UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON,

Plaintiff,

v. Case No: 3:21-CV-671-MCR-EMT

LAUREL M. LEE, in her official capacity as Florida Secretary of State, ASHLEY MOODY, in her official capacity as Florida Attorney General; GINGER BOWDEN MADDEN, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, Florida; JONI ALEXIS POITIER, in her individual capacity and official capacity as member and Vice Chair of the Florida Elections Commission; BARBRA STERN, KYMBERLEE CURRY SMITH, JASON TODD ALLEN, and J. MARTIN HAYES, in their individual capacities and official capacities as members of the Florida Elections Commission,

Defendants.
_____/

DEFENDANT SECRETARY OF STATE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND SUPPORTING MEMORANDUM

At issue in this case is the constitutionality of a state statute imposing certain speech-related restrictions on candidates running for nonpartisan office. Defendant, Florida Secretary of State Laurel

M. Lee, moves to dismiss the Complaint against her with prejudice pursuant to Federal Rule of Civil Procedure Rule 12(b)(1). The Secretary does not enforce the challenged provision, section 106.143(3), Florida Statutes, and consequently, there is no standing against her to establish subject-matter jurisdiction. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1241 (11th Cir. 2020) (vacating and remanding with instructions to dismiss with prejudice where Secretary "does not enforce the challenged law"). Regardless, the Secretary would not be a proper defendant under the *Ex Parte Young* exception to Eleventh Amendment immunity because she does not even have "*some* connection" with the enforcement of the provision and is not "responsible for" any enforcement against Plaintiff Hetherington. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (emphasis added).

I. BACKGROUND

Hetherington has brought a one-count Complaint challenging section 106.143(3) as invalid, both facially and as applied to him, under the First Amendment's free speech clause, as incorporated through the Fourteenth Amendment's due process clause. DE 1 ¶¶

26-28. The Secretary, the Attorney General, the State Attorney for the First Judicial Circuit, and members of the Florida Elections Commission ("FEC") are all Defendants in their official capacities. DE 1 ¶¶ 6-13. Hetherington seeks a declaration that the statute is unconstitutional on its face and as applied to him, and seeks an injunction against its enforcement. DE 1 at 10-11.[1]

In pertinent part, section 106.143(3) prohibits a "candidate for nonpartisan office" from "campaigning based on party affiliation." A "nonpartisan office" is by definition "an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." Fla. Stat. § 97.021(23). Chapter 105 of the Florida Elections Code, entitled "Nonpartisan Elections," provides that "school board members are nonpartisan offices." *Orange Cty. v. Singh*, 268 So. 3d 668, 672 (Fla. 2019).

In 2018, Hetherington was a candidate for the nonpartisan office of "Escambia County School Board" and publicly "described himself as a 'lifelong Republican' in his candidate statement at the

[1] Monetary relief is also sought, but only against the FEC.

website of the Escambia County Supervisor of Elections." DE 1 ¶ 16; DE 12-2 ¶ 3. A complaint was filed with the FEC and the FEC determined that Hetherington's statement violated section 106.143(3). DE 12-5 ¶¶ 6, 9; DE 12-2 ¶¶ 4, 6; DE 1 ¶¶ 17-18. The FEC ultimately fined Hetherington $200 for that violation. DE 12-5 at 5; DE 12-2 ¶ 6; DE 1 ¶18. Hetherington is now a candidate for the same office in the 2022 election and, but for the challenged provision, intends on making the same statement—that he is a "lifelong Republican"—again and in a variety of additional situations. DE 1 ¶¶ 19-21; DE 12-2 ¶¶ 9-12.

