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

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

Plaintiffs,

v.

ASHLEY MOODY, in her official capacity as Florida Attorney General,

Defendant.

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

DEFENDANT'S MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, Defendant, ASHLEY MOODY, in her official capacity as Florida Attorney General, moves to dismiss Plaintiffs' Second Amended Complaint ("SAC") with prejudice.

The Attorney General renews her claim that suit against her is barred by sovereign immunity and the Eleventh Amendment to the U.S. Constitution. The merits of her position are underscored by the Eleventh Circuit's ruling in *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020), discussed below, which postdates this Court's Order Granting Defendants' Motion to Dismiss ("Order"). The reasoning of *Jacobson*, applied to this action, further makes clear that Plaintiffs

lack Article III standing to assert claims against the Attorney General.

In addition, analysis of the allegations made in the Second Amended Complaint reveals that Plaintiffs, as before, fail to state a valid claim. In the course of its 55-page Order, the Court methodically assessed the constitutional claims asserted in the Amended Complaint—including claims under the Takings Clause, the Equal Protection Clause, the Contracts Clause, and the Due Process Clause (both substantive and procedural)—under applicable legal precedent. The Court held that none of Plaintiffs' claims stated a cause of action, warranting dismissal.

In light of the legal principles articulated in the Order and the comprehensive nature of the Court's treatment of the issues raised, it was clear that Plaintiffs faced a steep uphill battle in fashioning a pleading that could survive another dismissal. It therefore comes as no surprise, from even a cursory review of the Second Amended Complaint, that Plaintiffs have failed to allege new facts or legal theories, or to attach any exhibits, that could cure the myriad deficiencies which led to dismissal the last time around. In lieu of such a showing, Plaintiffs for the most part have simply rehashed their prior positions, in some cases with a slight alteration of emphasis that, upon closer inspection, changes nothing. The time has come to dismiss their claims with prejudice.[1]

[1] In Defendants' Motion to Dismiss the Amended Complaint, the Attorney General (joined by the Governor and the Secretary of State) offered extensive argumentation in opposition to Plaintiffs' claims, which with one minor exception have been

Argument

I. ALL CLAIMS AGAINST THE ATTORNEY GENERAL SHOULD BE DISMISSED FOR WANT OF SUBJECT MATTER JURISDICTION ON GROUNDS OF SOVEREIGN IMMUNITY, THE BAR OF THE ELEVENTH AMENDMENT, AND PLAINTIFFS' LACK OF ARTICLE III STANDING.

The Attorney General continues to assert that sovereign immunity and the Eleventh Amendment bar this action against her, warranting her dismissal pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction. There is no principled basis for dismissing the Governor and the Secretary of State, as the Court properly did in its Order, while continuing to mire the Attorney General in this action as a defendant against her will, despite her lack of enforcement authority with respect to the challenged constitutional provision.

It is well settled that, "[u]nless the state officer has some responsibility to enforce the statute or provision at issue, the 'fiction' of *Ex parte Young*[, 209 U.S. 123 (1908),] cannot operate." *Osterback v. Scott*, 782 F. App'x 856, 859 (11th Cir. 2019) (quoting *Summit Med. Assocs., P.C. 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

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recycled in their Second Amended Complaint. For the sake of brevity, the Attorney General does not repeat those arguments below, or offer extensive discussion of the same applicable case authorities as before. Instead, she highlights Plaintiffs' failure to overcome the many bases for dismissal set forth in the Order, warranting dismissal with prejudice this time around.

by the Eleventh Amendment." *Id.* (quoting *Summit Med. Assocs.*, 180 F.3d at 1341). *See also Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, Case No. 4:18cv137-MW/CAS (N.D. Fla.) ("*NRA*"), Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Doc. 94) (May 1, 2020) at 5-6 (same).

The Court has erred in concluding that the Attorney General is an enforcer of criminal laws in Florida, and thus that she would enforce criminal laws yet to be enacted by the Florida Legislature to enforce the challenged provision of the Florida Constitution barring dog racing connected with gambling in Florida. That task, like other criminal prosecutions, would be matters for the geographically appropriate State Attorney to pursue, as the Court has acknowledged (Order at 20).

