UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON,

Plaintiff,

v. **CASE NO. 3:21-cv-671-MCR-EMT**

GINGER BOWDEN MADDEN, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, et al.

Defendants.
_____/

ORDER

This matter is before the Court on Defendants Joni Alexis Poitier, Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes' (collectively, the "FEC Defendants") motion to dismiss, ECF No. 39. The FEC Defendants argue that all of Plaintiff Kells Hetherington's claims against them must be dismissed for failure to state a claim under Rule 12(b)(6) and that Hetherington's individual capacity claims against them must be dismissed on qualified immunity grounds. On full consideration, the Court finds that the FEC Defendants' motion is due to be granted, in part, and denied, in part.

First, for the same reasons the Court found that Hetherington had demonstrated a substantial likelihood of success on the merits, *see* ECF No. 51, the

Court finds that Hetherington has plausibly alleged that § 106.143(3), Fla. Stat. violates the First Amendment to the United States Constitution. Defendants' motion to dismiss Hetherington's claims under Rule 12(b)(6) is therefore denied.

Second, the Court finds that the FEC Defendants are entitled to qualified immunity with respect to Hetherington's individual capacity claims against them. "Under the doctrine of qualified immunity, government officials acting within their discretionary authority are immune from suit unless the official's conduct 'violates clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.' " *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (citation omitted). "The Supreme Court has established a two-part test for determining whether an officer is entitled to qualified immunity, and the district court has discretion to determine in what order to address each part." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)). Under the first part of the test, "[t]he court must determine 'whether [the] plaintiff's allegations, if true, establish a constitutional violation.' " *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 736 (2002)). Under the second part of the test, "[t]he court must also determine whether the constitutional violation was clearly established." *Id.* If the plaintiff carries his burden to satisfy both parts of the test, then the officer is not entitled to qualified immunity. *See id.*

Hetherington does not allege that the FEC Defendants' enforcement of § 106.143(3) falls outside the scope of their discretionary authority. Thus, the burden shifts to Hetherington to demonstrate that the FEC Defendants' enforcement of § 106.143(3) violated his First Amendment rights and that, at the time of the violation, those rights were clearly established. *See Jackson v. McCurry*, 762 F. App'x 919, 925 (11th Cir. 2019). As previously stated, Hetherington has plausibly alleged that the FEC Defendants' enforcement of § 106.143(3) violated his First Amendment rights. Thus, the Court's analysis turns on whether the FEC Defendants' conduct violated clearly established law.

"An official's conduct violates clearly established law when 'the contours of [the] right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' " *Echols v. Lawton*, 913 F.3d 1313, 1323 (11th Cir. 2019) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The Court "consider[s] the official's conduct in 'the specific context of the case,' not as 'broad general proposition[s].' " *Id.* at 1323–24 (citation omitted). The Court also "ask[s] the 'salient question . . . whether the state of law at the time of [an official's conduct] provided 'fair warning,' to every reasonable official that the conduct clearly violates the Constitution." *Id.* (citation omitted).

"A plaintiff may 'demonstrate that the contours of the right were clearly established in one of three ways.' " *Jackson*, 762 F. App'x at 925 (quoting *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204 (11th Cir. 2012)). "First, a plaintiff may establish that 'a materially similar case has already been decided.' " *Id.* "Second, the plaintiff may 'point to a broader, clearly established principle that should control the novel facts of the situation.' " *Id.* "Third, 'the conduct involved in the case may so obviously violate the [C]onstitution that prior case law is unnecessary.' " *Id.* "The precedents that clearly establish law for these purposes are those of the Supreme Court, [the Eleventh Circuit], and the highest court of the state where the challenged action occurred." *Id.* at 925–26.

Hetherington relies on the second approach, arguing that longstanding Supreme Court precedent clearly establishes that content-based laws and restrictions on political speech are subject to strict scrutiny. *See* ECF No. 46 at 7, 20 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2014) ("Content-based laws—those that target speech based on its communicative intent—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."), *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' . . . ."), *Davis v. Fed. Election Comm'n*, 554 U.S. 724,

739 (2008) (explaining that the "resulting drag" from a statute on "First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice"), and *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) ("[I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and their positions on vital public issues before choosing among them on election day.")); *see also Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). While Hetherington is correct that longstanding Supreme Court precedent clearly establishes that § 106.143(3) is subject to strict scrutiny, this case involves the enforcement of a previously unchallenged and duly-enacted statute, and the Court is bound to follow the Eleventh Circuit's interpretation of the Supreme Court's statement in *Michigan v. DeFillippo* that "[t]he enactment of a law forecloses speculation by enforcement officials concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." 443 U.S. 31, 38 (1979).

