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 SUPPLEMENTAL BRIEF ON QUALIFIED IMMUNITY

Pursuant to this Court's order (ECF No. 52), Plaintiff Kells Hetherington submits the following supplemental brief addressing *Michigan v. DeFillippo*, 443 U.S. 31 (1979), and its progeny. *DeFillippo* does not control whether the FEC Defendants may claim qualified immunity, because the Supreme Court has already subsumed within its qualified immunity test all the relevant considerations before it in that case. And under the Supreme Court's test, the FEC Defendants should not receive qualified immunity.

The Supreme Court has repeatedly reiterated two considerations as its binding standard "for resolving . . . qualified immunity claims." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). First, a court must evaluate "whether the facts alleged show the officer's conduct violated a constitutional right." *Id.* (internal quotation marks omitted). Second, "the court must decide whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Id.* (internal quotation marks omitted).

The Supreme Court has toyed with the order in which courts must address the test's prongs, but it has not changed them. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, (1998) (recommending that courts first evaluate if a right was violated, then if the right was clearly established before government action); *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts to follow that order); *Pearson*, 555 U.S. at 236 (allowing discretion in order). But, regardless of the prongs' order, this is the Supreme Court's long-time and current test for qualified immunity. *See, e.g., Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (noting two prongs); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (same).

To trigger this analysis, government officials must, under Eleventh Circuit precedent, first establish that they are acting within their discretionary authority when they committed the constitutional violation, which the FEC Defendants have not argued or established here. *See*, *e.g.*, *Carollo v. Boria*, 833 F.3d 1322, 1328 (11th Cir. 2016) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). Only then does the burden for the two-prong test shift to the plaintiff. *Id.*; *see also Carruth v. Bentley*, 942 F.3d 1047, 1054 (11th Cir. 2019) (noting two-prong test); *Taylor v. Hughes*, 920 F.3d 729, 732 (11th Cir. 2019) (same); *Gaines v. Wardynski*, 871 F.3d 1203, 1208 (11th Cir. 2017).

The Eleventh Circuit has frequently applied the standard for qualified immunity but infrequently mentioned *DeFillippo*. Except for law enforcement cases raising questions about arrests, where *DeFillippo* may be directly on point, there is no reason to do so.[1] The

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[1] *See, e.g.*, *Cooper v. Dillon*, 403 F.3d 1208, 1212-13, 1220-21 (11th Cir. 2005) (citing *DeFillippo* regarding arrest of reporter); *Harrison v. Deane*, 426 F. App'x 175, 176, 179-81 (4th Cir. 2011) (addressing *DeFillippo* regarding arrest for cursing at an officer); *Leonard v. Robinson*, 477 F.3d 347, 354 (6th Cir. 2007) (addressing *DeFillippo* regarding arrest for swearing at a town meeting); *Lederman v. United States*, 291 F.3d 36, 39-40, 47 (D.C. Cir. 2002) (addressing *DeFillippo* regarding

second prong of the Supreme Court's qualified immunity test already embraces *DeFillipo*'s statements about qualified immunity, as shown in one of the Eleventh Circuit's infrequent uses of *DeFillippo*. In *Cowart v. Enrique*, 311 F. App'x 210, 215 (11th Cir. 2009), the court examined *DeFillippo* as part of the second prong. *DeFillippo*'s statement that "enactment of a law forecloses speculation by" government officials, *DeFillippo*, 443 U.S. at 38, is equivalent to the principle that officials do not have "to be creative or imaginative in drawing analogies from previously decided cases," *Cowart*, 311 F. App'x at 215 (internal quotation marks omitted). And the requirement that officials have "fair warning," *id.*, covers *DeFillippo*'s exception for "a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws," *DeFillippo*, 443 U.S. at 38.

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arrest for demonstrating on Capitol building sidewalks); *Grossman v. City of Portland*, 33 F.3d 1200, 1202, 1209-10 (9th Cir. 1994) (addressing similar principles regarding arrest for demonstrating in a park without a permit); *cf. Muniz v. City of San Antonio*, 476 F. Supp. 3d 545, 551-52, 565 (W.D. Tex. 2020) (addressing citation by police for distributing literature in restricted area during sporting event); *Dumiak v. Vill. of Downers Grove*, 475 F. Supp. 3d 851, 853, 855 (N.D. Ill. 2020) (addressing *DeFillippo* regarding citation for panhandling).

