

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HARRIET TUBMAN FREEDOM
FIGHTERS, CORP., et al.,

Plaintiffs,

v.

Case No. 4:21cv242-MW/MAF

LAUREL LEE, Florida Secretary
of State, et al.,

Defendants.

_____ /

FLORIDA ATTORNEY GENERAL'S MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Ashley Moody, Florida Attorney General, moves to dismiss her from this case as to Count IV, which challenges the vote-by-mail ballot possession prohibition under section 104.0616, Florida Statutes (2021), because she is an improper defendant as to that claim. The Florida Attorney General also adopts and incorporates by reference herein Secretary of State Lee's Motion to Dismiss, ECF No. 79, and sections III(D) and III(E) of Secretary of State's Omnibus Memorandum of Law in Support of Her Motions to Dismiss, ECF No. 79-1, and moves to dismiss Counts I and IV of the Amended Complaint, ECF No. 44, for the reasons set forth in the aforementioned sections of the Secretary's Omnibus Memorandum.

SUPPORTING MEMORANDUM

BACKGROUND

This lawsuit stems from a recent Florida act relating to elections, which revised requirements governing third-party voter registration organizations and prohibited any person from distributing, ordering, requesting, collecting, delivering, or otherwise physically possessing more than two vote-by-mail ballots of other electors per election, not including immediate family members. *See* Ch. 2021-11, §§ 7, 32, Laws of Fla. (2021).

Plaintiffs bring their claims for declaratory and injunctive relief against the Florida Secretary of State, the Florida Attorney General, and Florida's Supervisors of Elections under the Civil Rights Act, 42 U.S.C. §1983. Plaintiffs assert that the third-party voter registration organization requirements (Count I) are void for vagueness, (Count II) compel speech, and (Count III) infringe on free speech and association. ECF No. 44, ¶¶ 111-150. Plaintiffs also assert that (Count IV) the vote-by-mail ballot possession prohibition violates Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508. *Id.*, ¶¶ 151-159. Plaintiffs sue the Attorney General as to all Counts.

Plaintiffs contend that the Attorney General is a proper defendant in this suit because she oversees the Office of the Florida Statewide Prosecutor, which has concurrent jurisdiction with State Attorneys to prosecute violations of criminal laws

and because she has civil enforcement authority over the vote-by-mail ballot possession prohibition statute. ECF No. 44, ¶ 57.

LEGAL STANDARD

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility requires “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *id.*, and must rise “above the speculative level.” *Twombly*, 550 U.S. at 555. “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 556 U.S. at 557).

ARGUMENT

I. THE ATTORNEY GENERAL OF FLORIDA IS AN IMPROPER DEFENDANT AND SHOULD BE DISMISSED.

Plaintiffs challenge two separate provisions in Florida’s elections laws. However, the Attorney General has no enforcement authority over the vote-by-mail ballot possession prohibition. *See* §104.0616(2), Fla. Stat. (2021).¹ Thus, sovereign

¹ The Attorney General recognizes that she has civil enforcement authority over §97.0575(3)(a), Fla. Stat. (2021), which contains the challenged third-party voter registration organization requirements. *See* §97.0575(4), Fla. Stat. (2021).

immunity under the Eleventh Amendment, as well as ordinary standing principles, render the Attorney General an improper defendant as to that provision. Therefore, this Court should dismiss the Attorney General from this suit as to Count IV.

A. Eleventh Amendment sovereign immunity bars suit against the Attorney General.

Under the Eleventh Amendment, a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress under section 5 of the Fourteenth Amendment. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). But under *Ex Parte Young*, 209 U.S. 123 (1908), suits filed against a state official in her official capacity for injunctive relief on a prospective basis, alleging violations of the federal constitution, are not considered to be suits against the state that violate the Eleventh Amendment.

This exception, however, has been read narrowly. A state official is subject to suit in his official capacity only “when his office imbues him with the responsibility to enforce the law or laws at issue in the suit.” *Grizzle*, 634 F.3d at 1319; *see Wusiya v. City of Miami Beach*, 614 F. App’x 389, 393 (11th Cir. 2015) (same). In other words, “federal courts have refused to apply *Ex [P]arte Young* where the officer who is charged has no authority to enforce the challenged statute.” *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1342 (11th Cir. 1999). That authority must be specific, as opposed to the official’s “general executive power,” which is “not a basis for

jurisdiction in most circumstances.” *Women’s Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (internal quotation marks omitted).

As for suits against a state attorney general in particular, the Supreme Court has explained that if state statutes could be challenged by suing the attorney general on the theory that she “might represent the state in litigation involving the enforcement of its statutes,” it would eviscerate “the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons.” *Ex Parte Young*, 209 U.S. at 157. Here, because the Attorney General has no enforcement responsibility over the vote-by-mail ballot possession prohibition, she is an improper defendant as to that challenge.