In its Order, the Court misreads section 16.08, Florida Statutes, to confer upon the Attorney General the authority to direct the State Attorneys—who are independently-elected public officials—as to when, how, and what to prosecute. Based upon that misreading, the Court mistakenly deems the Attorney General to have a genuine behind-the-scenes role as a criminal law enforcer for Eleventh Amendment purposes. However, section 16.08 does nothing of the kind. It states: "The Attorney General shall exercise a general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the state attorneys, shall give them her or his opinion upon any question of law." Thus, rather than empower the Attorney

General to control the substance of enforcement actions by the State Attorneys, the section allows her to exercise a "**general** superintendence and direction" over the State Attorneys, as to the "**manner**" by which they discharge their duties. The statute does not empower the Attorney General to commandeer the State Attorneys, such that she could require them to bring actions for violations of the ban on gambling-related greyhound racing under Article X, section 32 of the Florida Constitution. Rather, the only substantive aspect addressed by section 16.08 arises where a State Attorney, in making a prosecutorial decision, elects to ask the Attorney General for her opinion on a question of law. But even then, nothing in the statute requires the State Attorney to adopt the Attorney General's opinion.

Indeed, the only obligation imposed by statute upon the State Attorneys with respect to the Attorney General is found in section 27.05, Florida Statutes, which provides: "**Assisting Attorney General.**—In addition to the duties now imposed upon the several state attorneys of this state, by statute, they shall assist the Attorney General in the preparation and presentation of all appeals to the Supreme Court, from the circuit court of their respective circuits, of all cases, civil or criminal, in which the state is a party." Fla. Stat. § 27.05. But that duty, which pertains only to appeals, in no way imposes authority upon the Attorney General to control the State Attorneys in the exercise of their prosecutorial discretion either generally or with respect to enforcing the constitutional ban on gambling-related dog racing.

See also NRA, *supra,* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at 5-6, in which the District Court dismissed the Florida Attorney General under the Eleventh Amendment for lack of a sufficient connection to the enforcement of section 790.065(13), Florida Statutes, dealing with firearms possession.

In the case at bar, it follows that the requisite connection between the Attorney General and criminal enforcement of any provisions yet to be enacted pursuant to Article X, section 32 of the Florida Constitution is far too attenuated to predicate subject matter jurisdiction over her under binding Eleventh Amendment jurisprudence.

The same holds for civil enforcement of any such yet-to-be-enacted statutes. The question of which state officer, agency, or department is tasked with enforcing any given civil statute derives from the nature and provisions of the statute, and not from any preexisting status of the officer, agency, or department. In the case of Article X, section 32 of the Florida Constitution, there is simply no basis for speculating—much less concluding—that the Attorney General would have any role under any statutory scheme enacted to enforce its provisions.

In addition to the absence of a sound basis for invoking the fiction of *Ex parte Young* to make the Attorney General a proper defendant here, the Attorney General's attenuated connection to the enforcement of Article X, section 32 of the Florida

Constitution gives rise to another impediment to subject matter jurisdiction for claims against her in this action: *viz.*, that Plaintiffs lack Article III standing.

In *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020), the Eleventh Circuit recently dismissed the Secretary of State from a suit challenging the placement of candidates' names on ballots, because any alleged injury was not sufficiently traceable to the Secretary to confer Article III standing on the plaintiffs to pursue claims against her. As the Court noted, the law at issue made the independently-elected Supervisors of Elections responsible for the printing of ballots, while the Secretary's authority extended only to certifying the names of the candidates appearing on the ballots. Because the appellees could not point to "evidence to establish that the Secretary plays any role in determining the order in which candidates appear on ballots[,]" appellees could not show the requisite Article III standing to pursue a claim against the Secretary. *Id.* at 1207.

There, the Eleventh Circuit further stated:

> Our conclusion that any injury from ballot order is not traceable to the Secretary rests on the reality that the Supervisors are independent officials under Florida law who are not subject to the Secretary's control. The Supervisors are constitutional officers who are elected at the county level by the people of Florida; they are not appointed by the Secretary. …

Id. (citations omitted).

Notably, the Court rejected the proposition that the Secretary's position as the "chief election officer of the state," with "general supervision and administration of

the election laws," could suffice to make the order in which candidates appear on the ballot traceable to her. *Id.* at 1208 (citations omitted).

The same reasoning applies *a fortiori* to the Florida Attorney General in this case, because any connection between the Attorney General and the State Attorneys with respect to the ban on dog racing in connection with wagering is far weaker than the relationship between the Secretary of State and the Supervisors of Elections with respect to election-related issues such as the contents of ballots.

