

**UNITED STATES DISTRICT COURT  
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, *et al.*,  
*Defendants*.

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**FLORIDA SECRETARY OF STATE'S MOTION TO DISMISS  
VERIFIED COMPLAINT  
AND SUPPORTING MEMORANDUM**

At issue in this case is the constitutionality of a Special Law, under both the state and federal constitutions, creating the Gainesville Regional Utilities Authority and establishing it as the governing board of Gainesville Regional Utilities. DE 1 at 1-2; Laws of Fla. Ch. 2023-348. Defendant, Florida Secretary of State Cord Byrd, moves to dismiss the Verified Complaint for Declaratory Judgement, Injunctive Relief and Damages (DE 1) against him with prejudice pursuant to Federal Rule of Civil Procedure Rule 12(b)(1).

The Secretary does not enforce any aspect of the Special Law or its alleged defects—or municipal utilities generally—and consequently, there is no standing against him to establish subject-matter jurisdiction. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1241 (11th Cir. 2020) (vacating and remanding with instructions to dismiss

with prejudice where Secretary “does not enforce the challenged law”). Regardless, the Secretary would not be a proper defendant under the *Ex Parte Young* exception to Eleventh Amendment immunity because he does not even have “some connection” with the *enforcement* of the Law to allow the federal constitutional claims to go forward. *Women’s Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003). And, of course, the *Ex Parte Young* exception simply does not apply to allow the *state* constitutional claims to go forward. *Pennburst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (“when a plaintiff alleges that a state official has violated *state* law ... the entire basis for the doctrine of *Young* and *Edelman* disappears,” leaving Eleventh Amendment immunity). That would “emasculate the Eleventh Amendment.” *Id.* at 106. So too would allowing Plaintiffs’ damages claims and remedial relief “to expunge and remove” the Special Law. *Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613, 617 (2002); *Green v. Mansour*, 474 U.S. 64, 68 (1985); see *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

## I. BACKGROUND

The challenged Special Law creates the Gainesville Regional Utilities Authority and establishes it as the governing board of Gainesville Regional Utilities. Laws of Fla. Ch. 2023-348. Although the Law took effect on July 1, 2023, the “Gainesville Regional Utilities shall be governed by the Authority upon installation of the Authority’s members,” who have not yet been appointed and whose terms do not

take effect until October 1, 2023. *Id.* at Art. VII, §§ 7.01, 7.05.<sup>1</sup> “All City ordinances, policies, rates, fees, assessments, charges, rules, regulations, and budgets related to operation of the utilities shall remain in effect until such time as the Authority... modifies any such item.” *Id.* at § 7.10(2). Instead of the yet-to-exist Authority, Plaintiffs have named the Governor, Secretary, and Attorney General as Defendants, in addition to the City of Gainesville.

Plaintiffs bring twelve counts. Counts I through IV arise under the United States Constitution and are brought against “the Defendants” generally, to enjoin them from “enforcing the Special Law” and a particular section, among other things. Counts V through XI arise under the Florida Constitution and seek the same relief (without referencing any particular provision). Only these *state* constitutional claims additionally seek a mandatory injunction against the Secretary “to expunge and remove” the Special Law “from the official records of the State of Florida.” Plaintiffs also seek “to expunge and remove” “all Laws of Florida which incorporate the Special Law,” although none of those other, unidentified Laws of Florida are ever challenged or identified. The last count—Count XII—is brought only against the City and will therefore not be further addressed. The sole allegation against the Secretary is in paragraph 36 of the Verified Complaint. Plaintiffs allege that the Secretary “is

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<sup>1</sup> Section 2 of Chapter 2023-348 creates Article VII to chapter 12760, Laws of Florida (1927). Citations are to the sections of the new Article VII, rather than section 2 of the Chapter law, for better specificity.

responsible for custody of the original statutes and records for the State of Florida,” and that “[a]s such,” he is therefore necessary to “strick[e], expunge[], or remov[e] any statute or law that is invalidated.” DE 1 at ¶ 36.

## II. ARGUMENT

Before reaching the merits of a dispute, “no matter how weighty,” a court must ensure that it has subject-matter jurisdiction. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc). “For a court to pronounce upon . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998). Even assuming *arguendo* Plaintiffs have suffered an injury, two elements of subject-matter jurisdiction are still missing from this action as against the Secretary: (1) Plaintiffs’ standing against him and (2) an *Ex Parte Young* exception to the Secretary’s Eleventh Amendment immunity.

### A. There is No Standing Against the Secretary

The standing doctrine’s necessary components are threefold: (1) “injury-in-fact,” (2) “traceability,” and (3) “redressability.” *Lewis*, 944 F.3d at 1296; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs’ injury—being “cut[] off” from engaging their elected City representatives on the “vital social issues which affect [the Utility] and its relationship to its customers and the community” or otherwise from the mere existence of the Special Law—is neither traceable to the Secretary nor redressable by him. DE 1 at ¶ 57.