The Attorney General is Florida’s “chief state legal officer.” Art. IV, §4(b), Fla. Const. But while she may choose to intervene, in certain circumstances, to defend the constitutionality of Florida’s laws in state and federal court, the Attorney General ordinarily has no role in enforcing this provision of the election code. Instead, Florida law vests that authority in other officials, most notably the locally elected supervisors of elections and sheriffs. *See, e.g.*, Art. VIII, §1(d), Fla. Const. (establishing the offices of county supervisor of elections and sheriff). Those officials are tasked with administering the State’s vote-by-mail system, maintaining order at the polls, and watching for violations of elections laws. *See* §101.69(2)(a), Fla. Stat. (2021) (requiring supervisors to accept vote-by-mail ballots in secure drop

boxes); §102.012(1)(a), Fla. Stat. (2021) (requiring supervisors to appoint election boards); §102.031(1), Fla. Stat. (2021) (providing that election boards “shall possess full authority to maintain order at the polls”); and §102.091, Fla. Stat. (2021) (requiring sheriffs to exercise vigilance in detection of violations of election laws and apprehending violators). Because the Attorney General does not “have any relationship to the enforcement of [the challenged] provision,... the *Ex Parte Young* doctrine does not apply.” *Summit Med. Assocs.*, 180 F.3d at 1342.²

The Attorney General does have authority to intervene in cases “in which the state may be a party, or in anywise interested.” Fla. Stat. § 16.01(4) & (5); *see also State v. S.H. Kress & Co.*, 155 So. 823, 826 (Fla. 1934). But that authority is wholly discretionary. *See Mallory v. Harkness*, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996) (“It has long been recognized that the [Attorney General] is not a necessary party each time the constitutionality of a statute is drawn into question. The [Attorney General] is thus not affirmatively required to intervene every time an entity

² *See also Okpalobi v. Foster*, 244 F.3d 405, 422–24 (5th Cir. 2001) (en banc) (constitutional challenge to state statute not viable under *Ex Parte Young* because no enforcement connection existed between Governor or Attorney General and the statute); *Bolbol v. Brown*, 120 F. Supp. 3d 1010, 1018 (N.D. Cal. 2015) (finding an allegation that California’s Attorney General, as its “chief legal officer,” has “[a] ‘general duty to enforce California law’” to be “plainly insufficient to invoke the *Ex Parte Young* exception to Eleventh Amendment immunity”); *June Med. Servs., LLC v. Caldwell*, No. 3:14-cv-525, 2014 WL 4296679, at *3 (M.D. La. Aug. 31, 2014) (Louisiana Attorney General’s “broad power” as the state’s chief legal officer is insufficient to trigger *Ex Parte Young* exception).

challenges the constitutionality of a statute.” (citations omitted)), *aff’d without opinion*, 109 F.3d 771 (11th Cir. 1997). And forcing the Attorney General to defend the constitutionality of a statute would effectively eliminate her unreviewable discretion to intervene. *See S. H. Kress & Co.*, 155 So. at 826.

As a result, the Attorney General’s statutory authority to intervene vests only general executive power that does not constitute a “sufficient connection” to permit the exercise of jurisdiction. *Women’s Emergency Network*, 323 F.3d at 949–50; *see Osterback v. Scott*, 782 F. App’x 856, 859 (11th Cir. 2019) (holding that Florida Governor’s “general authority to enforce Florida’s laws” did not make him a proper party).

Plaintiffs rely on the power of the Office of Statewide Prosecution to “investigate and prosecute... any crime involving voter registration, voting, or candidate or issue petition activities,” §16.56(1)(a)(12), Fla. Stat. (2021), to justify the inclusion of the Attorney General in this suit. They ignore, however, that the Statewide Prosecutor may act “only when any such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits.” Fla. Stat. § 16.56(1)(a) (emphasis added). Despite that requirement, Plaintiffs have not alleged that they intend to engage in any such conduct. They assert merely that members of the Paralyzed Veterans of America

Florida Chapter and Paralyzed Veterans of America Central Florida Chapter would be prevented from relying on others to deliver their vote-by-mail ballots. ECF No. 44, ¶¶ 50-53, 156, 158. Those assertions, without more, are insufficient to “raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 555, and it is “not... proper to assume that [the plaintiff] can prove facts that it has not alleged.” *Id.* at 563 n.8 (citation omitted).

Moreover, the Attorney General cannot be sued merely because she has oversight authority over Florida’s state attorneys, who may prosecute violations of the vote-by-mail ballot possession prohibition. To be sure, the Attorney General exercises a “general superintendence and direction over” the State’s prosecuting attorneys. §16.08, Fla. Stat. (2021). But that does not mean that she bears any responsibility for enforcing the challenged statutes in the absence of a violation in multiple circuits. Instead, each “state attorney shall be the prosecuting officer of all trial courts in [her] circuit.” Art. V, §17, Fla. Const. “The State Attorney enforces criminal law in Florida, not the Florida Attorney General.” *Freiberg v. Francois*, No. 4:05-cv-177, 2006 WL 2362046, at *6 n.2 (N.D. Fla. Aug. 15, 2006) (dismissing complaint as to Attorney General because he “ha[d] no role... in the enforcement of the criminal statute”); *see also Roberts v. Bondi*, No. 8:18-cv-1062, 2018 WL

3997979, at *2 (M.D. Fla. Aug. 21, 2018) (rejecting argument that Attorney General is a proper party simply because “the challenged law is a criminal statute”).³

Nothing in Florida law grants the Attorney General the power to compel an elected state attorney to either prosecute or refrain from prosecuting an offense under state law. The Attorney General’s superintendence instead contemplates administrative activities like the receipt of “regular quarterly reports” from the state attorneys. Fla. Stat. § 16.09. Because enforcement of the challenged provision, at least as pled in the Amended Complaint, is left entirely to “local prosecutors, not the Attorney General,” *Children’s Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416–17 (6th Cir. 1996), the Attorney General is an improper defendant.