II. ARGUMENT

Before reaching the merits of a dispute, "no matter how weighty," a court must ensure that it has subject-matter jurisdiction. *Lewis v. Governor of Ala.*, 944 F. 3d 1287, 1296 (11th Cir. 2019) (en banc). "For a court to pronounce upon . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998). There are two elements of subject-matter jurisdiction missing from this action as against the Secretary: (1) Hetherington's standing and

(2) an *Ex Parte Young* exception to the Secretary's Eleventh Amendment immunity. Both elements are lacking because Defendant FEC is the entity "vested" with enforcement authority over the challenged provision and it alone did actually enforce that provision against Hetherington. Fla. Stat. § 106.25(1); DE 12-5 (FEC Final Order holding that Plaintiff violated § 106.143(3) and fining him $200); DE 1 ¶¶ 9-13, 18 (FEC members are each "vested with authority to investigate and determine violations of Chapter 106" and have "enforced the challenged provision against Plaintiff"). The Court should therefore dismiss this action as against the Secretary with prejudice.

A. There is No Standing Against the Secretary

The standing doctrine's necessary components are threefold: (1) "injury-in-fact," (2) "traceability," and (3) "redressability." *Lewis*, 944 F.3d at 1296; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Hetherington's injury—that he cannot campaign for nonpartisan office on the basis of party affiliation—is neither traceable to the Secretary nor redressable by relief against her. The only allegations against the Secretary are that her Division of Elections "is responsible for prescribing rules and regulations to

carry out the provisions of Florida's campaign-finance laws," DE 1 ¶ 6, and has many years ago "interpreted" the challenged provision under its advisory opinion authority, DE 1 ¶ 15. The Eleventh Circuit recently rejected these bases for standing because they "say[] nothing about whether [the Secretary] 'possess[es] authority to *enforce* the complained-of provision.'" *Jacobson*, 974 F.3d at 1257 (quoting *Lewis*, 944 F.3d at 1299) (third alteration in original). The *Jacobson* decision is important and instructive here, but it is enough to point out that Hetherington does not allege any injury caused by the Division's rulemaking or advisory opinion functions or request any relief regarding them. Hetherington's injury and request for relief concern only Defendant FEC—i.e., the body tasked with enforcing the challenged provision.

1) Hetherington's injury is not traceable to the Secretary

Hetherington's injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). "The problem" for Hetherington is that "Florida law tasks the [FEC], independently of the Secretary," with enforcement of the challenged provision against

him. *See Jacobson*, 974 F.3d at 1253. The FEC, and not the Secretary, determines violations and imposes penalties. Fla. Stat. § 106.25 ("vest[ing]" in the FEC "[j]urisdiction to investigate and determine violations of [Chapter 106]"); Fla. Stat. § 106.265 ("authoriz[ing]" the FEC to "impose civil penalties" upon "the finding of a violation of [Chapter 106"). As to Hetherington specifically, the FEC has previously determined Hetherington violated the statute and imposed a penalty. DE 12-5; DE 1 ¶¶ 9-13, 18. The Secretary was not a party to that enforcement action and the FEC did not need her to be a party.

2) Hetherington's injury is not redressable by relief against the Secretary

Against the Secretary, Hetherington requests only an injunction prohibiting her from "enforcing" the provision against campaigning for partisan office on the basis of party affiliation, and a declaration that the provision is invalid. DE 1 at 10-11. A "settled principle" of redressability is that "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis*, 944 F.3d at 1301. Because the Secretary does not enforce

the challenged provision, neither an injunction against its enforcement by *her*, nor a declaratory judgment against *her*, would redress Hetherington's injury. Many of the reasons that Hetherington's injury is not traceable to the Secretary (evaluated above) also indicate that relief against her will not redress that injury. Traceability and redressability overlap in this way as "two sides of a causation coin." *E.g. Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997).

B. There is No *Ex Parte Young* Connection with, or Responsibility of, the Secretary to Abrogate Her Eleventh Amendment Immunity

Without standing, the Court lacks subject-matter jurisdiction and can dismiss the action without addressing whether the Secretary is a proper defendant under *Ex Parte Young*'s exception to Eleventh Amendment immunity. *Ex Parte Young*, 209 U.S. 123, 168 (1908); *see Lewis*, 944 F.3d at 1306 ("Because we conclude that plaintiffs lack standing, we need not—may not—proceed to consider . . . whether the Attorney General is a proper defendant under *Ex Parte Young*[.]"); *Jacobson*, 974 F.3d at 1256 (finding "no occasion to consider whether the Secretary is a proper defendant under *Ex Parte Young*" because the plaintiffs lacked standing). In

any event, the exception does not apply here, giving the Court another, independent reason to dismiss with prejudice.

