UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GAINESVILLE RESIDENTS UNITED, INC., a Florida not-for-profit corporation, **IRVING W. WHEELER, JR.**, **ROBERT HUTCHINSON**, **SUSAN BOTTCHER**, **MICHAEL VARVEL**, **EVELYN FOXX** and **JOSEPH W. LITTLE**,	)	CASE NO.: 1:23-cv-176-AW-HTC
Plaintiffs,	)	
vs.	)	
RON DESANTIS, in his official capacity as Governor of the State of Florida, **ASHLEY MOODY**, in her official capacity as Attorney General of the State of Florida, **CORD BYRD**, in his official capacity as Secretary of State of the State of Florida, and the Nominal Defendant, **CITY OF GAINESVILLE**, a Florida municipal corporation,	)	
Defendants.	)	

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PLAINTIFF'S RESPONSE IN OPPOSITION TO GOVERNOR'S MOTION TO DISMISS

COME NOW the Plaintiffs, by and through their undersigned attorneys, and respond to Governor DeSantis's Motion to Dismiss Amended Complaint or in the Alternative to Stay (Doc. 28) and say:

I. STANDARD OF REVIEW

Plaintiffs challenge the constitutionality and legality of Ch. 2023-348, Laws of Florida (referred to herein as "HB 1645"). For the purposes of the Motion to Dismiss, the Court must view the allegations of the Verified Complaint in the light most favorable to the Plaintiff, must consider the allegations of the Complaint as true, and must accept all reasonable inferences therefrom. *See*, Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563, 127 S.Ct. 1955, 1969 (2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Twombly, 550 U.S. at 556.

II. FACTUAL ALLEGATIONS

Since 1912, the City of Gainesville has provided utility services to its residents and others through a wholly-owned municipal utility known as "Gainesville Regional Utilities" ("GRU"). GRU currently provides electricity, water, sewer and other utility services to residents through the City of Gainesville, as well as to subscribers residing outside of the municipal boundaries. (Doc. 1 at 17, ¶¶43, 44). Historically, GRU has been operated by the City of Gainesville Commission which

appointed a charter officer as general manager. (Doc. 1 at 19, ¶46). As with any municipality, the City Commission is ultimately responsible to Gainesville's voters.

GRU and its operations have played an out-sized role within the City for a number of reasons. The City has regularly withdrawn revenues from GRU and deposited them into the City's general revenue fund to pay for all manner of City services. In addition to their importance as sources of revenue, GRU's core services have direct impacts on the community in terms of planning, aesthetics, pollution control, economic fairness (especially to low income consumers) and discouragement of urban sprawl, which are not directly related to the costs and financing of the utility systems. In more recent years, the City has engaged in a marked effort to transition energy production to renewable resources. (Doc. 1 at 18-19, ¶45).

The individual Plaintiffs are present and long-time customers of GRU, residing both within and without the municipal limits of the City of Gainesville. (Doc. 1 at 4-14).[1] Plaintiffs Gainesville Residents United, Inc. is a public interest entity, with over 100 supporters, which opposes the loss of local political accountability accompanying the enactment of HB 1645 and advocates for decision

[1] Plaintiffs Wheeler, Bottcher, Foxx and Little reside within the City limits. (Doc. 1 at 6-14, ¶¶ 15, 21, 28, 31).

making which reflects environmental, political, and other socially beneficial values. (Doc. 1 at 4-5, ¶¶9-12). Plaintiffs Hutchinson, Wheeler and Bottcher are members and officers of Gainesville Residents United, Inc. (Doc. 1 at 5, ¶12). Plaintiff Wheeler is a former member and chair of the Gainesville Utilities Advisory Board, which served in an oversight and advisory capacity for GRU. (Doc. 1 at 6, ¶15). Several of the Plaintiffs have served as elected officials for either the City of Gainesville or Alachua County. (Doc. 1 at 7-13, ¶¶19, 21, 31). Plaintiff Little is a bondholder of GRU. (Doc. 1 at 13-14, ¶33, Doc. 1 at 83-88). Plaintiff Varvel is a current GRU employee and is enrolled in the City's pension plan. (Doc. 1 at 9-11, ¶¶23-27)

The Plaintiffs have regularly spoken at City Commission meetings concerning the governance, policies and operations of GRU. They remain vitally interested in the successful operations of the utility and its continuing engagement on social and environmental matters of importance to the community. (Doc. 1 at 6-13, ¶¶15, 16, 19, 20, 21, 22, 29, 30, 31, 32). Plaintiffs Little and Varvel are personally concerned about the impact HB 1645 will have on their economic interests (bond income and employment, respectively). (Doc. 1 at 11, ¶27, 13-14, ¶33, Doc. 1 at 83-88). All Plaintiffs are concerned that the restrictions in §7.12 of HB 1645 will prevent them from addressing the Authority and petitioning for effective redress of issues

pertaining to "the furtherance of social, political, or ideological interests". (Doc. 1 at 4-13, 24-42).

