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

SUPPORT WORKING ANIMALS, INC., *et al.,*

Plaintiffs,

v.

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

Defendants.

Case No.: 4-19-cv-00570-MW-CAS

DEFENDANTS' MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, Defendants, RON DESANTIS, in his official capacity as Governor of the State of Florida ("Governor DeSantis"), LAUREL LEE, in her official capacity as Florida Secretary of State ("Secretary Lee"), and ASHLEY MOODY, in her official capacity as Florida Attorney General ("Attorney General Moody"), (collectively "Defendants") move to dismiss with prejudice Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint" or "Am. Compl.") because: (1) Defendants have sovereign immunity from suit enshrined in the Eleventh Amendment; (2) there is no case or controversy because Plaintiffs lack

standing for several reasons and the matter is not ripe; and (3) Plaintiffs fail to state any claim upon which relief can be granted.

BACKGROUND AND INTRODUCTION

There has never been a constitutional right in Florida to race dogs, horses, or any other animal in connection with gambling. Historically, gambling was prohibited pursuant to the State's police power. In 1931, dog racing, in addition to horse racing, was legalized by legislative action. *See* Legalized Gambling in Florida—The Competition in the Marketplace, S. 2005-155, at 5 (2004), http://archive.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/ 2005-155rilong.pdf. Since that time, racing activities associated with gambling have been regulated and restricted by the Florida Legislature.

On November 6, 2018, Florida's voters adopted Article X, section 32 of the Florida Constitution, which appeared on the General Election Ballot as "Amendment 13," and summarized: "Ends Dog Racing.—Phases out commercial dog racing in connection with wagering by 2020. Other gaming activities are not affected." *See* Florida Division of Elections Results General Election 2018, *available at* https://results.elections.myflorida.com/Index.asp? ElectionDate=11/6/2018 (last visited October 17, 2019) (reflecting official results of 69.1% approval or 5,407,542 votes); *see also* Fla. Const. art. XI, § 5(e) (setting passage "by vote of at least sixty percent of the electors voting on the measure").

The adopted provision states:

> **Prohibition on racing of and wagering on greyhounds or other dogs.—**The humane treatment of animals is a fundamental value of the people of the State of Florida. After December 31, 2020, a person authorized to conduct gaming or pari-mutuel operations may not race greyhounds or any member of the *Canis Familiaris* subspecies in connection with any wager for money or any other thing of value in this state, and persons in this state may not wager money or any other thing of value on the outcome of a live dog race occurring in this state. The failure to conduct greyhound racing or wagering on greyhound racing after December 31, 2018, does not constitute grounds to revoke or deny renewal of other related gaming licenses held by a person who is a licensed greyhound permitholder on January 1, 2018, and does not affect the eligibility of such permitholder, or such permitholder's facility, to conduct other pari-mutuel activities authorized by general law. By general law, the legislature shall specify civil or criminal penalties for violations of this section and for activities that aid or abet violations of this section.

Fla. Const. art. X, § 32 ("Dog Racing Provision").

Plaintiffs challenge the Dog Racing Provision as violating the following provisions of the U.S. Constitution: the Takings Clause (Count One), the Equal Protection Clause (Count Two), the Contract Clause (Count Three), and the Due Process Clause (Count Four). Plaintiffs include companies engaged in businesses related to the racing of greyhounds in Florida in connection with gambling, as well as a 501(c)(4) organization and various individuals who seek to defend the rights of animal owners to race dogs in the context of gambling. Am. Compl. at ¶¶ 16-21.

ARGUMENT

Plaintiffs have sued the wrong parties, and their claims should therefore be

dismissed for lack of subject matter jurisdiction because of each Defendant's sovereign immunity and lack of a case or controversy against them. Even if there were subject matter jurisdiction, dismissal would be proper for failure to state a claim.

I. DEFENDANTS ARE IMMUNE FROM SUIT UNDER THE ELEVENTH AMENDMENT TO THE U.S. CONSTITUTION, AND THEREFORE THE COURT LACKS SUBJECT-MATTER JURISDICTION.

"Pursuant to 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." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). In the case at bar, the State of Florida has not waived its sovereign immunity, nor has its immunity been abrogated by Congress, precluding the exercise of subject-matter jurisdiction by the federal district and circuit courts over it. There is, however, a narrow exception to the States' immunity that arises under *Ex Parte Young*, 209 U.S. 123, 168 (1908). "[A] suit alleging a violation of the federal constitution against a state official in his [or her] official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment." *Grizzle*, 634 F.3d at 1319. But that narrow exception applies "[o]nly if a state officer has the authority to enforce an unconstitutional act in the name of the state." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999). Only then "can the Supremacy

Clause be invoked to strip the officer of [his or her] official or representative character and subject [him or her] to the individual consequences of [his or her] conduct." *Id.*; *see also Fitts v. McGhee,* 172 U.S. 516, 529-30 (1899).

Accordingly, before the Court can reach the merits here, it must address, *inter alia*, whether each of the Defendants, individually, is a proper party to this action. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016). There is a "wide difference between a suit against individuals … to prevent them, under sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute." *Fitts v. McGhee*, 172 U.S. at 529-30.[1] Only the former type of suit is permitted under *Ex Parte Young*. *Id.* at 158-60. This action is of the latter type. *See* Compl. at ¶24 (stating the action is brought "to determine the constitutionality of [the Dog Racing Provision]").

Indeed, the Eleventh Circuit and other "federal courts have **refused** to apply *Ex Parte Young* where the officer who is charged has no authority to enforce the challenged statute." *Summit Med. Assocs.*, 180 F.3d at 1342 (emphasis added).

[1] *Fitts* predates *Ex Parte Young* but it is recognized as "illuminat[ing] the important precept that allowing a state officer to be sued in lieu of the State absent some 'special connection' would permit the narrow exception to swallow the fundamental, constitutionally-based rule." *Okpalobi v. Foster*, 244 F.3d 405, 413 (5th Cir. 2001). The Eleventh Circuit has looked to *Fitts* in assessing "the nature of this 'connection' between the state officer and the challenged statute." *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999).

"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*, No. 18-11887, 2019 WL 3429072, at *3 (11th Cir. July 30, 2019) (citing and quoting *Summit Med. Assocs.*, 180 F.3d at 1341).