Since Plaintiffs have not adequately pled that the Attorney General is a proper defendant as to the vote-by-mail ballot possession prohibition, she must be dismissed as to Count IV.

³ This Court has previously found that the Attorney General is not a proper defendant in cases challenging the constitutionality of state laws, even though violations of those laws were subject to criminal penalties. *See Dream Defenders v. DeSantis*, No. 4:21-cv-191, *37-40 (N.D. Fla. August 9, 2021) (slip op.); *Nat’l Rifle Ass’n of Am., Inc. v. Swearingen*, No. 4:18-cv-137, *4-6 (N.D. Fla. May 1, 2020) (slip op.). As these decisions underscore, the Attorney General’s “general superintendence and direction over” the State’s prosecuting attorneys does not make her a proper defendant in every case challenging a law that may be enforced by locally elected State Attorneys.

B. Alternatively, Plaintiffs have not demonstrated standing to sue the Attorney General because she has not caused their alleged injuries and cannot redress them.

Assuming that the Attorney General is a proper party under *Ex Parte Young*, Plaintiffs lack standing to sue her. As the Eleventh Circuit has explained, “Article III standing and the proper defendant under *Ex [P]arte Young* are ‘[s]eparate[]’ issues.” *Jacobson v. Fla. Sec’y of State*, 957 F.3d 1193, 1210 (11th Cir. 2020) (quoting *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1295 (11th Cir. 2019) (en banc)). Whereas a “state official need only have ‘some connection’ with the enforcement of the challenged law” to constitute a proper party under *Ex Parte Young*, standing requires more: “that the plaintiff’s injury be ‘fairly traceable’ to the defendant’s actions and redressable by relief against *that* defendant.” *Id.* (quoting *Lewis*, 944 F.3d at 1298, 1301). Here, Plaintiffs cannot show that the Attorney General caused their alleged injuries or has the power to redress them.

For the reasons discussed above, the Attorney General lacks the power to enforce the vote-by-mail ballot possession prohibition. She simply is not involved in that aspect of Florida election law. Moreover, absent any allegation that the Plaintiffs intend to violate the challenged statute in multiple circuits, the Office of Statewide Prosecution—and therefore the Attorney General herself—has no power to enforce the challenged statute by criminal prosecution. Only Florida’s state attorneys may do so, and the Attorney General has no authority to order those

independently elected officials to refrain from prosecuting. *See* Art. V, § 17, Fla. Const.; Fla. Stat. § 27.02. An injunction directed to the Attorney General would therefore do nothing to prevent the harm Plaintiffs allege. Plaintiffs thus cannot show that their alleged injuries are traceable to the Attorney General. *See Support Working Animals, Inc. v. Governor of Fla.*, No. 20-12665, 2021 WL 3556779, *3-5 (11th Cir. Aug. 12, 2021) (holding that plaintiffs failed to show that any harm they suffered was traceable to the Attorney General because, although the plaintiffs could face future criminal penalties, they did not presently face any penalties as a result of the Attorney General’s actions). For the same reason, an injunction against the Attorney General would do nothing to redress the harm Plaintiffs allege. *See Support Working Animals, Inc.*, 2021 WL 3556779 at *5 (holding that the plaintiffs failed to show that any harm they suffered was redressable by a judgment against the Attorney General).

Where, as here, “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.’” *Gallardo by & through Vassallo v. Senior*, No. 4:16-cv-116, 2017 WL 3081816, at *6 (N.D. Fla. July 18, 2017) (quoting *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, J., concurring)); *see Lewis*, 944 F.3d at 1301 (holding that plaintiffs challenging state statute lacked standing to sue Alabama’s Attorney General, who had “no enforcement role” as to challenged statute); *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). Accordingly, the Attorney General must also be dismissed from the case as to Count IV based on lack of standing.

II. COUNTS I AND IV SHOULD BE DISMISSED.

The Florida Attorney General adopts and incorporates by reference herein the arguments presented in Sections III(D) and III(E) of Secretary of State’s Omnibus Memorandum of Law in Support of Her Motions to Dismiss. ECF No. 79-1.

CONCLUSION

For the foregoing reasons, the Florida Attorney General requests that this Court dismiss her from this case as to Count IV because she is an improper party. The Florida Attorney General also requests that this Court dismiss Counts I and IV of the Amended Complaint for the reasons set forth in the adopted sections of the Secretary’s Omnibus Memorandum.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(F), I hereby certify that the total number of words
in this Supporting Memorandum is 2,846.

/s/ Bilal Ahmed Faruqui
BILAL AHMED FARUQUI