Like the Supervisors of Elections, the State Attorneys are independent officials and constitutional officers elected on a county-by-county basis by the people of Florida. While the Attorney General's position falls within Article IV, dealing with the executive branch, the State Attorney's position arises under Article V of the Florida Constitution, dealing with the judicial branch. Article V, section 17 provides in pertinent part: "In each judicial circuit a state attorney shall be elected for a term of four years. Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law…." Nowhere in the Florida Constitution is the Attorney General given the authority to control State Attorneys' prosecutorial discretion. And, as shown above, the same holds true under Florida's statutory law.

In addition, as noted above, there is no basis for presuming any connection

whatsoever between the civil enforcement of statutes yet to be enacted pursuant to Article X, section 32 of the Florida Constitution and the Attorney General. Any such presumption would be the product of sheer speculation rather than well-reasoned inference.

Thus, regardless of whether any statutes enacted to enforce Article X, section 32 of the Florida Constitution turn out to be criminal or civil, there is no evidence that the Plaintiffs here stand to suffer any injury that is or will be traceable to the Florida Attorney General, warranting her dismissal as a party.

The Eleventh Circuit's opinion in *Jacobson* drives this point home by its emphasis on its prior decision in *Lewis v. Governor of Alabama*, 94 F.3d 1287 (11th Cir. 2019) (en banc). In discussing *Lewis*, the *Jacobson* Court stressed that the injury claimed there—lower wages resulting from the challenged state law—"was not traceable to the [Alabama] Attorney General because he had never enforced or threatened to enforce the law, and the law itself contemplated no role for the Attorney General." *Jacobson*, 957 F.3d at 1208.

The *Jacobson* Court, analogizing between the Eleventh Circuit's holding in *Lewis* that the Alabama Attorney General's broader enforcement authority was insufficient to confer jurisdiction and its holding in *Jacobson* that the Secretary of State's broader role over elections was likewise insufficient, stated:

> And of particular relevance to this appeal, [in *Lewis*] we rejected the worker' reliance upon "a host of provisions of the Alabama Code

> that generally describe the Attorney General's [enforcement] authority" to establish traceability. In the absence of any evidence that the Secretary controls ballot order, the [appellee] voters and organizations likewise cannot rely on the Secretary's general election authority to establish traceability.

Id. (citations omitted).

In sum, there is no basis by which this action can be maintained against the Florida Attorney General under Rule 12(b)(1). As with the Governor and the Secretary of State, this Court's dismissal for want of subject matter jurisdiction per its Order should be extended to the Attorney General because she has rightfully invoked her sovereign immunity. Further, Plaintiffs should be held to lack Article III standing to pursue their claims against the Attorney General, a result which also warrants dismissal for lack of subject matter jurisdiction.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE (UNCONSTITUTIONAL ANIMUS).

In Count Two of their Amended Complaint, Plaintiffs alleged violations of the Equal Protection Clause. While that claim mainly dealt with Plaintiffs' contention that dog racing and horse racing should have been treated the same, Amended Complaint ¶¶ 66 & 67, Plaintiffs also included the contention that the dog racing industry was targeted as a politically unpopular group and singled out from gambling as related to the racing of other animals including horses, *id.* at ¶ 67. Thus, the Court—like Defendants—understood the gist of the equal protection claim to turn on the distinctions made under law as between dogs and horses in the context

of gambling-related racing.

In their Second Amended Complaint, Plaintiffs now advance two distinct equal protection claims, stated in separate counts. Their claim that dog racing and horse racing should be treated alike is set forth in Count Four, discussed further below. Their new free-standing claim that the dog-racing industry has been politically targeted—in a pique of unconstitutional animus in violation of the Equal Protection Clause—is found in Count One.

In Count One, Plaintiffs contend that Article X, section 32 of the Florida Constitution is rooted in hostility to the greyhound industry, which Plaintiffs allege has been "targeted for disparate treatment" and is "disliked nationwide." SAC ¶ 99. Plaintiffs attempt to liken their circumstance to those found in a pair of Supreme Court cases—*U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996)—in which the claimants were denied equal protection of the laws based upon their alleged status as belonging to disfavored groups of individuals. But neither of those cases involved state police powers, gambling-related activities, or businesses engaged in such activities, as to which the legal standard for assessing legislation is especially deferential. More pointedly, neither case is apposite because each involved legislation that patently flunked the rational basis test, which is the appropriate test here.