III. INTRODUCTION TO HB 1645

HB 1654 gives life to an "Authority" which is unlike anything previously created under Florida law. The Gainesville Regional Utilities Authority is not an independent executive agency or a special district. Rather, it is and remains a division or "unit" of the City of Gainesville:

> 7.01 Establishment.–
>
> There is created a regional utilities authority to be known as the "Gainesville Regional Utilities Authority" ("Authority"). Gainesville Regional Utilities shall be governed by the Authority upon installation of the Authority's members pursuant to this article. **The Authority shall operate as a unit of city** government and, except as otherwise provided in this article, shall be free from direction and control of the Gainesville City Commission. The Authority is created for the express purpose of managing, operating, controlling, and otherwise having broad authority with respect to the utilities owned by the City of Gainesville. (Emphasis added).

HB 1645, §2, Art. VII, §7.01.

While remaining legally a part of the City, the Authority is simultaneously insulated from any control or influence by the elected representatives of the City – the City Commission. Id. ("The Authority… shall be free from direction and control of the Gainesville City Commission."). The Authority is given vast powers over utility property and infrastructure and is authorized to acquire additional property

through eminent domain. *See*, §7.03. However, the City of Gainesville apparently retains title to all of those properties. *See*, §§7.03(c), (d). The same is true with respect to finances: the Authority borrows and spends money without oversight by the City, but the funds remain City funds. *See*, §7.03(e). Likewise with respect to employees: the Authority hires and fires whomever it chooses and selects its own CEO, but all of those individuals remain City employees. *See*, §7.09.

Given this unique structure, the natural question to ask is: who is ultimately responsible for managing and overseeing the Authority? Before the enactment of HB 1645, the administrative head of GRU was a charter officer subservient to the City Commission. *See*, §Part I. Art. III, §3.06(1), Gainesville Code. ("The commission shall appoint a general manager for utilities ("general manager") who shall be responsible to the commission. The general manager for utilities shall serve at the will of the commission."). Following enactment of HB 1645, the Authority is responsible for appointing a manager (now called a "CEO/GM"). *See*, §7.03)(h). However, that does not make the Authority a self-governing entity because it remains a "unit" of the City. *See*, §7.01

Because the Authority remains a "unit" of the City, it has no separate legal existence and can neither sue nor be sued. "Gainesville Regional Utilities" itself is merely a fictitious name for the City of Gainesville. *See, e.g.*, Florida Dept. of Revenue v. City of Gainesville, 918 So.2d 250, 254 (Fla. 2005) ("The City of

Gainesville (the City), operating under the fictitious name Gainesville Regional Utilities…."); *See, also*, Caravels LLC v. City of Gainesville, Florida, 2020 WL 10731651 (N.D. Fla. 2020) (Referring to GRU as a "d/b/a" for the City). A City unit taking control over a fictitious entity does not create a new independent legal entity.

A long line of state and Federal cases show that city departments, divisions and units are not subject to suit because they remain part of the municipality. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 3–4 (1978) (Court approved dismissal of the city-owned utility because it was "a division of the city of Memphis which provides utility service… [and is] directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government."); Euwema v. Osceola Cnty., 2021 WL 2823443 at *2 (M.D. Fla. 2021) ("[M]unicipal departments and sub-units are not separate legal entities capable of being sued."); Eddy v. City of Miami, 715 F.Supp. 1553, 1556 (S.D. Fla. 1989) ("Where a police department is an integral part of the city government as the vehicle through which the city government fulfills its policing functions, it is not an entity subject to suit.").

In this unique circumstance, however, the Authority is *not* managed by the Gainesville City Commission because the City cannot exercise any control whatsoever over Authority operations. It may be that the Legislature intended to create a separate "commission" that was neither a municipality nor a city. That was

the result of a special act which created the Orlando Utilities Commission ("OUC"). In Lederer v. Orlando Utilities Com'n, 981 So.2d 521, 523–24 (Fla. 5th DCA 2008), the Court acknowledged that the OUC had a form of independent legal existence. However, there is a crucial different between the structure and governance of the OUC and that of the Authority. In the case of the OUC, the Orlando City Council retained the authority to appoint all of the board members. Id. at 523–24. In contrast, the City of Gainesville is expressly stripped of all control over the Authority and the members are all selected by the Governor. *See*, §§7.01; 7.04(1) ("There shall be five members of the Authority appointed by the Governor.").

It is the Governor's control over the Authority which makes HB 1645 unique – and unlawful. As will be seen below, the Florida Constitution does not envision any such role for the Governor. Under the Florida Constitution, the Governor is the chief executive officer of the State and exercises control over the executive branch of government. *See*, Art. IV, §1, FLA.CONST. The Governor is specifically authorized to "commission all officers *of the state and counties*" but that power does *not* include appointments to municipal positions or to units of municipal government. But that is the role assigned to the Governor under HB 1645.

Which brings us to question posed above: who is ultimately responsible for managing and overseeing the Authority? The answer must be Governor DeSantis. It cannot be the Authority itself. That unit of the City is not self-governing and has no

independent existence. It cannot be the City because, even though the City retains legal title to all of the assets, it plays no role in the selection of Authority members and is precluded by HB 1645 from exercising any supervisory or managerial role in the operation of GRU.

