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

KELLS HETHERINGTON, *Plaintiff*, v. LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al. *Defendants*.	Case No. 3:21-cv-671-MCR-EMT

RESPONSE IN OPPOSITION TO
DEFENDANTS LEE'S AND MADDEN'S MOTIONS TO DISMISS

Plaintiff Kells Hetherington submits the following response in opposition to the motions to dismiss filed by Defendants Secretary of State Lee (ECF No. 23) and State Attorney Madden (ECF No. 25). The state has already punished Mr. Hetherington for speaking as a political candidate, an act that the First Amendment specially protects because of its importance in educating voters and allowing candidates to appeal to their constituents. The Secretary and the State Attorney do not contest Mr. Hetherington's claims that Fla. Stat. § 106.143(3) is unconstitutional, only whether they should be dismissed as defendants.

Whether under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), Defendants' arguments for dismissal depend on mistaken notions of what is required for standing in pre-enforcement actions and their failure to recognize the extent of their enforcement authority. These Defendants pose a credible threat of enforcement, such that they are required parties. Their motions should be denied.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). This standard does not require "evidence for the factual allegations," nor must the allegations strike the judge as probable. *Hi-Tech Pharm., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1197 (11th Cir. 2018) (emphasis removed).

"Plausibility is the key," *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010), and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is

improbable, and that a recovery is very remote and unlikely," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

SUMMARY OF ARGUMENT

The Secretary and the State Attorney both argue that they are not proper parties because only the FEC was involved in the previous enforcement action and because they have no statutory enforcement role. The first argument fails because prior enforcement is not necessary to establish standing in a pre-enforcement action, only a credible threat of enforcement.

And the legislature has given both important enforcement roles. The Secretary's Division of Elections promulgates rules and regulations, drafts advisory opinions that binds the FEC to the Division's interpretations in future enforcement actions, and reports candidates to the FEC for enforcement. The State Attorney investigates and enforces the election code, both after receiving complaints from the FEC and from private citizens. And when citizens give the State Attorney complaints, her enforcement preempts FEC action. Given their

enforcement roles, the Court should deny the Secretary's and State Attorney's motions to dismiss.

ARGUMENT

I. SECRETARY LEE IS A REQUIRED PARTY.

Secretary Lee's claim that she is not a proper defendant, as she was not involved in the past enforcement proceeding against Mr. Hetherington, and lacks authority to enforce Fla. Stat. § 106.143(3), is unavailing. The first assertion mistakes what is required for a pre-enforcement challenge, and the second fails to acknowledge Defendant's role in the enforcement of Fla. Stat. § 106.143(3). Defendant Lee thus fails to recognize Mr. Hetherington's standing to seek relief from her, as well as the exception to Eleventh Amendment immunity of *Ex parte Young*, 209 U.S. 123 (1908). She is a required party.

A. Pre-enforcement challenges do not require prior enforcement by a party.

Mr. Hetherington does not have to await an enforcement action by Ms. Lee to show irreparable harm. The fear of enforcement already prevents Mr. Hetherington from speaking. And pre-enforcement actions exist precisely to protect against such harms.

The Secretary asserts that no injury is traceable to her, and thus no standing to sue her, in part because she "was not a party to [the past] enforcement action." Lee Mot. at 6-7. But pre-enforcement standing is supported when a plaintiff "alleges an intention to engage in conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (internal quotation marks omitted).

To sustain a pre-enforcement action, Mr. Hetherington must merely show "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012) (internal quotation marks omitted). That is, he does not have to show past enforcement, although that is one way to demonstrate such a danger. *Id.* at 1258. A plaintiff can also show that "there is a credible threat of application." *Id.*

Florida has already enforced this particular speech restriction against Mr. Hetherington. As discussed below, the Secretary has a

substantial role in the challenged provision's enforcement. And while it would not suffice to defeat standing, Defendant Lee has not even refused to forswear the use of that authority, namely, of her ability to bind the FEC to enforce Florida's unconstitutional restrictions against Mr. Hetherington and to report him to the FEC for enforcement. In fact, the Secretary is fighting any binding restriction against her power to do so. Accordingly, there is "a credible threat of application." *Id*. Mr. Hetherington is not required to seek protection in a piecemeal fashion, defendant by defendant, "sit[ting] on [his] hands" as to the Secretary until she decides to use the power she is fighting to keep. *Support Working Animals, Inc. v. Desantis*, 457 F. Supp. 3d 1193, 1213 (N.D. Fla. 2020).

