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

GAINESVILLE RESIDENTS UNITED, INC., a Florida not-for-profit corporation, *et al.*,

Plaintiffs,

v. Case No. 1:23-cv-00176-AW-HTC

RON DESANTIS, in his official capacity as Governor of the State of Florida, *et al.*,

Defendants.

ATTORNEY GENERAL'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rules 12(b)(1) and 12(b)(6), Defendant, the Attorney General of Florida, moves to dismiss the Attorney General as a defendant and dismiss Plaintiffs' Complaint (Doc. 1).

BACKGROUND

Plaintiffs filed this lawsuit challenging Committee Substitute for House Bill 1645, enrolled as Chapter 2023-348, Laws of Florida (hereinafter, the "Special Law"). The Special Law amends Article VII of the Charter of the City of Gainesville, Alachua County ("City" or

"Gainesville") and creates the Gainesville Regional Utility Authority ("Authority"), appointed by the Governor, to govern the Gainesville Regional Utilities ("GRU" or "the Utility System") "free from the direction and control of the Gainesville City Commission." Special Law, Section 7.01.[1] The City-owned Utility has utility customers located inside and outside city limits. With the exception of Gainesville Residents United, Inc. (Doc. 1 at ¶¶ 9-14), the Plaintiffs are customers of the utility. (Doc. 1 at ¶¶ 15-33).

Plaintiffs have sued the Attorney General Ashley Moody in her official capacity as the Attorney General for the State of Florida. (Doc. 1 at ¶ 35). Plaintiffs have raised four federal constitutional claims and eight supplemental state law claims in their Complaint.

Plaintiffs assert in a shotgun-like-manner that the Special Law unlawfully infringes upon their federal constitutional rights because it "transfers all political, legal, financial and operational control, including rate setting, over GRU [Utility System] from the elected City Commission of the City of Gainesville" to a new Authority appointed by the Governor

[1] Citations to Special Law will be to Chapter 2023-348, Laws of Florida, CS/HB 1645, available at, http://laws.flrules.org/2023/348, last viewed on September 8, 2023.

(Doc. 1 at ¶¶ 55) and because the Special Law directs the Authority not to "include consideration of the furtherance of social, political, or ideological interests." (Doc. 1 at ¶¶ 56, quoting Special Law, Section 7.12).

Plaintiffs set forth the following four federal constitutional claims: (1) the Special Law violates Plaintiffs' First Amendment Right to petition the Authority for redress of grievances (Count I) (Doc. 1 at ¶¶ 67-84); (2) the Special Law is "content-based and view-point based discrimination" (Count II) (Doc. 1 at ¶¶ 85-93; (3) Section 7.12 of the Special Law is a censorship scheme that infringes on Plaintiffs' free speech rights, thus subject to strict scrutiny (Count III) (Doc. 1 at ¶¶ 94-102); and (4) the Special Law is unconstitutionally vague. (Count IV) (Doc. 1 at ¶¶ 103-109). Plaintiffs allege that as a result of the Special Law and Defendants' "actions to implement and enforce the law", they have and continue to "suffer irreparable injury." (Doc. 1 at ¶¶ 59).

Plaintiffs additionally bring eight supplemental state law claims,[2] alleging the Special Law likewise violates Florida's Constitution (Counts

[2] Only seven of the state law claims are against the Attorney General. The City of Gainesville is only Defendants as to Count XII.

V through XII) (Doc. 1 at ¶¶ 110-258). Plaintiffs assert this Court has jurisdiction to address all twelve Counts. (Doc. 1 at ¶¶ 1-7).

Plaintiffs' claims against the Attorney General, however, should be dismissed as a matter of law because she is not a proper party and because there is no justiciable controversy existing between her and the Plaintiffs. Moreover, the Plaintiffs lack standing to assert their federal constitutional claims (Counts 1-4) and Eleventh Amendment Immunity completely bars their supplemental state law claims (Counts 5-12).

MEMORANDUM OF LAW

ARGUMENT

I. Sovereign Immunity Bars Suit Against the Attorney General

a. Federal claims

Under the Eleventh Amendment, "a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress under section 5 of the Fourteenth Amendment." *Osterback v. Scott*, 782 F. App'x 856, 858 (11th Cir. 2019) (quoting *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011)). *Ex Parte Young* provides a narrow exception to this rule for suits "alleging a violation of the federal constitution against a state official in his official

capacity for injunctive relief on a prospective basis." *Osterback*, 782 F. App'x at 858 (quoting *Grizzle*, 634 F.3d at 1319). Under this exception, a state official is subject to suit in his or her official capacity only when he or she has "responsibility to enforce the law . . . at issue in the suit." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (citing *Ex Parte Young*, 209 U.S. 123, 161 (1908). "Federal courts have refused to apply *Ex* [*P*]*arte Young* where the officer who is charged has no authority to enforce the challenged statute." *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1342 (11th Cir. 1999). Furthermore, the enforcement authority must be specific. The official's "general executive power" is "not a basis for jurisdiction in most circumstances." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003).

