UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON,

Plaintiff,

v. **CASE NO. 3:21-cv-671-MCR-EMT**

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

Defendants.
_____/

ORDER

This action challenges the validity of a provision of the Florida Election Code (the "Code") prohibiting candidates for nonpartisan office from campaigning based on party affiliation. *See* § 106.143(3), Fla. Stat. (2020). Plaintiff Kells Hetherington, who is a candidate for a nonpartisan office in the upcoming 2022 election, claims the provision violates the First Amendment to the United States Constitution because it prohibits core political speech during an election campaign. Hetherington's complaint raises a claim under 42 U.S.C. § 1983 against Defendant Laurel M. Lee, in her official capacity as Florida Secretary of State (the "Secretary"), Defendant Ashley Moody, in her official capacity as Florida Attorney General (the "Attorney General"), Defendant Ginger Madden, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, Florida (the "State Attorney"),

Defendant Joni Alexis Poitier, in her individual capacity and official capacity as member and Vice Chair of the Florida Elections Commission, and Defendants Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes in their individual capacities and official capacities as members of the Florida Elections Commission.

The Secretary, the Attorney General, and the State Attorney move to dismiss Hetherington's complaint for lack of subject matter jurisdiction on standing grounds. *See* ECF Nos. 23, 25, & 38. The Secretary and the Attorney General further argue that they are immune from suit under the Eleventh Amendment and therefore not proper parties. On full consideration, the Court agrees that Hetherington lacks standing to bring his claims against the Secretary and the Attorney General. Accordingly, the Court has no subject matter jurisdiction over Hetherington's claims against these officials and his claims against them must be dismissed.[1] The Court also finds, however, that Hetherington has standing to sue the State Attorney, and the State Attorney's motion to dismiss is therefore denied.

[1] Given the ruling on standing, the Court need not reach the Secretary's or the Attorney General's arguments about state sovereignty. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020).

I. Legal Standard

Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction "can be asserted on either facial or factual grounds." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009) (citation omitted). A facial challenge occurs when, as here, a defendant bases a challenge to subject matter jurisdiction solely on the allegations in the complaint. *See id.* In considering these Defendants' facial challenges, the Court accepts Hetherington's allegations as true. *See id.*

II. Background

The Florida Legislature regulates elections through the Code, which encompasses chapters 97-106, Florida Statutes. The Code "generally contemplates partisan elections." *See Orange County v. Singh*, 268 So. 3d 668, 671 (Fla. 2019). However, it also specifies that elections for certain offices—namely, judicial office and the office of school board member—must be nonpartisan. *See id.* at 672. Under the Code, " '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." *Id.* (quoting § 97.021(22), Fla. Stat.).

The provision of the Code at issue here, § 106.143(3), provides

> 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.*

(emphasis added). Based on § 106.143(3), Florida's Division of Elections advises candidates for nonpartisan office that they cannot "publicly represent or advertise [themselves] as . . . member[s] of any political party," but that they may "list partisan related experience such as 'executive committee of _____ party' in campaign advertisements."[2] Fla. Div. of Elections, Advisory Opinion DE 2003-02 at 2 (Feb. 21, 2003), https://bit.ly/2RxvpOR. The Division of Elections further advises candidates for nonpartisan office that § 106.143(3) only applies to "candidates" for nonpartisan office and that, once elected, nonpartisan officeholders "are not prohibited from publicly representing their party affiliation unless and until they

[2] The Secretary supervises the Division of Elections. *See* Fla. Stat. § 20.10(2)(a). The Code requires that the Florida Elections Commission ("FEC") "must, in all its deliberations and decisions, adhere to . . . advisory opinions of the [D]ivision [of Elections]." Fla. Stat. § 106.26(13).

again become a 'candidate' at which point they are precluded from campaigning based on party affiliation." Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010), https://bit.ly/3gkP8vF.

