**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

KELLS HETHERINGTON,
Plaintiff,

CASE NO: 3:21-CV-671-MCR-EMT

v.
LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,
Defendants.
_____/

**FEC DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT**

Defendants, Joni Alexis Poitier, Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes (collectively, "FEC Defendants"), by and through undersigned counsel, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and this Court's November 3, 2021, Scheduling Order (DE #64), hereby move for entry of summary final judgment in their favor and against Plaintiff. In support thereof, FEC Defendants state as follows:

**INTRODUCTION**

The immeasurable value of non-partisan elections has been recognized in the State of Florida. Moreover, the value of non-partisan school board elections has been so highly and widely recognized in Florida that it is imbedded in Florida's Constitution. Perhaps the two arenas where non-partisan elections are most important are judicial elections and school board elections. This is because of the

People's insistence that the quality of justice meted out by their courts and the quality of education imparted to their children in their public schools not be subject to corruption by the forces of partisan political views at odds with society's shared core values and the rule of law

Now Plaintiff, a candidate for school board in Escambia County who once was fined a paltry sum for campaigning for a school board position as a "lifelong Republican," seeks to undermine the integrity of nonpartisan elections, thereby threatening to eviscerate any veil of nonpartisanship on local school boards at a time when partisanship and division in the country is at fever pitch. Specifically, Plaintiff challenges Section 106.143(3), Florida Statutes, which merely regulates certain expressly partisan advertisements by candidates for nonpartisan office. Plaintiff's claims fail as a matter of law because, as demonstrated below, the statute is narrowly tailored to promote the State's compelling interest in preserving the nature of nonpartisan offices and nonpartisan elections in Florida.

**FRAMEWORK FOR NONPARTISAN SCHOOL BOARD ELECTIONS**

Plaintiff alleges that Section 106.143(3) violates his First Amendment rights. In relevant part, the statute provides that "[a] political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation." That subsection reads, in full

> (3) Any political advertisement of a candidate running for partisan office shall express the name of the political party of which the

> candidate is seeking nomination or is the nominee. If the candidate for partisan office is running as a candidate with no party affiliation, any political advertisement of the candidate must state that the candidate has no party affiliation. A political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation. This section does not prohibit a political advertisement from stating the candidate's partisan-related experience. A candidate for nonpartisan office is prohibited from campaigning based on party affiliation.

*Id.* (emphasis added).

Notably, this section specifies that it does ***not*** prohibit a political advertisement from stating the candidate's partisan-related ***prior*** experience. A candidate for nonpartisan office is prohibited from "***campaigning*** based on party affiliation." *Id.* (emphasis added).

Florida law defines nonpartisan offices:

> "Nonpartisan office" means an office for which a candidate is ***prohibited from campaigning*** or qualifying for election or retention in office ***based on party affiliation***.[1]

§ 97.021(23), Fla. Stat. (emphasis added). The Florida Constitution was amended in 1998 to expressly mandate that members of local school boards be chosen in nonpartisan elections.

[1] Plaintiff does not challenge Fla. Stat. § 97.021(23) in this lawsuit. *See* Ex. A., Pltf.'s Resp. to FEC Defs.' Req. for Admis. No. 1, and Ex. B., Pltf.'s Resp. to FEC Defs.' Interrog. No. 8, asking Plaintiff to identify the statutes being challenged (Plaintiff challenges only the clauses of § 106.143(3) that pertain to nonpartisan elections.) Nor does he challenge either Fla. Stat. § 1001.361, or Fla. Const. art. IX, § 4(a), which likewise safeguard the nonpartisanship of certain elections including those for local school boards.

> In each school district there ***shall be*** a school board composed of five or more members chosen by vote of the electors in a ***nonpartisan election*** for appropriately staggered terms of four years, as provided by law.

Fla. Const. art. IX, § 4(a) (emphasis added). *See also* Fla. Const. art. IX Commentary to 1998 Amend. The 1998 amendment rejected and overturned a prior Florida statute mandating partisan elections for schoolboard members. *See id.* Thus, for the past 23 years, "school board members [have joined] judicial candidates as Florida's only other non-partisan candidates for state office." *Id.* (internal citation omitted).