Mr. Hetherington has met his burden under qualified immunity's two-prong test. In his preliminary injunction briefing he demonstrated that Florida's law violates his First Amendment rights, and this Court already held that he has "demonstrated a substantial likelihood of success on the merits." Order at 14 (ECF No. 51). And any presumption of constitutionality disappears in the First Amendment context. *Cf. Wollschlaeger v. Governor*, 848 F.3d 1293, 1331 (11th Cir. 2017) ("As a general rule, if the government seeks to regulate speech based on content, the usual presumption of constitutionality afforded congressional enactments is reversed; content-based regulations are presumptively invalid under the First Amendment." (internal quotation marks omitted)); *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014) (holding that the normal presumption of constitutionality of enacted laws does not apply to infringement of First Amendment rights); *Ass'n of Cmty. Orgs. for Reform Now v. Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) (same); *Citizens for Better Env't v. Schaumburg*, 590 F.2d 220, 224 (7th Cir. 1978) (same).

Furthermore, the FEC Defendants cannot claim the benefit of *DeFillippo*'s presumption of constitutionality because they had "'fair warning' that their alleged conduct was unconstitutional." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). That is, qualified immunity's "protections do not extend to one who 'knew or reasonably should have known that the action he took . . . would violate the [plaintiff's] constitutional rights.'" *Jones v. Fransen*, 857 F.3d 843, 851 (11th Cir. 2017) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

The Eleventh Circuit has given a clear test to determine whether the FEC defendants had fair warning that Florida's speech restriction is unconstitutional—of whether a "person of reasonable prudence would be bound to see its flaws," to use *DeFillippo*'s parlance. 443 U.S. at 38. A plaintiff may demonstrate fair warning by pointing to "binding precedent that is materially similar," to "a broader, clearly established principle that . . . should control the novel facts [of the] situation," or to "conduct [that] lies so obviously at the very core of what the [First Amendment] prohibits that the unlawfulness of the conduct was readily

apparent to the official." *Jones*, 857 F.3d at 852 (internal quotation marks omitted).

Several of the cases this Court cited to hinged on the strong protections given to political speech. Indeed, in *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), the Sixth Circuit held that—because jurisprudence about "merely advocat[ing] an idea . . . is decades old" and because "of the prominent position that free political speech has"—"it cannot be seriously contended that any reasonable peace officer" could enforce a restriction applied to political speech. *Id.* at 361; *cf. Harrison v. Deane*, 426 F. App'x 175, 180 (2011) (distinguishing *Leonard* because plaintiff "was not arrested for [violating law] while advocating a political position"). On the other hand, another case this Court cited to involved commercial activity, which generally receives less scrutiny and where the protections are less clear. *See Connecticut ex rel. Blumenthal*, 346 F.3d 84, 87 (2d Cir. 2003) (granting qualified immunity for restrictions on commercial activity). And in another case this Court identified the protections were even less clear, requiring the court there to confront questions about the type of forum the

government had created on leased property, as well as multiple compelling state interests. *See Cantrell v. Rumman*, No. 04 C 3041, 2005 U.S. Dist. Lexis 9512, at *30-34 (N.D. Ill. Feb. 9, 2005); *id.* at *50 (noting "the difficulty in making our determination . . . given the competing and compelling interests").

This case involves not just protected political speech, but candidate speech. And the Supreme Court has made clear for 45 years that a candidate has the right "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. This right guarantees to candidates "the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues." *Id.* at 52-53; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (noting "right to engage in unfettered political speech").

