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.
_____/

MOTION TO DISMISS OF DEFENDANTS POITIER, STERN, SMITH, ALLEN, AND HAYES, AND MEMORANDUM IN SUPPORT

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Defendants, Joni Alexis Poitier, Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes (hereinafter, the "FEC Defendants"), by and through undersigned counsel, hereby move to dismiss the complaint against them, by which Plaintiff seeks to have Section 106.143(3), Fla. Stat., declared unconstitutional insofar as it acts, in a narrow fashion, to depoliticize the process by which nonpartisan elections in Florida are conducted. In addition, the FEC Defendants move to dismiss claims asserted against them in their individual capacities under the principle of qualified immunity. Lastly, the FEC Defendants move to dismiss Plaintiff's improper claim for nominal damages.

Memorandum of Law

The subsection at issue states:

> (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.*

Section 106.143(3), Fla. Stat. (emphasis added).

Plaintiff, a candidate for an elected school board position, seeks a declaration that the statute is unconstitutional, both facially and as-applied, with respect to the highlighted language of subsection (3), by which candidates seeking nonpartisan elective office are barred from stating their political party affiliation in political advertisements in support of their candidacy. He also seeks nominal damages against the FEC Defendants. He sues the various Commissioners of the Florida Elections Commission in both their official capacities as well as their individual capacities.

I. Plaintiff Fails to State a Cause of Action.

There are several categories of nonpartisan elections in Florida, including elections for judgeships and for membership on school boards. This reflects a

determination by the people of Florida, acting through their duly elected representatives, that certain elective positions are to be held by officials who are not sitting and acting as members of any particular political party to further its agenda. Accordingly, party affiliation is not shown on the ballots. Nor are political primary parties held to determine which candidates for these nonpartisan offices would be running with the endorsement of a party.

Against that backdrop, the challenged provision is narrow in its focus: candidates for nonpartisan offices are not to advertise themselves as running as representatives of any political party. Candidates may, however, disclose their history of party affiliation. Thus, the provision allows for political background to be communicated, but not political party affiliations with respect to seeking the offices in question. This modest restriction is constitutionally permissible as reasonably necessary to effectuate the legislative decision to have nonpartisan offices filled on a nonpartisan basis, thus warranting dismissal.

Plaintiff wants to tell voters that he is a "lifelong Republican." Plaintiff does not allege, nor could he, that the statute at issue prevents him from stating any fact regarding his history or his views on any issue. If his goal is to convey facts regarding his views on the school district's budget, curriculum, or issues unrelated to the school district, such as abortion, national debt, foreign affairs – the list is

endless – as well as his personal background, to the voters, the statute contains no impediment to him doing so.

However, Plaintiff wants to go a step farther than presenting facts or his opinions. He wants to present a party label to the voters, that of being a "lifelong Republican," and thereby to indicate that he is running "as" a Republican, that he would serve in office "as" a Republican, and that he has the support of the Republican party. This runs contrary to the legitimate goals end of having nonpartisan elections for nonpartisan public offices.

If a candidate may proclaim his or her political party affiliation in connection with seeking a specific nonpartisan office, then the State's attempt on behalf of its citizens to keep certain elections nonpartisan will be thwarted. The second half of subsection (3) of the statute gives meaning to the decision to have nonpartisan elections. It prevents candidates from running "as" Republicans, or "as" Democrats.

These elections do not have partisan primary elections, so no candidate's name will appear on the ballot with a party label after his or her name. A candidate running "as a lifelong Republican," as Plaintiff wishes to convey, risks potentially misleading and confusing voters into believing that the candidate is more than someone who has associated in the past with the Republican Party, and that he or she is in fact the Party's choice for the position. The confusion would

continue in the ballot box, where no party affiliation would be provided, inviting speculation as to the proper role (if any) of political affiliation for choosing among the candidates listed on the ballot. Such confusion, in turn, could contribute to voter distrust of the electoral process.