This constitutional mandate is also implemented through two other state statutes not at issue. *See, e.g.* Fla. Stat. § 97.021(23), *supra*, and Fla. Stat. §1001.361, which provides in pertinent part that, "the election of members of the district school board shall be by vote of the qualified electors of the entire district in a nonpartisan election…." *See also* the above-mentioned Florida Constitutional provision. Thus, by challenging Section 106.143(3)'s limitation on advertising one's political party affiliation in the course of a campaign, Plaintiff assails the very nature of nonpartisanship itself.

## MEMORANDUM OF LAW

### I. Applicable Legal Standard.

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. R. 56(a) ("The court ***shall*** grant summary judgment if

the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.") (emphasis added). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (citing Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 752 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. Chi. L. Rev. 72, 79 (1977)). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. "The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 Advisory Committee Notes (1963 Amend.). There is "no express or implied requirement in Rule 56 that

the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex Corp.*, 477 U.S. at 323 (emphasis original). "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*

## II. Non-Partisan Elections Are Constitutionally Proper.

The challenged statute, like the unchallenged related provisions of law cited above, is designed to protect the bipartisan quality of specified Florida elections. It is well settled that a State may require nonpartisan elections. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997).

Accordingly, Florida has every right to require that its school board elections be conducted in a nonpartisan fashion. That principle must prevail here.

## III. The Relief That Plaintiff Seeks Will Not Redress His Concern.

The obvious purpose of the Florida constitutional provision and statutes cited above is to remove partisan politics from public education, including elections of its school boards. The more specific purpose of the Florida enactments is to require candidates to campaign and advertise based on the issues, rather than based on party affiliation. The enactments are designed to avoid seeking votes simply because of the candidate's party affiliation. Plaintiff's intent to advertise and campaign using

the phrase that he is a "lifelong Republican" runs counter to these constitutionally protected goals.

Plaintiff's use of the phrase "lifelong Republican" would violate Section 106.143(3), Florida Statutes, which specifically addresses advertising and campaigning based on party affiliation. It also would run contrary to Section 97.021(23), Florida Statutes, which prohibits "campaigning … based on party affiliation" for nonpartisan elections, as well as Section 1001.361, Florida Statutes, and Article IX, Section 4(a) of the Florida Constitution, as shown *supra*.

However, Plaintiff's Complaint challenges only Section 106.143(3). Plaintiff's responses to interrogatories reiterate this point. See Ex. B, Pltf.'s Resp. to FEC Defs.' Interrog. No. 8, asking Plaintiff to identify the statutes being challenged (Plaintiff challenges only the clauses of § 106.143(3) that pertain to nonpartisan elections.) The existence of these other legal requirements renders Plaintiff's claim improper, because a ruling in his favor, would not fully redress the substance of his claimed injury.

In *Renne v. Geary*, 501 U.S. 312 (1991), the Supreme Court stated:

> There is reason to doubt, however, that the injury alleged by these voters can be redressed by a declaration of § 6(b)'s invalidity or an injunction against its enforcement.
>
> A separate California statute, the constitutionality of which was not litigated in this case, provides that a candidate's statement "shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations." Cal. Elec. Code Ann. § 10012

> (West 1977 and Supp.1991). This statute might be construed to prevent candidates from mentioning party endorsements in voter pamphlets, even in the absence of § 6(b). Overlapping enactments can be designed to further differing state interests, and invalidation of one may not impugn the validity of another.

*Renne*, 501 U.S. at 319. Here, as in *Renne*, other state enactments that have overlapping but different provisions also would be pertinent to Plaintiff's narrow grievance, undermining his claim for relief.

Therefore, summary judgment should be granted in favor of Defendants due to lack of redressability of Plaintiff's claims as stated in his Complaint.

## IV. FEC Defendants Are Entitled to Summary Final Judgment as a Matter of Law Because Section 106.143(3) Is Constitutional as Applied to Plaintiff.

Plaintiff bears the burden of proof at trial to establish the elements of his 42 U.S.C. § 1983 claim alleging an as-applied violation of his first amendment rights. Compl. Count I. To maintain this claim, Plaintiff must satisfy two prongs.: "First, the Plaintiff must [establish] that some person has deprived him of a federal right." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). As demonstrated below, summary judgment must be entered in favor of the FEC Defendants because Plaintiff has failed to meet his burden on summary judgment to present evidence showing that Section 106.143(3), Florida Statutes, is unconstitutional as applied to him.

