

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

KELLS HETHERINGTON,
Plaintiff,

v.

GINGER BOWDEN MADDEN, in her
official capacity as State Attorney,
et al.,
Defendants.

Case No.
3:21-cv-671-MCR-EMT

**PLAINTIFF KELLS HETHERINGTON'S MOTION FOR LEAVE
TO FILE AN AMENDED COMPLAINT**

Pursuant to Rules 7 and 15 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 15.1, Plaintiff Kells Hetherington respectfully files this Motion for Leave to File an Amended Complaint in the above-captioned case, to simultaneously challenge the restrictions on nonpartisan candidate speech at Florida Statutes §§ 106.143(3) and 97.021(23).

PRELIMINARY STATEMENT

In their motion for Summary Judgment, the FEC Defendants assert that, in addition to the statutory provision already challenged in the

above-captioned action, three additional constitutional and statutory provisions prohibit candidates in nonpartisan races from sharing their party affiliation. Because the original complaint in this action challenged only Fla. Stat. § 106.143(3), the FEC Defendants argue that this Court cannot give Mr. Hetherington complete relief, such that this action must be dismissed for lack of redressability. In his contemporaneously filed opposition to the FEC Defendants Summary Judgment Motion, Mr. Hetherington argues that their redressability arguments lack merit. Should this Court reject the FEC Defendants' redressability concerns, Mr. Hetherington asks the Court to dismiss this Motion for Leave to File an Amended Complaint as moot. To the extent the Court agrees that there are redressability concerns, Mr. Hetherington asks the Court to grant this Motion, accept the attached Amended Complaint adding § 97.021(23) to Mr. Hetherington's claims, and apply the same reasoning to both §§ 97.021(23) and 106.143(3), namely, that both unconstitutionally restrict a candidate's ability to express partisan affiliation during nonpartisan campaigns.

STATEMENT OF FACTS

On April 15, 2021, Mr. Hetherington initiated the present action with a Complaint requesting a declaration that § 106.143(3) is unconstitutional, facially and as applied to his speech; injunctive relief; nominal damages; and attorney's fees and costs. Complaint at 10-11 (ECF No. 1).

He filed a motion for preliminary injunction on April 26, 2021 (ECF No. 12), which this Court granted on July 14, 2021 (ECF No. 51). The Court granted motions to dismiss by the Secretary of State and the Attorney General, as well as the motion to dismiss by the FEC Defendants in their individual capacities, but it denied the motions to dismiss by the State Attorney and the FEC Defendants in their official capacities. Dismissal Order at 13 (ECF No. 50); FEC Dismissal Order at 9 (ECF No. 57).

On December 27, 2022, Mr. Hetherington, State Attorney Madden, and the FEC Defendants filed motions for summary judgment. (ECF Nos. 67, 68, and 69). The FEC Defendants' motion for summary judgment ("FEC Motion") argued in part that the Court should enter

summary judgment dismissing this action for lack of redressability.

FEC MSJ at 6-8.

In his opposition to the FEC Motion, filed contemporaneously with this motion, Mr. Hetherington argues that there is no merit to the FEC Defendants' redressability argument and that the FEC Motion should be rejected. To the extent that the Court finds merit to the FEC Defendants' arguments, however, Mr. Hetherington submits the present motion.

ARGUMENT

As discussed in Mr. Hetherington's opposition to the FEC Defendant's summary judgment motion, there is no merit to their argument that Mr. Hetherington's challenge should fail for lack of redressability. Two of the provisions the FEC Defendants cite—Article IX, Section 4(a) of the Florida constitution and Florida Statutes § 1001.361—require nothing more than nonpartisan elections, not any proscription on candidate speech. Fla. Const. Art. IX, § 4(a) (“chosen . . . in a nonpartisan election”); Fla. Stat. § 1001.361 (“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”). Indeed, given the standard definition of nonpartisan elections, *see* Hetherington MSJ Memo. at 21-22 (ECF No. 67-1), these provisions would merely require that ballots not indicate whether a particular party has nominated a candidate. The provisions do not require any control over candidates’ speech or expression outside the government-produced ballot.

While § 97.021 in fact addresses speech, it is nonetheless compatible with Mr. Hetherington’s speech, and regardless it is a definition and not a grant of enforcement authority. The provision defines “Nonpartisan office” as one “for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation.” Fla. Stat. § 97.021(23). This definition could mean merely that nonpartisan campaigns are those in which candidates do not claim that they are a party’s nominee for that office. But even if the definition did reach speech like Mr. Hetherington’s, it is a definition, and nothing in it authorizes the Defendants to control or punish any candidate’s speech.

Thus, only § 106.143(3) grants to the Defendants authority to restrict Mr. Hetherington’s speech—to prevent him and candidates like him

from expressing their party affiliation during a nonpartisan campaign. And a declaration that § 106.143(3) is unconstitutional and associated injunctive relief are adequate to give Mr. Hetherington the constitutional protection he seeks.