It is “settled principle that the injury must be traceable to and redressable *by the defendant.*” *ACLU v. Lee*, 546 F.Supp.3d 1096, 1100 (Fla. N.D. 2021) (dismissing the Secretary where she “does not enforce the challenged statute” although Plaintiffs’ injury may have been traceable to passage of the provision and redressed by enjoying the provision). In other words, “it must be *the effect of the court’s judgement on the defendant*—not an absent third party—that redresses the plaintiff’s injury” because redressability “requires that the court be able to afford relief *through the exercise of its power*” over those “who will cause any future injuries” if not enjoined. *Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1254-55 (11th Cir. 2020) (quoting *Lewis v. Gov. of Alabama*, 944 F.3d 1287, 1301 (11th Cir. 2019)). A federal court’s power is “limited;” it “may enjoin executive officials from taking steps to enforce a statute” and “can exercise that power only when the officials who enforce the challenged statute are properly made parties to a suit.” *Id.* at 1255 (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018)); *ACLU v. Lee*, 546 F.Supp.3d 1096, 1100 (Fla. N.D. 2021).

There is no allegation that the Secretary has caused or will cause Plaintiffs’ injury. The Secretary is not at all involved in Plaintiffs’ engagement of their elected City representatives, let alone in the “vital social issues which affect [the *Utility*] and *its* relationship to *its* customers and the community” which form the basis for Plaintiffs’ federal constitutional claims. DE 1 at ¶ 57 (emphasis added); *see id.* Count I (right to petition); Count II (content based and viewpoint-based discrimination); Count III

(prior restraint); Count IV (vagueness). Nor does the Secretary perform the notice, affidavit, or publication requirements for special laws, or enforce in any way municipal powers or the duties of the Governor that Plaintiffs allege are affected and which form the basis for their state constitutional claims. *See* Count V (affecting duties of the Governor); Count VI (failure to comply with notice requirements for special laws); Count VII (failure to comply with affidavit requirement for special laws); Count VIII (separation of municipal legislative power); Count IX (violation of the Municipal Home Rule Powers Act). Plaintiffs do not allege otherwise.

Plaintiffs' only allegation against the Secretary is that he has "custody" of the Special Law and can therefore "expunge" or "remove" it from the state's records. That says nothing of the Secretary's authority to *enforce* any of its provisions against Plaintiffs, which is what matters. Indeed, the Secretary has custody of all Laws of Florida, but that does not make him a party to any and all constitutional challenges to those laws. In *Lewis v. Gov. of Alabama*, 944 F.3d 1287 (2019) the Eleventh Circuit, sitting en banc, evaluated an analogous situation. The Circuit rejected as sufficient for standing, the Alabama Attorney General's authority to institute and prosecute all civil actions necessary to protect the state's interest because he could "be made a proper party defendant under innumerable provisions of the Alabama Code" under that proposition. *Id.* at 1300. That general authority "proves entirely too much—and thus nothing at all." *Lewis*, 944 F.3d at 1300; *see Women's Emergency Network v. Bush*, 323 F.3d 937, 949–50 (11th Cir. 2003) (rejecting jurisdiction over Florida Governor

because “if a governor’s general executive power provided a sufficient connection to a state law to permit jurisdiction over him, and statute could be challenged simply by naming the governor as a defendant”). “Despite” the Secretary’s “[expungement] powers and [custodial] responsibilities, a finding that the Secretary is a proper defendant would run afoul of the[se] concerns....” *Support Working Animals, Inc. v. DeSantis*, 457 F.Supp.3d 1193, 1210 (Fla. N.D. 2020).<sup>2</sup>

The Court cannot enjoin the Secretary from taking steps to enforce the Special Law because the Secretary has no enforcement role or authority.

**B. There is No *Ex Parte Young* Connection with, or Responsibility of, the Secretary to Abrogate His Eleventh Amendment Immunity**

Without standing, the Court lacks subject-matter jurisdiction and can dismiss the action as against the Secretary, without addressing whether the Secretary is a proper defendant under *Ex Parte Young*’s exception to Eleventh Amendment immunity.<sup>3</sup> *Ex Parte Young*, 209 U.S. 123, 168 (1908); *see Lewis*, 944 F.3d at 1306

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<sup>2</sup> Judge Walker used the Eleventh Circuit’s point about standing in *Lewis* to perform an *Ex Parte Young* analysis in dismissing an action against the Secretary. *Support Working Animals, Inc. v. DeSantis*, 457 F.Supp.3d at 1210 (Thus, applying the Eleventh Circuit’s analysis of the plaintiff’s standing in *Lewis* to the related *Ex Parte Young* analysis here, this Court finds the Secretary is not a proper defendant”). Standing is the analysis the Circuit performed in *Lewis* and its reasoning is instructive to the standing analysis here. But either way, standing or *Ex Parte Young*, this action should be dismissed against the Secretary.