"The Eleventh Amendment to the Constitution bars federal courts from entertaining suits against states." *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F. 3d 1298, 1302 (11th Cir. 2005). *Ex Parte Young* provides an "exception to this rule for suits against state officers . . . to end continuing violations of federal law." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000). However, the *Ex Parte Young* exception applies "only when those officers are 'responsible for' a challenged action and have 'some connection' to the unconstitutional act at issue." *Women's Emergency Network*, 323 F.3d at 949. Even partial responsibility to enforce is insufficient. *Id.* "Where the named defendant lacks any responsibility to enforce the statute at issue, 'the state is, in fact, the real party in interest,' and the suit remains prohibited by the Eleventh Amendment." *Osterback v. Scott*, 782 Fed. App'x. 856, 859 (11th Cir. 2019) (quoting *Summit Med. Assocs. P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999)). The FEC is tasked by Florida law with enforcing the challenged provision, and has

actually enforced it against Hetherington, notably, *without* the Secretary's involvement. The Secretary therefore lacks even "some connection" to enforcement and is not "responsible for" any penalty imposed by the FEC. The *Ex Parte Young* exception does not apply and the Secretary therefore maintains her immunity from suit.

C. Any Binding Nature of an Advisory Opinion on the FEC is Insufficient for Standing or an *Ex Parte Young* Exception to Immunity

The binding nature of a Division of Elections' advisory opinion on the FEC was raised by opposing counsel during conference. *See* Fla. Stat. § 106.26(13). Although not at all alleged as a basis for jurisdiction, *see* DE 1 ¶ 6 (alleging only the Secretary's rulemaking authority under sections 20.10, 106.22, and 106.23, Florida Statutes), or related in any way to the requested relief, *see* DE 1 at 10-11 (requesting only the prohibition against enforcement of section 106.143(3)), it is worth addressing the issue to illustrate the lack of justiciability and futility of amendment.

The Division of Elections, which is within the Department the Secretary heads,[2] has the authority to issue advisory opinions

[2] Fla. Stat. § 20.10.

"relating to any provisions or possible violations of Florida election laws with respect to actions" the requestor[3] "has taken or proposes to take." Fla. Stat. § 106.23(2). The opinion is binding on the requestor and, if the requestor "act[s] in good faith upon such advisory opinion" issued to them, they are immune from even criminal penalty. *Id.*; *see also Jones v. Governor of Florida*, 975 F.3d 1016, 1049 (11th Cir. 2020) (recognizing that Florida's "advisory-opinion process and accompanying immunity from criminal prosecution" is available to felons before registering to vote). Consequently, the FEC "may not issue advisory opinions and must, in all its deliberations and decisions, adhere to statutory law and advisory opinions of the [Division of Elections]." Fla. Stat. § 106.26(13). The advisory opinion therefore provides what the FEC has called a "safe harbor" for requestors. *FEC v. MCEA*, FEC 99-051, ¶ 42 (Final Order May 17, 1999) (describing the advisory

[3] The requestor must be a "supervisor of elections, candidate, local officer having election-related duties, political party, affiliated party committee, political committee, or other person or organization engaged in political activity." Fla. Stat. § 106.23(2).

opinion as a "'safe harbor' for those in doubt about their duties").[4] Since 1997, the FEC has otherwise been an independent agency—from the Division and Department of State, and every other governmental entity. Laws of Fla. Ch. 97-13; *see* Florida House Committee on Election Reform, *A Review of the Florida Elections Commission*, at 1 & n.4, 20 (Dec. 1999) ("FEC was granted autonomy in 1997" and "remains the central election law enforcement agency but now a separate body from the Division" and "responsible for performing all functions necessary of an independent body"); *see id.* at 1, 4-12 (describing the need for the FEC's independence).

