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

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, Ginger Bowden Madden, in her official capacity as the State Attorney for the First Judicial Circuit in and for Escambia County, Florida (the "State Attorney") submits her response in opposition to Plaintiff's Motion for Summary Judgment and in support thereof states the following:

I. INTRODUCTION

Plaintiff filed his Complaint alleging that he stands in fear of enforcement of Fla. Stat. § 106.143(3) by the Florida Secretary of State, Laurel M. Lee (the "Secretary"), the Florida Attorney General, Ashley Moody (the "Attorney General"), the State Attorney, and five (5) members of the Florida Elections Commission (the "FEC Defendants") both in their individual and official capacities.

This Court dismissed Plaintiff's claims as to the Secretary and the Attorney General but declined to dismiss Plaintiff's claims filed against the State Attorney and the FEC Defendants. Plaintiff's claims arise from Plaintiff's previous campaign for Escambia County School Board where he stated during his campaign that he is a "lifelong Republican." After receiving a complaint regarding Plaintiff's statement, an investigation was conducted and directed solely by the FEC. After the FEC completed its investigation, the FEC issued a finding of probable cause for violations of Fla. Stat. § 106.143(3) and fined Plaintiff for his violation.

Plaintiff's complaint details the FEC's investigation, its determination of probable cause, and its issuance of a fine against Plaintiff without any reference to the State Attorney whatsoever. The reason for this is because Plaintiff is well aware that the State Attorney was not involved in the previous enforcement of Fla. Stat. § 106.143(3) because the State Attorney was not then and is still not authorized by law to enforce (i.e., issue fines or criminal penalties) the provisions of Fla. Stat. § 106.143(3). *See* Fla. Stat. §106.265. In Plaintiff's Motion for Summary Judgment, he references the "FEC" approximately twenty-eight (28) times detailing the nature of the investigation, finding of probable cause, issuance of fines, and other actions taken by the FEC as the enforcement authority of Fla. Stat. § 106.143(3). In contrast, Plaintiff references the State Attorney four (4) times, none of which support a basis for the State Attorney being an alleged enforcement authority of the challenged

statute. Indeed, Plaintiff did not provide any substantive argument which would show that the State Attorney is appropriately before this Court.

Notwithstanding, Plaintiff has maintained his suit against the State Attorney and the FEC Defendants stating that he fears enforcement of Fla. Stat. § 106.143(3) in the upcoming non-partisan election for Escambia County School Board. Plaintiff attempts to challenge the non-partisan aspect of the school board election because he desires to run based on his party affiliation which is expressly prohibited by Fla. Stat. §§ 106.143(3) and §97.021(23)[1], as well as Florida's Constitution[2]. Importantly, the challenged statute seeks to protect the integrity of Florida's nonpartisan elections by forbidding Plaintiff to campaign as the republican candidate. Plaintiff challenges Fla. Stat. § 106.143(3) for the purpose of circumventing the nonpartisan nature of the school board election while being fully aware that he may speak on his past partisan experience, his opinion on important political issues, as well as his visions for the school board moving forward. Plaintiff is simply prohibited from campaigning based on his party affiliation which undoubtedly serves Florida's purpose of main ting the integrity of its nonpartisan elections and preventing unnecessary voter confusion.

[1] "Nonpartisan office" means an office for which a candidate is prohibited from campaigning or qualifying for election of retention in office based on party affiliation."

[2] "In each school district there shall be a school board composed of five or more members chosen by vote of the electors in a nonpartisan election . . ." Fla. Const. Art. IX, § 4(a)

Plaintiff's claims fail as a matter of law because the State Attorney is not the proper enforcing authority of Fla. Stat. § 106.143(3). Plaintiff's claims further fail because the statute is constitutional as applied to Plaintiff and is narrowly tailored to promote Florida's compelling interests in preserving its nonpartisan elections and preventing voter confusion.

II. MEMORANDUM OF LAW

A. The State Attorney is Not the Proper Enforcing Authority for Fla. Stat. § 106.143(3).

"Standing 'is the threshold question in every federal case, determining the power of the court to entertain the suit." *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F. 3d 1257, 1269 (11th Cir, 2006) (quoting *Warth v. Seldon*, 422 U.S. 490, 499 (1975)). "If at any point a federal court discovers a lack of jurisdiction, it must dismiss the action." *Jacobson v. Fla. Sec'y of State*, 974 F. 3d 1236, 1256 (11th Cir. 2020).

