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

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the Court's order granting leave to do so (ECF No. 35), Plaintiff Kells Hetherington submits the following reply to the opposition to Plaintiff's Motion for Preliminary Injunction filed by Defendants Moody, Poitier, Stern, Smith, Allen, and Hayes, Commissioners of the Florida Elections Commission, and Defendant Attorney General Moody (altogether "FEC Defendants") (ECF No. 28 ("FEC Opp.")), and the opposition to Plaintiff's Motion for Preliminary

Injunction filed by Defendant State Attorney Madden (ECF No. 27 ("Madden Opp.")).[1]

The FEC Defendants' response on the merits cites two cases, neither relevant to campaign speech. (FEC Opp. at 4-11). This case is not a challenge to non-partisan elections, "in which party labels have no place on the ballot." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 464.[2] Nor is it a challenge to what may be printed on the ballot, or to write-in voting. Rather, at issue here is highly protected speech by a candidate during his campaign. As Mr. Hetherington demonstrated, Florida lacks a sufficiently important interest to control candidate speech, and Florida's restrictions are insufficiently tailored to any interest the state might assert. Indeed, federal courts have already held that the government cannot control comparable speech by judicial

[1] As the Secretary of State failed to respond to Plaintiff's motion, the Court should grant the preliminary injunction as against her by default. *See, e.g., Ladies Mem'l Ass'n v. City of Pensacola*, No. 3:20cv5681-MCR-EMT, 2020 U.S. Dist. LEXIS 160071, at *5 (N.D. Fla. Sep. 2, 2020) (citing N.D. Fla. Loc. R. 7.1(H)).

[2] Indeed, such restrictions have been upheld only because candidates were free to share their party affiliation during campaigns. *See Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 337 (6th Cir. 2016).

candidates, even though the government may have a greater interest in such elections.

The rest of the FEC Defendants' arguments, and those by State Attorney Madden, do not respond to Mr. Hetherington's arguments, but are instead arguments in favor of dismissing the Attorney General and the State Attorney. But both parties have enforcement duties, and Mr. Hetherington's rights cannot be protected unless they are included in the injunction.

The Court should preliminarily enjoin Defendants' censorship of Mr. Hetherington's First Amendment campaign speech.

I. ATTORNEY GENERAL MOODY IS A REQUIRED PARTY AND SHOULD BE PRELIMINARILY ENJOINED

The Attorney General is a required party in this case. The FEC Defendants argue that Attorney General Moody has no role over enforcement—that her supervisory role over state attorneys is inadequate to establish a role, and that the state attorneys also have no enforcement role—such that she should not be enjoined. (*See* FEC Opp. at 11-14). They further argue that, because the Attorney General lacks enforcement authority, the claim is really against the state, such that Eleventh Amendment immunity applies. (*See* FEC Opp. at 14-17).

These arguments do not address or respond to Mr. Hetherington's motion, but are in fact arguments in favor of a motion to dismiss, and they should have been brought in a separate motion. They are also wrong and fail to show that the Attorney General should not be enjoined.

In fact, the FEC Defendants' arguments weigh against the state as to the preliminary injunction factors. If state authorities truly had no power or intent to enforce the speech restrictions, then they could hardly argue that enforcing the statute was in the public's interest or that the state would be harmed by the injunction. And they would not be contesting the preliminary injunction, which is by definition temporary (and more so for anyone later dismissed from the case). But instead of consenting to an agreement that they cannot and will not enforce the restrictions against Mr. Hetherington, the Defendants are all fighting to protect their ability to enforce those very restrictions. The effort to fight any limit on the Defendants' actions shows that, contrary to their assertions, the preliminary injunction is needed.

Furthermore, the premise to the FEC Defendants' argument is flawed. Given the Attorney General's duty to direct and oversee state

attorneys, the FEC Defendants argue that the Attorney General should not be enjoined if State Attorney Madden cannot be. But Ms. Madden is a necessary party by the plain language of Florida's statutes. As is the Attorney General, both because of her duty to oversee state attorneys and her inherent power to enforce Florida's laws.