Here, Plaintiffs allege that the "Defendant is the State of Florida *represented* by the governor, secretary of state, and attorney general." Am. Compl. at ¶ 22 (emphasis added). Plaintiffs further allege that "Defendants are charged with enforcing the Constitution and laws of the State of Florida and are affirmatively charged with enforcing civil or criminal penalties specified by the Florida legislative body for violations thereof." Am. Compl. at ¶ 24. Plaintiffs do not cite any law charging any Defendant with enforcement of the Dog Racing Provision because there is none. Indeed, the provision directs the Florida Legislature to "specify civil or criminal penalties for violations of this section and for activities that aid or abet violations of this section," which it has **not yet done**. Nevertheless, as shown below, Defendants do not have enforcement duties with respect to any gambling-related activities in Florida, rendering them improper parties as a matter of law.[2]

[2] While the Defendants are jointly submitting this motion, each Defendant's particular argument with respect to his or her Eleventh Amendment immunity is offered only on behalf of that particular Defendant.

A. The Governor Is Not a Proper Party.

The Governor is not a proper party to this litigation and thus this action against him should be dismissed. The Governor has not waived his sovereign immunity guaranteed under the Eleventh Amendment, and Plaintiffs fail to state any claim suggesting an exception. *See Ex Parte Young*, 209 U.S. at 168. The Governor has been given no authority "to enforce an unconstitutional act in the name of the state." *Summit Med. Assocs.*, 180 F.3d at 1341. And to date he has taken no state action regarding the Dog Racing Provision. Not surprisingly, Plaintiffs' Complaint cites no specific executive action, regulation, or other means by which the Governor has implemented or enforced the Dog Racing Provision. Rather, Plaintiffs merely name the Governor as a "representative" of the State and cite his "supreme executive power." *See* Am. Compl. at ¶ 26. Furthermore, Plaintiffs curiously allege the Governor "has the power to review or delay implementation of amendments that were placed on the ballot," citing Article IV, § 1 of the Florida Constitution. *Id.* This allegation is legally incorrect. The Governor's constitutional authority is to "take care that the laws be faithfully executive." *See* § 1, Art. IV, Fla. Const. Nowhere does the Governor have the authority to "delay" the implementation of a self-executing constitutional amendment. Federal courts bar the claims raised against the Governor.

The Eleventh Circuit has consistently held that a governor's "general

executive power" is "not a basis for jurisdiction in most circumstances." *See Women's Emergency Network v. Bush*, 323 F. 3d 937, 949 (11th Cir. 2003); *see also Harris v. Bush*, 106 F. Supp. 2d 1272, 1276-77 (N.D. Fla 2000). And though Article IV of the Florida Constitution vests the Governor with executive power to enforce state laws, "this general authority, standing alone, is insufficient to make him the proper party whenever a plaintiff seeks to challenge the constitutionality of a law." *Harris*, 106 F. Supp. 2d at 1276. Where courts have permitted narrow *Ex Parte Young* exceptions to state sovereign immunity, it is when state officers are directly "responsible for" a challenged action and have a "connection" to the unconstitutional act at issue. *Luckey v. Harris,* 860 F.2d 1012, 1015-1016 (11th Cir. 1988). Here, the voters of Florida, not the Governor, were responsible for passing the Dog Racing Provision, a self-executing constitutional amendment. Plaintiffs' efforts to frustrate the will of the voters are misdirected, and Governor DeSantis is not a proper party to the case.

B. <u>The Secretary of State Is Not a Proper Party</u>.

The Secretary does not have any authority to enforce the challenged provision. Plaintiffs cite nothing to the contrary. To be sure, the Secretary has no duties related to racing of any animal or gambling of any kind. None of the Secretary's actions or her duties are alleged to be unconstitutional and in need of compulsion or constraint for the *Ex Parte Young* exception to apply. *Okpalobi v. Foster*, 244 F.3d 405, 421

(5th Cir. 2001) ("it is the unconstitutional conduct, or at least the ability to engage in the unconstitutional conduct, that makes [the official] no longer a representative of the sovereign"). Nor does she have any general authority to enforce the laws of the State. But even if she did, that general enforcement authority would not be enough to apply *Ex Parte Young*. *Ex Parte Young*, 209 U.S. at 155-56; *Women's Emergency Network v. Bush*, 323 F. 3d 937, 949 (11th Cir. 2003) (as to the Governor); *Mallory v. Harkness*, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996), *aff'd without opinion*, 109 F. 3d 771 (11th Cir. 1997) (as to the Attorney General). That "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law," "but it is a mode which cannot be applied to the states of the Union consistently with [their sovereign immunity]." *Fitts v. McGhee,* 172 U.S. at 530; *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"). "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*, 2019 WL 3429072, at *3 (*citing and quoting Summit Med. Assocs.*, 180 F.3d at 1341).

Plaintiffs cite to the Secretary's duty to accept corporate filings as a basis of enforcement. Am. Compl. at ¶ 25. Plaintiffs allege this duty conflicts with the

Secretary's "constitutional duties of providing a competitive business climate in the state of Florida." *Id.* The Secretary however, does not have any constitutional duties to provide a competitive business climate.[3] Nor do Plaintiffs cite any. Nor does she have any statutory duties as head of the Department of State, Division of Corporations. Plaintiffs seem to allege that in that role she is "charged with rejecting those corporate filings for businesses involved with the greyhound racing industry." Am. Compl. ¶ 25. That is incorrect. The Division of Corporations merely maintains a filing repository of corporate documents delivered to it that satisfy the requirements of section 607.0120, Florida Statutes. Fla. Stat. § 607.0125(1) ("…the department shall file it" if it meets the requirements). None of those requirements concern the legality of a corporation's existence, purpose, or actions, or permit the Division to reject filings of corporations involved with conduct now prohibited by the Dog Racing Provision. The duty to accept corporate filings is administrative and does not include the discretion to reject any filing on the basis Plaintiffs allege. Indeed, the Division's acceptance or rejection of any corporate document submitted for filing does not at all relate to the truth or accuracy of the document or its information. Fla. Stat. § 607.0120(4). The Secretary does not have any authority to

[3] Plaintiffs seem to think the Secretary is a constitutional officer. Am. Compl. ¶ 25. She is not. The Secretary of State was removed from the Cabinet in 1998, effective January 7, 2003. The Secretary has some constitutional duties, such as custodian of state records, but is not a constitutional officer.

enforce the Dog Racing Provision and, therefore, the action against her is barred.

C. The Attorney General Is Not a Proper Party.

Likewise, the Attorney General has no general or specific enforcement duties with respect to laws concerning gambling or animals, and she plays no role in enforcing the Dog Racing Provision. Accordingly, the Eleventh Amendment bars this action as against her.

