

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

KELLS HETHERINGTON,

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

Plaintiff,

v.

GINGER BOWDEN MADDEN, in her
official capacity as State Attorney for the
First Judicial Circuit in and for Escambia
Count, et al.

Defendants.

ANSWER AND DEFENSES

COME NOW Defendants Joni Alexis Poitier, Barbara Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes (hereinafter “FEC Defendants”), by and through undersigned counsel, and Answer the Complaint in like-numbered paragraphs, as follows:

1. Admitted that the Florida Elections Commission imposed a fine on Plaintiff in the amount of \$200 for violating section 106.143(3), Fla. Stat., by describing himself as a “lifelong Republican” to voters while running for the Escambia County School Board, a nonpartisan entity. Any remaining allegations are denied.

2. Admitted that Florida may establish nonpartisan offices. Any remaining

allegations are denied.

3. Denied that the Court has subject matter jurisdiction.

4. Venue is admitted. Any remaining allegations are denied.

5. Admitted that Plaintiff ran for the Escambia County School Board in 2018. FEC Defendants lack knowledge of and therefore deny any remaining allegations.

6. Admitted that Plaintiff in this suit has named Laurel M. Lee, in her official capacity as Secretary of State of Florida, as a defendant. The statutes cited speak for themselves. Any remaining allegations are denied.

7. Admitted that Plaintiff in this suit has named Ashley Moody, in her official capacity as the Attorney General of Florida, as a defendant. The statute cited speaks for itself. Any remaining allegations are denied.

8. Admitted that Plaintiff in this suit has named Ginger Bowden Madden, in her official capacity as the State Attorney for the First Judicial Circuit, as a defendant. The statutes cited speak for themselves. Any remaining allegations are denied.

9. Admitted that Defendant Joni Alexis Poitier is a member and Vice Chair of the Florida Elections Commission, and that in that capacity she is vested with the authority to investigate violations of Chapter 106, Fla. Stat. The statutes cited speak for themselves. Admitted that this Defendant is sued individually and in her official capacity. Any remaining allegations are denied.

10. Admitted that Defendant Barbara Stern formerly was a member of the Florida Elections Commission, and that in that capacity she was vested with the authority to investigate violations of Chapter 106, Fla. Stat. The statutes cited speak for themselves. Admitted that this Defendant is sued individually and in her former official capacity. Any remaining allegations are denied.

11. Admitted that Defendant Kymberlee Curry Smith is a member of the Florida Elections Commission, and that in that capacity she is vested with the authority to investigate violations of Chapter 106, Fla. Stat. The statutes cited speak for themselves. Admitted that this Defendant is sued individually and in her official capacity. Any remaining allegations are denied.

12. Admitted that Defendant Jason Todd Allen is a member of the Florida Elections Commission, and that in that capacity he is vested with the authority to investigate violations of Chapter 106, Fla. Stat. The statutes cited speak for themselves. Admitted that this Defendant is sued individually and in his official capacity. Any remaining allegations are denied.

13. Admitted that Defendant J. Martin Hayes is a member of the Florida Elections Commission, and that in that capacity he is vested with the authority to investigate violations of Chapter 106, Fla. Stat. The statutes cited speak for themselves. Admitted that this Defendant is sued individually and in his official capacity. Any remaining allegations are denied.

14. The quoted statute speaks for itself. Any remaining allegations are denied.
15. The quoted advisory opinions of the Florida Department of State's Division of Elections speak for themselves. Any remaining allegations are denied.
16. Admitted.
17. Admitted.
18. Admitted that the FEC initially determined to fine Plaintiff \$500.00, for violation of section 106.143(3), Fla. Stat., because he identified himself as a "lifelong Republican" in campaigning in 2018 for a nonpartisan seat on a school board. Admitted that the FEC later reduced the fine to \$200.00 based on Plaintiff's request for reconsideration. Any remaining allegations are denied.
19. FEC Defendants lack knowledge of therefore deny the allegations.
20. FEC Defendants lack knowledge of therefore deny the allegations.
21. FEC Defendants lack knowledge of therefore deny the allegations.