In 2018, Hetherington ran for a seat on the Escambia County School Board. During the campaign, Hetherington described himself as a "lifelong Republican" in a candidate statement published on the Escambia County Supervisor of Elections' website. In May 2018, the FEC initiated an investigation after it received a complaint about Hetherington's candidate statement. On November 19, 2019, the FEC imposed a $500 fine on Hetherington after determining that his candidate statement violated § 106.143(3) because it expressed Hetherington's party affiliation. The FEC later reduced the amount of the fine to $200, which Hetherington paid.

On March 30, 2021, Hetherington established his candidacy for the 2022 Escambia County School Board election. Hetherington desires to express his party affiliation in his current campaign but refrains from doing so because he fears enforcement of § 106.143(3) by Defendants. Consequently, Hetherington filed this suit, seeking a declaration that § 106.143(3) is unconstitutional and an injunction barring its enforcement.

III. Discussion

The Court "ha[s] an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute." *Jacobson*, 974 F.3d at 1245. "If at any point a federal court discovers a lack of jurisdiction, it must dismiss the action." *Id.* "Standing 'is the threshold question in every federal case, determining the power of the court to entertain the suit.' " *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). To establish he has standing, Hetherington "must prove (1) an injury in fact (2) that is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson*, 974 F.3d at 1245 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The Court finds that Hetherington has sufficiently alleged an injury in fact: self-censorship in order to avoid a credible threat of enforcement consequences. *See, e.g.*, *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010). With respect to the Secretary and the Attorney General, however, Hetherington has failed to allege facts to establish the second and third elements because his injury is neither traceable to nor redressable by relief against these Defendants.

Hetherington maintains that he is injured because his fear of enforcement of § 106.143(3) by *all* of the Defendants causes him to refrain from mentioning his

party affiliation in his campaign. While this may be true, "[t]he problem" for Hetherington is that Florida law tasks the FEC and the State Attorney, independently of the Secretary and the Attorney General, with enforcing § 106.143(3). *See Jacobson*, 974 F.3d at 1253 ("The problem for the [plaintiffs] is that Florida law tasks the Supervisors [of Elections], independently of the Secretary, with [enforcing the challenged provision of the Code]."). Florida law vests the FEC with "[j]urisdiction to investigate and determine violations" of Chapter 106 of the Code, *see* Fla. Stat. § 106.25(1), and authorizes the FEC to "impose civil penalties" if it finds a violation, *see* Fla. Stat. § 106.265(1).[3] *See also Schurr v. Sanchez-Gronlier*, 937 So. 2d 1166, 1170 (Fla. 3d DCA 2006) (explaining that enforcement of "violations of Chapter 106 [of the Code] . . . [is] within the purview of the [FEC]"). Indeed, it was the FEC that determined Hetherington had violated § 106.143(3) during his 2018 campaign and imposed a penalty. As discussed in further detail below, it is also the case that the State Attorney possesses "enforcement jurisdiction"

[3] The Code also provides that "[a] person alleged by the [FEC] to have committed a violation of [Chapter 106] . . . may elect, as a matter of right, within 30 days after the date of the filing of the [FEC]'s allegations, to have a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings" and that "[t]he administrative law judge in such proceedings shall enter a final order, which may include the imposition of civil penalties." *See* Fla. Stat. § 106.25(5). This provision does not alter the Court's analysis because the Division of Administrative Hearings' enforcement authority is contingent on both the FEC filing allegations of a violation and the person alleged by the FEC to have violated the code electing to have a hearing by an administrative law judge.

over § 106.143(3). *See Cullen v. Cheal*, 586 So. 2d 1228, 1229 (Fla. 3d DCA 1991) (explaining that the FEC and State Attorney "hav[e] enforcement jurisdiction" over Chapter 106 of the Code); *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1282 (S.D. Fla. 2012) (finding plaintiff had standing to sue a state attorney where the plaintiff's alleged injuries stemmed from a credible threat of enforcement of a provision of Chapter 106 of the Code).