The Florida Attorney General is the State's chief legal officer, Art. IV, § 4, Fla. Const. As such, she is vested with broad authority to act in the public interest and, when she deems it necessary, to defend statutes against constitutional attack. *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976); *State ex rel. Landis, Attorney General v. S.H. Kress & Co.*, 155 So. 823 (Fla. 1934).

With respect to criminal enforcement of statutes, in Florida it is the State Attorneys who are charged with this responsibility, Fla. Const. art. V, § 17; Fla. Stat. § 27.02, not the Attorney General (with narrow but irrelevant exceptions, mainly pertaining to antitrust enforcement). Neither the Attorney General's indirect role with respect to criminal actions brought by Florida's statewide prosecutor, nor her general authority to appear on the State's behalf to defend legislation, makes her a proper party defendant.[4] For that reason, district courts in Florida have routinely

[4] While Florida has established within the Office of the Attorney General the position of Statewide Prosecutor, appointed by the Attorney General under prescribed conditions, the Statewide Prosecutor has concurrent jurisdiction with State

dismissed actions against her. *See, e.g., Roberts v. Bondi*, No. 8:18-cv-1062-T-33TGW, 2018 WL 3997979, at *2-3 (M.D. Fla. Aug. 21, 2018) (dismissing Florida Attorney General under Eleventh Amendment and rejecting argument that she is proper party because she is entitled to defend a statute's constitutionality); *Frieberg v. Francois*, No. 4:05-cv-CV177-RH/WCS, 2006 WL 2362046, at *6 (N.D. Fla. Aug. 15, 2006) (Florida Attorney General not proper party under Eleventh Amendment because he has no role in licensure or enforcement of criminal statute at issue).[5]

Here, in ending wagering on dog races in Florida, the Dog Racing Provision is self-executing and by its terms will take effect on January 1, 2021. While it provides that the Florida Legislature "shall specify civil or criminal penalties for

---

Attorneys for a limited array of criminal violations committed in or affecting more than one judicial circuit. Fla. Const. art. IV, § 4(b). But the Statewide Prosecutor has no role unless a violation implicates more than one circuit. *See generally Winter v. State*, 781 So. 2d 1111 (Fla. 1st DCA 2001), *disapproved on other grounds, Carbajal v. State*, 75 So. 3d 258 (Fla. 2011). Regardless, the Statewide Prosecutor's criminal enforcement responsibilities, which are delineated in section 16.56, Florida Statutes, do not extend to enforcing criminal provisions comparable to any that the Legislature might enact pursuant to the Dog Racing Provision. If such a responsibility should arise, it would rest with the State Attorneys.

[5] For the same reasons, Attorneys General of other States have routinely been dismissed as parties. *See, e.g., Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (Attorney General improper party for want of enforcement responsibilities); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001 (en banc) (same); *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) (same); *June Med. Servs., LLC v. Caldwell*, No. 3:14-cv-525, 2014 WL 4296679, at *3 (M.D. La. Aug. 31, 2014 (same).

violations of this section and for activities that aid or abet violations of this section[,]" the Legislature has yet to do so. Regardless of the nature of any provisions that the Legislature eventually enacts, the Attorney General will have no enforcement responsibilities with respect to them. Plaintiffs' bare assertion that as the "chief legal officer" the Attorney General must defend the constitutionality of statutes, *see* Am. Compl. at ¶ 27, does not overcome the requirements of the Eleventh Amendment. Accordingly, the Court lacks subject matter jurisdiction to maintain this action as against the Attorney General, requiring dismissal of all claims asserted against her by Plaintiffs.

II. THERE IS NO CASE OR CONTROVERSY.

"Both standing and ripeness originate from the Constitution's Article III requirement that the jurisdiction of the federal courts be limited to actual cases or controversies." *Elend v. Basham*, 471 F.3d 1199, 1204-05 (11th Cir. 2006) (citing *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968), and *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Here, both standing and ripeness deficiencies warrant dismissal of this action.

A. Plaintiffs Lack Standing.

Plaintiffs, in seeking solely prospective declaratory and injunctive relief, meet none of the requisites for standing. Standing is a threshold matter that must be satisfied before a federal court may consider the case's merits. *Bochese v. Town of*

Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005) (citing *Dillard v. Baldwin Cnty. Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000)). In order to satisfy his or her standing burden, each plaintiff must minimally allege: (1) an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) injury that likely will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And where prospective declaratory and injunctive relief is involved, a plaintiff must "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 the plaintiff seeks will likely prevent such injury from occurring." *Cone Corp. v. Fla. Dept. of Transp.*, 921 F.2d 1190, 1203-04 (11th Cir. 1991).

1. Plaintiffs Have Not Alleged any Actual or Imminent Injury-In-Fact.

A plaintiff seeking injunctive relief also must allege 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) (internal citation omitted). In the context of a pre-enforcement challenge to avoid future injuries, the plaintiff must show a **credible** threat of prosecution. Standing cannot hinge on speculative future events or unknowable details about how a future violation may be committed. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 105–06 (1983) (plaintiff lacked standing because his future injury depended on him violating an unchallenged law and

provoking constitutional violations based on the manner of police enforcement).

Plaintiffs fail to allege any injury that is concrete, particularized, or actual or imminent. Plaintiffs do not address their ability either to sell their race dogs or to relocate them to another state that allows dog racing in connection with gambling. Nor do Plaintiffs address their prospects for selling their racetracks, for converting them to a different form of racing for which gambling is permitted in Florida, or for finding another use for their property. Plaintiffs simply ignore the question of whether they could avoid injury altogether.

2. Plaintiffs Cannot Show A Causal Connection to Defendants.

Even if such threat of concrete and imminent injury, Plaintiffs cannot show that any such injury would be caused by Defendants because, as shown above, none of the Defendants has enforcement authority for the Dog Racing Provision. Nor do any have authority to enforce any penalties, which have not yet even been established by the Legislature.

3. Plaintiffs Cannot Show Redressability.

Even if there was a threat of concrete and imminent injury caused by Defendants, Plaintiffs cannot show that Defendants could redress such injury. Declaratory and injunctive relief entered against Defendants would be of no moment with respect to (1) the self-executing aspects of the Dog Racing Provision, or (2) the enactment of legislation pursuant to it, or (3) the enforcement of the legislation by

other state actors. *See, e.g., Gallardo by & through Vassallo v. Senior*, No. 4:16-cv-116, 2017 WL 3081816, at *6 (N.D. Fla. July 18, 2017) ("If relief is sought against an official who cannot remedy the plaintiff's alleged injury, there is no 'case or controversy between himself and the defendant[s] within the meaning of Art[icle] III.'") (citing *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, J., concurring)); *see also Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998) (dismissing, for lack of standing, supervisors of elections who had "no source of power" to enforce provision at issue); *Calzone v. Hawley*, 866 F.3d 866, 870 (8th Cir. 2017) (affirming dismissal of suit against attorney general for lack of standing where attorney general did not enforce challenged statutes).

