Authority is a not an arm of the state, but they offer no support for imputing that status to the Governor based on the authority he has under the Act. The Governor is entitled to Eleventh Amendment immunity as to all claims against him.

The Governor's motion to dismiss (ECF No. 28) is GRANTED. All claims against the Governor are dismissed without prejudice.

SO ORDERED on December 21, 2023.

s/ *Allen Winsor*
United States District Judge