

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

HARRIET TUBMAN FREEDOM
FIGHTERS, *et al.*,

Plaintiffs,

v.

Case No. 4:21-cv-242

LAUREL M. LEE, in her official
capacity as Secretary of State of
Florida, *et al.*,

Defendants

**PLAINTIFFS' OPPOSITION TO FLORIDA ATTORNEY GENERAL'S
MOTION TO DISMISS**

Florida Attorney General Ashley Moody (the "Attorney General") asks the Court to dismiss the above-captioned matter as to Count IV, in which Plaintiffs Paralyzed Veterans of America Florida ("PVAF"), Paralyzed Veterans of America Central Florida ("PVACF") (collectively, "PVA Plaintiffs"), and Steve Kirk challenge mail ballot restrictions under Section 104.0616, Florida Statutes (2021), alleging that the Attorney General is an improper defendant as to that claim. In the alternative, the Attorney General argues that Plaintiffs do not have standing to sue her. Additionally, the Attorney General moves to dismiss Counts I and IV of the Amended Complaint, ECF No. 44, adopting and incorporating by reference Secretary of State Lee's (the "Secretary of State") Motion to Dismiss, ECF No. 79,

and Sections III(D) and III(E) of the Secretary of State’s Omnibus Memorandum of Law in Support of Her Motions to Dismiss, ECF No. 79-1. For reasons set forth in detail below, the Court should deny the Attorney General’s motion because the nature and breadth of her authority to enforce the challenged statutory provisions render her a proper party to this action.

I. Parties’ Arguments

This lawsuit relates to certain provisions of Florida Senate Bill 90 (“SB 90”), enacted May 6, 2021, which amends Florida’s election law. The PVA Plaintiffs and Steve Kirk¹ challenge amendments to Fla. Stat. § 104.0616 limiting who may handle a mail ballot, on the grounds that it directly conflicts with, and therefore violates, Section 208 of the Voting Rights Act (“VRA”). Section 208 guarantees covered voters the right to choose *any* person other than their employer, employer’s agent, or union representative to assist them with the voting process.

Conceding that she is an appropriate defendant as to Plaintiff Harriet Tubman Freedom Fighters’ (HTFF) void for vagueness claim (Count I), the Attorney General only moves to dismiss Count IV of Plaintiffs’ Amended Complaint, arguing that she is not an appropriate defendant for the PVA Plaintiffs’ and Plaintiff Kirk’s Section 208 claim. ECF No. 130 at 3–4. Specifically, the Attorney General asserts sovereign

¹ Plaintiff Kirk is President of PVACF and a registered Florida voter who would like to vote by mail with the assistance of his hired caregiver. *See* ECF No. 44 at ¶ 156.

immunity under the Eleventh Amendment on the grounds that “the Attorney General has no enforcement responsibility over the vote-by-mail ballot possession prohibition.” *Id.* at 4. She argues that “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.” *Id.* at 5. Additionally, she states that she may only enforce state criminal laws in certain situations involving alleged criminal activity across two or more judicial circuits, *id.* at 7, and that “[n]othing 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.” *Id.* at 9.

In the alternative, the Attorney General argues that Plaintiffs do not have standing to bring their Section 208 claim against her because their injuries are not fairly traceable to her and she could not redress them if the Court grants Plaintiffs their requested relief. *Id.* at 11. Finally, the Attorney General incorporates Sections III(D) and III(E) of the Secretary of State’s memorandum in support of her motion to dismiss Counts I and IV of the Amended Complaint. *Id.* at 12.

II. Legal Standard

A. Rule 12(b)(1)

The threshold questions of standing and Eleventh Amendment sovereign immunity implicate the Court’s subject matter jurisdiction under Federal Rule of

Civil Procedure 12(b)(1). *Reprod. Health. Servs. v. Strange*, 3 F.4th 1240, 1250–51 (11th Cir. 2021) (citations omitted). A plaintiff has standing under Article III of the Constitution when she has (1) “suffered an injury in fact, (2) that is fairly traceably to the challenged conduct of the defendant and (3) likely to be redressed by a decision in the plaintiff’s favor.” *Strange*, 3 F.4th at 1251 (quoting *Spokeo v. Robins*, 578 U.S. 856 (2016)). On a motion to dismiss, the court “must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations.” *Id.* (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998)).