In Hetherington's FEC Final Order, the Division is referenced in the "Facts" section as having "issued [two] advisory opinions" regarding "the interpretation of section 106.143(3)." DE 12-5 ¶ 5.[5]

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[4] Available at: http://www.fec.state.fl.us/FECWebFi.nsf/0/4E9BAA918F0FE82385257D04005FD7E3/$file/99-051.pdf.

[5] Substantively, the opinions offered little beyond the express language or logical extent of the now-challenged provision. The first opinion merely concluded that the requesting nonpartisan candidate "may not publicly represent or advertise [them]self as a member of any political party." DE 12-3 at 3. That is not a leap from the provision's: "A candidate for nonpartisan office is prohibited from campaigning based on party affiliation." Fla. Stat. §

But Hetherington was not the requestor of either advisory opinion; the advisory opinions were therefore not binding on Hetherington. *See* DE 12-3 & 4. To be sure, the opinions were issued eight (8) and fifteen (15) years prior to Hetherington's 2018 candidacy. Any binding nature of an advisory opinion on the FEC is therefore insufficient for standing or application of *Ex Parte Young* here because Hetherington never requested or received an advisory opinion. *See Lewis*, 944 F.3d at 1297 (rejecting Alabama Attorney General's advisory opinion authority as sufficient for standing where no one requested an opinion). A Division advisory opinion is binding only on the *requestor* and the FEC has rejected safe harbor for those who did not request the relied-upon opinion. *Schreiber v. FEC*, No. 01-1293, 2001 WL 1113253, *11 (Fla. DOAH Sept. 19, 2001) ("Petitioner did not request either opinion referenced herein and, therefore, is not bound by either opinion"). Even if Hetherington had requested an opinion, the Division could not have opined as to the constitutionality of any election provision; only its

106.143(3). The second opinion merely concluded that the terms "candidate" and "campaigning" in the provision meant that the prohibition did not extend to officeholders "unless and until they again become a 'candidate'." DE 12-4 at 3-4

interpretation of the provision and application to the requestor. *E.g.*, DE 13-05.[6]

An order by this Court to require the Division (through the Secretary) to opine or adopt a rule that the challenged provision is unconstitutional would be an "oddity" and "seeming[ly] superfluous[]" to an injunction against the enforcing authority. *Lewis*, 944 F.3d at n.11. It would be "doubtful that a federal court would have authority to order it" in any event. *Jacobson*, 974 F.3d at 1257 (regarding an injunction requiring the Secretary to promulgate a rule requiring the Supervisors to act contrary to Florida law); *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 241-42 (5th Cir. 2020) (explaining that court cannot control Secretary in her exercise of discretionary functions to "issue particular advisories"). Nor could the Court require the two previous opinions to be withdrawn. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (dismissing complaint for order against Director "to withdraw [his] advice to the federal agencies"). The *Ex Parte Young* exception would not allow it. *Va. Office for Prot. & Advocacy v. Stewart*, 563

[6] Available at: https://opinions.dos.state.fl.us/searchable/pdf/2013/de1305.pdf.

U.S. 247, 255 (2011) (explaining that the exception "is limited to that precise situation" where the court "commands the state official to do nothing more than refrain from violating federal law"). Amendment to add these types of relief would therefore be futile.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint against the Secretary with prejudice.

Respectfully submitted this 1st day of June, 2021.

/s/ Ashley E. Davis
BRADLEY R. MCVAY (FBN 79034)
General Counsel
brad.mcvay@dos.myflorida.com
ASHLEY E. DAVIS (FBN 48032)
Deputy General Counsel
ashley.davis@dos.myflorida.com
candice.edwards@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Suite 100
500 South Bronough Street
Tallahassee, Florida 32399-0250
Phone: (850) 245-6536
Fax: (850) 245-6127

Counsel for Secretary of State

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 1st day of June 2021.

/s/ Ashley E. Davis
Attorney