Where, as here, a challenged statute imposes only a slight burden on constitutional rights, the appropriate standard is a determination of whether the law

furthers an "important regulatory interest." *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). As the Supreme Court has explained,

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

*Timmons*, 520 U.S. at 358-59 (internal citations and quotation marks omitted).

Of course, all election laws impose at least some burden on the expressive and associational rights protected by the First Amendment. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). To determine whether a particular burden rises to the level of a constitutional violation, courts weigh the "character and magnitude" of a plaintiff's injury against the state's interests supporting the regulation. *Id*. at 434 (citation and quotation marks omitted). The level of scrutiny applied to the State's justification varies depending on the rule's effect on First Amendment rights. *Id*. The greater the burden, the more exacting the Court's inquiry. *Id*. Where the burden on a plaintiff's First Amendment rights is trivial, a rational relationship between a legitimate state interest and the law's effect will suffice. *Maslow v. Bd. of Elections in City of New York*, 658 F.3d 291, 296 (2d Cir. 2011).

These principles apply in the context of challenges to laws imposing election restrictions. In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court stated:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

*Burdick*, 504 U.S. at 433.[2]

When analyzing an election law challenge, the court

> must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

*Id.* at 434 (quoting respectively *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986)).

But even if the review were to require a compelling state interest, the statute at issue passes muster, because it is narrowly tailored—so as to separate current campaigning from prior political affiliations—and is in furtherance of a compelling

[2] Although the *Burdick* Court was considering a law relating to the form of the election rather than the speech of a candidate, the same principle applies to both contexts. *Burdick*, *supra*, at 433 (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("the rights of voters and the rights of candidates do not lend themselves to neat separation.") ).

state interest to minimize the impact of politics on the education of Florida's children.

**i. Section 106.143(3) Satisfies the Compelling Interest Requirement under Strict Scrutiny.**

To the extent this Court determines that § 106.143(3) is subject to the more exacting strict scrutiny analysis, the FEC Defendants are entitled to summary judgment in their favor because the law is narrowly tailored to promote the State's compelling interesting in ensuring the integrity of nonpartisan elections and protecting the nature of nonpartisan offices. Courts have repeatedly recognized the importance of preserving nonpartisan offices through regulating expressly partisan speech. *Cf. In re Code of Jud. Conduct (Canons 1, 2, and 7(1)(B)*, 603 So. 2d 494, 497 (Fla. 1992) ("Maintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent is a compelling governmental interest.") (citing *Morial v. Jud. Comm'n*, 565 F.2d 295 (5th Cir.1977), cert. denied, 435 U.S. 1013 (1978)).[3]

The statute at issue here "does not prohibit a political advertisement from stating the candidate's partisan-related experience." § 106.143(3). Nor does the statute restrict Plaintiff's speech as to any issue, or any political opinion that he has

[3] The courts should accept the reasonable statements of purpose by States, whose "considered judgments deserve our respect…." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015).

or endorses, or how he intends to vote on school board issues, making the Florida law different in kind from many of statutes subjected to strict scrutiny in other cases. Florida's law merely restricts Plaintiff's ability to advertise or campaign for the nonpartisan schoolboard office "based on party affiliation." *Id.* As the Supreme Court has held in interpreting similar regulations, Plaintiff "retains great latitude in [his] ability to communicate ideas to voters[.]" *Timmons*, 520 U.S. at 363. Plaintiff has failed to identify any ***substance*** that he wishes to communicate to voters which is prohibited by Section 106.143(3). Instead, he wishes to advertise that he is a lifelong Republican, so that voters will identify him as a current Republican in considering how to cast their ballots. See Ex. B,, Pltf.'s Resp. to FEC Defs.' Interrog. Nos. 5 & 8.

The burden on Plaintiff's speech was exceedingly light. Plaintiff was unable to identify any meaning to the phrase "lifelong Republican," that he was unable to impart to voters through alternative words. See Ex. B, Pltf.'s Resp. to FEC Defs.' Interrog. No. 5. Similarly, Plaintiff could identify no words or phrases other than "lifelong Republican," that the challenged statute prevented him from speaking. See Ex. B, Pltf.'s Resp. to FEC Defs.' Interrog. No. 9. Therefore, whatever message Plaintiff wants voters to receive from the phrase "lifelong Republican," is a message that Plaintiff can easily present in alternative forms.