In sum, Plaintiffs cannot show that they have standing to pursue their claims for relief against Defendants, warranting dismissal for want of subject matter jurisdiction.

B. <u>This Action Is Not Ripe</u>.

The same result obtains, for much the same reasons, under the doctrine of ripeness. As the Eleventh Circuit has noted, both "[s]tanding and ripeness present the threshold jurisdictional question of whether a court may consider the merits of a dispute." *Elend v. Basham*, 471 F.3d at 1204 (citations omitted). Ripeness differs from standing in that "standing deals with which party can appropriately bring suit, while ripeness relates to the timing of the suit." *Id.* at 1205 (citation omitted). "But

in cases of pre-enforcement review, the standing and ripeness inquiries tend to converge. This is because claims for pre-enforcement review involve the possibility of wholly prospective future injury, not a prayer for relief from damages already sustained." *Id.* (citation omitted).

In *Elend*, the Eleventh Circuit, addressing ripeness, went on to state:

> In essence, this doctrine deals with when a party can seek pre-enforcement review: "whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court." Ripeness analysis involves the evaluation of two factors: the hardship that a plaintiff might suffer without court redress and the fitness of the case for judicial consideration.

Id. at 1210-11 (citations omitted).

Here, the future is clouded by the twin unknowns of: (1) what, if anything, Plaintiffs (or any of them) might opt to do in lieu of simply maintaining the status quo and risking adverse consequences once legislation is enacted; and (2) the nature of that legislation, including when it is enacted, whether it is civil or criminal, who is to enforce the legislation, and the consequences provided therein for violations. Ripeness considerations favor waiting for both of these unknowns to be resolved before a legal proceeding is entertained.

III. PLAINTIFFS FAIL TO STATE A CLAIM.

Even if the Court determines that it has jurisdiction, dismissal with prejudice in nonetheless warranted because Plaintiffs fail to state a claim in any of the four

counts of their Amended Complaint.

In *Roberts v. Bondi*, Case No.: 8:18-cv-1062-T-33TGW, 2018 WL 3997979 (M.D. Fla. Aug. 21, 2018), the district court, citing to dispositive authorities, set forth the standards applicable to a motion to dismiss. "On a motion to dismiss, this Court accepts as true all the allegations in the complaint and construes them in the light most favorable to the plaintiff. *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004). Further, the Court favors the plaintiff with all reasonable inferences from the allegations in the complaint. *Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571, 1573 (11th Cir. 1990)." *Roberts, id.* at *1. However, "[c]ourts are not 'bound to accept as true a legal conclusion couched as a factual allegation.' *Papasan v. Allain*, 478 U.S. 265, 286 (1986). 'The scope of review must be limited to the four corners of the complaint' and attached exhibits. *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002)." *Roberts, id.* at *2.

As further shown below, the State of Florida has every right, under its police power, to forbid gambling activities altogether, and *a fortiorari* to choose to allow limited forms of gambling as it sees fit. *Pompano Horse Club v. State*, 111 So. 801, 810 (Fla. 1927) (State may prohibit gambling in exercise of police power); *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983) (State has greater discretion in exercising police power over gambling). Federal

courts recognize the States' police power. *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc*., 399 F.3d 1276, 1278 (11th Cir. 2005) (acknowledging State's police power to protect the "health, safety, and welfare" of its citizens); *Alliance of Auto. Mfrs., Inc. v. Jones*, 897 F. Supp. 2d 1241, 1250 (N.D. Fla. 2012) (State may enact "regulations designed to promote … general prosperity or the public welfare as well as those designed to promote the public safety or public health.").[6]

Plaintiffs seek to stand this principle on its head by, in effect, asserting that Floridians have a right to engage in gambling activities, and to utilize animals for making money from wagering, without interference from the State. In all regards, Plaintiffs are incorrect as a matter of well-settled and binding principles of law. Their causes of action should be dismissed.

A. Plaintiffs Fail to State a Claim under the Takings Clause.

Plaintiffs do not state a claim under the Takings Clause.[7] They fail to identify a property interest under Florida law, which is a prerequisite to such a claim under

[6] While Plaintiffs concede that the State has authority under its police power to regulate how people earn a living and use property, Am. Compl. at ¶ 59, they neglect to acknowledge the State's significantly greater police power over gambling.

[7] In Count One of the Complaint, Plaintiffs invoke both the Fifth and Fourteenth Amendments to the Constitution. Clearly, however, the Takings Clause at issue here, in this challenge to the Florida Constitution, is that found in the Fourteenth Amendment.

any circumstance. Beyond that fatal shortcoming, they do not state a claim under any of the three *per se* takings theories. Moreover, while the relief they seek squarely qualifies their challenge as facial rather than as-applied,[8] they also fail to state an as-applied takings claim under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

1. Plaintiffs fail to identify a property interest under state law.

Plaintiffs do not state a claim under any takings theory because they do not identify a property interest under Florida law with which the Dog Racing Provision interferes. To determine whether an unconstitutional taking occurred, courts "refer to [state property] law to determine what" property interest the government "took." *United States v. Certain Prop. Located in the Borough of Manhattan*, 306 F.2d 439 (2d Cir. 1962); *accord Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327 (9th Cir. 1977). Plaintiffs must demonstrate that the property interest they invoke is "a stick in the bundle of property rights" under state law, or no taking will have occurred. *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed Cir. 1995)

[8] Plaintiffs seek sweeping injunctive and declaratory relief aimed at eliminating the Dog Racing Provision altogether. Even though Plaintiffs have couched their claims as both facial and as-applied, the substance of the relief sought by them squares only with a facial attack. *See Am. Fed'n of State, Cty. & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) (explaining that "the label is not what matters," because when plaintiffs seek "an injunction [that] reach[es] beyond the particular circumstances of these plaintiffs," it "must . . . satisfy [the Supreme Court's] standards for a facial challenge to the extent of that reach").

(quotation omitted); *accord Fla. Dep't of Envtl. Prot. v. Burgess*, 667 So. 2d 267, 271 (Fla. 1st DCA 1995) (if "the proscribed use was not part of [the plaintiff's] property interests," then no taking occurred and "compensation would not be due.").