As to suits against a state attorney general, the Supreme Court has explained that if state statutes could be challenged by suing the attorney general on the theory that he or she, "as attorney general, might represent the state in litigation involving the enforcement of its statutes," it would eviscerate "the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons." *Ex Parte Young*, 209 U.S. at 157. Here, because the Attorney

General has no enforcement authority over the Special Law, she is not a proper defendant.

Plaintiffs assert that the Attorney General is "ultimately responsible for the enforcement of the laws of the State of Florida, including special acts. The Attorney General is Florida's chief legal officer and is vested with broad authority to act in the public interest." Doc. 1 at ¶ 35. The Attorney General has a statutory duty to appear in suits in which the state may be a party, (Doc. 1 at ¶ 35) (citing §§ 16.01(4),(5), Fla. Stat), and has a common law authority "to protect the public interest through litigation." (Doc. 1 at ¶ 35). However, this authority is discretionary. *See Mallory v. Harkness*, 923 F. Supp 1546, 1553 (S.D. Fla. 1996) ("The [Attorney General] is . . . not affirmatively required to intervene every time an entity challenges the constitutionality of a statute.") (citations omitted)), *aff'd without opinion*, 109 F.3d 771 (11th Cir. 1997).

This discretionary authority is a general executive power and does not constitute a sufficient connection in order to make the Attorney General a proper defendant as to the federal claims. *See Women's Emergency Network*, 323 F.3d at 949-50 ("A governor's 'general executive

power' is not a basis for jurisdiction in most circumstances."); *see also Osterback v. Scott*, 782 F. App'x 856, 859 (11th Cir. 2019) (holding that Florida Governor's general authority to enforce Florida's laws "did not make him a proper party"). Indeed, other than a passing reference to the Attorney General in paragraph 35 of its Complaint, Plaintiffs make no specific allegations as to the Attorney General. That is because the Attorney General does not have any enforcement authority over the Special Law. Counts I-IV should be dismissed as to the Attorney General.

b. State law claims

The remaining eight supplemental state law claims against the Attorney General are also barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (holding the Eleventh Amendment prohibits federal courts from intruding on state sovereignty by instructing state officials on how to comply with state law.)

The Eleventh Amendment affords unconsenting states immunity from suits brought by their own citizens and citizens of other states in federal court. *Pennhurst*, 465 U.S. at 100; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). It bars a suit against state officials when the State is the

real, substantial party in interest, regardless of whether the suit seeks damages or injunctive relief. *Pennhurst*, 465 U.S. at 101-102. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the [state]. It is *not* a suit against the official personally, for the real party in interest is the [state]." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis in original) (citation omitted).

Therefore, pursuant to *Pennhurst*, Plaintiffs' supplementary state law claims and state constitutional claims (Counts V through XII) are barred by the Eleventh Amendment.

II. Plaintiffs each lack standing to raise their Federal Constitutional Claims

In order to satisfy Article III's case-or-controversy requirement, a plaintiff must show that he has standing and that the case is ripe for review. *Elend v. Basham*, 471 F.3d 1199, 1204-05 (11th Cir. 2006). In pre-enforcement challenges, the standing inquiries tend to converge. *Id.* at 1205. Here, standing deficiencies require dismissal.

To establish standing, Plaintiffs must show (1) injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between that injury and the

complained-of conduct that is fairly traceable to the challenged action of the defendant that is not the result of independent action not before the court; and (3) it must be "likely"—and not speculative—"that the injury will be redressed by a favorable decision." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (marks and citation omitted). The Plaintiffs have the burden of establishing these elements. *Id.*

Where prospective declaratory and injunctive relief is requested, such as here, a plaintiff must first "demonstrate that he is likely to suffer future injury; second, that he is likely to suffer such injury at the hands of the defendant; and third, that the relief [sought] will likely prevent such injury from occurring." *Cone Corp. v. Fla. Dept. of Transp.*, 921 F.2d 1190, 1203-04 (11th Cir. 1991). Because an injunction would regulate future conduct, a plaintiff seeking injunctive relief must also allege for the "injury-in-fact prong" a real and immediate threat, not merely a conjectural or hypothetical threat of a future injury. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citation omitted). Importantly, each plaintiff must establish standing as to each claim and for each form of relief sought. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *see also Davis v. Federal Election Comm'n*, 554 U.S. 724, 734

(2008). Plaintiffs have established neither injury, traceability, nor redressability for any claim.

In this case, there are seven Plaintiffs. Gainesville Residents United, Inc. ("GRUI Plaintiff"), a not-for-profit-corporation, and six individually named Plaintiffs. Doc. 1 at ¶¶ 9-33. This standing analysis will start with the GRUI Plaintiff before addressing the individual Plaintiffs.

a. GRUI Plaintiff lacks organizational standing

GRUI Plaintiff lacks organizational standing to sue on its own behalf. "[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing [it] to divert resources to counteract those illegal acts." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008).