Under the Eleventh Amendment, a state cannot be sued in federal court unless it waives its sovereign immunity, or its immunity is abrogated by an act of Congress enacted under section 5 of the Fourteenth Amendment. *Strange*, 3 F.4th at 1255. However, the landmark case *Ex parte Young*, 209 U.S. 123, 155–57 (1908), created an exception to this general rule of immunity. The exception allows state officials to be sued in their official capacities by plaintiffs “seeking prospective relief to end continuing violations of federal law.” *Strange*, 3 F.4th at 1255 (quoting *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999)). To fall into the exception to sovereign immunity under *Ex parte Young*, the state official “must have some connection with the enforcement of the act.” *Ex parte Young*, 209 U.S. at 157. “The fact that the state officer by virtue of his office has some connection with the

enforcement of the act is the important and material fact[. W]hether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.” *Id.*

B. Rule 12(b)(6)

In the Eleventh Circuit, when determining whether to dismiss an action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), district courts must accept the factual allegations in the complaint as true and construe the allegations in the light most favorable to the plaintiff. *See, e.g., Strange*, 3 F.4th at 1258. In determining whether a complaint survives a Rule 12(b)(6) challenge, “[the court] ask[s] whether the complaint contains enough facts to state a claim to relief that is plausible on its face.” *Bilal v. Geo Care, LLC*, 981 F.3d 903, 911 (11th Cir. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (quotation marks omitted). A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (quotation marks omitted). Plaintiffs have met that standard.

III. Arguments

A. The Attorney General is a proper defendant because she has ultimate prosecutorial power over purported violations of Section 104.0616.

Defendant Attorney General argues that she does not fall under the *Ex parte Young* exception to sovereign immunity because, as a state official, she lacks “some

connection with the enforcement of the act.” *Ex parte Young*, 209 U.S. 123, 157 (1908). This minimizes her own authority.

The *Ex parte Young* exception to sovereign immunity is clear: If a state-official defendant can enforce an allegedly unconstitutional statute, or a statute that violates federal law, the necessary *Ex parte Young* connection exists. *Strange*, 3 F.4th at 1256 (citing *Ex parte Young*, 209 U.S. at 157). Whether the connection “arises out of the general law, or is specially created by the act itself, is not material so long as it exists.” *Ex parte Young*, 209 U.S. at 157. The *Ex parte Young* doctrine applies to the Attorney General because she can enforce Fla. Stat. § 104.0616’s mail ballot restrictions challenged under Count IV of this action.

First, anyone who violates the statute’s restrictions commits a first-degree misdemeanor, punishable by up to one year in prison or a \$1,000 fine per violation. Fla. Stat. § 104.0616. The Office of Statewide Prosecution—which sits within the Office of the Attorney General—has the power to enforce these restrictions pursuant to its authority to investigate and prosecute “any crime involving voter registration, voting, or candidate or issue petition activities” that occurs in two or more judicial circuits. Fla. Stat. § 16.56(1)(a)(13).

Moreover, the Attorney General appoints the statewide prosecutor who oversees the Office of Statewide Prosecution. *Id.* § 16.56(2). The statewide prosecutor “may . . . exercise such other powers as by law are granted to state

attorneys.” *Id.* § 16.56(3). “The Attorney General may remove the statewide prosecutor prior to the end of his or her term” and, “[d]uring the period of any vacancy,” “shall exercise all the powers and perform all the duties of the statewide prosecutor.” *Id.* § 16.56(2). Given that the Attorney General selects, oversees, and can terminate the chief officer of the state body responsible for prosecuting “any crime involving . . . voting,” it is specious to disclaim her ultimate prosecutorial authority over the criminal consequences of a possible Section 104.0616 violation.

Second, the Attorney General concedes she has the power to investigate and prosecute *any* crime involving voter registration, voting, or candidate or issue petition activities, but argues her power is limited to when 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. ECF No. 130 at 7–8. This distinction does not render her an improper defendant here. As discussed in the Amended Complaint, the PVA Plaintiffs’ members reside in several counties and more than one judicial circuit. ECF No. 44, ¶ 48. Some of their members reside as in-patients at Veterans Affairs facilities that service patients from multiple counties and judicial circuits, and employ a small number of social workers who would be available to assist PVA members in receiving, marking, and returning their ballots. *Id.* ¶ 50. As a result, should the Attorney General investigate violations of Section 104.0616 involving

PVA members, she would satisfy the jurisdictional hook needed to investigate and potentially prosecute suspected violations.