B. The Secretary errs in asserting that she has no role in enforcing Fla. Stat. § 106.143(3).

The Secretary supervises the Division of Elections, Fla. Stat. § 20.10, which includes supervising the Division in developing "rules and regulations to carry out the provisions of this chapter," Fla. Stat. § 106.22(9). In addition, her powers to issue binding advisory opinions and to refer cases to the FEC for enforcement create a credible threat.

Under the Secretary's authority, the Division of Elections "[p]rescribes rules and regulations to carry out the provisions of" Florida's elections code. Fla. Stat. § 106.22(9). It is also required to "provide advisory opinions when requested . . . relating to any provisions or possible violations of Florida election laws . . . ." Fla. Stat. § 106.23(2). Such advisory opinions provide safe harbors for those requesting them, and bind requesting parties to the Division of Election's interpretations. *Id.*

Because § 106.23(2) says that an advisory opinion is "binding on any person or organization who sought the opinion," the Secretary asserts that an opinion cannot be binding on anyone else. Thus, according to the Secretary, her opinions do not bind Mr. Hetherington and she lacks any broader enforcement role. That is not correct, either by logic, other statutory language, or experience. First, § 106.23(2) does not state that the opinions are not binding on other parties, only that they are binding on those requesting them. And Fla. Stat. § 106.26 forces the FEC to apply it to other parties, commanding that the FEC "must, in *all* its deliberations and decisions, adhere to . . . advisory opinions of the

division." Fla. Stat. § 106.26(13) (emphasis added). That is, in all subsequent, similar situations, the FEC is required to apply the Secretary's previous advisory opinions. Third, experience shows the Secretary's opinions are used against other parties. In fact, the Secretary's previous opinions were used against Mr. Hetherington in the past enforcement action. *See* Final Order at 4 (ECF No. 12-5) (citing DE 03-02 and DE 10-02 (ECF Nos. 12-3 and 12-4)).

But the Secretary's power over enforcement goes beyond merely promulgating rules and issuing advisory opinions that compel FEC enforcement. After making a rule or issuing an opinion that requires enforcement against a party like Mr. Hetherington, the Secretary may report that person to the FEC for enforcement. And the FEC is required to "investigate all violations . . . [the Secretary has] reported to it." Fla. Stat. § 106.25(2); *see also* Fla. Stat. § 106.25(4) (requiring FEC investigation of "a matter initiated by the division").

In all this, the Secretary cannot hide behind the FEC's intervening actions. The Eleventh Circuit has made clear that standing is not defeated merely because an "alleged injury can be fairly traced to the

actions of" multiple parties. *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1247 (11th Cr. 1998).

Moreover, the Secretary's reliance on *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020), is misplaced. The plaintiffs in *Jacobson* lacked standing as to the Secretary because the Secretary had no supervisory power over the county supervisors, and no other role whatsoever in printing ballots. *Id.* at 1253 (noting that supervisors "not subject to the Secretary's control"). Here, however, the Secretary is able to promulgate rules and advisory opinions that require enforcement against Mr. Hetherington, which bind the FEC, and the Secretary may report Mr. Hetherington to the FEC, requiring the FEC to investigate and initiate enforcement proceedings against him. Enjoining the Secretary will protect Mr. Hetherington by prohibiting her from promulgating any rules or opinions that will bind the FEC to act against him, and by barring her from reporting Hetherington's violation of this unconstitutional provision for investigation and enforcement.

The Secretary's claims to Eleventh Amendment immunity also fail. These arguments rise or fall with the issue of her enforcement

authority. That is, they depend on the Secretary's argument that the *Ex parte Young* exception does not apply, and that in turn depends on her having no enforcement role here. But, as discussed above, the Secretary's enforcement role is much greater than the "some connection" required to trigger *Ex parte Young*'s exception to Eleventh Amendment immunity. *Ex parte Young*, 209 U.S. at 157.

Thus, statutory language, the Secretary's opinions, and experience bely the Secretary's claim that her enforcement authority cannot and will not be used to enforce the challenged provision against Mr. Hetherington.