The key objective of the statute is for Plaintiff, like other such candidates for nonpartisan public office, to avoid representing that he is running as a party candidate. Notably, the statute does not in any way limit Plaintiff's expression of his position on any issue. He may state what his views have been throughout his life or career. He may also describe his partisan-related experience. He may state every partisan office or position (if any) he has held. Thus, he may describe, without limitation, any and all aspect of his beliefs, positions, experiences and opinions. However, he may not perform an "end-run" on the statute and proclaim words that communicate that he is running "as" a Republican (or other party) candidate. The statute merely prevents Plaintiff from establishing a party label for himself as candidate for a nonpartisan office.[1]

[1] The Florida Election Commission reached what it thought was an agreement with Plaintiff on one narrow application of the statute. The Commission initially fined Plaintiff $500.00 for declaring himself a "lifelong Republican" in his candidacy for a nonpartisan school board position, because the obvious import was that he was seeking the office as a Republican. The Commission reduced the fine to $200.00, on the agreement by Plaintiff that he would abide by the statute in the future.

The burden that this statute imposes on Plaintiff is slight. A slight burden is subject to a determination of whether there is an "important regulatory interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). More specifically, the Supreme Court has stated:

> 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.'" *Burdick[v. Takushi*, 504 U.S. 428, 434 (1992)] (quoting *Anderson [v. Celebrezze*, 460 U.S. 780, 788 (1983))]; *Norman [v. Reed*, 502 U.S. 279, 288–289 (1992)] (requiring "corresponding interest sufficiently weighty to justify the limitation"). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer[v. Brown*, 415 U.S. 724, 730 (1974)] ("[N]o litmus-paper test ... separat[es] those restrictions that are valid from those that are invidious.... The rule is not self-executing and is no substitute for the hard judgments that must be made").

Timmons, 520 U.S. at 358-59.

The Supreme Court has upheld other limitations on voting. Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments. *Burdick v. Takushi*, 504 U.S. 428 (1992).

The State's important regulatory interest does not require a large degree of support.

> Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195–196, 107 S. Ct. 533, 537–538, 93 L. Ed. 2d

> 499 (1986) ("Legislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

Timmons, 520 U.S. at 364.

The Supreme Court's description of the factors bearing on the political party should be equally applicable to Plaintiff, as a candidate. Just as the Supreme Court described regarding a political party, Plaintiff as a candidate is fully allowed to express his views on any and all topics, and to receive support from any quarter. Indeed, Plaintiff is not prevented from speaking in any way that he might wish, except in the single narrowly-drawn aspect of proclaiming a party affiliation for himself *qua* candidate for nonpartisan public office.

A State may even prohibit so-called "fusion" candidates for partisan office from appearing on the ballot as a candidate of more than one party without running afoul of the Constitution. Despite this legitimate restriction, such a candidate

> retains great latitude in its ability to communicate ideas to voters and candidates through [his] participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate …. *See Anderson [v. Celebrezze*, 460 U.S. 780, 788 (1983)] ("[A]n election campaign is an effective platform for the expression of views on the issues of the day"); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186, 99 S. Ct. 983, 991, 59 L. Ed. 2d 230 (1979) ("[A]n election campaign is a means of disseminating ideas").

Timmons, 520 U.S. at 363.

Therefore, the State's interests are sufficient to sustain the relatively minor burden complained of by Plaintiff, since Plaintiff may engage in any description he wishes regarding his past, or his stance on issues; he is only restricted from declaring that he is running as a candidate for a political party in a nonpartisan election.[2]

Plaintiff's desire to advertise himself as a "lifelong Republican" is tantamount to saying he was, is, and always will remain a Republican. Thus, the clear message is that he is running "as" a Republican, not as a nonpartisan candidate. This is what the law is designed to prevent. Allowing candidates to attach the label of Republican or Democrat (or any other party name) would severely cut against the State's legitimate goal of having various public offices, and the elections to serve in them, be on a nonpartisan basis.

Therefore, Florida's law must be upheld against Plaintiff's constitutional assault, both facially and as-applied.