In Florida, gambling on dog racing is "a **privilege** … that requires strict supervision and regulation in the best interests of the state." Fla. Stat. § 550.1625(1) (emphasis added). The Florida Supreme Court has recognized that privileges of this nature confer no property interest under Florida law. *See State ex rel. Biscayne Kennel Club v. Stein*, 178 So. 133, 135 (Fla. 1938) ("racing [of dogs] in Florida is not a right but a privilege"; "[a] license" to race dogs is not a "property right" (quotations omitted)); *cf. Lite v. State*, 617 So. 2d 1058, 1060 (Fla. 1993) ("there is no property interest in possessing a driver's license" because "driving is a privilege" under Florida law).

As noted, the only effect of the Dog Racing Provision is to prohibit gambling on dog racing. Because gambling on dog racing is a privilege, and because Florida law does not recognize a property right in this privilege, Plaintiffs' takings claim fails as a matter of law. But even if Plaintiffs had identified a property interest, they fail to state a cause of action.

2. Plaintiffs fail to state a cause of action for a *per se* taking.

The U.S. Supreme Court has recognized three categories of *per se* takings: (1) when the government physically appropriates property for its own use, *Horne v.*

Dep't of Agric., 135 S. Ct. 2419, 2425 (2015); (2) when the government causes "a permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982); and (3) when the government "denies all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Because this case does not involve either the State of Florida taking dogs or racetracks for its own use, or the State permanently occupying any property, only the third category of *per se* takings is at issue.

As to Plaintiffs' personal property—including any race dogs owned or controlled by them—they fail to state a cause of action for a *per se* taking because *Lucas* applies only to real property, not to personal property, as to which the Supreme Court has held that an owner "ought to be aware of the possibility that new regulation might even render his property economically worthless." *Lucas*, 505 U.S. at 1027–28; *see also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 34 (1st Cir. 2002) (en banc) ("the *Lucas* per se rule" does not apply to "personal[] property").[9] Whether a regulation renders personal property valueless is "relevant" in "considering" whether an as-applied taking occurred under "the *Penn Central* factors." *Id.* This topic is discussed *infra*.

[9] *Accord Bradfordville Phipps Ltd. P'ship v. Leon Cty.*, 804 So. 2d 464, 468 (Fla. 1st DCA 2001) (discussing a taking under *Lucas* as applicable to "real property"); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 n.2 (4th Cir. 2007) ("*Lucas* by its own terms distinguishes personal property.").

As to Plaintiffs' real property, their *per se* takings claim fails for two reasons. First, Plaintiffs do not allege facts sufficient to establish that the Dog Racing Provision "denies all economically beneficial or productive use of [their] land." *Lucas*, 505 U.S. at 1015. Any allegation that their real property will have "lost all value" is a mere legal conclusion that this Court is not bound to accept, and one which would be both speculative and contrary to common sense.

Second, the prohibition in the Dog Racing Provision is insufficient as a matter of law for Plaintiffs to establish a *per se* taking. In *Lucas*, the Supreme Court left open whether a *per se* taking had occurred and remanded for a determination of whether state law "would have prevented the erection of *any* habitable or productive improvements on petitioner's land." 505 U.S. at 1031 (emphasis added). Significantly, the Court subsequently made clear that *Lucas* "was limited to the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quotation omitted). Florida's First District Court of Appeal has similarly noted that "situations are 'relatively rare' where the government deprives a landowner of 'all economically beneficial uses.'" *Bradfordville Pipps*, 804 So. 2d at 468 (quoting *Lucas*, 505 U.S. at 1018).

The only effect the Dog Racing Provision would have on Plaintiffs' land is that Plaintiffs can no longer earn income from gambling-related greyhound racing

on their tracks. Plaintiffs not only fail to allege facts to support a claim that their property will be rendered altogether useless for any purpose, but also fail to negate the possibility of putting their land to uses related to out-of-state greyhound racing. Even if racing greyhounds in connection with wagering were, in some corrupted sense, the "highest and best use" for Plaintiffs' real property, Plaintiffs still would not meet the test for a *per se* taking, because their property could have some remaining economically viable use. *See Loreto Dev. Co. v. Vill. of Chardon*, 149 F.3d 1183 (Table), 1998 WL 320981, at *4 (6th Cir. 1998) ("A taking does not occur [under *Lucas*] just because the owner is denied the highest and best use of the property.") (citing *Goldbatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962)).

3. Plaintiffs fail to state a cause of action for an as-applied taking.

Plaintiffs also fail to plead an as-applied taking because they cannot allege facts to meet the three factors set forth by the Supreme Court in *Penn Central*: "(1) '[t]he economic impact of the regulation on the claimant,' (2) 'the character of the governmental action,' and (3) 'the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Scott v. Galaxy Fireworks, Inc.*, 111 So. 3d 898, 900 (Fla. 2d DCA 2012) (quoting *Penn Central*, 438 U.S. at 124).

First and foremost, Plaintiffs cannot show that the Dog Racing Provision interferes with any legally protected "investment-backed expectations." *Galaxy Fireworks*, 111 So. 3d at 900. "Pari-mutuel wagering is a heavily regulated industry

in Florida." *License Acquisition, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1148 (Fla. 2014). Courts have recognized that individuals doing business in heavily regulated industries do not have legally protected investment-backed expectations, because they are "on notice of the possibility … that further regulations may be enacted" that would render their property worthless. *Galaxy Fireworks*, 111 So. 3d at 900–01.

In *North Shore Kennel of Lynn, Inc. v. Commonwealth*, 965 N.E.2d 899 (table), 2012 WL 1432283 (Mass. App. Ct. 2012), the Appeals Court of Massachusetts rejected a Takings Clause theory that is virtually identical to Plaintiffs'. The court reasoned that "gambling on dog races is a heavily regulated industry that only exists by virtue of legislatively created narrow exceptions to common-law and statutory bans and that, because of the nature of the business[, it] can be abolished at any time that the Legislature may deem proper for the safeguarding and protection of the public welfare." 2012 WL 1432283, at *1 (quoting the Supreme Judicial Court of Massachusetts in *Carney v. Attorney Gen.,* 890 N.E.2d 121, 132 (Mass. 2008)).

Similarly, in *Holliday Amusement Company v. South Carolina*, the Fourth Circuit rejected a Takings Clause claim in the analogous context of a prohibition on video poker. 493 F.3d 404, 411 & n.2 (4th Cir. 2007). There, the plaintiff contended that South Carolina's prohibition on video poker was a "taking of his … video poker

machines." *Id.* at 406. The Court reasoned that "Plaintiff's participation in a traditionally regulated industry [like gambling] greatly diminishe[d] the weight of his alleged investment-backed expectations." *Id.* at 411 n.2.