Count I

22. FEC Defendants hereby adopt and incorporate by reference, as if fully stated herein, their responses to paragraphs 1-21, *supra*.
23. The case cited speaks for itself. Any remaining allegations are denied.
24. The First Amendment to the U.S. Constitution and the cited case speak for themselves. Any remaining allegations are denied.
25. The case cited speaks for itself. Any remaining allegations are denied.

26. Denied.
27. Denied.
28. Denied.

Prayer for Relief

Denied that Plaintiff is entitled to any of the relief he seeks.

Any allegations not expressly admitted are hereby denied.

DEFENSES

**FIRST DEFENSE
(Qualified Immunity)**

The FEC Defendants are immune from suit under the doctrine of qualified immunity. There is no controlling decision in this jurisdiction that has held Section 106.143(3) or a substantially similar law to be unconstitutional. A reasonable public official would not have known that the relevant provisions of Florida’s statute were unconstitutional, either facially or as applied to Plaintiff’s context of a school board election. Therefore, qualified immunity attaches and bars Plaintiff’s claims. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (holding that qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”); *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

SECOND DEFENSE
(Sovereign Immunity)

Plaintiff's claim for nominal damages is barred by the doctrine of sovereign immunity. Because nominal damages are requests for retrospective monetary relief, rather than prospective relief, claims for such damages are subject to the defense of sovereign immunity when brought against an individual officer in his or her official capacity. *See, e.g., ACLU v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 53 n.7 (1st Cir. 2013) (finding that sovereign immunity bars award of nominal damages against federal officers); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022 & n.5 (9th Cir. 2010) (explaining that if a state entity had timely asserted sovereign immunity, that would have barred a claim for nominal damages), cert. denied, 563 U.S. 936 (2011); *Hopkins v. Saunders*, 199 F.3d 968, 978 (8th Cir. 1999) (noting that “[s]everal . . . circuits have . . . implicitly recognized the legal nature of nominal damages by finding them to be barred by qualified immunity”), cert. denied, 531 U.S. 873 (2000). Therefore, Plaintiff's claim for nominal damages is barred by the doctrine of sovereign immunity.

THIRD DEFENSE
(Accord and Satisfaction)

Plaintiff's action is barred by the doctrine of accord and satisfaction arising from the settlement of Plaintiff's prior dispute with the FEC for violation of Section 106.143(3), pursuant to which Plaintiff agreed to pay a substantially reduced fine

amount in full accord and satisfaction of the parties' dispute. *See* Fed. R. Civ. P. 8(c)(1).

**FOURTH DEFENSE
(Waiver/Estoppel)**

Plaintiff's action is barred by the doctrine of waiver and/or estoppel, arising from the settlement of Plaintiff's prior dispute with the FEC for violation of Section 106.143(3), pursuant to which Plaintiff agreed not to challenge the constitutionality of the statute in exchange for the FEC's agreement to accept payment of a substantially reduced fine.

**FIFTH DEFENSE
(Lack of Standing and Redressability - Stern)**

Other than monetary relief, which is barred by qualified and sovereign immunities, Plaintiff seeks declaratory and injunctive relief. However, Defendant Stern is no longer a member of the Florida Elections Commission. Accordingly, the Court cannot provide redress in favor of Plaintiff by entering judgment for declaratory and injunctive relief against Defendant Stern.

**SIXTH DEFENSE
(Lack of Standing to Seek Equitable Relief Barring Enforcement of the Statute at Issue Beyond Context of Speech Alleged by Plaintiff)**

Plaintiff lacks standing to assert claims of facial unconstitutionality or as-applied unconstitutionality of Section 106.143(3) beyond the narrow factual context raised in the Complaint.

Respectfully submitted,

**ASHLEY MOODY
ATTORNEY GENERAL**

/s/ Glen A. Bassett

Glen A. Bassett (FBN 615676)

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For FEC Defendants Poitier, Stern, Smith,
Allen, and Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 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