Prior to the enactment of HB 1645, the electors of the City of Gainesville (including some of the Plaintiffs) were the ultimate sovereigns in control of GRU through their elected representatives, the Gainesville City Commission. Now Governor DeSantis has assumed the role of sovereign. That is because he has stepped into the shoes previously occupied by the Gainesville City Commission. Governor DeSantis is responsible for soliciting and vetting nominees, appointing members of the Authority Board and determining when the number of non-resident Board members must change (in proportion to service connection outside of the city limits). Most importantly, he is ultimately responsible for the success of the Authority through his power to remove Board members.[2] HB 1645 notably increases the authority of the Governor in this regard as his removal powers include not only the normal statutory authority under §112.501, Fla.Stat., but also the right to remove a

[2] Under §7.08(1), the Governor has both the authority and the responsibility to suspend or remove Board members on his own initiative. Under §7.08(2), the Governor can also remove a Board member following a referral from a majority of the Authority members.

member "for failure to maintain the qualifications specified in section 7.04.". *See*, §7.08(1).[3]

Prior to the enactment of HB 1645, it would be clear that a suit involving a dispute with GRU would be filed against the City of Gainesville. That is because the City Commission had the ultimate authority over GRU. That is no longer true after the enactment of HB 1645 as the City is stripped of that authority. It follows that a dispute concerning the Authority or its operations may no longer be brought against the City – which apparently lacks the authority to change or enforce policy – but must now be brought against the Governor, the individual with control over the Authority.

IV. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIMS

Plaintiffs have not sued the State in violation of the Eleventh Amendment. The State is not named as a Defendant and no state funds are at risk in this action seeking only prospective relief. Instead, the Plaintiffs have properly sued the Governor under the auspices of Ex parte Young, 209 U.S. 123 (1908); *See*, Gale

[3] Residency requirements are among the qualifications set forth in §7.04. *See*, §7.04(2)(d). The Governor's managerial responsibilities are not merely passive as he is solely charged with the right and the responsibility to remove members whose qualifications lapse (as might occur if a member moves). This implies that the Governor has a duty to continuously monitor the Board to ensure that individuals retain their residency and other qualifications.

Force Roofing & Restoration, LLC v. Brown, 548 F.Supp. 3d 1143, 1157 (N.D. Fla. 2021) ("[A] suit alleging a constitutional violation against a state official in his or her official capacity for prospective injunctive relief is not a suit against the state and, therefore, does not violate the Eleventh Amendment…").[4]

A. THE GOVERNOR IS THE PROPER DEFENDANT

The Governor argues that he is not a proper Defendant under Ex parte Young, because he does not have the authority to "enforce" HB 1645. The Governor adopts a "not me" approach, pointing his finger at the Authority as the proper entity to sue:

> Rather, the Act explicitly authorizes the Authority to "manage, operate, and control the utilities, and to do all things necessary to effectuate an orderly transition of the management, operation, and control of the utilities from the City [of Gainesville] to the Authority, consistent with this article." Art. VII § 7.03(1)(a).

(Doc. 28 at 6-7).

That approach is unavailing for the reasons discussed above. The Authority remains a "unit" of the City of Gainesville which has neither legal existence nor the

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[4] Plaintiffs have also sued the City of Gainesville, which filed an Answer to the Complaint. (Doc. 21). There can be no dispute that the Eleventh Amendment does not apply to any claims directed to the City. *See*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts… does not extend to counties and similar municipal corporations.").

ability to bring or defend a lawsuit. While the City of Gainesville has been stripped of all control over the Authority, that does not render the Authority a self-governing entity; it remains what the statute makes of it: a subunit of the municipality.[5] Where then does the power to supervise manage and control lie? It lies with the Governor. The Governor has assumed the role previously occupied by the City Commission (and indirectly by the electors of the City).

One way to test the legal significance of the Governor's statutorily-assigned role is to ask how an injunction could be enforced against the Authority. An injunction against the Authority itself would be meaningless as it lacks independent legal existence. Precedent would normally dictate that the suit be brought against the City of Gainesville as the Authority is a unit of that municipal government. However, in this case, the City is statutorily precluded from exercising any control over the Authority. There are no levers of power the City could exercise over the Authority to give meaning to an injunction. [6]

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[5] The fact that the Authority appoints a CEO for the purpose of managing daily operations does not change this calculus. The Authority does not become a self-governing independent legal entity just because it can assign some responsibilities to an employee (who, incidentally, remains an employee of the City).

[6] One can certainly conjure ways in which effective relief could be granted against the City even under these circumstances. For instance, if HB 1645 was invalidly enacted or is unconstitutional, it is simply void and not enforceable against anyone. *See*, Ex parte Siebold, 100 U.S. 371, 376–77 (1879) ("An unconstitutional law is void, and is as no law."). But that relief would be in the form of a declaratory

In contrast, an injunction would be meaningful if directed to the Governor who has essentially inherited the power and authority formally conferred upon the City. *See*, Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991) (Injunction upheld against Governor as member of executive branch commission where statute authorizing reduction in agency budgets was unlawful). The Governor could comply with that injunction by virtue of his authority to control the make-up of the Board, including the power to suspend or remove any recalcitrant Board members. Indeed, the Governor is the only person in the State assigned this authority by HB 1645. *See, generally*, Jacobson v. Florida Sec'y of State, 974 F.3d 1236, 1256 (11th Cir. 2020) ("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.").