Plaintiff has maintained his lawsuit against the State Attorney under the premise that there is a "realistic danger" that the State Attorney may enforce §106.143(3) against the Plaintiff. As previously briefed and based on a reading of Fla. Stat. § 106.265, it is clear that the State Attorney is not justified by law to enforce any penalties relating to any alleged violations of Fla. Stat. § 106.143. Although the State Attorney is authorized to issue fines or criminal penalties for other sections within Chapter 106, the challenged statute is not one of them. *See e.g.*, *Towbin v.*

Antonacci, 885 F. Supp. 2d 1274, 1282 (S.D. Fla. 2012) (Plaintiff had standing to sue the State Attorney for credible threat of enforcement where Fla. Stat. § 106.08 specifically provided criminal penalties for violation of the statute). Indeed, after a search of lawsuits throughout Florida challenging the provisions Chapter 106, the only cases where the State Attorney was included as a Defendant were for those instances where the challenged statute provided criminal penalties for violations of such statute. *See Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694 (September 29, 1998) (constitutional challenge of Fla. Stat. §§ 106.085 (now repealed) and 106.071 which were punishable as misdemeanors and subject to criminal penalties for which the State Attorney was authorized by law to impose); *Gore Newspapers, Co. v. Sheven*, 397 F. Supp. 1253, 1255 (S.D. Fla. 1975) (constitutional challenge to Fla. Stat. § 106.16 which was punishable as a misdemeanor and subject to criminal penalties for which the Stat Attorney was authorized by law to impose); see also *Feliu v. Fernandez Rundle*, 2007 U.S. Dist. LEXIS 36217 (due process challenge to enforcement of Fla. Stat. §§ 106.15 and 106.19 where State Attorney pursued criminal action against Plaintiff for violations of the challenged statutes which were subject to criminal penalties). Although the court in *Cullen v. Cheal*, 586 So. 2d 1228, 1229 (Fla. 3d DCA 1991), relying on *Smith v. Tynes*, 412 So. 2d 295 (Fla. 1st DCA 1982), stated that the FEC and the State Attorney have enforcement jurisdiction over Chapter 106 generally, the

challenged statute in this case does not provide an avenue for enforcement by the State Attorney. In *Smith*, the Court specifically noted that the provisions of Chapter 106 relating to campaign finance provided civil and criminal penalties for such violations noting that a violation of those provisions was punishable as a misdemeanor or third-degree felony. 412 So. 2d at 927. The *Smith* court further noted that "[Fla. Stat. §] 106.265 provides for civil penalties, to be imposed by the Florida Elections Commission, for violations of Chapter 106." *Id*. In contrast, violations of Fla. Stat. § 106.143 are not punishable as misdemeanors or felonies, and instead are only subject to civil penalties pursuant to Fla. Stat. 106.265(1) and (2) which specifically state such fines are to be determined and issued by the FEC or in cases referred to the Department of Administrative Hearings, an administrative law judge.

As such, the State Attorney is entitled to Summary Judgment as she is not an enforcement authority of Fla. Stat. § 106.143(3) and is improperly before this Court.

B. Fla. Stat. § 106.143(3) is Constitutional as Applied to Plaintiff.

Here, the challenged statute imposes a slight burden on Plaintiff's speech by prohibiting Plaintiff from advertising for a nonpartisan position on the Escambia County School Board. Although Plaintiff demands that a strict scrutiny analysis applies, the fact that the burden imposed upon Plaintiff is slight requires triggers a lesser scrutiny analysis. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. Art. I, § 4, cl. 1, and they have even more power over local elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997) ("[The Elections Clause] invests the States with responsibility for the mechanics of . . . elections."). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. Accordingly, the Supreme Court applies the so-called *Anderson-Burdick* sliding scale test to "a wide variety of challenges to . . . state-enacted election procedures," including those implicating First Amendment rights. *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018). When deciding whether a state's election law violates the First and Fourteenth Amendment, a court must weigh the "character and magnitude" of the burden the state's statute imposes on those rights against the interests asserted by the state to justify such burden and consider the extent the state's concerns make the burden necessary. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 789). Where the encumbrance on a Plaintiff's First Amendment rights are *de minimis*, a rational relationship between advancing the state's interest and the law's effect will suffice.

EH Fusion Party v. Suffolk Cty. Bd. Of Elections, 401 F. Supp. 3d 376, 391 (E.D.N.Y 2019). "[T]he mere fact that a state's system creates barriers . . . does not itself compel close scrutiny." *Burdick*, 504 U.S. at 433.