The Supreme Court has struck down both direct and indirect attempts to limit this strongly protected right. In *Brown v. Hartlage*, 456 U.S. 45 (1982), despite assertions of a need to secure election integrity, the Court struck down a law that prohibited candidate

pledges to turn down part of their government salaries. The Court rejected any possibility that "the protection of the First Amendment" might diminish "when [a candidate] declares himself for public office." *Id.* at 53. To the contrary, the First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," guaranteeing candidates "the unfettered opportunity to make their views known." *Id.* (internal quotation marks omitted). Just like Florida, Kentucky sought "to restrict directly the offer of ideas by a candidate to the voters." *Id.* And like Florida's law, this restriction on what a candidate could say could not stand when confronted with candidates' clear and powerful right to advocate for themselves without legislative fetter.

This unfettered speech guarantee also invalidates indirect restrictions on candidate speech. In both *Buckley* and *Davis*, the Supreme Court struck down attempts to indirectly regulate candidate speech by controlling the funds that they could use. *See Buckley*, 424 U.S. at 54 (holding that "the First Amendment simply cannot tolerate [the law's] restriction upon the freedom of a candidate to speak without

legislative limit on behalf of his own candidacy"); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (invalidating law that "require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations").

For 45 years the Supreme Court has been clearly stating that candidate speech must be unfettered and without legislative limit. And it has struck down not only direct proscriptions on what candidates may say, but even indirect restrictions on their speech. These cases both established broad principles against restrictions on candidate speech and, with *Brown*, constituted materially similar precedent. *See Jones*, 857 F.3d at 852. The FEC Defendants had ample fair warning in the history of campaign finance law that this was a law they should not enforce.

Furthermore, the Supreme Court's recent decisions on content-based restrictions established a "broader, clearly established principle that" fairly warned the FEC Defendants. *Jones*, 857 F.3d at 852 (internal quotation marks omitted). The government loses any presumption of

constitutionality when it passes a content-based law, as such laws "are presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). And *Reed* made clear that the government could no longer get a pass on content-based laws by asserting a content-neutral, beneficent purpose for the law. *Id*. at 165-66. If the law is content based on its face, then it is presumptively unconstitutional.

The speech restriction here is content based in at least two ways. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 163. Here, the law applies only to speech that "state[s] the candidate's political party affiliation." Fla. Stat. § 106.143(3).

Second, to know if Florida's speech restriction applies, the FEC Defendants have to examine a candidate's message. But a law is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks omitted). As one of the cases cited by this

Court noted in denying qualified immunity, a long line of cases "have placed the . . . constitutional question beyond debate," that content-based restrictions like Florida's are unconstitutional. *Dumiak*, 475 F. Supp. 3d at 855 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Given the multiple ways in which Florida's speech restriction is content based, and the Supreme Court's clear precedent, the FEC Defendants had more than fair warning that their law was presumptively unconstitutional as a content-based law. *See also Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("neither are they free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation"); Hetherington Resp. to FEC Defendants' Motions to Dismiss at 15-17 (ECF No. 46).

Accordingly, whether under *DeFillippo*'s "grossly and flagrantly unconstitutional" standard or qualified immunity's fair warning requirement, the precedent and principles striking down restrictions on candidate speech and content-based speech were clear. The FEC

Defendants could not assume the constitutionality of § 106.143(3), and they are not now entitled to qualified immunity.

Mr. Hetherington acknowledges that qualified immunity, though inapplicable here on the present facts, remains a viable doctrine that binds this Court. Nonetheless, Hetherington respectfully maintains that the doctrine of qualified immunity is unlawful and should be reconsidered by the Supreme Court. The doctrine has become unmoored from the immunities available under the common law at the time the Civil Rights Act of 1871 was passed, and it thus contradicts Congressional intent as to the scope of 42 U.S.C. § 1983 and the immunities from it. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in the judgment) (explaining that qualified immunity doctrine lacks statutory authority because it no longer requires a common law basis for immunity). And the FEC Defendants have not demonstrated a tradition under the common law of allowing the government to restrict candidates' right to advocate for themselves, much less one prohibiting candidates from sharing their membership in a political party. Accordingly, they are not entitled to

qualified immunity under the test as it now stands nor under a reconsidered standard.

Dated: August 11, 2021

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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 2,353 words, exclusive of the case style, signature block, and certificates.

Dated: August 11, 2021

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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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