The record is replete with coherent, concise examples of the message that Plaintiff contends he wishes to convey with the phrase "lifelong Republican." *See* Ex. B., Pltf.'s Resp. to FEC Defs.' Interrog.; No. 5 (concisely explaining that the message he wished to convey to voters was one of "fiscal responsibilities and personal freedoms and the need to hold individuals . . . accountable for the failures of one of the worst school districts in the state."); and No. 8 (explaining that Plaintiff "firmly endorsed" "the President's[4] America-first agenda."). Thus, it is clear that the statute satisfies the compelling interest requirement under strict scrutiny, and Plaintiff has failed to present any credible evidence showing otherwise.

If Plaintiff may put out political advertisements that state that he is a lifelong Republican, then the will of Florida's citizens will be thwarted. Advertising that fact is the same as advertising party affiliation. Such a statement in his advertisement would threaten to become the basis for voters' selections, and indeed Plaintiff ***intends*** his "lifelong Republican" statement to influence voters to choose him over other candidates. His interrogatory responses demonstrate that his intention was precisely to garner votes based solely on his party affiliation – the one effect that the challenged statute is intended to prevent. See Ex. B, Pltf.'s Resp. to FEC Defs.' Interrog. No. 2 ("party affiliation as a shortcut in deciding how to vote," voters can "offset ignorance" by voting for party affiliation, voters can "infer a great deal" from

[4] At the time, President Donald Trump.

party affiliation, voters "use parties to guide voting decisions," which is useful to "rationally ignorant" voters); See Ex. B, Pltf.'s Resp. to FEC Defs.' Interrog. No. 4 (party affiliation is a "powerful shorthand" for voters, and some voters would have voted for Plaintiff had they known his party affiliation.)

The limitation on Plaintiff is trivial. Therefore, the State need only show a rational basis for the statute, which is shown by the desire of Florida's citizens to eliminate party affiliation for school board elections.

**ii. Section 106 is Narrowly Tailored.**

The challenged statute is not overly broad or over-inclusive. It contains a very limited and narrow restriction on speech. Plaintiff is only restricted in advertising or campaigning based upon his party affiliation. The challenged statute places no other limits on Plaintiff's speech to prospective voters. Plaintiff may speak on any subject or and convey any intention he has regarding carrying out his office if he is elected. Contrary to his prior assertion, the statute does not "prohibit[] any message containing the words 'Republican' or 'Democrat' during a campaign for public office." DE #46, at 2. It does not prohibit Plaintiff from describing his history: "This section does not prohibit a political advertisement from stating the candidate's partisan-related experience." Section 106.143(3), Florida Statutes. Rather, it merely prevents candidates from conveying their current partisanship in seeking office.

There is no lesser means available to satisfy the government's compelling interest in making these elections nonpartisan. If a candidate may freely advertise that he is a lifelong Republican, he is effectively advertising that he is running as a Republican candidate. This would turn a nonpartisan election into a partisan one. Plaintiff has disputed that his campaign statement of being a lifelong Republican is tantamount to running "as" as Republican, *id*, at 9, but the very fact that he has brought this lawsuit and his responses to interrogatories, *supra*, strongly evidences the contrary: He is utterly determined to inform voters of his current Republican Party affiliation in the context of campaigning for a nonpartisan office.

As shown, the challenged statute is not overinclusive. Nor is it underinclusive. While an underinclusive statute can cast doubt on the purpose of the statute, *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002), the narrow breadth of Section 106143(3) clearly reinforces its purpose. In contrast, *White* dealt with a statute providing that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues., *id.* at 768, but the restriction was held to be underinclusive because it did not extend past the election. Florida's statute ends after the election, because it pertains only to the election process, which must be nonpartisan. What the school board members state about their party affiliations ***after*** the election is not restricted.

## CONCLUSION

Wherefore, for all of the above reasons, summary final judgment should be entered in favor of the FEC Defendants.

Respectfully submitted,

**ASHLEY MOODY**
**ATTORNEY GENERAL OF FLORIDA**

*/s/ Glen A. Bassett*
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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)**

I HEREBY CERTIFY that the foregoing response contains 3,599 words, and is thus within the limitation of the Local Rules of this Court.

*/s/ Glen A. Bassett*
Glen A. Bassett
Attorney

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of December 2021, I electronically filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will serve all attorneys of record.