Third, the Attorney General argues that PVA Plaintiffs have not alleged that they intend to violate Section 104.0616 in two or more judicial districts. This is irrelevant under the *Ex parte Young* doctrine. See, e.g., *Summit Med. Assocs., P.C.*, 180 F.3d 1326 (holding that the Alabama Attorney General fell within the ambit of *Ex parte Young* because it could enforce certain criminal liability provisions of an Alabama abortion law). “The *Ex parte Young* doctrine does not demand that a plaintiff first risk the sanctions of imminent prosecution or enforcement in order to test the validity of a state law.” *Id.* at 1338 (11th Cir. 1999). Thus, taking Plaintiffs’ allegations as true, potential violations of Fla. Stat. § 104.0616’s ballot restrictions fall into the Attorney General’s enforcement jurisdiction, and PVA Plaintiffs may seek prospective injunctive relief.

Fourth, the Attorney General argues that she lacks a sufficient connection to Section 104.0616’s enforcement because elected supervisors of elections and sheriffs are tasked with enforcing that provision. See ECF No. 130 at 8–9. Presumably, the Attorney General relies on non-binding, distinguishable cases²

² Unlike PVA Plaintiffs, who have members in multiple Florida judicial districts whose conduct could form the basis for criminal prosecution under Fla. Stat. § 16.56(1)(a)(12), the cases cited by the Attorney General involved individual plaintiffs under the criminal jurisdiction of specific Florida judicial districts. See

because she cannot cite a provision of law or case that *prevents* her from enforcing Fla. Stat. § 104.0616. As discussed above, the Attorney General has the power to enforce this statute. Therefore, that the Florida Constitution identifies additional county-level officials who may enforce the challenged statute does not negate the Attorney General’s specific statutory authority to criminally prosecute the provision at issue.

Finally, the Attorney General argues that courts have held that “general executive power” such as hers does not constitute a sufficient connection for the exercise of jurisdiction. However, the cases she cites in support of this argument feature the *Governor* of Florida—not the Attorney General. *See Women’s Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (“A governor’s ‘general executive power’ is not basis for jurisdiction in most cases.”); *Osterback v. Scott*, 782 F. App’x 856, 859 (11th Cir. 2019) (“[A] governor’s general executive authority . . . is insufficient to make the governor a proper party under *Ex Parte*

ECF No. 130 at 8-9 (citing *Freiberg v. Francois*, No. 4:05CV177-RH/WCS, 2006 WL 2362046 (N.D. Fla. Aug. 15, 2006) (dismissing lawsuit by a Florida resident who held an out-of-state naturopathy license and could not obtain one in Florida because the Attorney General has no role in the licensing of naturopaths or prosecuting the crime of practicing or advertising naturopathy services without a license); *Roberts v. Bondi*, No. 8:18-CV-1062-T-33TGW, 2018 WL 3997979 (M.D. Fla. Aug. 21, 2018) (dismissing lawsuit brought by an individual firearm owner in Bradenton, Florida against the Attorney General seeking an injunction against a law prohibiting bump stocks).

Young.”). It is clear that the cited references to “general executive power” are specific to the Governor’s extensive powers as the chief officer of a state’s entire executive branch, not the enforcement and legal powers explicitly assigned to the Attorney General. Relying on these cases to imply that “general executive power” extends to the Attorney General misrepresents both the nature of these powers and the Eleventh Circuit’s holdings.

In sum, the Eleventh Amendment does not bar Plaintiffs’ suit against the Attorney General because she has more than a sufficient connection—under Florida law and this Circuit’s *Ex parte Young* precedent—to the state’s criminal enforcement of Fla. Stat. § 104.0616. Therefore, the Attorney General falls squarely within the exception to state sovereign immunity set forth in *Ex parte Young* and is a proper defendant in this suit.

B. Plaintiffs have standing because their injuries caused by Fla. Stat. § 104.0616 are fairly traceable to and redressable by the Attorney General.