In *Moreno*, the law at issue denied food stamps to households containing

unrelated members. The Supreme Court, acknowledging the stated purpose of the legislation as being to alleviate hunger and malnutrition, 413 U.S. at 533, assessed it under the rational basis standard, stating:

> The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, "(t)he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements."

Moreno, 413 U.S. at 534 (citation omitted). However, the legislation's failure to meet the rational basis set forth within it did not end the matter, because a statute may still be upheld so long as any rational basis can be advanced to support it. But the only other bases advanced were the needs to prevent use of food stamps by able-bodied persons willfully shirking work (e.g., hippies) and to prevent fraud. The Court rejected both asserted rationales out-of-hand, because other features of the law already addressed those concerns. *Id.* at 534-38. The Court concluded: "Traditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.' But the classification here in issue is not only 'imprecise', it is wholly without any rational basis." *Id.* at 538 (citation omitted).

In *Romer*, Colorado voters adopted by statewide referendum an amendment to the state constitution which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons

based on their homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships. The Supreme Court, assessing it under the rational basis test, rejected the argument that it put gays and lesbians in the same position as all other persons, stating:

> Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Id. at 627. Elaborating on the problem presented by the amendment, the Court further stated:

> [The amendment's] reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.

Id. at 630. The Court concluded that the amendment failed the rational basis test:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id. at 632. Thus, the Court concluded that the reasons offered to justify the amendment under the rational basis test seemed "inexplicable by anything but animus toward the class it affects."

In the case at bar, Plaintiffs wholly ignore that this Court has already assessed Article X, section 32 of the Florida Constitution under the rational basis test and found that it passes muster. As before, Plaintiffs can offer nothing to establish that their claim implicates a recognized fundamental right or a suspect class. Thus, the rational basis test governs. *See* Order at 42. Applying that test, which the Court acknowledged to be "highly deferential" toward economic and social legislation, the Court held that Amendment 13, which resulted in Article X, section 32 becoming part of Florida's Constitution, satisfied the test regardless of whether its purpose is to protect greyhound dogs from harm or to prohibit a certain form of pari-mutuel wagering in Florida. *Id.*

Whatever "hostility" there may be on the public's part with respect to gambling generally or to gambling as related to dog racing specifically, the law is well settled that the People of Florida—whether directly through amendment of their Constitution or indirectly through enactment of legislation by their elected representatives—have the right to prohibit such activities in the exercise of Florida's constitutional police power. Plaintiffs offer nothing that would warrant the Court's reaching a different conclusion this time around with respect to the rational basis for Article X, section 32 of the Florida Constitution. Plaintiffs, who depend on revenues derived from gambling-related activities in a highly regulated industry, are wholly distinct from persons seeking food stamps and homosexuals seeking to avoid

discriminatory treatment under a law that arbitrarily singles them out.

Count One should be dismissed with prejudice.

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE TAKINGS CLAUSE.

In Count Two of the Second Amended Complaint, Plaintiffs again attempt to state a claim for violations of the Takings Clause. But they offer nothing new by way of allegations to avoid dismissal.

The Court has held that Plaintiffs must identify a cognizable Fifth Amendment property interest that is subject to being taken, and that a deprivation or reduction of that interest constitutes a taking. Order at 27. The Court held that the Amended Complaint failed to state a claim for a taking. *Id.* The Court noted that Plaintiffs could not maintain a takings claim for the loss of the continued operation of their dog-racing businesses, because their participation in that business was a privileged and not a right. *Id.* at 29 n.11. While Plaintiffs' dogs or dog-related property could qualify as a cognizable Fifth Amendment property interest, Plaintiffs were held to have failed to allege a compensable taking because no such property was taken for "public use," which is required where the government acts pursuant to its police power. *Id.* at 29-30. The Court further held that Amendment 13 to be a valid exercise of Florida's police power regardless of whether its purpose was to protect the health and welfare of racing dogs or to prohibit wagering on dog races. *Id.* at 30-32. These determinations alone doomed Plaintiffs' takings claim.

In addition, the Court alternatively held that, even ignoring Florida's police power with respect to gambling and related activities, Plaintiffs still could not make out either a per se or an as-applied takings claim. As the Court noted, a per se claim requires showing that a regulation has denied all economically beneficial or productive use of land, citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017), and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). Order at 33.[2] As the Court indicated, it would be only an "extraordinary case" in which an owner of property would be permanently deprived of all value of his property. The Court held that Plaintiffs had failed in the Amended Complaint to offer any plausible allegations that their situations fall into that extraordinary category. *Id.*

In their Second Amended Complaint, Plaintiffs have done nothing to overcome that fatal pleading defect. They cannot possibly demonstrate that their land has been rendered permanently worthless by the passage of Amendment 13.