Hetherington's arguments regarding the Secretary's and the Attorney General's enforcement authority under Florida law are unavailing. Under *Jacobson*, "when a state law makes *one* state official responsible for the challenged action, plaintiffs lack standing to sue *another, independent* state official for that action. *See Claire v. Fla. Dep't of Mgmt. Servs.*, 504 F. Supp. 3d 1328, 1332 (N.D. Fla. 2020) (citing *Jacobson*, 974 F.3d at 1254). Thus, because Florida law makes the FEC and State Attorney responsible for enforcement of § 106.143(3), the Secretary's general responsibility "for prescribing rules and regulations to carry out the provisions of Florida's campaign-finance laws" and her past "interpret[ations]" of § 106.143(3) are insufficient to confer standing. *See Jacobson*, 974 F.3d at 1257 (explaining that the Secretary's "power to prescribe rules and issue directives about ballot order . . . says nothing about whether she 'possess[es] authority to *enforce* the complained-of provision,' as the causation element of standing requires"). Moreover, that an FEC

investigation may be initiated by "an information reported to it . . . by the Division of Elections," *see* Fla. Stat. § 106.25(2), (4),[4] does not mean that the Secretary possesses the authority to *enforce* § 106.143(3).

Similarly, Hetherington lacks standing to sue the Attorney General because, although the FEC is housed within the Office of the Attorney General, Florida law provides that the FEC "shall not be subject to control, supervision, or direction by . . . the Attorney General in performance of its duties . . . ." Fla. Stat. § 106.24(1)(a). Hetherington argues that the Attorney General's "duty to oversee state attorneys and her inherent power to enforce Florida's laws" are sufficient to confer standing, citing *Support Working Animals v. DeSantis*, 457 F. Supp. 3d 1193 (N.D. Fla. 2020). The Court rejects this argument. Under the Florida Constitution, the State Attorney is an independently elected constitutional officer who serves as "the prosecuting officer of all trial courts in [her] circuit," *see* Art. 5, § 17, Fla. Const., and only the Governor has the power to suspend her, *see* Art. 4, § 7, Fla. Const ("[T]he governor may suspend from office any state officer not subject to impeachment . . . or any county officer . . . ."). Whatever split of authority existed on the issue before the Eleventh

[4] The Division of Elections "is not alone in this regard" because the Code authorizes "Any person" with information about a violation to file a complaint with the FEC. *See* Order on Motions for Preliminary Injunction and Motion to Dismiss at 7–8, *ACLU of Fla., Inc. v. Lee*, 4:21-cv-190 (N.D. Fla. July 1, 2021), ECF No. 38 (quoting Fla. Stat. § 106.25(2)).

Circuit's decision in *Jacobson*,[5] the law in this Circuit is that a state official's supervisory authority over locally elected, independent constitutional officers is insufficient to confer standing. *See Jacobson*, 974 F.3d at 1253–54 ("Because the Supervisors are independent officials not subject to the Secretary's control, their actions to implement the ballot statute may not be imputed to the Secretary for purposes of establishing traceability."). *Support Working Animals* illustrates the point. The district court's decision in *Support Working Animals* that Hetherington cites predates the Eleventh Circuit's opinion *Jacobson*. Post-*Jacobson*, the same district court dismissed the plaintiffs' claims against the Attorney General because *Jacobson* "instructs that such supervisory authority is insufficient to render state level Florida authorities proper defendants in cases like the present one." *See* Order Granting Motion to Dismiss at 1–2, Support Working Animals v. Moody, 4:19-cv-