That Plaintiffs do not have protected investment-backed expectations in property used for gambling on dog races is further underscored by the relevant statutory scheme. As discussed *supra*, Plaintiffs were on notice that gambling on dog racing is "a **privilege** … that requires strict supervision and regulation in the best interests of the state." Fla. Stat. § 550.1625(1) (emphasis added). Thus, it would have been unreasonable for Plaintiffs to have developed investment-backed expectations. *See City of Jacksonville v. Coffield*, 18 So. 3d 589, 599 (Fla. 1st DCA 2009) (dismissing as unreasonable plaintiff's investment-backed expectations).

Plaintiffs similarly cannot show that the character of the government action weighs in favor of finding an as-applied taking. "[C]ertainly the legislative body, in the rightful exercise of its power to preserve and protect the public morals and safety of its citizens, may lawfully denounce and prohibit gambling" without violating the Takings Clause. *Pompano Horse Club v. State*, 111 So. 801, 810 (Fla. 1927). Gambling regulations are a "classic 'instance[] in which a state … [may] reasonably conclude[] that the health, safety, morals, or general welfare would be promoted' by [a] prohibition." *Holliday Amusement*, 493 F.3d at 411 n.2 (quoting *Penn Central*, 438 U.S. at 125). As the Florida Supreme Court noted: "[B]ecause of the nature of

the enterprise, authorized gambling, this state may exercise greater control and use the police power in a more arbitrary manner." *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983).

As to the economic impact on Plaintiffs' property, Plaintiffs do not sufficiently allege that the value of their real property has been significantly diminished by the gambling ban in the Dog Racing Provision, as discussed *supra*. With respect to Plaintiffs' personal property, the Supreme Court has upheld regulations of personal property even where the economic impact was "commercially crippling." *Andrus v. Allard*, 444 U.S. 51, 67 (1979). Moreover, as noted above, Florida voters gave Plaintiffs nearly three years to sell their personal property to buyers in states where gambling on dog racing remains legal.[10] Thus, "the economic impact" on Plaintiffs' personal property is "indirect in nature and limited" because the Dog Racing Provision applies "only within" Florida and because their property can be "sold" or "leased for racing in other States." *See N. Shore Kennel*, 2012 WL 1432283, at *1; *accord Hunt v. Florida*, No. 2018-CA-000564, at 8 (Fla. Cir. Ct. 2d Jud. Cir., May 10, 2019) (Flury, J.) (dismissing a takings clause claim under *Penn Central* because, among other reasons, the law provided a "six month grace period where plaintiffs could" sell their personal

[10] *See* Greyhound Racing in the United States, Grey2K USA Worldwide, https://www.grey2kusa.org/about/states.php (last visited Oct. 10, 2019) (discussing States where gambling on dog racing remains legal).

property "out of the State").

State v. Basford, 119 So. 3d 478 (Fla. 1st DCA 2013), in which a different constitutional amendment requiring the humane treatment of pregnant pigs rendered the plaintiffs' property worthless, is plainly distinguishable because it had nothing to do with gambling. *See id.* at 479, 483. By contrast, the Dog Racing Provision prohibits "wager[ing]… in connection with" dog racing but does not directly regulate the treatment of dogs, much less in such a fashion as to render Plaintiffs' dogs or their racetracks worthless.

For these reasons, Plaintiffs fail to state a cause of action under the Takings Clause.

B. Plaintiffs Fail to State a Claim under the Equal Protection Clause.

Plaintiffs assert in Count Two that the People of Florida, by enacting the Dog Racing Provision, have violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by treating dog racing differently from horse racing. Plaintiffs assert that there is a "fundamental right to earn a livelihood" and that this right has been violated by the Dog Racing Provision, *see* Am. Compl. at ¶ 59, but do not make the preposterous allegation that race dog owners constitute a suspect class under equal protection jurisprudence. Hence, in contending that the strict scrutiny standard should apply, Plaintiffs must be relying on the claim of deprivation of a fundamental right. But Plaintiffs contradict themselves even as to

the applicable standard. They acknowledge that the right to earn a living "is subject to proper and reasonable police regulations[,]" *id.*, and then contend in Count Two that the Dog Racing Provision "is not rationally related to a legitimate governmental purpose[,]" *id.* at ¶ 67. These allegations, of course, are consistent with the rational basis test, not strict scrutiny. And in that regard, Plaintiffs are correct: the rational basis test applies, because there is no fundamental right to engage in the business of racing dogs in the context of gambling, as shown *supra*.

Turning to the rational basis test, in *Houston v. Williams*, 547 F.3d 1357 (11th Cir. 2008), plaintiff, a convicted sexual offender, claimed that a policy denying him eligibility for weatherization assistance because of his criminal background violated equal protection principles. There, the Eleventh Circuit stated:

> Because Houston does not claim to be a member of a suspect class and does not allege a burden on a fundamental right, the question of whether the Policy violates equal protection is subject to rational basis review. *Kadrmas v. Dickinson Pub. Schs.,* 487 U.S. 450, 457–58, 108 S.Ct. 2481, 2487, 101 L.Ed.2d 399 (1988). Rational basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 2100–01, 124 L.Ed.2d 211 (1993); *see also Haves v. City of Miami,* 52 F.3d 918, 921 (11th Cir.1995). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). Policy determinations "cannot run afoul of the Equal

> Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). Furthermore, a legislative body like the Brevard County Board of County Commissioners need not "actually articulate at any time the purpose or rationale supporting its classification." *See Nordlinger v. Hahn,* 505 U.S. 1, 15, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1 (1992). Instead, the policy determination "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns,* 508 U.S. at 313, 113 S.Ct. at 2101. For these reasons, the Policy is accorded a strong presumption of validity.

Houston v. Williams, 547 F.3d at 1363. Thus, the absence of membership in a suspect class and the failure to allege a burden on a fundamental right subjected Houston's claim to the rational basis test. The Court, assessing whether "there is any reasonably conceivable state of the facts that could provide a rational basis for the classification," held that no equal protection violation had been established.

In the case at bar, Plaintiffs' claim is demonstrably without merit. That gambling on horse racing continues to be allowed in Florida has no bearing whatsoever on whether the Florida Legislature, or the People of the State of Florida, can disallow gambling with respect to dogs. The species are distinct from one another, and racing events of the two categories are also distinct.