There are two avenues by which a complaint may come before a state attorney, either through the FEC or directly. First, the FEC may refer complaints to a state attorney. The FEC "shall investigate all violations" submitted by sworn complaint or reported by the Secretary of State's Division of Elections. Fla. Stat. § 106.25(2). The Commission must "determine if the facts alleged" in the complaint or referred by the Division "constitute probable cause to believe that a violation has occurred." *Id*. at § 106.25(4). If it finds probable cause, the FEC may then "refer the matter to the state attorney for the judicial circuit in which the alleged violation occurred." *Id*. It is then "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).

Second, while the FEC is specifically tasked with investigating and acting on violations of Florida's election law, "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." Fla. Stat. § 106.25(1). Indeed, when a complainant chooses to follow the route of going through the FEC first, he or she must state in the "sworn complaint . . . whether a complaint of the same violation has been made to any state attorney." *Id*.§ 106.25(2). Thus, it is only if a complaint has *not* been filed with a state attorney that the FEC may receive it. On the other hand, this means that state attorneys have preemptive authority to investigate and act on violations of the election code. Furthermore, the state attorneys are required to act on complaints brought to them: "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).

The FEC Defendants try to lay a foundation for a future motion to dismiss, and argue against a preliminary injunction here, by arguing that it does not appear that the State Attorney will enforce the speech restrictions. (FEC Opp. at 11-12). But State Attorney Madden is a required party: "[a] person who . . . must be joined as a party if . . . in that person's absence, the court cannot accord complete relief." Fed. R. Civ. P. 19(a)(1). Mr. Hetherington cannot be protected from the state's unconstitutional restrictions on candidate speech unless the State Attorney is a party. Not only could the FEC attempt to circumvent an injunction against it by referring matters to the State Attorney, but the State Attorney has independent authority to take up and act on violations of the code, including civil violations like this. Fla. Stat. § 27.02(1).

Given the State Attorney's enforcement power, she is a necessary party and Mr. Hetherington cannot obtain complete protection without an injunction against her enforcement of the restrictions. And, in the absence of a necessary party, Mr. Hetherington's case could be dismissed, denying him any protection whatsoever. *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. British 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). Indeed, this Court could even lack jurisdiction to hear the case. *See Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) (holding no jurisdiction in the absence of a required party).

Thus, contrary to the FEC Defendants, "there is [an] avenue . . . justified by law for [the] State Attorney to enforce" these speech restrictions, (FEC Opp. at 12), and the injunction must extend against the State Attorney to fully protect Mr. Hetherington.

The FEC Defendants argument regarding the Attorney General thus rests on a mistaken premise when it asserts that, with "no apparent basis to enjoin State Attorney Madden, *a fortiori* there is no basis to enjoin Attorney General Moody." *Id.* "The Florida Constitution designates the Attorney General as 'the chief state legal officer.'" *United*

States v. Domme, 753 F.2d 950, 956 (11th Cir. 1985) (quoting Fla. Const. art. IV, § 5). As such, the Attorney General "is vested with broad authority to act in the public interest and, when she deems it necessary, to defend statutes against constitutional attack." *Support Working Animals, Inc. v. Desantis*, 457 F. Supp. 3d 1193, 1211 (N.D. Fla. 2020) (quoting Attorney General brief). Indeed, Florida law states that the Attorney General "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions," including civil cases, "in which the state may be a party, or in anywise interested." Fla. Stat. § 16.01(4)-(5). And Florida law requires the Attorney General to supervise and direct the state attorneys. Fla. Stat. § 16.08. In addition, "[e]ven absent an express grant of statutory authority, the Attorney General has the common law power to institute lawsuits to protect the public interest." *Support Working Animals*, 457 F. Supp. 3d at 1211 (internal quotation marks omitted).

As in *Support Working Animals*, this is not a case where a private right of action bypassing state enforcement exists or where "the Attorney General plays no role in enforcing" the law restricting Mr. Hetherington's speech. *Id.* at 1213 (internal quotation marks omitted).

