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

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| KELLS HETHERINGTON,<br>*Plaintiff*,<br><br>v.<br><br>GINGER BOWDEN MADDEN, in her official capacity as State Attorney, et al.,<br>*Defendants*. | Case No.<br>3:21-cv-671-MCR-EMT |

**PLAINTIFF KELLS HETHERINGTON'S OPPOSITION TO DEFENDANT GINGER BOWDEN MADDEN'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The State Attorney argues that Mr. Hetherington has not shown that she is a proper party to the action, and that accordingly the Court should grant summary judgment in her favor. Mr. Hetherington agrees that there are no genuine issues of material fact. But, contrary to Ms. Madden's argument, the record shows that Florida enforces § 106.143(3), and Florida law empowers the State Attorney to enforce it. And she is defending the right to enforce the law.

Ms. Madden is a required party, and Mr. Hetherington cannot obtain complete relief absent an injunction against her. Indeed, Mr. Hetherington would lose all protection against the speech restriction, as the FEC Defendants would seek to dismiss the case entirely in her absence. *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). Furthermore, contrary to her arguments, the speech restriction is unconstitutional as it is not narrowly tailored to any compelling interest.

Therefore, this Court should deny Ms. Madden's motion for summary judgment and grant Mr. Hetherington's motion for summary judgment.

## STATEMENT OF FACTS

Under Florida law, "[a] candidate for nonpartisan office is prohibited from campaigning based on party affiliation." Fla. Stat. § 106.143(3). In particular, "[a] political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation." *Id.*

The Division of Elections requires that candidates running for nonpartisan office "not publicly represent or advertise [themselves] as . . . member[s] of any political party." Fla. Div. of Elections, Advisory Opinion DE 2003-02 at 2 (Feb. 21, 2003), https://bit.ly/2RxvpOR (Hetherington MSJ, Ex. A (ECF No. 67-3)); Fla. Stat. § 106.23(2) (requiring that the Florida Elections Commission ("FEC" or Commission") follow the Division's binding opinions). But candidates may express past party leadership experience, "such as 'executive committee of _____ party.'" Advisory Opinion DE 2003-02 at 2. Florida even allows nonpartisan officeholders to express their

affiliation, once the election is over. *See* Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010), https://bit.ly/3gkP8vF (Ex. B (ECF No. 67-4)).

In 2018, Kells Hetherington ran for a nonpartisan seat on the Escambia County School Board. Hetherington Decl. ¶ 2 (Ex. F (ECF No. 67-8)). During the campaign, Mr. Hetherington described himself in the Escambia County voter guide as a "lifelong Republican." Final Order at 3, *Fla. Elections Comm'n v. Hetherington*, Case No. FEC 18-133, F.O. No. FOFEC 20-145W (FEC Sept. 25, 2020) (Ex. C (ECF No. 67-5)).

Acting on a complaint filed by Escambia County resident and former PTA President Michelle Salzman, the FEC found probable cause that Mr. Hetherington had violated Fla. Stat. § 106.143(3) when he stated that he was "[a] lifelong Republican." *Id*. On November 19, 2019, the FEC ordered Mr. Hetherington to pay a $500 fine, which it reduced to $200 on reconsideration in August 2020. Final Order at 2, 4 (Ex. C (ECF No 67-5)). Mr. Hetherington paid the fine. Hetherington Decl. at ¶ 7 (Ex. F (ECF No. 67-8)).

Florida law recognizes an individual as a candidate for political office once she has filed qualification papers and subscribed to a candidate's oath, or once she has "appoint[ed] a treasurer and designate[d] a primary depository." Fla. Stat. § 97.021(7)(d); *accord* Fla. Stat. § 106.011(3)(d); *see also* Advisory Opinion DE 2010-02 at 2 (Ex. B (ECF No. 67-4)) ("This usually occurs when a person first appoints a campaign treasurer and designates a primary campaign depository."). On March 30, 2021, Mr. Hetherington established his candidacy for the 2022 election to the Escambia County School Board by filing Form DS-DE 9, Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates. Hetherington Decl. at ¶ 8 (Ex. F (ECF No. 67-8)); Appointment of Campaign Treasurer (Ex. G (ECF No. 67-9)); Statement of Candidate (Ex. H (ECF No. 67-10)); Pre-File Form (Ex. I (ECF No. 67-11)). He also established a primary campaign depository. Hetherington Decl. at ¶ 9 (Ex. F (ECF No. 67-8)).

Mr. Hetherington wished to share his party affiliation in his current campaign—in his candidate statement and in meetings, messages, and conversations with voters and others—but he feared doing so because

Florida actively enforces Fla. Stat. § 106.143(3). Hetherington Dec. at ¶¶ 11-12. On April 15, 2021, he filed the present action, 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). While the Court granted the motions to dismiss by the Secretary of State and the Attorney General, as well as the motion to dismiss the FEC Defendants in their individual capacities, it denied the motions to dismiss 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 filed a motion for summary judgment, and the State Attorney filed the motion for summary judgment that Mr. Hetherington now opposes.

## LEGAL STANDARD

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v.*

*Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) (Roberts, C.J., controlling op.). Accordingly, the Defendants here bear a double burden. The party moving for summary judgment "bears the initial burden of proving the absence of a genuine issue of material fact." *Whitehead v. BBVA Compass Bank*, 979 F.3d 1327, 1328 (11th Cir. 2020). But because the Defendants bear the burden of proving the constitutionality of § 106.143(3), they must not only "affirmatively show the absence of a genuine issue of material fact," they must support their "motion[s] with credible evidence demonstrating that no reasonable jury could find for [Mr. Hetherington] on all of the essential elements of [this] case." *Landolfi v. City of Melbourne*, 515 F. App'x 832, 834 (11th Cir. 2013) (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993)). The Court must "view the evidence and all factual inferences therefrom in the light most favorable to [Mr. Hetherington], and resolve all reasonable doubts about the facts in [his] favor." *Melvin v. Fed. Express Corp.*, 814 F. App'x 506, 512 (11th Cir. 2020) (internal quotation marks omitted).

## ARGUMENT

The State Attorney's arguments depend on multiple errors. Her argument that there is no claim against her ignores 1) the difference between an enforcement and a preenforcement challenge; and 2) the enforcement authority granted to state attorneys under Florida law. Her argument that the speech restrictions are constitutional depends on an incorrect characterization of the nature of Mr. Hetherington's challenge, treating it as a challenge to the existence of nonpartisan elections altogether, rather than to the unconstitutionality of speech restrictions enforced during nonpartisan elections. This Court has already rejected her claim that she is not a required party, and these arguments all fail under the standard for summary judgment.

### I. THE STATE ATTORNEY MUST BE A PARTY TO PROTECT MR. HETHERINGTON'S RIGHTS

The State Attorney revisits her motion to dismiss, arguing that summary judgment should be granted in her favor because she has not and cannot enforce the speech restriction at § 106.143(3). Her argument still fails, both because preenforcement challenges do not require prior

enforcement by an official, and because she has enforcement authority under Florida law.

A. By definition, preenforcment challenges do not require prior enforcement

Preenforcement challenges exist to protect speakers from silencing themselves because of the fear of future prosecution. Ms. Madden nonetheless asserts that there is no case here because Mr. Hetherington "provide[d] no evidence that the State Attorney previously enforced Fla. Stat. § 106.143(3) against Plaintiff during his 2018 campaign." Madden MSJ at 7; *see also id.* at 8 ("Plaintiff's claims fail because he cannot establish sufficient evidence that the State Attorney has previously deprived, or is presently depriving, Plaintiff of his right to free speech."); *id.* at 9 ("Plaintiff has not and cannot provide any evidence to show that the State Attorney previously investigated and/or enforced any alleged violations of Fla. Stat. §106.143(3) during his 2018 campaign . . . ."); *id.* (arguing that the correspondence in the previous enforcement action brought by the FEC involved only the FEC).

In a preenforcement challenge, a plaintiff need only "allege[] an intention to engage in a course of conduct arguably affected with a

constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (internal quotation marks omitted). Thus, Mr. Hetherington need only 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). While past enforcement is one way to demonstrate a danger of injury, all a plaintiff has to show "is a credible threat of application." *Id.* at 1258.

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, Inc. v. Desantis*, 457 F. Supp. 3d 1193, 1205 (N.D. Fla. 2020) (internal quotation marks omitted). And Mr. Hetherington may seek to enjoin all those who could enforce those provisions against him. He is

not required to "sit on [his] hands," *id.* at 1213, waiting for government officials to come after him one by one.

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 has power to enforce § 106.143(3)

The State Attorney asserts that because several statutory provisions discuss only the Commission's authority or how the Commission is to

carry out its duties, that the State Attorney lacks any enforcement authority whatsoever. Not only is this a logical fallacy, but other statutory provisions show that the argument is false.

Ms. Madden may begin an enforcement action against Mr. Hetherington in at least three ways: after referral from the FEC, upon a citizen complaint filed with her, or under her own duty to investigate and enforce the law. Under the first, the State Attorney must investigate "a complaint referred by the commission" both "promptly and thoroughly," then "undertake such criminal or civil actions as are justified by law," and finally "report to the commission the results of" the actions it has taken to court. Fla. Stat. § 106.25(6).

But she may also begin an enforcement action through a complaint filed directly with her. Indeed, the Commission's authority is preempted when an individual files a complaint first with the State Attorney. *See id.* § 106.25(2) (noting that a complaint to the Commission "shall state whether a complaint of the same violation has been made to any state attorney").

Whether she begins her investigation because of a complaint brought to her, or through her own investigatory duties, the State Attorney must prosecute that complaint in the state courts. *See* Fla. Stat. § 27.02(1) ("The state attorney shall . . . prosecute . . . all suits, applications, or motions, civil or criminal . . . ."). Indeed, Florida law is explicit that the Commission's enforcement authority does not preempt others' authority or duty to enforce the election laws at issue. 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). And Florida Courts have recognized the State Attorney's power to enforce all of Chapter 106. *Cullen v. Cheal*, 586 So. 2d 1228, 1229 (Fla. 3d CDA 1991). Indeed, other State Attorneys have asserted the right to enforce Chapter 106. *See Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1283 (S.D. Fla. 2012).

Ms. Madden further avers that she must lack enforcement authority because she cannot of herself "impose any civil penalties." Madden MSJ at 8. But that is both unsurprising and constitutionally proper. A state

attorney imposing penalties upon a party would violate the constitutionally required separation of powers. Her constitutional duty is to take an action to the courts and let the courts impose the penalties. And those courts—whether the State Attorney brings the action after a citizen complaint, after referral by the Commission, or under her own duties to enforce the law—will follow the guidance given in the statutes in imposing penalties. *See, e.g.* Fla. Stat. § 106.265(1) (discussing potential penalties for violations).

Furthermore, even if Fla. Stat. § 106.265(1) did not guide courts in actions brought by the State Attorney, Fla. Stat. § 106.19 would. It punishes expenditures in violation of Chapter 106—which would include expenditures on communications that impermissibly mention partisan affiliation under § 106.143(3)—as a first degree misdemeanor. Fla. Stat. § 106.19(1)(d). Furthermore, a court may impose "a civil penalty equal to three times the amount involved in the illegal act." *Id.* at § 106.19(2).

Regardless, Mr. Hetherington's speech is chilled by the credible threat of prosecution by the State Attorney. The statutes are clear that

the State Attorney has the power to enforce § 106.143(3). But even if they were not, if they were as ambiguous about enforcement authority and penalties as Ms. Madden argues, that ambiguity still chills Mr. Hetherington's speech. An ambitious, energetic prosecutor would just as easily use that ambiguity to bring charges, silencing speakers fearful of the costs of defending against such actions and of the penalties a court might impose. Indeed, the danger of ambiguity is that prosecutors will use it in an expansive and subjective way.[1]

And ambiguity about the State Attorney's enforcement power would not sustain Ms. Madden's argument that she should be dismissed as a party. Even the possibility that she will enforce § 106.143(3) will chill speech, which suffices to make her a required party in this preenforcement action. *Cf. Goldhamer v. Nagode*, 621 F.3d 581, 586

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[1] Furthermore, painting the statute in a way that creates such ambiguity about the State Attorney's enforcement authority only sustains Mr. Hetherington's argument that § 106.143(3) is unconstitutional. *See Wollschlaeger v. Governor*, 848 F.3d 1293, 1320 (11th Cir. 2017) (noting that the void for vagueness doctrine demands that speakers "know what is required of them," to avoid arbitrary or discriminatory enforcement).

(7th Cir. 2010) (holding that, given the danger of chilled speech, "when an ambiguous statute arguably prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge").

## II. FLORIDA'S SPEECH RESTRICTIONS ARE UNCONSTITUTIONAL

The State Attorney attempts to protect her ability to enforce § 106.143(3) by arguing that the speech restriction still lets Mr. Hetherington say other things and by trying to convert his challenge into one against nonpartisan elections in general. But a content-based restriction on speech is still unconstitutional, even if a speaker can say other things. And the asserted interests are not tailored to the restriction imposed.

The State Attorney admits that § 106.143(3) prohibits Mr. Hetherington's chosen message: that it "prevent[s him] from stating his party affiliation." Madden MSJ at 11. But she asserts that this censorship is okay because Mr. Hetherington can share other ideas and opinions, such as "opinions on important issues." *Id*. But in saying that speech about other issues is still possible, she concedes that Florida

restricts not just words but ideas. And one sees why courts "cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. Cal.*, 403 U.S. 15, 26 (1971). Were First Amendment protections so easily circumvented, "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.*; *see also Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1247 (11th Cir. 2015) (noting that Florida's attempt to control particular language "deprived [the speaker] of its full rhetorical toolkit" and "the marketplace of ideas of the full range of public sentiment").

Thus, as a content-based speech restriction—applying only to expression of "the candidate's political party affiliation," § 106.143(3)—the provision here must survive strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (requiring narrow tailoring to compelling interests when a law applies to speech "because of the topic discussed or the idea or message expressed"); *Siefert v. Alexander*, 608

F.3d 974, 981 (7th Cir. 2010) (holding that a law was content based when it prohibited expressions of party affiliation).

Ms. Madden attempts to save the speech restriction from strict scrutiny's rigors by treating this case as an existential threat to nonpartisan elections, and thus pulling in all the possible interests sustaining such elections. But even if they were compelling interests, they are too unrelated to the speech restriction here.

Whether primary voters "choos[e] a party's nominee" is the "constitutionally crucial" distinction between partisan and nonpartisan races. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 446 (2008); *see In re Springfield*, 818 F.2d 565, 566 (7th Cir. 1987) ("A nonpartisan election is not one without partisanship but one without primary elections to choose parties' candidates."); *see also* 5 C.F.R. § 734.101 ("Nonpartisan election means . . . [a]n election in which none of the candidates is to be nominated or elected as representing a political party . . . .").

A nonpartisan election may also be defined as an election where candidates' names do not appear on the ballot. *See Wash. State Grange*,

552 U.S. at 464 (Scalia, J., dissenting) (treating non-partisan elections as those "in which party labels have no place on the ballot").[2] Thus some states hold elections classified as nonpartisan even though political parties select the candidates, as long as the partisan affiliation does not appear on the ballot.[3] But neither of these definitions involves a

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[2] *See also* Claire S. H. Lim, James M. Snyder, and David Strömberg, *The Judge, the Politician, and the Press: Newspaper Coverage and Criminal Sentencing across Electoral Systems*, 7.4 Am. Econ. J.: Applied Econs. 103, 108 (2015), http://www.jstor.org/stable/24739061 (discussing three forms of judicial elections and noting that the "nonpartisan election system[ is] where multiple candidates compete without party identification on the ballot"); Brandice Canes-Wrone, Tom S. Clark, and Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108.1 Am. Pol. Sci. Rev. 23 (2014), http://www.jstor.org/stable/43654045 ("Many states use nonpartisan elections, in which the ballot does not specify the judicial candidates' partisan affiliations."); Michael J. Nelson, Rachel Paine Caufield, and Andrew D. Martin, *OH, MI: A Note on Empirical Examinations of Judicial Elections*, 13.4 State Pols. & Pol'y Q. 495, 498 (2013), http://www.jstor.org/stable/24710962 ("Typically, if the candidate's party identification appears next to their name on the ballot in a general election, the election is classified as partisan; if it does not, the election is nonpartisan."); Gerald C. Wright, *Charles Adrian and the Study of Nonpartisan Elections*, 61.1 Pol. Rsch. Q. 13, 15 (2008), http://www.jstor.org/stable/20299698 (discussing history of research on nonpartisan elections, which follow "[t]he simple rule of not having party labels on the ballot").

[3] *See* Nelson, *OH, MI*, 13.4 State Pols. & Pol'y Q. at 497. For example, the requirements for Ohio's "nonpartisan general election" prohibited

complete prohibition on all mention of partisan affiliation. Indeed, given that parties sometimes choose the candidates, such a prohibition is not part of the standard definition, nor of the accepted governmental interest in sustaining such elections.

That is, if nonpartisan elections are generally accepted as merely prohibiting party affiliation on the ballot, then the governmental interest is merely in preventing party affiliation on the ballot. If nonpartisan elections are ones in which the parties don't select the candidates, then the interest is one in keeping parties from naming a nominee. But there is no relation between those interests and prohibiting any mention of partisan affiliation during a campaign: The most obvious and least restrictive means of protecting those interests is to prohibit partisan primaries and party affiliation on the ballot.

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"judicial candidates from being associated with their political parties on the general-election ballot," even while the parties chose the candidates and the candidates were "entirely free to associate themselves with the parties of their choice and express their party affiliations publicly in forums other than the general-election ballot." *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 332, 337 (6th Cir. 2016).

Ms. Madden further asserts an interest in protecting against confusion and undue influence. But she fails to explain what confusion and undue influence is involved, nor does she "adequately explain[] how" restricting any mention of party membership "advances that interest." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989).

Indeed, in that respect, the State Attorney's reliance on *Eu v. San Francisco County Democratic Central Committee* undermines her arguments in multiple ways. Both here and there the government "never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest," *id.* at 226, how the speech restriction combatted confusion and undue influence. *Eu* also fails to sustain her claim that combatting confusion and undue influence are compelling interests. While the government in *Eu* similarly asserted an interest in combatting confusion and undue influence, the Supreme Court neither endorsed that interest nor declared that it was compelling. *Id.* at 228. Instead, the Supreme Court

declared a "legitimate," that is, not a compelling, "interest in fostering an informed electorate." *Id.*[4]

But even if the *Eu* Court had stated that it was a compelling interest it wouldn't have mattered: the laws at issue in *Eu* and here *restrict* information, and "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Id.* (internal quotation marks omitted) (alternation in original). Rather, to restrict information the Court required an interest in combatting "fraud and corruption," and it held that—like the State Attorney and FEC here—the government had produced "no evidence" that the speech restriction "serve[d] that purpose." *Id.* at 229.

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[4] Indeed, the Supreme Court has explicitly rejected any interest in combatting undue influence. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court discussed a previous concurring opinion where a plurality of the Court had rejected any interest in combatting "undue influence," finding it insufficient to outweigh "the loss for democratic processes resulting from the restrictions upon free and full public discussion." *Id.* at 344 (internal quotation marks omitted). The *Citizens United* Court went on to reject this anti-distortion interest. *Id.* at 349.

In addition, it is noteworthy that a challenge to California's prohibition on party endorsements in nonpartisan elections had originally been one of the claims in *Eu*, but the district court had stayed that claim based on *Pullman* abstention. *Id.* at 219, 220 n.13. After the California Supreme Court declared that the state constitutional provision in question did not prohibit such endorsements, "[a] ban on party endorsements in nonpartisan elections . . . was enacted by ballot initiative." *Id.* at 220 n.13. Another federal district court declared that the resulting constitutional provision—Section 6(b)—was unconstitutional. *Id.*[5]

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[5] The subsequent history of that case is long and tortuous, but it only undermines the State Attorney's claim that Florida's speech restriction is constitutional. The Ninth Circuit, sitting en banc, reversed a panel decision and held that the district court had correctly held that the restriction was unconstitutional. *See Geary v. Renne*, 911 F.2d 280, 286 (9th Cir. 1990). The Supreme court vacated that decision for lack of a justiciable controversy. *Renne v. Geary*, 501 U.S. 312, 324 (1991). Meanwhile, a law challenging a related statutory restriction, prohibiting candidates from mentioning party affiliation in their official voter information pamphlet statements, had been affirmed by a Ninth Circuit panel. *Geary v. Renne*, 914 F.2d 1249, 1255-56 (9th Cir. 1990). That panel distinguished Section 10012 from Section 6(b), arguing that the former involved a limited public forum where the government's

Furthermore, invoking *Burson v. Freeman*, 504 U.S. 191 (1992), does not help the State Attorney. In *Burson* there was a long history showing that voter intimidation in fact took place and that law enforcement could not intervene to prevent intimidation at the polling places. *McCullen v. Coakley*, 573 U.S. 464, 496 (2014). Placing police officers at the polls to prevent intimidation could raise the "appearance of coercion." *Id*. Thus, the obvious less restrictive means for protecting against voter intimidation was "inadequate." *Id*.

No such problems appear here. The government controls the ballots and the primary elections, so there is no possibility that candidates will slip their party affiliation undetected onto the ballot or use the primary election to secure a party's nomination. And even if the state's interest supported further action, it could forbid candidates from saying that they were the party's nominees for nonpartisan office. Doing so would

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interests were greater and that the latter had restricted all speech during a campaign, not just in the voter pamphlet. *Id*. The en banc court vacated the panel decision and affirmed the district court, noting that the parties had agreed that Section 10012 was an unconstitutional "prior restraint on speech," *Geary v. Renne*, 2 F.3d 989, 990 (9th Cir. 1993), as is Section 106.143(3).

not be impossible to detect or punish. It would require, in fact, the same effort it currently uses to restrict Mr. Hetherington's speech. Thus there is no evidence that the available less restrictive alternatives are inadequate. And, "[g]iven the vital First Amendment interests at stake, it is not enough for [the State Attorney] simply to say that other approaches have not worked." *Id.*

Finally, it is important to note that the integrity interests claimed here are of a different kind than those sustained in *Burson*, as is the difficulty of demonstrating the government's need and the burden of the restriction. The *Burson* Court noted a long history of fraud and actual intimidation. This included battles at the polling places to keep away "elderly and timid voters." 504 U.S. at 202. Moreover, poll watchers would monitor an individual's votes, either to pay voters when they voted for approved candidates or to threaten them when they did not, by firing them and even throwing them out of their homes. *Id.* at 201 & n. 7. These dangers are of a different kind entirely than those claimed here, and assertions that the same integrity interest applies here ring hollow.

Moreover, it was "the long, uninterrupted, and prevalent use of" similar requirements, across all the states and over all the time for which statistical data would be available, that made "it difficult for [the government] to come forward with" proof in *Burson*. *Id*. at 208. There were no states without such laws from which to gather comparative data. There are no such difficulties here. As pointed out in Mr. Hetherington's memorandum in support of summary judgment, there are other states that allow candidates to state their party affiliation during nonpartisan campaigns. *See* Hetherington MSJ at 22. Indeed, as the *Eu* and *Renne* cases show, some states have necessarily adopted and dropped similar speech restrictions. Thus, once Florida has decided what it means by voter confusion, it should be able create time-series and cross-series datasets for statistical analysis to determine whether there is any voter confusion that is not resolved through other, less restrictive means and whether controlling speech like Mr. Hetherington's makes any difference.

Lastly, the effect of the restriction at issue in *Burson* was temporally and geographically limited to 100 feet around polling places when

voting was actually happening. 504 U.S. at 210. But the plaintiffs were completely free to engage in their solicitation beyond that 15 second, 100 foot radius, and they were completely free to solicit there and anywhere else before the polls opened. Here, Florida prohibits Mr. Hetherington's desired speech at any time in the months and even years before election day. The restriction here is of a different kind entirely.

## CONCLUSION

The State Attorney fails to demonstrate that there is no credible threat of enforcement and that § 106.143(3) is constitutional, and the Court should deny her motion for summary judgment. To the contrary, as discussed in Mr. Hetherington's memorandum in support of his motion for summary judgment, the state lacks a compelling interest for its speech restrictions, Hetherington MSJ at 12-15, and the speech restrictions fail the tailoring required by strict scrutiny, *id*. at 15-25. For the reasons given there, his motion for summary judgment should instead be granted.

Dated: January 18, 2022

*/s/ Owen Yeates*
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## 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 4,942 words, exclusive of the case style, tables of contents and authorities, signature block, and certificates.

Dated: January 18, 2022

*/s/ Owen Yeates*
Owen Yeates

## 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