But even if Plaintiffs' other forms of property—their dogs, bleachers, and such—were counted in assessing a claim of per se taking, they still have failed to come forward with allegations to support such a claim. As the Court noted in rejecting their prior pleading, Amendment 13 does not compel the surrender of any

[2] The Court suggests, Order at 33 n.13, that it is an open question whether a per se taking relates only to land, noting that the Eleventh Circuit has not dispositively ruled on the matter and that other circuits appear to have extended the scope to personal property. But the U.S. Supreme Court's rulings, including that cited above in the 2017 *Murr* case, should be deemed binding here.

such property, nor does it constitute a physical invasion or restraint upon that property. Plaintiffs are not entitled to the most profitable use of their property. *Id.* at 34. Moreover, "[n]othing in the Amended Complaint plausibly alleges facts that would preclude other economically beneficial uses of Plaintiffs' dog-related property." *Id.* Plaintiffs therefore failed to state a claim for a per se regulatory taking. *Id.* at 35.

Plaintiffs also failed to allege facts sufficient to make out an as-applied regulatory taking under the test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See* Order at 35. Plaintiffs failed "to plausibly allege that Amendment 13 interferes with their **reasonable** investment-back expectations in their dog-related property." Order at 36-37 (emphasis added). Under the circumstances surrounding the regulatory history of gambling, any such expectations would be ipso facto unreasonable, as the Court acknowledged in concluding: "Plaintiffs have not plausibly alleged that their dog racing-related property would not be made economically worthless by a new law." *Id.* at 37.

The Court then distinguished *State v. Basford*, 119 So. 3d 478 (Fla. 1st DCA 2013), relied upon heavily by Plaintiffs in the Amended Complaint, because it did not concern a heavily-regulated industry such as gambling, which strongly implicates the State's police power. Instead, *Basford* concerned a constitutional amendment requiring the humane treatment of pregnant pigs, for which an

investment-backed expectation that applicable laws would not be changed was far stronger. Order at 39.

Ignoring the Court's extensive discussion, Plaintiffs again allege that all of the economically beneficial use of their property is being denied, SAC ¶ 107, including the value of racing puppies that will be given away instead of sold for "a great deal of money[,]" SAC ¶ 108. But these allegations do not suffice to avoid dismissal. As before, Plaintiffs have failed to allege a compensable taking because no such property was taken for "public use," which is required where the government acts pursuant to its police power. Moreover, Amendment 13 was a valid exercise of Florida's police power regardless of whether its purpose was to protect the health and welfare of racing dogs or to prohibit wagering on dog races. These determinations, already made by the Court, foreclose Plaintiffs' takings claim.

Alternatively, Plaintiffs also have failed to allege facts to predicate either a per se or an as-applied takings claim. They cannot plausibly contend that their land has become permanently worthless. Nor can they make such a claim with respect to their other dog racing-related property. As to their racetracks and bleachers and such, they cannot possibly show that they could not utilize the property for alternative forms of racing, entertainment, or other purposes; and bleachers equipment, and other personal property can be sold. Even the racing dogs and puppies could be sold for use in other states or nations that allow dog racing. Nor

do Plaintiffs address, much less plausibly negate, the possibility that greyhounds might be desirable as pets or for other uses and fetch a sales price higher than zero.

Plaintiffs' insistence in sticking with their previous takings theory is underscored by their continued heavy reliance on *State v. Basford*, SAC ¶ 106. Plaintiffs in effect ignore the Court's rejection of that case as having any precedential value here.

Count Two should be dismissed with prejudice.

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE.

In Count Three of the Second Amended Complaint, Plaintiffs renew their prior equal protection claim, stated as Count Two of their Amended Complaint and disposed of by the Court in its Order at 40-45.

Plaintiffs offer nothing new, but instead cling to their position that the People of Florida were constitutionally obliged to treat dog-racing and horse-racing in the context of gambling the same.