Indeed, the distinctness of dog racing from horse racing was addressed head-on by Florida's Third District Court of Appeal in *Miami Beach Kennel Club, Inc. v.*

Board of Business Regulation, 265 So. 2d 373 (Fla. 3 DCA 1972). There, the court stated:

> Petitioner claims that all holders of pari-mutuel permits, which would necessarily include summer and winter thoroughbred permittees, dog racing permittees, harness racing permittees and jai alai frontons, belong in one large class and as members of such a class they all must, by law, be treated equally in all respects. **Historically and traditionally, however, these permittees have been treated differently by the legislature.**
>
> **The legislature has passed numerous laws which make distinctions between the various pari-mutuel permittees. When considering only thoroughbred race track permittees and dog track permittees, many differences are evident as a result of legislation.** For example, competition between permit holders is a major distinction since thoroughbred permittees are expressly prohibited by law from competing with each other while dog racing permittees may compete. The number of days that the different racing facilities may operate in a year is another difference regulated by the legislature. Additional distinctions between horse and dog racers include the tax structure, daily operational cost allowances and purse structure, which the legislature has recognized due to basic differences in the volume of the handle, attendance, per capita wagering at the different facilities. More differences can be seen between the two types of pari-mutuels in the cost of the racing facilities, size of the plant, length of track, etc. The number of differences will increase when one expands this consideration to include all other types of parimutuel permit holders.
>
> **The conclusion that must be reached following the above discussion is that different classifications exist among the various pari-mutuel permittees. The many differences discussed above establish the valid foundation for these different classifications of pari-**

> **mutuel permit holders. It is to these reasonable classifications between the different types of permittees established by the legislature that the constitutional concepts of due process and equal protection must be applied.** In order to prevent constitutional challenges for violation of due process and equal protection, all members of each separate class of permit holders must be treated equally.
>
> The statute under consideration only affects that classification of pari-mutuel permittees which include winter thoroughbred and standardbred horse racing permit holders. All those included in this class are treated equally and no violation of due process or equal protection has occurred. **Petitioner cannot allege that the statute discriminates against dog tracks since the dog racing permittees belong to a separate and distinct classification not affected by this legislation.**

Id., 265 So. 2d at 375-76 (emphasis added).

The Florida Third District's holding in *Miami Beach Kennel Club* that dog racing and horse racing are distinct—cited with approval by the Florida Supreme Court in *Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d at 882—should be deemed dispositive. Florida, in the exercise of its police power, has the right to ban gambling, and short of that to draw distinctions among different classifications of pari-mutel permittees under its laws. Plaintiffs' equal protection claim should be dismissed.

C. Plaintiffs Fail to State a Claim for Impairment of Contract.

In Count Three of the Amended Complaint, Plaintiffs allege that the Dog Racing Provision "impaired the contracts of all people engaged in the business of

dog racing in the State of Florida." Am. Compl. at ¶ 70. Plaintiffs cite to the "Tenth Amendment of the United States Constitution" as the constitutional provision upon which they rely, *see* caption of Count Three of the Amended Complaint, but plainly their intent was to base their claim on Article I, section 10, clause 1 of the Constitution, which provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." The Complaint otherwise is conspicuously devoid of any factual allegations concerning the existence or nature of any contracts alleged to be subject to impairment by the enactment of the Dog Racing Provision; nor are any contracts appended as exhibits to the pleading.

Despite their claim that they are alleging both facial and as-applied unconstitutionality of the Dog Racing Provision, it is clear that Plaintiffs have brought a facial Contract Clause challenge, as demonstrated by the sweeping relief they seek, *viz.*, both preliminary and permanent injunctions to prevent Defendants from enforcing the amendment, and a declaratory judgment holding the amendment unconstitutional. Thus, irrespective of the form of Plaintiffs' allegations, their substance squares only with a facial attack, and as a matter of law mere labels do not control. *See Am. Fed'n of State, Cty. & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) (explaining that "the label is not what matters," because when plaintiffs seek "an injunction [that] reach[es] beyond the particular circumstances of these plaintiffs," they "must . . . satisfy [the Supreme Court's]

standards for a facial challenge to the extent of that reach"). Accordingly, Plaintiffs must demonstrate that the Dog Racing Provision in all of its applications violates the Contact Clause. This showing cannot be made, because the law is firmly settled that no impairment of contract claim can arise with respect to contracts entered into **after** the challenged amendment's enactment. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978); *Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982). Because the Dog Racing Provision does not take effect until 2021, it is all but certain that additional contracts "of people engaged in the business of dog racing" will be entered into in Florida.

Regardless, the Contract Clause does not erect a bar to the States' ability to enact laws that impact contracts. The "inherent police power of the State to safeguard the vital interests of its people" must be taken into account in assessing the propriety of challenged legislation. *Energy Reserves Group, Inc. v. Kansas Power and Light Co*., 459 U.S. 400, 410 (1983). In doing this, courts consider whether the law substantially impairs an existing contract, whether a significant and important public purpose supports the law, and whether the contractual adjustments brought about by the law are reasonable and appropriate. *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F.3d 1427, 1433 (11th Cir. 1998); *Sanitation & Recycling Indus., Inc.. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997).

Thus, even with respect to those contracts currently in force, Plaintiffs' claim

lacks merit. The Contract Clause does not prohibit States "from enacting legislation with retroactive effect." *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977). "The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *Id.* at 22. Even substantial modification of existing contracts is permissible if "reasonable and necessary to serve an important public purpose." *Id.* at 25. *See also Energy Reserves Group*, 459 U.S. at 411-12 (impairment allowed if State has "a significant and legitimate public purpose … such as the remedying of a broad and general social or economic problem."). In *Energy Reserves Group*, the Supreme Court stated: "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 412-13 (quotations omitted). Where, as here, the State is not a party to an affected contract, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 413.