The Governor cites to cases which stand for the proposition that his role as chief executive officer of the State is not sufficient to render him susceptible to suit. (Doc. 28 at 5-6). The Governor also notes that his authority to appoint officials under HB 1645 or to sign legislation is not sufficient to make him a Defendant (Doc. 28

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judgment. It is difficult to discern how an injunction could provide relief as HB 1645 bars the City from any control over the Authority or its members.

at 6-9). However, there is more to the story, both factually and legally.[7]

As another Judge in this division held, the Governor is properly joined as a defendant where he controls the appointment process and has some additional authority to enforce the law:

> As for Plaintiffs' argument that the Governor has constitutional authority to enforce the laws of Florida, that alone is not enough to establish traceability or redressability. *See* Dream Defs. v. DeSantis, 553 F.Supp, 3d 1052, 1078 (N.D. Fla. 2021). However, this Court has found that injuries are fairly traceable to the Governor where the Governor has the authority to suspend officers, initiate proceedings against those who fail to follow directives to enforce the law, ***plus*** some other additional enforcement authority.

Honeyfund.com, Inc. v. DeSantis, 622 F.Supp, 3d 1159, 1173–74 (N.D. Fla. 2022) (Emphasis original); *See, also*, Dream Defs. v. Governor of the State of Florida, 57 F.4th 879, 889 (11th Cir. 2023) ("We agree with the district court that, based on Ex parte Young, Governor DeSantis is a proper party because he has statutory authority to enforce §870.01(2)'s prohibition on riots.").

In this case, the Governor is the only individual with any power or authority to enforce HB 1645. By now, it should be clear that the Authority has no independent legal existence and the City of Gainesville is statutorily precluded by HB 1645 from

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[7] The Governor also argues that he is immune from any money damages under the Eleventh Amendment. (Doc. 28 at 11). While true, that argument is immaterial because Plaintiffs seek only prospective relief against the Governor. The only monetary claims are in Count XII which is directed solely against the City.

controlling any aspect of its utilities. That leaves Governor DeSantis holding the legal bag. And this should not come as a surprise as the Governor's name is literally all over HB 1645.

Governor DeSantis is a proper party as he has a direct role in implementing HB 1645. *See*, Support Working Animals, Inc. v. DeSantis, 457 F.Supp, 3d 1193, 1209 (N.D. Fla. 2020) ("But Ex parte Young does not require a grant of explicit enforcement authority. Rather, it requires 'some connection with the enforcement of the act.'" (citations omitted)). In the present legislation, the Governor is directed to take very specific actions: (i) seek candidates via a public notice; (ii) after the expiration of that time (30 days), appoint – at his sole discretion – all of the members of the Board; and (iii) thereafter, enforce HB 1645 by *removing or suspending such members if they fail to meet the standards and requirements within the legislation*. *See* §§7.04 and 7.05 (Expressly listing both the Governor's authority *and responsibilities* in connection with GRU).

Once the Governor appoints the Authority, the Governor is charged with ensuring that the terms of the legislation continue to be met, which requires ongoing vigilance. That vigilance is not limited to an obligation to make sure that Authority members don't break the law. Section 7.04(3) requires the Governor to replace or nominate new members to the Board based on residency if the proportion of customers outside of city limits exceeds 40%. In addition, the law instructs the

Governor to remove incompetent Board members, either at his own initiative, or upon a referral from the Board majority. *See*, §7.08(1), (2). The Governor is the state official – indeed, the only official - designated to enforce the statute. *See* §7.08(1).

The Governor's reliance on cases such as Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003) is unavailing. In that case, the Governor was not the agency head, but was merely one of several cabinet members with ultimate control over a state department. The Court concluded that this diffuse control was not sufficient to invoke Ex Parte Young:

> In Luckey, this Court interpreted Ex Parte Young to permit suits against state officers only when those officers are "responsible for" a challenged action and have "some connection" to the unconstitutional act at issue. Id. Governor Bush's only connection with Fla. Stat. §320.08058 is that he, along with six members of the cabinet, are responsible for the Department of Highway Safety and Motor Vehicles. Governor Bush's shared authority over the Department is simply too attenuated to establish that he is "responsible for" the distribution of funds to adoption agencies.

Id. at 949.

Bush actually stands as a strong counterpoint to the Governor's argument. Unlike the "attenuated" role the governor played in Bush, Governor DeSantis is the sole legal authority responsible for the Authority. This case is much close to Luckey, Honeyfund.com, and Dream Defenders, as the Governor has control over the authority "plus" "some connection" and responsibility for the implementation of HB 1645, both initially and in the future. Here, the Governor has a special relation to the

statute, he is the authority charged with appointing the members of this new body, managing them, and re-appointing them, with no oversight from elected officials or any other entity.

The Governor's "not me" defense fails under Ex Parte Young, because there is no one other than him who is capable of being sued and of enforcing the statutory responsibilities uniquely assigned to him. While it may seem "weird" to think of the Governor as the legal head of a local municipal utility, that is precisely the result wrought by HB 1645.

V. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' STATE LAW CLAIMS UNDER THE MANDERS TEST.

At first blush it seems obvious that Plaintiffs cannot raise state law claims against the Governor of Florida in a Federal Court. After all, he's the Governor – the quintessential state official. However, the Courts have counseled that "[t]he States' federal-court immunity comes with a host of exceptions." Ernst v. Rising, 427 F.3d 351, 358–59 (6th Cir. 2005). The unique circumstances of this case show that Plaintiffs state law claims are properly litigated in this Court.[8] Plaintiffs cannot emphasize enough that HB 1645 has created a unique regulatory scheme for a municipal utility which has no precedent in Florida – or anywhere else in the country.