Under this sliding scale analysis, Fla. Stat. § 106.43(3) strict scrutiny does not apply as the burden imposed on plaintiff is not severe and does not go beyond the mere inconvenience of Plaintiff not being allowed to campaign based on his party affiliation. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008). The challenged statute does not chill Plaintiff's political speech as to his opinions, previous experience, or intentions for future decisions while on the school board. Instead, the challenged statute merely prohibits Plaintiff from undermining the nonpartisan campaign process by prohibiting Plaintiff from campaigning based on political affiliation and/or misleading voters by insinuating he is the republican candidate for Escambia County School Board. As such, the challenged statute survives rational basis review as Florida has important regulatory interests in enforcing the provisions of Fla. Stat. § 106.143(3). Florida has set out in Fla. Stat. §§ 97.021(23) and 1001.361, that elections of member of Florida's district school boards shall be nonpartisan. Fla. Stat. § 106.143(3) ensures the sanctity of such nonpartisan elections by preventing candidates running for nonpartisan office from campaigning based on party affiliation. Removing politics from the election process in Florida's nonpartisan elections ensures the sanctity of the election process

ensuring that voters are able to view each respective candidate from a lens unclouded with party identification or false labels of party candidacy.

Even if the Court were to agree with Plaintiff that a strict scrutiny analysis is appropriate, the challenged statute still passes constitutional muster as it is narrowly tailored and is in furtherance of a compelling state interest, that is to minimize the impact of politics during the elections of those responsible for guiding Florida's students. Plaintiff has failed to meet his burden on summary judgment to present evidence that Fla. Stat. § 106.143(3) is unconstitutional as applied to him and summary judgment in Defendants' favor is appropriate.

C. Fla. Stat. § 106.143(3) is Narrowly Tailored and Serves a Compelling Interest.

The State Attorney is entitled to summary judgment in her favor as Fla. Stat. § 106.143(3) is narrowly tailored to serve the State's compelling interest in maintaining the integrity of its nonpartisan elections. The challenged statute is not over inclusive or underinclusive and Plaintiff's claims should be disposed of in their entirety.

Plaintiff's speech as to important issues or his political opinion is not stifled by Fla. Stat. § 106.143(3). Plaintiff may speak on his previous partisan experience, he can explain to potential voters that he is fiscally conscious, or what political opinions he agrees with or disagrees with throughout his campaign for Escambia County School Board. Plaintiff is merely prevented from running for Escambia

County School Board based on his party affiliation. The challenged statute serves Florida's compelling interest in maintaining its nonpartisan elections as it is nearly mirrored in Florida's Constitution as well as Fla. Stat. § 97.021(23). The importance of the preservation of nonpartisan offices through the regulation of partisan speech has frequently been recognized and it is without a doubt necessary to maintain Florida's interest in maintaining the integrity of its election process. The challenged statute does not rob Plaintiff of his ability to communicate substantive messages to potential voters throughout his campaign and Plaintiff continues to have great latitude in expressing his ideas and thoughts to Florida's voters.

Here, the burden on Plaintiff is slight. Plaintiff is merely prohibited from campaigning as a party candidate. Plaintiff is without question left with endless words, phrases, and statements that he can issue throughout his campaign to portray his "republican" ideas without improperly identifying himself as the republican candidate in a nonpartisan election. As such, Fla. Stat. § 106.143(3) is not overinclusive.

The challenged statute is also not underinclusive as its purpose is to maintain the integrity of Florida's nonpartisan elections during the campaign process. Thus, any restrictions regarding a candidate's party affiliation ends once the election process is finished and the school board members are elected. Although an underinclusive statute may bring doubt upon a challenged statute, *Republican Party*

of Minn. v. White, 536 U.S. 765, 780 (2002), the purpose of Fla. Stat. § 106.143(3) is served by its narrow tailoring to be inclusive of only the nonpartisan campaign process. Fla. Stat. § 106.143(3) merely restricts Plaintiff's ability to advertise or campaign for a nonpartisan schoolboard position based on his party affiliation. Plaintiff cannot provide any detail of any substance that he intends to communicate during his campaign other than his party affiliation. Instead, Plaintiff intends to circumvent the nonpartisan aspect of the election for school board to announce that he is a lifelong republican for the purpose of voters identifying him as the republican candidate in considering how to cast their votes – precisely what the challenged statute is intended to prevent.

It is clear that Fla. Stat. § 106.143(3) serves a compelling interest and Plaintiff has failed to present any evidence or facts to prove otherwise. The limitations that Fla. Stat. § 106.143(3) place on Plaintiff are slight and summary judgment should be granted in Defendants' favor.

III. CONCLUSION

Wherefore, for all of the reasons above and those provided in the State Attorney's Motion for Summary Judgment, summary judgment should be entered in favor of the State Attorney.

LOCAL RULE 7.1(F) CERTIFICATION

I CERTIFY that the pertinent part of this Motion does not exceed 2546 words.

CERTIFICATE OF SERVICE

I CERTIFY that on this 18th day of January 2022, the within and foregoing document has been filed using the CM/ECF System which will automatically serve all counsel of record.

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