*/s/ Glen A. Bassett*
Glen A. Bassett
Attorney

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

| | |
|---|---|
| KELLS HETHERINGTON,<br>*Plaintiff*,<br><br>v.<br><br>GINGER BOWDEN MADDEN, in her official capacity as State Attorney, et al.,<br>*Defendants*. | Case No.<br>3:21-cv-671-MCR-EMT |

**PLAINTIFF KELLS HETHERINGTON'S RESPONSES TO FEC DEFENDANTS' FIRST SET OF REQUESTS FOR ADMISSION**

Under Federal Rules of Civil Procedure 26 and 36 and Local Rule 26.1, Plaintiff Kells Hetherington answers and objects to the FEC Defendants' First Set of Requests for Admission as follows.

PRELIMINARY STATEMENT

A. Plaintiff's investigation and development of all facts and circumstances relating to this action are ongoing. These responses and objections are without prejudice to, and are not a waiver of, Plaintiff's right to rely on other facts or documents at trial.

B. These Responses are made without in any way waiving or intending to waive, but on the contrary, intending to preserve:

EXHIBIT
A

1) All objections as to competency, relevancy, materiality, privilege, and admissibility as evidence for any purpose in subsequent proceedings or the trial of this or any other actions;

2) The right to object to the use of any information that may be provided, or the subject matter thereof, in any subsequent proceedings or the trial of this or any other action on any other grounds;

3) The right to object on any ground at any time to further discovery proceedings involving or relating to the subject matter of these requests for production of documents; and

4) The right at any time to revise, correct, supplement, clarify, or amend this response in accordance with the Federal Rules of Civil Procedure.

C. Plaintiff will produce responsive information and documents only to the extent that such information or documents are in his possession, custody, or control. Plaintiff's possession, custody, or control does not include any constructive possession that may be

conferred by Plaintiff's right or power to request or compel the production of information or documents from third parties or contractors.

D. A response to a request stating objections or indicating that documents will be produced shall not be construed to mean that responsive information or documents in fact exist.

E. Plaintiff expressly reserves the right to supplement, clarify, revise, or correct any of his objections and responses, and to assert additional objections or privileges, in one or more subsequent supplemental responses.

F. Publicly available information or documents including, but not limited to court papers, and documents available on the Internet, will not be produced.

G. These responses are not a representation or concession as to the relevance and/or relationship of the information to this action.

REQUESTS FOR ADMISSION

1. Admit that you do not challenge the definition of "nonpartisan office" provided in Florida Statutes Section 907.021(23).

   **RESPONSE**: Mr. Hetherington denies that any such definition exists at Fla. Stat. § 907.021. To the extent that Defendants ask about the definition at Fla. Stat. Ann. § 97.021(23), Mr. Hetherington at this time neither admits nor denies the constitutionality of that definition. The FEC Defendants have continually tried to alter the scope of this lawsuit, and the Court has already rebuffed these attempts, stating that Mr. "Hetherington challenges only the clauses of § 106.143(3) that pertain to candidates for nonpartisan office." Order at 3 (ECF No. 51).

2. Admit that for any message you contend that you wish to convey to prospective voters by using the term "lifelong Republican," you can also convey that meaning through the use of other words that would not violate Florida's election laws.

**RESPONSE**: Denied. Mr. Hetherington wishes to convey the message that he is a "lifelong Republican." There is no way to communicate that message without violating Fla. Stat. Ann. § 106.143(3).

I hereby certify that, to the best of my knowledge, the foregoing objections and responses comply with Rule 26(g).

DATED: October 10, 2021

Owen Yeates
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*Counsel for Plaintiff*

VERIFICATION

I, Kells Hetherington, have read the foregoing, and declare that the answers and responses are true and correct, to the best of my knowledge, under penalty of perjury under the laws of the United States.

Executed this the 10th day of October, 2021.

Kells Hetherington

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail and electronic mail on counsel of record, constituting service on the parties they represent:

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Dated: October 13, 2021

Owen Yeates

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

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| KELLS HETHERINGTON,<br>*Plaintiff*,<br><br>v.<br><br>GINGER BOWDEN MADDEN, in her official capacity as State Attorney, et al.,<br>*Defendants*. | Case No.<br>3:21-cv-671-MCR-EMT |

**PLAINTIFF KELLS HETHERINGTON'S RESPONSES TO FEC DEFENDANTS' FIRST SET OF INTERROGATORIES**

Under Federal Rules of Civil Procedure 26 and 33 and Local Rule 26.1, Plaintiff Kells Hetherington answers and objects to the FEC Defendants' First Set of Interrogatories.