[8] Again, the Governor's arguments in favor of his dismissal do not apply to the City of Gainesville, which is not protected by the Eleventh Amendment.

For all intents and purposes, the Legislature has appointed the Governor as the head of a local governmental unit completely separate from the Executive or Legislative branches and with no ties to state government other than the identity of its leader – Governor DeSantis.

Where, as here, Plaintiffs have alleged that the GRU Authority is not a state agency and that Governor DeSantis is effectively acting as a municipal officer and not a state official,[9] the inquiry requires a careful case-by-case analysis:

> Under the traditional Eleventh Amendment paradigm, states are extended immunity, counties and similar municipal corporations are not, and entities that share characteristics of both require a case-by-case analysis. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

[9] Much more could be written on this point. Plaintiffs allege that the Legislature had no authority to appoint Governor DeSantis as the effective head of a municipal utility because the Florida Constitution constrains the governor's authority vis-à-vis cities. In particular, Art. III, §§3 and §11(a) of the Florida Constitution do not authorize the Governor to appoint municipal officers except under certain circumstances where there is a vacancy. The State appears to take the position that the Legislature has "plenary authority" over cities. However, the 1968 Constitution gives municipalities the power of home rule and the Legislature's authority has been circumscribed. *See*, Lake Worth Utilities Auth. v. City of Lake Worth, 468 So. 2d 215, 217 (Fla. 1985) (The legislature's retained power is now one of limitation rather than one of grace…"). One way to resolve this constitutional conflict is to conclude that the Governor has been given the power of appointment, not in his role as governor, but as the equivalent of a municipal agent. Municipal agents cannot claim the protection of the Eleventh Amendment.

U.S. ex rel. Lesinski v. S. Florida Water Mgmt. Dist., 739 F.3d 598, 601 (11th Cir. 2014).

In conducting this case-by-case analysis, the Court's inquiry will be governed by the four-part test set forth in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003):

> "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials" when they act as "an arm of the State." Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Whether an official is an "arm of the State" "depends, at least in part, upon the nature of the entity created by state law." Id.; *see also* Manders, 338 F.3d at 1308… For over twenty years, our Court has applied a four-factor test to determine whether public officials act as arms of the State for purposes of the Eleventh Amendment: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." Manders, 338 F.3d at 1309; Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n, 226 F.3d 1226, 1231 (11th Cir. 2000).

Austin v. Glynn Cnty., Georgia, ___ F. 4th __, 2023 WL 5967920 at *3 (11th Cir. Sept. 14, 2023).[10]

Plaintiffs have already pointed the Court in the right direction for this inquiry. HB 1645 affects the governance of a municipal utility in Gainesville. It is a special law of local affect; it does not affect any other utility or any other municipality in

[10] "The issue of whether an entity is an "arm of the State" for Eleventh Amendment purposes is ultimately a question of federal law. But the federal question can be answered only after considering provisions of state law." Manders, 338 F.3d at 1309.

the State. The Authority is designate a "unit" of the City of Gainesville, which again demonstrates that neither the State nor any state agency is directly involved.

The State itself does not exercise any control over the Authority. Rather, that responsibility has been assigned to the Governor, who must make appointments and supervise the make-up and fidelity of the Board on a continuous basis going forward. It is important to note that this authority is personal to the Governor and is not delegated to any other state official or agency.

HB 1645 makes it clear that the Authority derives its funds exclusively from utility fees charged to customers, together with whatever money it obtains through bonds it forces the City to issue. *See*, §§7.03(1)(b)(c), 7.11(1). There are no circumstances in which the State of Florida will be liable for the Authority's debt and the State coffers are not at risk.

In terms of liability for judgments, Plaintiffs have shown that the Authority is not a legal entity and cannot be sued directly. While the City can certainly be sued for contracts, debts and liabilities incurred by its municipality, it is debatable whether it is answerable to an injunction as it lacks control over the Authority. Injunctive relief would be effective against the Governor, but the State's purse will not be subject to levy as the statute specifies that the pool of at-risk funds remains with the City (albeit controlled by the Authority).

Under the Manders tests, the State has virtually nothing to do with the Authority. Rather, the Governor is given plenary control over what amounts to a municipal office. The fate of HB 1645 will have no impact whatsoever on State governance, funds or operations. Accordingly, on the unique facts presented, the Eleventh Amendment does not serve as a bar to relief directed to the Governor in the strictly local capacity created for him by HB 1645.

The Governor asks this Court to decline to exercise supplemental jurisdiction over Plaintiffs' state law claims. (Doc. 28 at 11). However, that would be improper. Even if the Governor is dismissed entirely from this case, Federal constitutional claims remain pending against the City of Gainesville, which has filed an Answer to those claims. (Doc. 21). This Court will be called upon to decide the related state law claims against the City.