The Court's treatment of the previous equal protection claim is fully applicable here, as well. *See* Order at 40-45. Plaintiffs' claim, as before, does not implicate a suspect class or a fundamental right, warranting application of the rational basis test. As noted above, the Court properly assessed the challenged provision under that test and found that it passes as a matter of law. That is, the People of Florida, in the exercise of the police power, were entitled to draw

distinctions between racing horses and racing dogs in the context of wagering. The allegations of the Second Amended Complaint afford no basis for any different result this time.

Count Three should be dismissed with prejudice.

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE CONTRACTS CLAUSE.

Count Four of the Second Amended Complaint, alleging impairment of contracts in violation of the Contracts Clause, is virtually identical to Count Three of the Amended Complaint, which the Court dismissed. No basis arises for a different treatment here.

As before, Plaintiffs fail to allege the existence of a specific contract impaired by Amendment 13. *See* Order at 47. Nor have they utilized the opportunity for amendment of their pleading to attach as exhibits even a single contract allegedly impaired. However, as the Court has noted, the State's rights with respect to contracts are powerful where the police power and concerns such as gambling are involved, especially where the State itself is not a party to any such contracts. *Id.* at 46-47. Indeed, it was incumbent upon Plaintiffs at least to try to show reasonable expectations and reliance on the continuation of the regulatory status quo—particularly where, as here, they operated in the context of an extensive and complex regulatory scheme governing pari-mutuel wagering, for which regulatory changes should have been anticipated. *Id.* at 48. Instead, Plaintiffs contented themselves

with reiterating the same allegations that were previously rejected.

Count Four should be dismissed with prejudice.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF SUBSTANTVE DUE PROCESS.

Count Five of the Second Amended Complaint, like the dismissed Count Four of the Amended Complaint, alleges violations of Plaintiffs' substantive due process rights under the federal and Florida Constitutions. While the two versions are substantially similar, the new count—tracking Plaintiffs' failed takings claim—adds allegations: that Amendment 13 decreases the value of their property and deprives them of the use of that property in their commercial enterprises, SAC ¶ 121; that it has left them with no economically viable use of their property, SAC ¶ 122; and that it has forced them to shoulder a burden that should be borne by the public as a whole because it offers no benefits to Plaintiffs, SAC ¶ 123.

In its Order dismissing Plaintiffs' prior substantive due process claim, the Court noted that an arbitrary and capricious act may be the basis for a substantive due process claim. Order at 49. But where fundamental rights are not implicated, the rational basis test applies. *Id.* at 51. As the Court held, while Plaintiffs alleged that they held fundamental rights to use their property and to earn a living, those rights are not recognized as fundamental. *Id.* Constitutionally protected rights, under both federal and Florida law, do not include property interests such as pari-mutuel licenses, *id.* at 51-52 & 51 n.17, or the right to maintain a business or earn a

profit, *id.* at 52. As the Court further noted, even constitutionally protected property rights are not absolute, and are subject to the State's exercise of its police power. *Id.* at 52-53. As it did in rejecting Plaintiffs' other claims, the Court held that Amendment 13 would be subject to the rational basis test under substantive due process analysis and that the provision passes constitutional muster as a matter of law. *Id.* at 53.

The same legal analysis and conclusions apply to Plaintiffs' newly-pleaded version of their substantive amendment claim, which is materially indistinguishable from the prior claim dismissed by the Court.

Count Five should be dismissed with prejudice.[3]

Conclusion

In its Order Granting Defendants' Motion to Dismiss, the Court erred in not dismissing the Florida Attorney General on grounds of sovereign immunity and the Eleventh Amendment. Under Rule 12(b)(1), the Court should dismiss the Attorney General on those grounds, as well as the grounds that Plaintiffs lack Article III standing to assert their claims against her.

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[3] As before, Plaintiffs' Second Amended Complaint does not contain a claim for violation of procedural due process, but its allegations assailing the process by which Amendment 13 got on the ballot, and the very fact that it was enacted as a constitutional provision rather than a statute, occupies many pages. And as before, any such claim is without merit as a matter of law, as the Court held in its Order at 50-51 n.16.

Moreover, it is now clear that the Court was, if anything, too generous in affording Plaintiffs the opportunity to cure their incurably deficient pleading. Plaintiffs' complete failure to effect any such cure as to even a single cause of action underscores that dismissal under Rule 12(b)(6) again is in order, this time with prejudice.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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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). At 5,611 words, this filing complies with the 8,000-word limitation set forth in Local Rule 7.1(F).

/s/ Blaine H. Winship
Blaine H. Winship

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 May, 2020, including:

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