<sup>3</sup> Eleventh Amendment immunity may also be waived or abrogated by Congress. Neither of these exceptions apply to this case, which is brought pursuant to 42 U.S.C. § 1983. Florida has not waived its immunity to suits under § 1983, *see Gamble v. Fla. Dep’t of Health & Rehab. Servs.*, 779 F.2d 1509, 1513-20 (11th Cir. 1986), and Congress

(“Because we conclude that plaintiffs lack standing, we need not—may not—proceed to consider . . . whether the Attorney General is a proper defendant under *Ex Parte Young*[.]”); *Jacobson*, 974 F.3d at 1256 (finding “no occasion to consider whether the Secretary is a proper defendant under *Ex Parte Young*” because the plaintiffs lacked standing). In any event, the exception does not apply here, giving the Court another, independent reason to dismiss with prejudice.

“The Eleventh Amendment to the Constitution bars federal courts from entertaining suits against states.” *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm’rs*, 405 F.3d 1298, 1302 (11th Cir. 2005). *Ex Parte Young* provides an “exception to this rule for suits against state officers . . . to end continuing violations of federal law.” *Fla. Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000). Plaintiffs’ *state* constitutional claims do not fall within the exception. *Pennhurst*, 465 U.S. 89, 106 (holding that the *Ex Parte Young* exception is “inapplicable in a suit against state officials on the basis of state law”). Nor does the *remedial* relief, essentially against the state itself, requested by Plaintiffs “to expunge or remove” the Special Law from the *state’s* records. *Green v. Mansour*, 474 U.S. 64, 68 (1985); see *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (dismissing complaint for order against Director “to withdraw [his] advice to the federal agencies”). The *Ex Parte Young* exception does not allow it. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)

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did not abrogate state sovereign immunity through § 1983, see *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 68-71 (1989).



(explaining that the exception “is limited to that precise situation” where the court “commands the state official to do nothing more than refrain from violating federal law”). Moreover, an order directing a state official to expunge a record from the state’s records is in effect mandamus relief against the state official, which a federal court lacks the power to grant. *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F.Supp.2d 1328, 1380 (N.D. Ga. 2012); *Moye v. Clerk, DeKalb Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973). The state constitutional claims in Counts V through XI should therefore be dismissed with prejudice.

As to the *federal* constitutional claims, the defendant “must, at a minimum, have some connection with the enforcement of the provision at issue” for the *Ex Parte Young* exception to apply. *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998). “Where the named defendant lacks any responsibility to enforce the statute at issue, ‘the state is, in fact, the real party in interest,’ and the suit remains prohibited by the Eleventh Amendment.” *Osterback v. Scott*, 782 Fed. App’x. 856, 859 (11th Cir. 2019) (quoting *Summit Med. Assocs. P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999)). For the reasons previously stated, the Secretary lacks any responsibility to *enforce* the Special Law. Finally, as to any monetary damages claims, the Supreme Court has reiterated that “we have held that a State is not a ‘person’ against whom a § 1983 claim for money damages might be asserted.” *Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613, 617 (2002) (*citing Will v. Michigan Dept. of State Police*, 491

U.S. 58, 66 (1989)). Plaintiffs' federal constitutional claims in Counts I through IV should therefore be dismissed with prejudice.

Calling upon the Secretary to defend the merits of statutes he has no official interest in would be a "very convenient way" to invalidate state statutes, but it cannot be done consistently with his sovereign immunity. *Fitts v. McGhee*, 172 U.S. 516, 530 (1899); *see also Digital Recordation Network, Inc. v. Hutchinson*, 803 F.3d 952, 958-59 (8th Cir. 2015) ("the federal courts would be busy indeed issuing advisory opinions that could be invoked as precedent in subsequent litigation"). The *Ex Parte Young* exception does not apply to this action and the Secretary therefore maintains his immunity from suit.

### III. CONCLUSION

For the foregoing reasons, the Court should dismiss the Verified Complaint for Declaratory Judgment, Injunctive Relief and Damages (DE 1) as against the Secretary with prejudice.

Respectfully submitted this 11th day of September, 2023.

/s/ Ashley E. Davis

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**RULE 7.1(F) CERTIFICATE**

I HEREBY CERTIFY that this memorandum is 2,669 words inclusive of parts that do not even count toward the 8,000 limit and that 14-point Garamond font was used throughout.

*/s/ Ashley E. Davis*  
Attorney

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 11th day of September 2023.

*/s/ Ashley E. Davis*  
Attorney