In its Complaint, Doc. 1 at ¶¶ 9-14, GRUI Plaintiff has not alleged it has diverted any funds to address the Special Law, nor has it "explained what activities" the expenditures were "divert[ed]…away from." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020). That is fatal to their standing. *See id.* (stating that "precedent requires" a plaintiff-organization to "explain[] what activities [it] would

divert resources away *from* in order to" address a challenged law) (emphasis in original); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (a plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending."). Further, the Special Law applies to the City of Gainesville and the Authority it creates; it does not apply to any of the Plaintiffs including the GRUI Plaintiff. As discussed below, all Plaintiffs' injuries are purely hypothetical, so they cannot form a basis for standing.

b. GRUI Plaintiff lacks associational standing

GRUI Plaintiff does not have associational standing either. To establish associational standing, an organization must show that its members would have standing to sue in their own right. *See Jacobson*, 974 F.3d at 1248. As discussed below, the GRUI Plaintiff members and individual Plaintiffs lack standing, therefore, the GRUI Plaintiff lacks associational standing.

c. Plaintiffs lack individual standing

i. Plaintiffs fail to show injury in fact

To have standing, Plaintiffs must show an injury in fact – "an invasion of a legally protected interest that is both (1) 'concrete and

particularized' and (2) 'actual or imminent, not conjectural or hypothetical.' " *Support Working Animals, Inc. v. Gov. of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021) (citation omitted). In the pre-enforcement context, that means they must establish "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and "a credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). They have not.

"An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. at 158 (marks omitted) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). Allegations of future harm are not enough, though, when they rest on a "speculative chain" of future contingencies. *Clapper*, 568 U.S. at 414. Here, the Plaintiffs assert that the yet-to-be-appointed Authority will not allow the Plaintiffs to address the Authority on "social, political, or ideological interests" and that they have a First Amendment right to do so. *See* Doc. 1, Counts I-IV, ¶¶ 67-109. Their speculative argument

concerns what unappointed future members of the Authority may or may not do in a future meeting.

Plaintiffs' theory moreover requires this Court to speculate not only as to future events that may or may not happen but also as to the actions of an independent third party (the Authority). *See Hallendale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 911 F.2d 756, 762 (11th Cir. 1991); *Clapper*, 568 U.S. at 413 ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). In this case, the independent Authority created by Special Law within the City of Gainesville has not yet been appointed; therefore, it is speculative whether the Authority will prohibit any speech during its public meetings. The Plaintiffs individually and collectively cannot prove "an actual or imminent injury-in-fact" and therefore they lack standing.

ii. Plaintiffs fail to show "traceability and redressability" as to the Attorney General

The second and third prong of the standing analysis "traceability and redressability" often travel together. *Support Working Animals, Inc. v. Governor of Fla.,* 8 F.4th 1198, 1201 (11th Cir. 2021) "[W]here, as here, a plaintiff has sued to enjoin a government official from enforcing a law,

he must show, at the very least, that the official has the authority to enforce the particular provision that he has challenged, such that an injunction prohibiting enforcement would be effectual." *Id.*

Article III standing requires an even more rigorous analysis than *Ex Parte Young*. *See Jacobson*, 974 F.3d at 1256. Therefore, because Plaintiffs cannot establish that the Attorney General is a proper defendant under *Ex Parte Young*, they cannot establish traceability or redressability. Plaintiffs' purported injury is not "fairly traceable" to the Attorney General because she has no enforcement authority over the Special Law that they challenge, and an injunction against her therefore will not redress the injury. *See id.*; *Lewis v. Governor of Ala.*, 944 F.3d 1287 (11th Cir. 2019) (*en banc*) (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). As the Eleventh Circuit has held, a party lacks standing to sue a state official when state law assigns enforcement authority to a different, independent official—here, it is not the Attorney General. *See Jacobson*, 974 F.3d at 1253–54; *Claire v. Fla. Dep't of Mgmt. Servs.*, 2020 WL 7086140, at *3 (N.D. Fla. Dec. 3, 2020) (Walker, J.) ("Per the Eleventh Circuit, when a state law makes *one* state

official responsible for the challenged action, plaintiffs lack standing to sue *another, independent* state official for that action.").

Therefore, the GRUI Plaintiff and individual Plaintiffs lack standing. Since the court lacks original jurisdiction over the federal claims, the court has no discretion to exercise supplemental jurisdiction as to Plaintiffs' state law claims. *See Garcia v. Miami Beach Police Dep't*, 336 F. App'x 858, 860 (11th Cir. 2009).

CONCLUSION

Based on the above, the Court should dismiss the Complaint as to the Attorney General.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Erik L. Sayler*
Erik L. Sayler (FBN 0029525)
Special Counsel
Complex Litigation Division
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
850-414-3300
Erik.Sayler@myfloridalegal.com
ComplexLitigation.eservice@myfloridalegal.com

Anita Patel (FBN 0070214)
Assistant Bureau Chief
Complex Litigation Division
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
850-414-3300
Anita.Patel@myfloridalegal.com

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

I hereby certify that this Motion and incorporated Memorandum of Law contains 2944 words.

/s/ *Erik L. Sayler*
Erik L. Sayler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September 2023, a copy of this document was filed electronically through the CM/ECF system and furnished by email to all counsel of record.

/s/ *Erik L. Sayler*
Erik L. Sayler