To the contrary, "the Attorney General could superintend and direct the state attorneys to bring prosecutions" to enforce Fla. Stat. § 106.143(3)'s "civil . . . penalties." *Id.* (internal quotation marks omitted). The Attorney General "could independently institute such prosecutions" under her common law authority, "and she could intervene in the trial of the case or on appeal." *Id.* (citation omitted). Thus, as in *Support Working Animals*, the Attorney General's powers and enforcement role are "sufficient to bring [Mr. Hetherington's] claims against her within *Ex parte Young*." *Id.*

The conclusion that "the Attorney General [is] a proper defendant in this case is consistent with decades of Supreme Court precedent finding standing in pre-enforcement constitutional challenges to state laws." *Id.* (collecting cases). Mr. Hetherington does not have to wait for another enforcement action to protect his rights, nor does he have to "sit on [his] hands until" state actors other than the FEC enforce the law against him. *Id.*

Lastly, the FEC Defendants' arguments as to the Eleventh Amendment rise or fall with the Attorney General's enforcement authority. That is, they depend on the Attorney General's argument

that the *Ex parte Young* exception does not apply, and that in turn depends on the Attorney General not having an enforcement role here. But, as discussed above, the Attorney General has an enforcement role, such that the *Ex parte Young* exception does apply to her. And the FEC Defendants' Eleventh Amendment arguments therefore fail.

Thus, Attorney General Moody is a required party, and Mr. Hetherington's rights cannot be protected absent an injunction against her.

II. STATE ATTORNEY MADDEN IS A REQUIRED PARTY AND SHOULD BE ENJOINED

The Court should protect Mr. Hetherington from the threat of enforcement by the State Attorney. The State Attorney argues that, as there are no facts showing she has been involved in such a prosecution, no preliminary injunction should issue against her. (Madden Opp. at 3). Indeed, she mistakenly asserts that Mr. Hetherington must show that she "committed" the violative conduct, or that she "deprived" him of his rights. (*Id*. at 5).

This is a pre-enforcement action, and 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 Human Rights v.*

Governor of Ga., 691 F.3d 1250, 1257 (11th Cir. 2012). As discussed above, there are multiple avenues for Ms. Madden to enforce the law against Mr. Hetherington, whether by referral from the FEC 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 the enforcement of Florida's speech restrictions absent an injunction that includes 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 1268. 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, 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 does not have to await 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).

Thus, State Attorney Madden is a required party, and Mr. Hetherington's rights cannot be protected absent an injunction against her.

CONCLUSION

The Court should grant Plaintiff's motion for a preliminary injunction against all Defendants.

Respectfully submitted June 16, 2021.

/s/ Owen Yeates
Owen Yeates (pro hac vice)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Ste. 801
Washington, DC 20036
oyeates@ifs.org
Telephone: 202-301-3300
Facsimile: 202-301-3399
Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the word limits at N.D. Fla. Loc. R. 7.1(F) and (I). As measured by Microsoft Word's internal count, the memorandum is 2,541 words, exclusive of the case style, signature block, and certificates.

Dated: June 16, 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:

Ashley E. Davis
Bradley Robert McVay
FLORIDA DEPARTMENT OF STATE
500 South Bronough St., Ste. 100
Tallahassee, FL 32399-0250
ashley.davis@dos.myflorida.com
brad.mcvay@dos.myflorida.com
Counsel for the Secretary of State

Jennifer Sniadecki
HALL ARBERY GILLIGAN
4987 E County Highway 30A
Santa Rosa Beach, FL 32459
jsniadecki@hagrslaw.com

Mark Leonard Bonfanti
SEAGROVE
4987 E. Hwy 30-A
Santa Rosa Beach, FL 32459
mbonfanti@ghrslaw.com
Counsel for the State Attorney

I further certify that I served an electronic copy of the foregoing by sending it by email to counsel below:

Glen A. Bassett
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
400 S. Monroe St., PL-01
Tallahassee, FL 32399
Glen.Bassett@myfloridalegal.com
Counsel for the FEC Commissioners and the Attorney General

Dated: June 16, 2021

/s/ Owen Yeates
Owen Yeates