V. EACH OF THE PLAINTIFFS HAS STANDING.

A. Plaintiffs Each Plead a Constitutional Injury

The Governor's standing arguments miss the mark because it is based on generic standing cases rather than the specific cases addressing First Amendment violations – a distinct jurisprudence all of its own. "When First Amendment rights are involved, courts apply the injury-in-fact requirement most loosely, 'lest free speech be chilled even before the law or regulation is enforced.'" Pernell v. Florida Bd. of Governors of State Univ. Sys., 641 F.Supp. 3d 1218, 1249 (N.D. Fla. 2022)

quoting Harrell v. Fla. Bar, 608 F.3d 1241, 1254 (11th Cir. 2010). Plaintiffs have demonstrated the near-certainty of a constitutional violation without waiting to be thrown out of an Authority meeting or ignored by the entity statutorily barred from redressing their grievances. *See*, Clean-Up '84 v. Heinrich, 582 F.Supp, 125, 126 (M.D. Fla. 1984) ("Besides prohibiting laws abridging freedom of speech, the First Amendment proscribes legislative attempts at restricting the right to petition the Government for a redress of grievances.").

Plaintiffs' core legal claims are facial challenges to §7.12 of HB 1645 under the First and Fourteenth Amendments. For purposes of those facial challenges, the individual facts of this case are largely irrelevant. *See, generally*, Sentinel Communications Co. v. Watts, 936 F.2d 1189, 1197 (11th Cir. 1991) ("In a facial challenge such as this, the facts of the challenging party's case are irrelevant."); *See, also*, Miami Herald Pub. Co. v. City of Hallandale, 734 F.2d 666, 674 (11th Cir. 1984).

The facts necessary to show Plaintiffs' standing and to support their constitutional claims are set forth at length in the Complaint (Doc. 1 at 4-42). Reducing those allegations to the core, Plaintiffs allege that they are local activists serviced by GRU who have historically brought their "social, political, or ideological interests" to the attention of the authorities and would do so in the future but for §7.12 of HB 1645 which precludes the Authority from so much as considering those

ideas. Plaintiffs' Complaint properly demonstrated (1) an intent to "engage in a course of conduct arguably" protected by the First Amendment; (2) that the Act arguably proscribes that conduct; and (3) that there is a credible threat of enforcement. Wollschlaeger v. Gov. of Florida, 848 F.3d 1293, 1304 (11th Cir. 2014); *see also* Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1119–20 (11th Cir. 2022).

The Governor suggests that a "credible threat of enforcement" is triggered only if there is a risk of arrest and criminal prosecution and that a non-criminal statute can never justify a pre-enforcement challenge. (Doc. 28 at 15-16). That is not the law. Rather, any threatened enforcement of a statute which will infringe upon constitutional rights is sufficient to confer standing:

> "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). "When a plaintiff has stated that he intends to engage in a specific course of conduct 'arguably affected with a constitutional interest,' however, he does not have to expose himself to enforcement to be able to challenge the law. 'If the injury is certainly impending, that is enough.'" Am. Civil Liberties Union v. Fla. Bar, 999 F.2d 1486, 1492 (11th Cir. 1993) (*quoting* Babbitt, 442 U.S. at 298, 99 S.Ct. 2301) (internal citation omitted).

Taylor v. Polhill, 964 F.3d 975, 980 (11th Cir. 2020).

Plaintiffs have explained why their right of free expression is infringed by the Complaint. Their injury is all but unavoidable because the "social, political, or

ideological interests" they wish to address can never be placed on an Authority agenda (because the Authority is statutorily precluded from considering such items). (Doc. 1 at 24-29). It is long established that the loss of first amendment rights is a cognizable injury. Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) ("A deprivation of First Amendment rights standing alone is a cognizable injury.").

The strength of the petition clause claim is that Plaintiffs need not prove the strong probability of adverse Board action. Rather, they know from the language of the statute itself, that the Board, administered by Governor DeSantis, can never redress the issues which are important to Plaintiffs. That is the central difference between the speech claims addressed in the Governor's Motion and the petition claims, which go unaddressed.

HB 1645 expressly and statutorily prohibits the Authority from taking any action on the Plaintiffs' grievances no matter how often and eloquently they may be spoken. The Governor admits as much:

> The closest they comes is alleging that they want GRU to "address social, political or ideological interests, as well as industry best practices" but these issues "fall within the concepts prohibited by the challenged Special Law." Id. ¶ 16.…
>
> The Act does no proscribe any speech. It requires the Authority to consider "pecuniary factors and utility industry best practices standards" when making policy and operational decisions, **and prohibits consideration of "social, political or ideological interests."** Art. VII, § 7.12. (Emphasis added).

(Doc. 28 at 15). Exactly.

That is why the First Amendment right of petition claim appears as the first count in the Complaint – a right which is separate and co-equal to the right of free speech:

> The right to petition the government for a redress of grievances is "one of the most precious of the liberties safeguarded by the Bill of Rights," and is "high in the hierarchy of First Amendment values." Lozman v. City of Riviera Beach, Fla., 585 U.S. __, __, 138 S. Ct. 1945, 1954–55, 201 L.Ed.2d 342 (2018) (internal quotation marks omitted) (*quoting* BE & K Const. Co., v. NLRB, 536 U.S. 516, 524, 122 S. Ct. 2390, 2395, 153 L.Ed.2d 499 (2002)); *see also* Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). The right to petition the government for redress of grievances is such a fundamental right as to be "implied by '[t]he very idea of a government, republican in form.'" BE & K Const., 536 U.S. at 524–25, 122 S. Ct. at 2396 (*quoting* United States v. Cruikshank, 92 U.S. 542, 552, 23 L.Ed. 588 (1875)).

DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1288–89 (11th Cir. 2019).

It is certain that the statute will be enforced as written. Accordingly, each of the Plaintiffs has standing to raise facial, pre-enforcement First Amendment challenges to HB 1645.[11] Gainesville Residents United properly alleges that it has standing to maintain this action in its own right as well as through organizational standing. (Doc. 1 at 4-5). That entity exits for the purpose of engaging in social

[11] Plaintiffs can succeed on this Motion even if only one of them has standing to challenge the law. *See*, Pernell v. Florida Bd. of Governors of State Univ. Sys., 641 F.Supp, 3d 1218, 1288 (N.D. Fla. 2022) ("Only one Plaintiff needs standing to challenge a Defendant's enforcement of the [law]").

advocacy pertaining to the operations of GRU – precisely the issues which the Authority is prohibited from considering under §7.12 (Doc. 1 at 5). In the alternative, the entity has standing because its members do. *See*, Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 53, n. 2 (2006).

HB 1545 is vague and it will not get any less vague when it is employed in the day-to-day operations of the Authority. A vague law "raises special First Amendment concerns because of its obvious chilling effect on free speech." Reno v. ACLU, 521 U.S. 844, 871–72 (1997). In a facial challenge such as this one, Plaintiffs do not have to wait until the Authority adopts a questionable interpretation of the law or abuses its authority to determine what is and what is not speech "in furtherance of social, political, or ideological interests". The point is that the opportunity to arbitrary enforcement is written right into the statute because no one can tell what is and is not within the prohibited subject matter. *See, generally*, Hill v. Colorado, 530 U.S. 703, 732 (2000) (Noting that a law can be vague because it invites arbitrary enforcement or because people of ordinary intelligence cannot determine its application).

It does the Governor no good to proclaim that each of the words challenged as vague has a dictionary definition. That fact does not assist in narrowing down concepts which include a large swath of vital social and political issues. By way of example, is the term "ideological interests" meant to apply to extreme political

viewpoints such as communism or white supremacy or does it include any partisan issue subject to political disagreement? The Governor's guess is as good as the Plaintiffs'.

The prior restraint claim deals less with substance and more with process. The essence of that claim is that the Authority can prohibit speech in advance without standards addressing whether speech is political, social or ideological. *See, generally*, Chesapeake B & M, Inc. v. Harford Cnty., Md., 58 F.3d 1005, 1013 (4th Cir. 1995) ("The 'intermediate scrutiny' analysis applicable to content-neutral restrictions on speech is distinct from the prior restraint analysis...").

B. Plaintiffs' Injury is Traceable to the Governor and Fully Redressable

The Governor claims that HB 1645 does not trace back to him because the Authority is responsible for its own management. For the same reason, the Governor maintains that Plaintiffs' constitutional injuries are not redressable. (Doc. 28 at 19-21). The Governor's position is not sustainable because Plaintiffs meet all of the elements of Article III standing. Those issues largely track the prior discussion concerning the propriety of joining the Governor as a Defendant in the face of Eleventh Amendment concerns:

> First, the plaintiff must demonstrate that she has suffered an "injury in fact" - an invasion of a legally protected interest that is both (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical." Id. (internal quotation marks and citations

> omitted). Second, the plaintiff must show a "causal connection" between her injury and the challenged action of the defendant - i.e., the injury must be "fairly ... trace[able]" to the defendant's conduct, as opposed to the action of an absent third party. Id. (citation omitted). Finally, the plaintiff must show that it is likely, not merely speculative, that a favorable judgment will redress her injury. Id. at 561, 112 S.Ct. 2130 (citation omitted).

Lewis v. Governor of Alabama, 944 F.3d 1287, 1296 (11th Cir. 2019), *citing* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

As to traceability, the Governor has the primary role in administering HB 1645, first, in its initial execution and thereafter in its continuing administration. HB 1645 empowers and requires the Governor:

1. To issue a public notice soliciting nominations for members of the Authority. §7.05.

2. To issue the notice and make appointments is a time schedule prescribed by HB 1645. §§7.05 (1)(2)(3)(4).

3. To appoint Authority members from the nominees. §7.05(2).

4. To balance appointments to the Authority members between residents of the City of Gainesville and non-city residents in a ration prescribed by the statute. §7.05 (3). This is a continuing duty and will apply to all future governors.

5. To appoint fill any vacancies in membership of the Authority when vacancies should exist. §7.05(4). This is a continuing duty and will apply to all future governors.

6. To remove or suspend members of the Authority pursuant to §112.501 Fla. Stat. §7.08 (1). This is a continuing duty and will apply to all future governors.

In addition, Art. IV, § 1 Florida Constitution empowers the Governor to enforce the statute under this provision:

> (b) The governor may initiate judicial proceedings in the name of the state against any executive or administrative state, county or municipal officer to enforce compliance with any duty or restrain any unauthorized act. (Bold added.)