The Attorney General argues that Plaintiffs lack standing because she has not caused their alleged potential injuries and cannot redress them. As discussed *supra* II.A, one of the requirements for Article III standing is that plaintiff’s injuries be fairly traceable to the challenged conduct of the defendant[.]” *Strange*, 3 F.4th at 1251 (quoting *Spokeo*, 578 U.S. 856). In the Eleventh Circuit, “the traceability requirement is less stringent than proximate cause: ‘[e]ven a

showing that a plaintiff's injury is *indirectly* caused by a defendant's actions satisfies the fairly traceable requirement.” *Cordoba v. DIRECT TV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019) (quoting *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012)) (emphasis added) (alteration in original). Given that the Attorney General is a government official, the causation element of standing requires the named defendant to possess authority to enforce the complained-of provision. *Strange*, 3 F.4th at 1252.

In *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1264 (N.D. Fla. 2020), the plaintiffs sued to enjoin the Attorney General from enforcing a state voting law restricting the delivery of remote ballots cast by others. The court found that the Office of Statewide Prosecution's authority to prosecute any crime involving voter registration or voting that occurs in two or more judicial districts under Fla. Stat. § 16.56(1)(a) was a sufficient connection to the enforcement of Florida's statutory provision restricting ballot delivery to confer standing. *Id.* at 1268.

Here, the injury is traceable to the Attorney General because, as discussed above, she has the power to enforce Fla. Stat. § 104.0616. *See Strange*, 3 F.4th 1240 (holding plaintiffs' injuries were traceable to the Attorney General because the act at issue contemplated enforcement by the Attorney General through its provisions). Section 104.0616, as amended by SB 90, deprives Section 208-covered voters their right to receive help from an assistant of their nearly unrestricted choice by limiting

voters' choice to the categories of individuals listed in the statute and subjecting individuals who provide assistance, but who do not meet the statute's criteria, to criminal penalties. Fla. Stat. § 104.0616(2). Each of Plaintiffs' members—across multiple Florida counties (and judicial circuits)—who needs assistance to vote by mail due to their disability is covered by Section 208 and therefore impermissibly constrained by Section 104.0616 in choosing an assistant. This fact alone is sufficient to confer standing on the PVA Plaintiffs. *See Charles H. Wesley Ed. Found. V. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (finding alleged injury to federal statutory right traceable to defendant with enforcement authority sufficient to confer standing, regardless of whether voting franchise was denied to individual).

Additional factors further demonstrate traceability. One example of the PVA Plaintiffs' members who could be affected by Section 104.0616's ballot restrictions are Section 208-covered members who reside as in-patients in Veterans' Affairs facilities outside their counties of registration, and who will need the assistance of a limited number of facility staff members to obtain, mark, and return their mail ballots. *See* ECF No. 44 at ¶ 50. If facility staff were to provide assistance, such activities would, on information and belief, involve mail ballots issued by Supervisors of Elections in two or more judicial circuits, thereby triggering the Attorney General's criminal enforcement authority under Section 104.0616.

The Attorney General also points to the fact that Plaintiffs have not violated Section 104.0616 in multiple circuits to argue that the PVA Plaintiffs' injuries are not fairly traceable to her. The Eleventh Circuit already rejected a similar argument in *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486 (11th Cir. 1993) ("*ACLU*"), finding that ". . . it is the state official designated to enforce that rule who is the proper defendant, *even when that party has made no attempt to enforce the rule.*" 999 F.2d at 1490 (emphasis added). The Eleventh Circuit reasoned the "controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of the injury." *Id.* Although the PVA Plaintiffs and Plaintiff Kirk seek to invalidate Section 104.0616 because it conflicts with a federal statute—rather than on constitutional grounds—the same reasoning applies here: The state has violated their right under Section 208 of the VRA in enacting Section 104.0616's mail ballot restrictions, and the Attorney General has the authority to represent the state in actions to enforce Section 104.0616, making their injury fairly traceable to her office. Their members and their members' assistants need not actually violate the law to bring this action against any of the named Defendants, including the Attorney General, especially where the mere threat of prosecution is sufficient to deter a chosen assistant from providing help to Section 208-covered voters, thereby depriving them of the right guaranteed under Section 208.