The State of Florida, in the exercise of its police power, has ample public purpose justifications that would support the enactment of the Dog Racing Provision by its People. As shown above, no person in Florida has a vested property right to engage in gambling or gambling-related activities, and no person has any legally

protected investment-backed expectations connected to such activities. Instead, everyone entering into a contract dependent upon the continued legality of dog racing associated with wagering has been "on notice of the possibility … that further regulations may be enacted" that would render their property worthless. *Galaxy Fireworks*, 111 So. 3d at 900–01. The same holds for the enforceability of their contracts. Count Three should be dismissed.[11]

D. Plaintiffs Fail to State a Claim for Violation of Due Process.

Plaintiffs pitch Count Four as alleging a "violation of substantive due process." Am. Compl. at p. 17. This characterization is consistent with Plaintiffs' allegation in Count Four that they "seek to ensure that their fundamental right to

[11] Plaintiffs (Am. Compl. at ¶ 70) misplace reliance on *State ex rel. Women's Benefit Ass'n v. Port of Palm Beach Dist.*, 164 So. 851 (Fla. 1935). In that case, the Florida Supreme Court held, *inter alia*, that the Florida Constitution could not be amended so as to alter the taxing structure and obligations that were implemented in connection with the selling of public bonds by a special taxing district so as to prevent sufficient tax revenues from being raised to pay off the bonds. The case was decided under the Contract Clause of the U.S. Constitution rather than the comparable provision of the Florida Constitution, presumably for the obvious reason that it would be absurd to declare a provision of a State's Constitution to be unconstitutional under itself. For the same reason, it is only the Contract Clause of the U.S. Constitution that is at issue here. Regardless, *Women's Benefit Association* is inapposite, because it dealt with plainly vested rights of persons who had purchased the publicly-issued bonds, repayment of which was predicated upon the prior taxing structure. Thus, the bondholders were entitled to be protected against subsequent modifications of that structure that would deny them the payments for which they had bargained. Gambling, as shown *supra*, presents a wholly distinct context in which no such vested property rights accrue to those who engage in gambling-related businesses in Florida.

their property is recognized by the State of Florida." *Id.* at ¶ 72. But Plaintiffs' allegation that the Dog Racing Provision "denies the Plaintiff's [sic] property rights without due process of law," *id.* at ¶ 73, coupled with Plaintiffs' prior allegations complaining of the enactment of the Dog Racing Provision pursuant to Florida's Constitution Revision Commission ("CRC"), *id.* at ¶¶ 54-57, suggests that Plaintiffs' claim is for a violation of procedural due process. Regardless, Count Four should be dismissed.

1. Substantive Due Process.

It is well settled that, "[t]o establish a claim of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property or liberty interest." *Loreto Dev. Co., Inc. v. Vill. of Chardon*, 149 F.3d 1183 (Table), 1998 WL 320981, at *3 (6th Cir. 1998) (quoting *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992). *Accord Worthy v. City of Phenix City*, 930 F.3d 1206, 1222 (11th Cir. 2019) ("[s]ubstantive due process analysis must [therefore] begin with a careful description of the asserted [fundamental] right.") (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). *See also Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995), *cert. denied*, 516 U.S. 816 (1995).

Here, however, as shown above, Plaintiffs cannot lay claim to any vested property or liberty interests in connection with gambling-related industries in

Florida. Instead, they must be deemed to have entered into such businesses with full knowledge that the People of Florida, whether acting directly through amendment of their Constitution, or acting indirectly through the enactment of legislation by their duly-elected representatives in the Florida Legislature, retained the authority to alter or end the business arrangements pursuant to the police power. Consequently, no valid claim of denial of substantive due process arises here.

2. Procedural Due Process.

Likewise, no claim of denial of procedural due process has been or can be shown. "In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Graydon v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (citing *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994)). As noted above, no constitutionally-protected liberty or property interest is at issue here, in the context of the gambling-related industry of dog racing. This alone dooms Plaintiffs' procedural due process claim, because Plaintiffs cannot meet the first of the three elements to state such a cause of action.

In addition, Plaintiffs cannot meet the third element. Their grievance appears to be with the CRC avenue for putting a constitutional proposal on the ballot, specifically "by side-stepping the elected representatives of the State of Florida."

Am. Compl. at ¶ 14. But the CRC process was added to the Florida Constitution by joint resolution of the **Legislature** at its 1968 Special Session. HJR 1-2X (1968). Moreover, it is the People who have the ultimate right to determine the manner in which the Constitution may be amended. *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958). And determine they did when the People adopted the Constitutional Revision Commission process proposed by the legislature in the first place. *See In re Advisory Opinion of Governor Req. of November 19, 1976*, 343 So. 2d 17, 18 (Fla. 1977) (explaining that the "Florida Constitution, 1968 Revision" proposing the method was "adopted at the general election held on November 5, 1968"). Under the Florida Constitution, "[s]overeignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic law in proposing the amendment…." *Pope*, 104 So. 2d at 842. The time to bring any challenge to the amendment process was before the electors approved of then-Amendment 13 by a supermajority in the 2018 General Election. To be sure, the ballot language of the amendment was challenged and cleared before the election. *Dep't. of State v. Florida Greyhound Ass'n*, 253 So. 3d 513 (Fla. 2018). Part of the CRC process was also challenged before the 2018 General Election in three different cases concerning the bundling of many more amendments. *See Dep't. of State v. Hollander*, 256 So.

3d 1300, 1311 (Fla. 2018); *Detzner v. Anstead*, 256 So. 3d 820, 823-24 (Fla. 2018); *County of Volusia v. Detzner*, 253 So. 3d 507, 512 (Fla. 2018). The People chose to create the CRC process of revision or amendment to their own Constitution, and the electorate at the 2018 General Election approved the particular constitutional provision challenged here. Plaintiffs' federal procedural due process rights were not implicated in any fashion.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss Plaintiffs' claims with prejudice against Defendants for lack of subject-matter jurisdiction and failure to state a claim.

Respectfully submitted,

/s/ Nicholas A. Primrose
Nicholas A. Primrose (FBN 104804)
Deputy General Counsel
James Uthmeier (FBN 113156)
Deputy General Counsel

Executive Office of the Governor
The Capitol, PL-05
Tallahassee, Florida 32399-0001
(850) 717-9310
Nicholas.Primrose@eog.myflorida.com
James.Uthmeier@eog.myflorida.com

Counsel for Governor Ron DeSantis

/s/ Brad McVay
Brad R. McVay (FBN 79034)
General Counsel
Ashley E. Davis (FBN 48032)
Deputy General Counsel

Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399-0250
(850) 245-6536
Brad.McVay@dos.myflorida.com
Ashley.Davis@dos.myflorida.com

Counsel for Secretary Laurel Lee

/s/ Blaine H. Winship
Blaine H. Winship (FBN 356913)

Special Counsel

Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Tel.: (850) 414-3300
Fax: (850) 488-4872
Blaine.Winship@myfloridalegal.com

Counsel for Attorney General Ashley Moody

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that the foregoing complies with the size, font, and formatting requirements of Local Rule 5.1(C). While at 10,072 words, this filing exceeds the word limitations set forth in Local Rule 7.1(F), Defendants have filed an Unopposed Motion to Exceed the Word Limit.

*/s/ Nicholas A. Primrose*_____
Nicholas A. Primrose

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 26th day of November, 2019.

*/s/ Nicholas A. Primrose*_____
Nicholas A. Primrose