HB 1645 imposes a variety of duties on the City of Gainesville – chiefly in the nature of subservient cooperation. *See*, §§7.10 (1), §7.07(2), §7.10 (3). Should the City of Gainesville fail to perform its statutory duties the Governor, as chief administrator of the statute, would have the power and the duty to initiate judicial proceedings to enforce the statute. Plainly Defendant Governor DeSantis is a proper party to defend the statute.

Given these powers, and considering his position of ultimate control over the Authority (to the exclusion of any other government actor), it is clear that a declaratory judgment and injunction against the Governor, prohibiting appointments and any enforcement of HB 1645, would afford the Plaintiffs complete relief.

VI. PLAINTIFFS HAVE PROPERLY PLED CAUSES OF ACTION BASED ON VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

Plaintiffs have already provided a solid overview of their constitutional claims in the section addressing their standing and injury. The Government's briefing on its 12(b)(6) motion is perfunctory. A few words should suffice to show that Plaintiffs have adequately stated a claim.

A. First Amendment; Speech and Petition Clauses

The elements and standards for evaluating Plaintiffs' First Amendment speech claim are found in Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015):

> Content-based laws - those that target speech based on its communicative content - are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.
>
> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, Sorrell v. IMS Health, Inc., 564 U.S. __, __ , 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011) (Additional citations omitted).

The Governor claims that Plaintiffs fail to state any facts in support of their constitutional claims. (Doc. 28 at 23) That is preposterous. The Complaint devotes pages of detailed allegations explaining Plaintiffs' long-time interest in social activism related to GRU, their history of voicing their concerns to the City Commission and the certainty that the Authority will either prohibit that speech outright or simply refuse to address the Plaintiffs' grievances. (Doc. 1 at 4-43). Plaintiffs identified the offending provision:

> 56 The Special Law prohibits any discussion or action which might further "social, political, or ideological interests" – issues which have often been referred to as "DEI" for "diversity, equity and inclusion". The operative language of the Special Law reads as follows:
>
> 7.12 Limitation on Utility Directives. …

(Doc. 1 at 21, ¶56). Plaintiffs also identified the particular words which made HB 1645 unconstitutionally vague. (Doc. 1 at 36-43).

The Governor does not claim that Plaintiffs have no First Amendment rights. Instead, he insists that HB 1645 does not prohibit Plaintiffs from speaking. (Doc. 28 at 24). While HB 1645 does not outlaw speech, it does deny Plaintiffs any meaningful forum in which speech can take place for the reasons set forth in the Complaint. (Doc. 1 at 26, 31). A failure to provide a meaningful forum ("alternative avenues of communication" is the term art) is a violation of the First Amendment even in the absence of de jure censorship. *See*, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266 (11th Cir. 2021).

Plaintiffs also showed how §7.12 of the Special Law precludes them from ever petitioning the Authority for redress of any grievance which the Authority believes may constitute "social, political, or ideological interests." Government cannot use legislation to prevent its citizens from petitioning their representatives. *See*, Clean-Up '84, 582 F.Supp.at 126 ("[T]he First Amendment proscribes legislative attempts at restricting the right to petition the Government for a redress of grievances."). That is particularly true where the ban is content and viewpoint-based. *See*, Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the

specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

B. Prior Restraint.

The Governor does not brief the sufficiency of Count III, which asserts that §7.12 imposes an unconstitutional prior restraint. Plaintiffs properly alleged those elements which the Supreme Court has held constitute the defining characteristics of a prior restraint. *See*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-27 (1990).

C. Vagueness.

If one asked a dozen people what "social, political, or ideological interests" refers to, one is liable to get twelve different answers. That is the essence of a vagueness claim. *See, generally*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("[W]e have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but… the requirement that a legislature establish minimal guidelines to govern law enforcement.").

The fact the Governor can claim that these terms of art have "common and ordinary meanings" (Doc. 28 at 26) is a poor defense against a vagueness claim. *See*, Pernell, 641 F.Supp. 3d at 1281 ("[T]he fact that the IFA uses real words found in an English dictionary does not magically extinguish vagueness concerns.").

VII. ANY ISSUES WITH RESPECT TO SHOTGUN PLEADINGS WAS RESOLVED THROUGH THE DISMISSAL OF THE OTHER STATE DEFENDANTS.

In this instance, the heading says all that needs to be said.

WHEREFORE, the Plaintiffs pray that Governor's Motion to Dismiss be denied in its entirety.

Respectfully Submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Response was furnished to CINDY A. LAQUIDARA, Esquire [cindy.laquidara@akerman.com] 50 North Laura Street, Suite 3100, Jacksonville, Florida 32202; NICHOLAS J.P. MEROS, Esquire [Nicholas.Meros@eog.myflorida.com], The Capitol, PL-5 S. Monroe Street. Tallahassee, FL 32399; ANITA PATEL, Esquire [Anita.Patel@myfloridalegal.com], Office of the Attorney General PL – 01, The Capitol, Tallahassee, Florida 32399-1050; JOSEPH S. VAN DE BOGART, Esquire [joseph.vandebogart@dos.myflorida.com]; ASHLEY E. DAVIS, Esquire [Ashley.Davis@dos.myflorida.com] R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, Florida 32399-0250, via the CM/ECF System this 3rd day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I hereby certify that this motion and memorandum of law contains 7,911 words.

/s/ Gary S. Edinger
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