The Attorney General cites *Support Working Animals, Inc. v. Governor of Fla.*, No. 20-12665, 2021 App. Lexis 24024, 2021 WL 3556779 (11th Cir. Aug. 12, 2021) and *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1299 (11th Cir. 2019) to bolster her argument that PVA Plaintiffs' alleged injuries are not traceable to her. These cases are distinguishable. *Support Working Animals, Inc.* involved a criminal provision not in effect at the time appellees initially filed suit. In addition, the Eleventh Circuit noted that it was unclear whether the Attorney General would have enforcement authority even after the criminal penalties at issue became effective because the statute vested "all...executive power[]" to enforce them in a newly created but yet-to-be determined state agency. 2021 WL 3556779 at 9 n.3 (internal citations omitted). Similarly, the statute at issue in *Lewis v. Governor of Alabama*, did "not require (or even contemplate) enforcement by anyone, let alone the Attorney General." 944 F.3d 1287 at 1299. By contrast, here, the Attorney General plays an explicitly-defined role in the enforcement of the state's voting laws, and Section 104.0616(2) (and the attendant potential for criminal enforcement) went into effect on May 6, 2021. Accordingly, Plaintiffs' injuries are traceable to the Attorney General.

Finally, an injunction would redress PVA Plaintiffs' injuries caused by Section 104.0616. As stated above, the threat of criminal penalties to assistants who do not meet Section 104.0616's criteria effectively deny the PVA Plaintiffs'

members their right under Section 208. An order by this Court enjoining the enforcement of this law would redress their injury by allowing them to receive assistance in voting consistent with Section 208. An injunction only against the Supervisors of Elections, but not the Attorney General, would leave Veterans Affairs staff—and other caregivers or staff assisting multiple people cast mail-in ballots—vulnerable to prosecution, thereby reducing their willingness to provide the necessary voting help and limiting (or even preventing) disabled voters from exercising their right to vote under both federal and state law. Indeed, in *Nielsen*, this Court held that the Attorney General was a proper defendant in a challenge to Florida’s restriction on the delivery of remote ballots cast by others because “[i]f the challenge succeeds, an injunction against prosecution could properly run against the Attorney General.” 469 F. Supp. 3d at 1265, 1268.

For all of these reasons, the PVA Plaintiffs’ injury is fairly traceable to the Attorney General; an injunction against the Attorney General would redress their injuries; and they consequently have standing to bring Count IV against the Attorney General.

C. Plaintiffs’ response to the Attorney General’s request to dismiss Counts I and IV

Attorney General Moody also incorporated into her memorandum in support of her motion to dismiss Sections III(D) and III(E) of the Secretary of State’s Omnibus Memorandum of Law in Support of Her Motions to Dismiss. ECF No. 79-

1). In that motion, the Secretary of State moved to dismiss Plaintiff Harriet Tubman Freedom Fighters (“HTFF”) void for vagueness claim (Count I) and the PVA Plaintiffs’ and Plaintiff Kirk’s Section 208 claim (Count IV). *See* ECF Nos. 79 & 79-1. Plaintiffs opposed the Secretary’s motion. *See* ECF No. 119. As such, Plaintiffs incorporate Sections III and IV of their Opposition to the Secretary of State’s Motion to Dismiss here. ECF No. 119.

IV. Conclusion

For the foregoing reasons and the reasons discussed in Sections III and IV of Plaintiffs’ Opposition to the Secretary of State’s Motion to Dismiss, ECF No. 119, the Court should deny the Attorney General’s Motion to Dismiss.

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Dated: September 2, 2021

Respectfully submitted,

/s/ Emma Bellamy

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**NORTHERN DISTRICT OF FLORIDA
LOCAL RULE 7.1(F) CERTIFICATION**

Pursuant to Local Rule 7.1(F), the attached Memorandum in Opposition to the Florida Attorney General's Motion to Dismiss contains 3684 words, excluding the case style, signature block, and any certificate of service.

**NORTHERN DISTRICT OF FLORIDA
LOCAL RULE 7.1(B) CERTIFICATION**

Pursuant to Local Rule 7.1(B), Plaintiffs conferred with Defendant Attorney General Moody prior to filing this Response.

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 the 2nd of September, 2021.

/s/ Emma Bellamy
Attorney for Plaintiffs