Lastly, the Secretary claims that there is no remedy that this Court can enforce against her. But the Court can enjoin her from promulgating unconstitutional rules and advisory opinions and from reporting protected speech for enforcement. And the cases she cites do not uphold the proposition that the Court has no authority over her advisory opinions. The *Jacobson* Court did not hold that it lacked authority to enjoin the Secretary with respect to her rulemaking ability. 974 F.3d at 1257. Rather, it cited cases holding that federal courts can

command state officials not to violate federal law, but that courts cannot force them to enact federal regulatory schemes, including the publication of particular ballot scripts. *Id*. Likewise, *Richardson v. Hughs*, 978 F.3d 220 (5th Cir. 2020), addressed affirmative injunctions to use an officer's discretionary authority, and that in a very particular way. *Id*. at 241-43. And *Hawaii v. Gordon*, 373 U.S. 57 (1963), dealt with a request for an affirmative injunction, as well as a request that the court do more than control an official's action—that it order the United States to give up property. *Id*. at 58 (noting "would require . . . official affirmative action").

The relief requested here does no such thing. This Court would not be issuing an affirmative, mandatory injunction, demanding that the Secretary issue a particular script in a rule or advisory opinion. It would be issuing a prohibitory injunction, calling for the Secretary to refrain from issuing rules or opinions furthering unconstitutional enforcement under Fla. Stat. § 106.143(3) for the mere mention of party affiliation. Contrary to the Secretary, a command to do "nothing more than refrain from violating federal law" is not an affirmative injunction

that could violate the State's sovereign immunity. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011).

None of the Secretary's cited cases stand for the proposition that the Court cannot order the Secretary to cease holding out an unconstitutional advisory opinion as binding, much less that it cannot order her to refrain from making further advisory opinions that bind the FEC to unconstitutional actions. And this Court is fully empowered to bar Defendant from reporting candidates to the FEC for engaging in protected speech.

* * *

The Secretary has refused to make any binding commitment that she will not use her enforcement power against Mr. Hetherington or others. To the contrary, she is fighting to maintain that power. Given the Secretary's past opinions binding the FEC to enforce Fla. Stat. § 106.143(3) against political candidates in Mr. Hetherington's position, the state's insistence on maintaining its right to enforce this censorship provision, and the fact that it already has done so, Mr. Hetherington has demonstrated a credible threat of enforcement. Furthermore, at this stage of the proceedings, Mr. Hetherington's credible allegations of

enforcement are presumed true. Mr. Hetherington's First Amendment right to free speech depends on this Court's protection, and the Secretary's motion to dismiss should be denied.

II. STATE ATTORNEY MADDEN IS A REQUIRED PARTY.

Ms. Madden's motion to dismiss repeats the Secretary's errors, namely in misunderstanding the nature of a pre-enforcement challenge and failing to recognize her full role in the enforcement process. Madden Mot. at 5-6 (ECF No. 25).

A. Pre-enforcement challenges do not require prior enforcement by a party.

Ms. Madden asserts that the claims against her should be dismissed because she "was not a party to" the past enforcement proceeding. Madden Mot. at 5. As noted above, Hetherington's intention to speak, combined with the credible threat of enforcement, add up to pre-enforcement standing. *Susan B. Anthony List*, 573 U.S. at 159 (noting "intention to engage" in proscribed conduct); *Ga. Latino All.*, 691 F.3d at 1257 (noting realistic danger from "statute's operation or enforcement"). Mr. Hetherington need not show a Defendant's past enforcement, only

that the Defendant poses "a credible threat of application." *Id*. This is apparent here.

Ms. Madden has multiple ways at her disposal to enforce the law against Mr. Hetherington, whether by referral from the FEC, complaint from other citizens, or under her own duty to investigate and enforce the law. *See* Fla. Stat. §§ 27.02(1), 106.25(6). Ms. Madden is thus a required party, as Mr. Hetherington cannot obtain "complete relief" from Florida's speech restrictions without an injunction against her. *See* Fed. R. Civ. P. 19(a)(1).

Rather than agreeing to a temporary injunction and seeking dismissal from the case, the State Attorney fights to protect her enforcement rights. This demonstrates "a credible threat of application." *Ga. Latino All.*, 691 F.3d at 1258. In addition, not only has Mr. Hetherington already been "threatened with application of the statute," the restrictions have been enforced against him. *Id*. And that enforcement further shows that future "application is likely," not just that "there is a credible threat," because the state is intent on enforcing these restrictions. *Id*.

Moreover, "[i]n the context of this pre-enforcement challenge to a legislative enactment, the causation element does not require that [Ms. Madden] caused [Mr. Hetherington's] injury by [her] acts or omissions in the traditional tort sense; rather it is sufficient that the injury is directly traceable to the" statutory speech restrictions. *Support Working Animals*, 457 F. Supp. 3d at 1205 (internal quotation marks omitted). And moving from standing to dismissal analysis, as noted above, Mr. Hetherington does not have to wait for each government official to individually enforce the law against him. That is, he is not required to "sit on [his] hands," but may protect himself by seeking an injunction against all those who might enforce the law against him. *See id.* at 1213.

Furthermore, Mr. Hetherington need not wait for an enforcement action by Ms. Madden to show irreparable harm. The fear of enforcement already prevents Mr. Hetherington from sharing protected speech. And pre-enforcement actions exist precisely to protect against such harms. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) ("Where a prosecution is a likely possibility . . . speakers may self-

censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech."); *ACLU v. Alvarez*, 679 F.3d 583, 589-90 & 590 n.1 (7th Cir. 2012) (holding irreparable harm and noting danger of self-censorship); *Fund for Louisiana's Future v. La. Bd. of Ethics*, 17 F. Supp. 3d 562, 575 (E.D. La. 2014) (noting harm from "self-censoring"); *ACLU v. Miller*, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997) (same).

B. The State Attorney ignores her role in enforcing Florida's candidate speech restriction.

It is not just the threat of fines that silences speakers, but all the burdens of defending oneself in an investigatory process. The State Attorney has two distinct ways to threaten and silence speakers. First, Ms. Madden may subject a speaker like Mr. Hetherington to the burdens of an investigation and hale him before a tribunal after the FEC refers a complaint to her. *See* Fla. Stat. § 106.25(4) (noting referral to state attorney). After receiving a complaint from the FEC, it is "the duty of [the] state attorney . . . to investigate the complaint promptly and thoroughly; to undertake such criminal *or civil* actions as are justified by law; and to report to the commission the results of such

investigation, the action taken, and the disposition thereof." *Id*. at § 106.25(6) (emphasis added).

But the State Attorney has an even more direct way to enforce Florida's speech restrictions against Mr. Hetherington, one that takes complete control over a case and preempts any role for the FEC. In granting the FEC authority to investigate complaints, Section 106.25 states that "nothing . . . limits the jurisdiction of any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this code," which includes the State Attorney. Fla. Stat. § 106.25(1). The statute then divests the FEC of authority, leaving all enforcement to the State Attorney, if a complainant first files his or her complaint with the State Attorney. *Id*. at § 106.25(2) (requiring that a complainant swear "whether a complaint of the same violation has been made to any state attorney"). Ms. Madden is required to act on any such complaints: "The state attorney *shall* appear in the circuit and county courts within his or her judicial circuit and prosecute . . . all suits, applications, or motions, *civil*

or criminal, in which the state is a party . . . .” Fla. Stat. § 27.02(2) (emphasis added).

Thus, Mr. Hetherington cannot be protected from enforcement of Florida’s speech restrictions—including the burdens of an investigation and the threat of fines—absent an injunction against Ms. Madden. Third parties will and do use such complaints to silence ideological opponents and those they dislike. The past enforcement action here came from a complaint filed by the former PTA president. *See* Hetherington Decl. ¶ 4 (ECF No. 12-2). If an injunction prevented the FEC and Secretary of State, but not the State Attorney, from pursuing Mr. Hetherington, such opponents would merely turn to the State Attorney in their efforts to silence Mr. Hetherington.

Ms. Madden is thus a required party, as Mr. Hetherington cannot obtain complete relief absent an injunction against her. Indeed, Mr. Hetherington could lose all protection whatsoever, as courts have dismissed actions entirely in the absence of a required party. *See* Fed. R. Civ. P. 19(b) (directing courts to consider whether to dismiss case in the absence of a required party); *Laker Airways, Inc. v. Brit. Airways,*

PLC, 182 F.3d 843, 847-50 (11th Cir. 1999) (affirming dismissal for failure to join a necessary party); *cf. Kraebel v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 90 Civ. 4391 (CSH), 1994 U.S. Dist. LEXIS 4619, at *9 (S.D.N.Y. Apr. 14, 1994) (holding that "injunctive relief would not fully remedy the unconstitutional procedures" where injunction would have no effect on absent party); *Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) (holding no jurisdiction in the absence of a required party).

CONCLUSION

Mr. Hetherington respectfully requests that the motions to dismiss by Secretary of State Lee and State Attorney Madden be denied.

Dated: June 15, 2021

/s/ Owen Yeates

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply 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 3,319 words, exclusive of the case style, signature block, and certificates.

Dated: June 15, 2021

/s/ Owen Yeates
Owen Yeates

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed through the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all counsel of record, constituting service on those parties they represent:

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