GENERAL OBJECTIONS

A. Plaintiff objects to each definition, instruction, and interrogatory to the extent that it attempts to impose discovery obligations which are greater than those required under the Federal Rules of Civil Procedure.

B. Rule 26(b)(1) limits the scope of discovery to only non-privileged matters. Plaintiff objects to each definition, instruction, and request for production to the extent that it seeks information that is protected from

EXHIBIT
B

disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege or doctrine. Inadvertent production of any documents so privileged does not constitute a waiver of such privilege or any other grounds for objecting to the discovery request.

C. Plaintiff may also withhold any documents related to this lawsuit that were generated after this lawsuit was filed, including attorney-client and work product emails between legal counsel and clients about this case, and related meeting requests and notes.

D. Plaintiff objects to each definition, instruction, and request for production to the extent that it requests information that is not relevant to any party's claim or defense, or that is not proportional to the needs of the case, or that otherwise exceeds the scope and manner of discovery permitted by the Federal Rules of Civil Procedure. As used in these discovery responses, the objection "disproportionate" means that the requested discovery is not proportional to the needs of the case as defined in Rule 26(b)(1), while the objection "not relevant to a party's

claims or defenses" refers to the scope of discovery as defined in that rule.

E. Plaintiff will produce responsive information and documents only to the extent that such information or documents are in his possession, custody, or control.

F. Plaintiff objects to each request insofar as it calls for the production of documents that are publicly available or otherwise equally available and/or uniquely available to the Defendants or from third parties.

G. Plaintiff objects to each definition, instruction, and interrogatory to the extent that it seeks legal bases, legal conclusions, or opinions.

H. Plaintiff reserves all objections to the admissibility of any information into evidence in this litigation (including information contained in the answers to these requests for production), including, without limitation, objections of relevance and materiality.

I. Plaintiff reserves the right to seasonably supplement, clarify, revise, or correct any of his objections and responses, and to assert

additional objections or privileges, in one or more subsequent supplemental responses.

J. Plaintiff's investigation and development of all facts and circumstances relating to this action are ongoing. These responses and objections are without prejudice to, and are not a waiver of, Plaintiff's right to rely on other facts or documents at trial.

K. A response to a request stating objections or indicating that documents will be produced shall not be construed to mean that responsive information or documents in fact exist, that Plaintiff performed any of the acts or omissions described in the request or interrogatory, or that Plaintiff acquiesces in the characterization of the conduct or activities contained in any request or interrogatory.

INTERROGATORIES

1. Identify: (a) what you contend the meaning is of the term "lifelong Republican" and all documents or information you relied upon as the basis for that meaning; (b) what meaning you contend the term "lifelong Republican" has for voters in your county; and (c) identify which groups of voters you contend would have different

perspectives of the meaning of "lifelong Republican," and identify the composition of the groups and how you contend their perspectives are different.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states:

a. The term "lifelong Republican" would include those who have registered as a Republican or affiliated with the

Republican party for all or most of the time that they have been registered voters; who have generally voted for Republican candidates in that period; or who have supported its proposed policies and values for that period or longer.

b. The voters in my county would share that understanding of a "lifelong Republican."

c. None.

2. Identify all bases for your contention that voters will understand the term "lifelong Republican" in the same way as you identify that term in your response to Interrogatory #1(a)(b) and (c).

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly

available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: Political science literature on political parties and rational ignorance recognizes that voters look to party affiliation as a shortcut in deciding how to vote. A necessary precondition to this heuristic is a general, common understanding of what it means to be a party member. *See Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (noting that party affiliation "is shorthand" for "publicly taking a stance on" a number of "matters of current public importance" (internal quotation marks omitted)); *Article: Can We Make the Constitution More Democratic?*, 55 Drake L. Rev. 971, 978 (2007) ("Voters who possess little political knowledge can sometimes use information shortcuts to offset their ignorance," including "knowledge about political parties . . . ."); John H. Aldrich, *Why Parties? The Origin and Transformation of*