In *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), the Eleventh Circuit, relying on *DeFillippo*, found that the defendant police officer was entitled to qualified immunity on the plaintiff reporter's individual capacity claims against him arising from the officer's arrest of the reporter for violating a Florida statute which made it a misdemeanor to disclose non-public information obtained as a participant in an internal investigation of law enforcement officers. *See* 403 F.3d at 1220. Although the Eleventh Circuit found that the statute was "an unconstitutional abridgement of core First Amendment rights," the court nonetheless reasoned that "it could not have been apparent to [the officer] that he was violating [the reporter's] constitutional rights" because "[a]t the time of [the reporter's] arrest, the statute had not been declared unconstitutional. . . . and [the officer] was entitled to assume that the current version [of the statute] was free of constitutional flaws."[1] *See id.* (citing *DeFillippo*, 443 U.S. at 38); *accord Cowart v. Enrique*, 311 F. App'x 210, 215–16 (11th Cir. 2009) ("The Deputies enforced a statute as it was enacted and therefore had no 'fair warning' that strict adherence to the Florida statutes would have them run afoul of the Constitution." (citing *DeFillippo*, 443 U.S. at 38)). The Eleventh

[1] Without explanation, Hetherington argues that *DeFillippo*'s reasoning is limited to "law enforcement cases raising questions about arrests." *See* ECF No. 56 at 3. The Court sees no reason why the principle articulated in *DeFillippo* is not applicable to the qualified immunity analysis in this case.

Circuit further reasoned that the statute was not " 'so grossly and flagrantly unconstitutional' that [the officer] should have known it was unconstitutional" because—as illustrated by the district court's determination that the statute was constitutional—"reasonable public officials could have differed as to the constitutionality of the statute prior to this case." *See Cooper*, 403 F.3d at 1220.

Thus, because the constitutionality of § 106.143(3) had not been challenged prior to this case, the FEC Defendants were entitled to assume that the statute was free from constitutional flaws. *See Cooper*, 403 F.3d at 1220; *Cowart* , 311 F. App'x at 215–16. Moreover, Hetherington has not met his burden to show that the challenged provisions of § 106.143(3) are "so grossly and flagrantly unconstitutional" that reasonable public officials should have anticipated their invalidation. Although Hetherington has demonstrated a substantial likelihood of success in demonstrating that the challenged provisions of § 106.143(3) fail strict scrutiny, the Florida legislature attempted to tailor the statute by permitting candidates for nonpartisan office to advertise their "partisan-related experience." The FEC Defendants were not required to speculate as to whether this attempt at tailoring would survive strict scrutiny.[2] *See Connecticut ex rel. Blumenthal v. Crotty*,

[2] As the dissent in *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007) put it, holding a state official to the standard of anticipating a court's later invalidation of a statute that was duly enacted

346 F.3d 84, 105 (2d Cir. 2003) ("Conducting a balancing test reflects a recognition that there are no absolutes in constitutional law and the balancing process, like the narrowly tailoring process inherent in it, is 'not an exact science.' . . . Accordingly, a reasonable officer cannot be expected to perform that analysis prior to enforcing a statute on the books in the execution of his official duties." (citation omitted)); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002) ("While we find the ban's sheer breadth astonishing, we recognize that the Police Board made some attempt at tailoring . . . . Although those qualifiers cannot begin to satisfy the narrow tailoring requirement, we think their inclusion in the ban keeps it from being 'so grossly and flagrantly unconstitutional' that the officers should have recognized its

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by legislators sworn to uphold the Constitution "risks placing him in the push-me-pull-me predicament of having to decide which duly enacted laws to enforce and which ones not to enforce on the pain of losing either way—because he is charged with dereliction of duty when he opts not to enforce the law and because he is charged with money damages when he does enforce the law." *See* 477 F.3d at 367 (Sutton, J., dissenting). Of course, this is not to say that state officials are *always* entitled to qualified immunity simply because they were enforcing duly enacted laws. *See Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority.") But the FEC Defendants' enforcement of § 106.143(3) cannot be said to be as "patently violative of fundamental constitutional principles" as the enforcement of the policies or orders behind the Holocaust or My Lai massacre. *See Grossman*, 33 F.3d at 1209; *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1117 n.15 (10th Cir. 2007) ("Only in the rarest of instances, as reflected in the standard set forth in *DeFillippo,* is an officer expected to question the will of the majority embodied in a duly, and democratically, enacted law; like courts before us, we decline to speculate as to the class of circumstances necessitating the exercise of such judgment.").

flaws." (citations omitted)). For these reasons, the Court finds that the FEC Defendants did not have "fair warning" that enforcing the challenged provisions of § 106.143(3) violated Hetherington's First Amendment rights. The FEC Defendants are therefore entitled to qualified immunity on Hetherington's individual capacity claims against them.

Accordingly, **IT IS ORDERED**:

1. The FEC Defendants' Motion to Dismiss, ECF No. 39, is **GRANTED, in part, and DENIED in part**.
2. The motion is **GRANTED** as to Hetherington's individual capacity claims against the FEC Defendants.
3. The motion is otherwise **DENIED**.

DONE AND ORDERED this 17th day of August 2021.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE