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 for the First Judicial Circuit in and for Escambia County, Florida, et al.

Defendants.

Case No.: 3:21-CV-671

STATE ATTORNEY'S REPLY TO PLAINTIFF'S OPPOSITION TO THE STATE ATTORNEY'S MOTION FOR SUMMARY JUDGMENT

Ginger Bowden Madden in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, Florida (the "State Attorney"), by and through undersigned counsel, hereby files her Reply to Plaintiff's Opposition to the State Attorney's Motion for Summary Judgment, and in support thereof states the following:

INTRODUCTION

Plaintiff's response in opposition to the State Attorney's Motion for Summary Judgment misrepresents the State Attorney's position in an attempt to confuse this Court. However, there is no credible threat that the State Attorney would enforce Fla. Stat. § 106.143(3) against Plaintiff, because the State Attorney is not authorized

by law to enforce the noted civil penalties associated with an alleged violation. Without this essential element, summary judgment is appropriate. Next, Plaintiff's response argues that Plaintiff's hypothetical scenario regarding an alleged violation of Fla. Stat. § 106.19 somehow relates to Plaintiff's challenge to Fla. Stat. § 106.143(3). Such a connection cannot be made between the two statutes. Finally, Plaintiff may freely express his ideas, statements, and messages regarding the issues facing a schoolboard candidate. Plaintiff is merely prohibited from campaigning on a party label and nothing more. As a result, the narrowly tailored statute should be upheld.

ARGUMENT

I. Plaintiff Cannot Prove a Credible Threat of Prosecution

There is no credible threat that the State Attorney would prosecute Plaintiff for using his political affiliation in an upcoming nonpartisan election. Plaintiff's lack of this essential element is fatal to his claim. Plaintiff cannot prove a credible threat of enforcement by the State Attorney because she is not authorized by law to enforce the noted civil penalties associated with an alleged violation of Fla. Stat. § 106.143(3). While the State Attorney anecdotally asserts that she has not previously enforced the provisions of the challenged statute, that is not the basis of her argument. This lack of a credible threat of enforcement is the crux of the State Attorney's argument and stifles Plaintiff's claims.

Additionally, there is also no credible threat of enforcement of Fla. Stat. §§ 106.143(3) because the State Attorney is not authorized by any law to enforce any civil or criminal penalties for violations. Plaintiff again seeks to confuse this Court by presenting an alternative theory in reading Fla. Stat. §§ 106.143(3) 106.25, and 106.265 together creates a logical fallacy that the State Attorney lack enforcement authority. [DE 71 at 11]. This argument is wholly without merit.

As previously briefed, a reading of these statutes together requires the conclusion that, (i) anyone found to be in violation of the provisions of Fla. Stat. 106.143 is subject to the penalties prescribed by Fla. Stat. s 106.265; (ii) the FEC or an administrative law judge by law to impose the civil penalties prescribed by Fla. Stat. § 106.265; and, (iii) the State Attorney is only authorized to undertake such civil or criminal actions as are justified by law and the challenged statute provides no such civil or criminal penalty that may be enforced by the State Attorney. Next, Plaintiff attempts to insert a hypothetical connection between the provisions of Fla. Stat. § 106.143(3) and Fla. Stat. § 106.19, the latter of which classifies improper campaign contributions as first degree misdemeanors. Plaintiff's interpretation of Fla. Stat. § 106.19 is without merit and asks this Court to accept his extreme hypothetical that is completely implausible. Plaintiff provides no evidence that the State Attorney would credibly enforce the statute, therefore his speech is not chilled. Thus, summary judgment is the State Attorney's favor is appropriate.

II. The Challenged Statute is Not Overly Broad or Underinclusive

As previously briefed, the challenged statute is not overly broad or underinclusive as it contains a narrow restriction on Plaintiff's ability to campaign for a non-partisan office based on party affiliation. The restriction of Fla. Stat. § 106.143(3) is limited to achieve Florida's goals and does not expand beyond the campaign period for the office for which Plaintiff intends to campaign. Plaintiff is free to speak about his past partisan experience, his opinions on issues which he intends to address should he be elected to school board, and any other issue relating to his campaign. Plaintiff is simply restricted from campaigning using a party label. Plaintiff is free to respond to inquiries regarding his positions on policies, taxes, schools, or any other issues which voters deems to be important. Plaintiff indeed retains great latitude in his ability to communicate with his potential constituents and Plaintiff's speech is not chilled. If Plaintiff were permitted to campaign based on his party affiliation it would undoubtedly stifle the purpose of having a non-partisan election as well as potentially misleading voters. For example, if Plaintiff were allowed to campaign based on his party affiliation as a "lifelong Republican," voters may expect Plaintiff will make all decisions in his position on the Escambia County school board based on traditional Republican beliefs without ever knowing how Plaintiff really feels about the issues facing Escambia County schools. As the restrictions here only prevent Plaintiff from advertising and campaigning based on

his party affiliation and there is no lesser means available, the statute is narrowly tailored and is not over broad.

The statute is additionally not underinclusive at it is limited only to the campaign period for Plaintiff's non-partisan election because is intended only to serve Florida's compelling interest of maintaining the integrity of non-partisan elections. Once elected, there is no further need to ensure the integrity of the non-partisan election process as those campaigning will be in office and the provisions of Fla. Stat. § 106.143 are inapplicable.

III. The Court Should Decline to Decide Summary Judgment Based on Plaintiff's Amended Complaint

Plaintiff asks this Court to accept his Amended Complaint and decide summary judgment based on Plaintiff's Amended Complaint. Plaintiff's request is improper and should be denied as any Amended Complaint filed by Plaintiff would undoubtedly require response to Plaintiff's new claims from all parties named as Defendants. S*ee Barney v. Escambia Cty., Fla.*, No. 3:17CV3-MCR-CJK, 2018 WL 4113369, at *7 (N.D. Fla. May 30, 2018), report and recommendation adopted, No. 3:17CV3-MCR-CJK, 2018 WL 4107904 (N.D. Fla. Aug. 29, 2018) (holding that the general rule is that an amended complaint renders all prior complaints as nullities, and that pending motions for summary judgment are moot.)

CONCLUSION

For the foregoing reasons, the State Attorney respectfully request this Court deny Plaintiff's Motion for Summary Judgment and grant summary judgment in favor of all Defendants and granting any such other and further relief as this Court deems just and proper.

Respectfully submitted this 25th day of January 2022.

/s/ Jennifer K. Sniadecki
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I HEREBY CERTIFY that the foregoing reply contains 1,244 words and is thus in compliance with the Local Rules of this Court.

/s/ Jennifer K. Sniadecki
Jennifer K. Sniadecki, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 25th day of January 2022.

/s/ Jennifer K. Sniadecki
Jennifer K. Sniadecki