[2] Further damping any claim of injury by Plaintiff is the reality that party affiliation does not necessarily communicate any meaningful information about a candidate. For example, a candidate supporting a balanced budget might be from either major party. In fact, the perception of voters that some Republicans are more like Democrats has even given rise to a new acronym, RINO (for "Republican in name only"), underscoring the imprecision of party labels. This, in turn, undermines any claim that a candidate was harmed by not being able to trumpet his or her party affiliation in seeking nonpartisan elective office.

II. The FEC Defendants Are Protected by Qualified Immunity.

The FEC Defendants are immune from suit under the principle of qualified immunity because a reasonable state official would not have known that the statute violates the constitution. Indeed, as shown above, officials—including the FEC Defendants—had every right to presume that the statute is constitutional.

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al–Kidd*, 563 U.S. 731, 743 (2011).

> As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 584 U.S. ——, ——, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (per curiam) (internal quotation marks omitted); see *District of Columbia v. Wesby*, 583 U.S. ——, —— – ——, 138 S. Ct. 577, 593, 199 L. Ed. 2d 453 (2018); *White v. Pauly*, 580 U.S. ——, —— – ——, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. ——, —— – ——, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (per curiam).
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> Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts ... not to define clearly established law at a high level of generality." *Kisela*, 584 U.S., at ——, 138 S. Ct., at 1152 (internal quotation marks omitted).

City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503 (2019).

The Supreme Court also held in a First Amendment speech case

> … that Franks was entitled to qualified immunity as to the damages claims because "a reasonable government official in [Franks'] position would not have had reason to believe that the Constitution protected [Lane's] testimony."

Lane v. Franks, 573 U.S. 228, 234 (2014). The fact that the plaintiff in Lane had testified about his official activities pursuant to a subpoena and in the litigation context did not clearly bring the plaintiff's speech within the protection of the First Amendment.

The Eleventh Circuit also concluded that even if a constitutional violation of Lane's First Amendment rights had occurred, the public official was entitled to qualified immunity in his personal capacity because the right at issue had not been clearly established. "Thus, even if—if, which we think is not correct—a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity." *Lane v. Cent. Alabama Cmty. Coll.*, 523 F. App'x 709, 711 (11th Cir. 2013), aff'd in part, rev'd in part and remanded sub nom. *Lane v. Franks*, 573 U.S. 228 (2014).

There is no controlling decision in this jurisdiction that has held Section 106.143(3) or a substantially similar law to be unconstitutional. Plaintiff has not cited to any such authority, and Defendants' counsel has not discovered controlling precedent holding any such statute to be unconstitutional. Therefore, no reasonable public official could have known that the relevant provisions of Florida's statute are unconstitutional, either facially or as applied to Plaintiff's

context of a school board election. This will remain true no matter how the ultimate constitutional issue in this case-of-first-impression is decided.

III. Plaintiff's Claim for Nominal Damages Must be Dismissed.

Plaintiff asserts a claim for nominal damages against each of the FEC Defendants. This claim must be dismissed.

Most obviously, because nominal damages are requests for retrospective monetary relief, rather than prospective declaratory judgments by another name, such damages, when sought against an individual officer in his official capacity, are subject to the defenses of sovereign immunity and qualified immunity. 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 27 U.S. 936 (2011); *Hopkins v. Saunders*, 199 F.3d 968, 978 (8th Cir. 1999), cert. denied, 531 U.S. 873 (2000) (noting that "[s]everal . . . circuits have . . . implicitly recognized the legal nature of nominal damages by finding them to be barred by qualified immunity").

Therefore, Plaintiff's claim for nominal damages must be dismissed.

CONCLUSION

For all the reasons stated above, this action should be dismissed. Regardless, all claims against the Therefore, all claims against the FEC Defendants in their individual capacities should be dismissed, as well as Plaintiff's claim for nominal damages.

ASHLEY MOODY
ATTORNEY GENERAL

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY that the foregoing response contains 2796 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 21st day of June 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