*Political Parties in America* 48-50 (1995) ("Affiliation with a party provides a candidate with . . . a 'brand name.' In advertising, successful brand names convey a great deal of information cheaply . . . The candidate's party affiliation therefore provides a very inexpensive way to infer a great deal . . . ."); *id*. at 168-74 (discussing "why parties might be seen as offering distinctive choices," and why "there is a good reason for this perceived clarity and distinctiveness"); Samuel Kernell and Gary C. Jacobson, *The Logic of American Politics 3d ed.* 466 (2006) (noting that "party labels offer a serviceable shorthand cue that keeps voting decisions cheap and simple"); *id*. at 493-96 ("Voters may not think much of parties, but large majorities still admit to a party preference and use parties to guide their voting decisions. They do so because, despite the divisions within the party coalitions and regardless of how they feel about the parties, the party labels still carry valuable information about candidates . . . . That is, party labels continue to provide the cheap, shorthand cue so useful to rationally ignorant voters."); *id*. at 496 ("In general Republicans

tend to favor a smaller, cheaper federal government; they advocate lower taxes, less regulation of business, and lower spending on social welfare. . . . Democrats are more concerned with 'fairness' and equality, Republicans with letting free enterprise flourish. . . . Not all candidates adhere to their party's modal positions . . . . But the party label continues to distinguish candidates from one another on many issues with considerable accuracy. . . . As the predictive accuracy of party labels has grown in recent decades, so has the usefulness—and therefore use—of party cues.").

3. Identify all of your platform positions for which you contend the phrase "lifelong Republican" is relevant or informative to voters.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil

Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: The phrase "lifelong Republican" is relevant and informative to voters as it relates to my general philosophy on school budgetary issues and union negotiations, and it aptly describes my general outlook on personal responsibility. During my 2018 campaign, I made clear that the members of the teaching staff and senior administrators needed to be held to account for the shortcomings of the school district, which ranks as one of the worst in the state of Florida.

4. Is it your contention that there are voters who will not vote for you unless they are informed that you identify as a "lifelong Republican"?

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the irrelevance of this request, Mr. Hetherington states: Yes. Voters often have little time to familiarize themselves with candidates' positions on issues. Knowing a candidate's party affiliation is a powerful shorthand to educating voters on his or her policy positions and general approach to future, still undefined issues. In the absence of this information, relying on incomplete and other information, a voter's decision-making will necessarily change, and at least some voters who would otherwise have voted

for me will instead vote for someone else. See Response to Interrogatory 2.

5. For both the past election as well as the upcoming election referenced in your Complaint, identify any meaning that you contend attaches to the term "lifelong Republican" that you feel is or was relevant to your candidacy, but which you are/were unable to express other than by the use of the term "lifelong Republican."

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this

request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: The phrase "lifelong Republican" is an important political dog whistle, especially in a three-way race in which my two political opponents were both lifelong Democrats such as I experienced in 2018. Had I been able to speak to voters with all my First Amendment freedoms unfettered, I could have won the primary. Most of the voters in this district are Republicans and would have coalesced behind a Republican message emphasizing fiscal responsibility and personal freedoms and the need to hold individuals from the teaching staff to the school administrators accountable for the failures of one of the worst school districts in the state. Instead, I spent weeks working to find ways to share my values and positions, when I could have quickly and easily placed my positions in voters' minds simply by saying that I was Republican. It was a waste of time and a disservice to voters.

6. Identify all issues that you contend are relevant to either the past election or the upcoming election referenced in the Complaint

where your position on the issue is not identical to the position of the Republican Party, and describe your position and the Republican Party's position on each of these issues.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: Neither in 2018 nor at present do I have any fundamental

disagreements with the Republican National Committee party platform.

7. Identify all issues you contend are relevant to your candidacy for school board (either the past election or the upcoming election referenced in your Complaint), and for each issue state your position as a candidate as well as the position of the Republican Party, and identify all sources of information from which you determined the position of the Republican Party.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Mr. Hetherington further objects to this request as seeking information that is not relevant, that is disproportionate to the needs of the case, and that exceeds the scope permitted by the Federal Rules of Civil Procedure. The government must show

that its interests and a law's tailoring to those interests are not undermined by the availability of less restrictive means. That is, it is the state's burden to show an interest in restricting speech and narrow tailoring to achieve that interest. It is not the speaker's burden to show that he or she really needs to say what she wants to say. Given that the burden of proof is on the Defendants, the only point of these disproportionate questions is to confuse the issues, harass Mr. Hetherington, and increase the costs of litigation. Nevertheless, without waiving his objections, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states:

As my campaign progresses, issues will continue to develop and the Republican Party's outlook and values will inform my views and thus educate voters about my positions on those issues. Furthermore, after the Republican National Committee (RNC) significantly scaled back the size and scope of the 2020 Republican National Convention due to COVID-related restrictions and safety concerns, it unanimously voted to forego the Convention

Committee on Platform. It nonetheless enthusiastically supported President Trump, resolving only "to enthusiastically support the President's America-first agenda." I firmly endorse that agenda.

8. Identify with specificity the portions of Florida statutes that you contend in this lawsuit to be unconstitutional.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; or to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure. The FEC Defendants have continually tried to alter the scope of this lawsuit, and the Court has already rebuffed these attempts, stating that Mr. "Hetherington challenges only the clauses of § 106.143(3) that pertain to candidates for nonpartisan office." Order at 3 (ECF No. 51). Without waiving his objections, and not excluding further response after additional, ongoing

investigation and research, Mr. Hetherington agrees with the Court's statement.

9. Other than using the phrase "lifelong Republican," identify any words or phrases that you want to use in the upcoming election, but which you contend you are forbidden by law to use, and for each word or phrase state: (a) the meaning the word or phrase that you contend you wish to express; (b) the reason (such as a specific portion of a Florida statute) you contend it is forbidden; and (c) whether you are also forbidden to inform potential voters of the meaning in part (a) of this Interrogatory.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly

available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality of this request, Mr. Hetherington states: Fla. Stat. § 106.143(3) prohibits "stat[ing] the candidate's political party affiliation." This provision forbids any statement of party affiliation, including that a candidate is a lifelong member of the party. Among other meanings, a statement of party affiliation signifies that a candidate is registered with, a member of, or affiliates with the party; that he or she has generally voted for that party's candidates; or that he or she supports its proposed policies and values. The statute specifically forbids Mr. Hetherington from stating his party affiliation.

10. Identify all elections, in Florida or elsewhere, where you have run, or attempted to run, for public office, providing: (a) the date of the election; (b) the title of elected position you ran or attempted to run for; (c) the location (state and county) of the foregoing position; (d) whether it was a partisan election; and (e) if it was a

partisan election, identify the party with which you identified, or identify the status you claimed other than membership in a party.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: I ran for Escambia County School Board in 2018, and I am currently running for that office. That was and is a nonpartisan election in Escambia County, Florida.

11. For each election identified in Interrogatory 10, identify all public disclosures you made regarding your party affiliations.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional, ongoing investigation and research, Mr. Hetherington states: I shared my party affiliation in my candidate statement in the 2018 Escambia County Candidate Handbook. I have shared that I am a lifelong Republican on my 2022 Facebook campaign page.

12. Identify all reasons and all sources of information pertaining to your reasons, for contending that it is significant to prospective voters in Escambia County to know that you are a "lifelong Republican," with regard to either the past election or the upcoming election referenced in your Complaint.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional,

ongoing investigation and research, Mr. Hetherington refers Defendants to his response to Interrogatory 2.

13. If you contend that some prospective voters would not vote for you if you do not identify yourself as a "lifelong Republican," explain your basis for this contention.

**Response:**

Mr. Hetherington objects to this request to the extent that it seeks privileged information or legal bases, conclusions, or opinions; to the extent that it seeks information that is not relevant, that is disproportionate to the needs of the case, or that exceeds the scope permitted by the Federal Rules of Civil Procedure; or to the extent that it seeks information that is outside his possession, custody or control, or that is publicly available, equally available to both parties, or uniquely available to the FEC Defendants. Without waiving his objections, particularly to the disproportionality and irrelevance of this request, and not excluding further response after additional,

ongoing investigation and research, Mr. Hetherington refers Defendants to his response to Interrogatory 2.

I hereby certify that, to the best of my knowledge, the foregoing objections and responses comply with Rule 26(g).

DATED: October 10, 2021

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VERIFICATION

I, Kells Hetherington, have read the foregoing, and declare that the answers and responses are true and correct, to the best of my knowledge, under penalty of perjury under the laws of the United States.

Executed this the 10th day of October, 2021.

Kells Hetherington

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail and electronic mail on counsel of record, constituting service on the parties they represent:

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Dated: October 13, 2021

Owen Yeates