Nonetheless, the Court may conclude that § 97.021(23), alone or in concert with some other provision, allows the Defendants to restrict the same speech proscribed by § 106.143(3). Thus, Mr. Hetherington asks the Court for leave to amend the Complaint to include § 97.021(23) to the extent that this Court agrees with the FEC Defendants: 1) that § 97.021(23) means that candidates for nonpartisan office are not allowed to make any mention of partisan affiliation while they are candidates; and 2) that § 97.021(23) and/or statutory provisions incorporating or relying on it give the Defendants authority to restrict the speech of nonpartisan candidates.

While at this stage of the proceedings, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave,” nonetheless the “court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). “In the absence of any apparent or

declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962); see also *Blackburn v. Shire US Inc.*, 18 F.4th 1310, 1317-18 (11th Cir. 2021) (noting five *Foman* factors: “(1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility”).

None of these factors counsel against freely granting leave to amend. The FEC Defendants only asserted an issue with redressability in their motion for summary judgment, and Mr. Hetherington is timely addressing the issue in his opposition and this motion. He is acting quickly before the Court needs to “rul[e] on a dispositive motion.” *Blackburn*, 18 F.4th at 1318. Thus, there is no undue delay, bad faith, or dilatory motive. Rather, the integration of this motion and the opposition should save the Court’s and the parties’ time, by allowing

simultaneous action on similar issues and avoiding the need to repeat all the pleadings, discovery, and initial motions. And the Defendants have not previously alleged this or any other deficiency that would require amendments to the Complaint, such that there is no hint of repeated failure to cure deficiencies.

Moreover, there will be no undue prejudice to the opposing parties. By amending the Complaint now, the Court may simply examine § 97.021(23) alongside § 106.143(3) in its summary judgment determinations, applying the arguments already made by Mr. Hetherington and the Defendants about the constitutionality or unconstitutionality of § 106.143(3) to both provisions. Thus, granting amendment should add little or no work for the Defendants. Rather, it would take advantage of the work already done by the Court and the parties and avoid unnecessary litigation down the road.

Moreover, rather than striking down the provision altogether, the Court could apply a narrowing construction to § 97.021(23) that would preserve its constitutionality and that of any other provisions that depend on it. *See Buckley v. Valeo*, 424 U.S. 1, 44, 60-61, 79 (1976) (per

curium) (applying narrowing construction to preserve the constitutionality of the Federal Election Campaign Act). Here, the Court need only hold that “campaigning . . . for election . . . based on party affiliation” means claiming that a candidate is the party nominee for office. § 97.021(23). This would preserve the statute and the nonpartisan character of Florida’s elections while upholding Mr. Hetherington’s First Amendment rights. While limiting the Defendants power, this would not create any undue prejudice to the government’s asserted interests.

Lastly, amendment would not be futile. Amendment is futile only “if a more carefully drafted complaint could not state a claim.” *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1133 (11th Cir. 2019) (internal quotation marks omitted). The FEC Defendants have not pointed to any other provisions that would be necessary to grant relief to Mr.

Hetherington.¹ Thus, to the degree that Mr. Hetherington needs to

¹ It is not necessary to amend the Complaint to challenge Article IX, Section 4(a) of the Florida constitution and Florida Statutes § 1001.36, so long as the definition of nonpartisan that they incorporate is constitutionally valid.

challenge any provision other than § 106.143(3), amending the Complaint to challenge § 97.021(23) would more than grant Mr. Hetherington the relief he needs to protect his constitutional rights.

CONCLUSION

Accordingly, to the extent that the Court finds merit to the FEC Defendants' redressability concerns, Mr. Hetherington asks that the Court grant leave to amend the Complaint to simultaneously challenge both the restrictions on nonpartisan candidate speech at 106.143(3) and § 97.021(23). Should the Court reject the FEC Defendants' redressability concerns, Mr. Hetherington asks that the Court deny this motion as moot.

Dated: January 18, 2022

/s/ Owen Yeates

Owen Yeates (pro hac vice)

Institute for Free Speech

1150 Connecticut Ave., NW, Ste. 801

Washington, DC 20036

oyeates@ifs.org

Tel.: 202-301-3300

Counsel for Plaintiff

CERTIFICATE OF ATTORNEY CONFERENCE

Pursuant to N.D. Fla. Loc. R. 7.1, I certify the following: On January 14, 2022, I emailed counsel for the FEC Defendants and for the State Attorney, asking whether they would consent to the motion to amend the Complaint. I also called counsel for the State Attorney. Both responded that they would discuss this motion with their clients.

I spoke again with counsel for the State Attorney on January 18, 2022. The State Attorney objects to the amended Complaint, given her continuing assertion that she should not be a party to this case.

Counsel for the FEC Defendants communicated on January 18, 2022, that they have not determined their position on the motion to amend.

Dated: January 18, 2022

/s/ Owen Yeates

Owen Yeates (pro hac vice)
Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the word limits at N.D. Fla. Loc. R. 7.1(F). As measured by Microsoft Word's internal count, the memorandum is 1,617 words, exclusive of the case style, tables of contents and authorities, signature block, and certificates.

Dated: January 18, 2022

/s/ Owen Yeates

Owen Yeates (pro hac vice)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that 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.

Dated: January 18, 2022

/s/ Owen Yeates

Owen Yeates (pro hac vice)
Counsel for Plaintiff