[5] Florida district courts analyzing the "separate" issue of whether the Florida Attorney General is a proper defendant to suits challenging state criminal statutes under *Ex parte Young*, 209 U.S. 123 (1908) are split. *See Jacobson*, 974 F.3d at 1256 ("Article III standing and the proper defendant under *Ex parte Young* are 'separate' issues."); *compare Teltech Sys., Inc. v. McCollum*, No. 08-61664-CIV, 2009 WL 10668266, at *1–2 (S.D. Fla. June 30, 2009) ("Florida's Attorney General, as an officer charged with enforcing state statutes, is a proper defendant in a suit challenging the constitutionality of a state criminal statute."), *with Roberts v. Bondi*, No. 8:18-cv-1062, 2018 WL 3997979, at *3 (M.D. Fla. Aug. 21, 2018) ("Because [the Attorney General] does not have the authority to enforce [the challenged Florida criminal statute], she is not a proper defendant in this action."), *and Freiberg v. Francois*, No. 4:05cv177, 2006 WL 2362046, at *6 (N.D. Fla. Aug. 15, 2006) ("Attorney General Crist has no role in . . . the enforcement of the criminal statute. . . . the only proper Defendant for the challenge to the criminal statute is . . . [the] State Attorney for the Second Judicial Circuit.").

570-MW-MAF (N.D. Fla. June 12, 2020), ECF No. 50. The district court further explained that "the[] statutory delineations and assignments of the Florida Attorney General's powers as relevant to the present case are not meaningfully distinguishable from the corresponding statutory delineations and assignments of the Florida Secretary of State's powers as relevant to *Jacobson*." *See id.* at 2. Furthermore, the Attorney General's "inherent power to enforce Florida's laws" in her role as the state's chief legal officer does not make Hetherington's alleged injuries traceable to and redressable by her. *See Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020) ("The Attorney General is not a proper defendant based only on her role as the state's chief legal officer." (citing *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1300-01 (11th Cir. 2019)). Under the standard set in *Jacobson*, Hetherington's complaint alleges injuries that are not fairly traceable to or redressable by the Secretary or the Attorney General as they originate from the actions by independent government entities—the FEC and the State Attorney—that Florida law has given control over enforcement of § 106.143(3).

Turning finally to the State Attorney, the Code's grant of jurisdiction to the FEC to investigate and determine violations of Chapter 106 does not "limit[] the jurisdiction of any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this [C]ode." *See* Fla. Stat.

§ 106.25(1). The Code empowers the State Attorney to investigate, act upon, and dispose of alleged violations: if the FEC determines probable cause exists to believe that a violation has occurred, it "shall make a preliminary determination to consider the matter *or refer the matter to the state attorney* for the judicial circuit in which the alleged violation occurred, *see id.* § 106.25(4)(j) (emphasis added), and "[i]t is the duty of a state attorney receiving a complaint referred by the [FEC] to investigate the complaint promptly and thoroughly" and "to undertake such criminal *or civil* actions as are justified by law," *see id.* § 106.25(6) (emphasis added). Citing § 106.25(4)(j), the State Attorney argues that Hetherington lacks standing to sue her because "[t]he FEC is essentially the gatekeeper to all investigations and/or civil penalties in the instance of a campaign election violation." *See* ECF No. 25 at 6. But as the State Attorney concedes, she "may have a case referred to her office." *See id.* at 7. Thus, there is a "realistic danger" that the State Attorney may enforce § 106.143(3) against Hetherington, and the Court therefore finds that Hetherington's alleged injuries are traceable to the State Attorney and that a decision in Hetherington's favor enjoining the State Attorney from enforcing § 106.143(3) would likely redress his injuries. *See Reproductive Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1318–19 (M.D. Ala. 2016) (finding plaintiff had standing where "the plaintiffs' realistic danger of sustaining direct injury as a result of the defendants'

enforcement of the Act is fairly traceable to the operation of the statute"). Hetherington's standing to sue the State Attorney "is not defeated merely because the alleged injury can be fairly traced to the actions of" both the FEC and the State Attorney. *See Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1247 (11th Cir. 1998).

Accordingly, the Secretary's and the Attorney General's motions to dismiss, ECF Nos. 23 & 38, are **GRANTED**. The State Attorney's motion to dismiss, ECF No. 25, is **DENIED**.

DONE AND ORDERED this 12th day of July 2021.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE