

**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; 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.

Case No. 3:21-cv-671

AMENDED
COMPLAINT

INTRODUCTION

1. The First Amendment guarantees the right of political candidates to share their views with the voting public. And few items of

information convey as much about a candidate's general leanings and outlook as the candidate's identification with a political party. Yet Florida officials fined Kells Hetherington \$200 for describing himself as a "lifelong Republican" to voters while running for the Escambia County School Board, in violation of Fla. Stat. § 106.143(3)—and they stand ready to punish him again under both §§ 106.143(3) and 97.021(23) should he make the same statement now that he is again a candidate for elected office.

2. Florida may establish non-partisan offices, but it cannot prohibit candidates from discussing their political views. The Court should strike down Florida Stat. §§ 106.143(3) and 97.021(23) and ensure that state officials stop violating Floridians' First Amendment rights.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331, because this action arises out of the First and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. § 1983, because it involves a deprivation of rights secured by the Constitution.

4. Venue for this action is proper in the Pensacola Division of the United States District Court for the Northern District of Florida because “a substantial part of the events [and] omissions giving rise to the claim occurred” and are occurring there and because a defendant resides within it. 28 U.S.C. § 1391; *see also* N.D. Fla. Loc. R. 3.1(B).

PARTIES

5. Plaintiff Kells Hetherington is a natural person and citizen of Pensacola, Florida. Mr. Hetherington ran for election to the Escambia County School Board in 2018 and is running again in the 2022 election.

6. Defendant Laurel M. Lee is sued in her official capacity as the Secretary of State of Florida. The Secretary—through the Division of Elections of the Department of State—is responsible for prescribing rules and regulations to carry out the provisions of Florida’s campaign-finance laws. *See* Fla. Stat. §§ 20.10, 106.22, and 106.23.

7. Defendant Ashley Moody is sued in her official capacity as the Attorney General of Florida. As the Attorney General, Defendant Moody is vested with the duty to direct and oversee state attorneys. *See* Fla. Stat. § 16.08.

8. Defendant Ginger Bowden Madden is sued in her official capacity as the State Attorney for the First Judicial Circuit in and for Escambia County, Florida. As the State Attorney, Defendant Bowden Madden is expressly vested with the duty to investigate and prosecute violations of state law, including election laws that occur in Escambia County. *See Fla. Stat. §§ 27.02 and 106.25(6).*

9. Defendant Joni Alexis Poitier is a member and Vice Chair of the Florida Elections Commission. As such, she is vested with the authority to investigate and determine violations of Chapter 106. *See Fla. Stat. §§ 106.24 and 106.25.* She has enforced the challenged provision against Plaintiff and stands ready to do so again. Defendant Poitier is sued in her official and individual capacities.

10. Defendant Barbara Stern is a member of the Florida Elections Commission. As such, she is vested with the authority to investigate and determine violations of Chapter 106. *See Fla. Stat. §§ 106.24 and 106.25.* She has enforced the challenged provision against Plaintiff and stands ready to do so again. Defendant Stern is sued in her official and individual capacities.

11. Defendant Kymberlee Curry Smith is a member of the Florida Elections Commission. As such, she is vested with the authority to investigate and determine violations of Chapter 106. *See Fla. Stat.* §§ 106.24 and 106.25. She has enforced the challenged provision against Plaintiff and stands ready to do so again. Defendant Smith is sued in her official and individual capacities.

12. Defendant Jason Todd Allen is a member of the Florida Elections Commission. As such, he is vested with the authority to investigate and determine violations of Chapter 106. *See Fla. Stat.* §§ 106.24 and 106.25. He has enforced the challenged provision against Plaintiff and stands ready to do so again. Defendant Allen is sued in his official and individual capacities.

13. Defendant J. Martin Hayes is a member of the Florida Elections Commission. As such, he is vested with the authority to investigate and determine violations of Chapter 106. *See Fla. Stat.* §§ 106.24 and 106.25. He has enforced the challenged provision against Plaintiff and stands ready to do so again. Defendant Hayes is sued in his official and individual capacities.

FACTS

Florida's Prohibition of Campaign Speech

14. Pursuant to Florida Statute § 106.143(3), “A political advertisement of a candidate running for nonpartisan office may not state the candidate’s political party affiliation. This section does not prohibit a political advertisement from stating the candidate’s partisan-related experience. A candidate for nonpartisan office is prohibited from campaigning based on party affiliation.”

15. Florida further defines “Nonpartisan office” as “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).

16. The Florida Department of State’s Division of Elections has interpreted § 106.143(3) to prohibit a nonpartisan candidate from “publicly represent[ing] or advertis[ing] [him]self as a member of any political party.” Fla. Div. of Elections, Advisory Opinion DE 2003-02 (Feb. 21, 2003), <https://bit.ly/2RxvpOR>. A candidate can at most share past experience with a party, “such as ‘executive committee of _____ party’ in campaign advertisements.” *Id.* But, once a candidate has won

nonpartisan office, she may publicly share her party affiliation (up until she is again running for office). Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010), <https://bit.ly/3gkP8vF>.

17. The Commission has also asserted that § 97.021(23) is an independent source of power to prohibit candidates from sharing their party affiliation with others during their candidacies. *See* FEC Mot. for Summary Judgment at 6-8, *Hetherington v. Madden*, No. 3:21-cv-671-MCR-EMT (N.D. Fla. Dec. 27, 2021), ECF No. 69.

Enforcement of Florida's Statute Against Plaintiff's Speech

18. Kells Hetherington ran for a nonpartisan seat on the Escambia County School Board in 2018. During that campaign, Mr. Hetherington described himself as a “lifelong Republican” in his candidate statement at the website of the Escambia County Supervisor of Elections.

19. In May of 2018, Michelle Salzman, a former Escambia County PTA council president, filed a complaint with the Florida Elections Commission (“FEC”) against Mr. Hetherington alleging multiple violations of Florida’s election laws. The FEC found probable cause to support one charge against Mr. Hetherington: for expressing his partisan affiliation.

20. On November 19, 2019, the FEC entered a decision ordering Mr. Hetherington to pay a \$500 fine for identifying himself as a Republican during the 2018 school board election campaign. Upon reconsideration in August 2020, the FEC reduced the fine to \$200. Mr. Hetherington paid the fine.

The Speech Prohibition's Continuing Impact on Mr. Hetherington

21. On March 30, 2021, Mr. Hetherington established his candidacy for the 2022 election to the Escambia County School Board by filing Form DS-DE 9, Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates, and he has established a primary campaign depository.

22. Mr. Hetherington intends to mention his party affiliation in his campaign but refrains from doing so because he fears enforcement of Fla. Stat. §§ 106.143(3) and 97.021(23) by Defendants. His current campaign would otherwise feature materially and substantially similar statements as his 2018 campaign. This would include sharing his partisan affiliation in his candidate statement at the website of the Escambia County Supervisor of Elections, and sharing that he is a

Republican in meetings and other conversations with voters and the media.

23. Mr. Hetherington also plans to run for nonpartisan office in future elections and will make materially and substantially similar statements about his party affiliation in those nonpartisan campaigns.

COUNT I:

RIGHT OF FREE SPEECH, U.S. CONST., AMENDS. I, XIV
42 U.S.C. § 1983

24. Plaintiff realleges and incorporates by reference paragraphs 1 through 23.

25. The First Amendment’s safeguards are at their “fullest and most urgent application to speech uttered during a campaign for political office.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

26. The First Amendment protects the “unfettered opportunity” of candidates “to speak without legislative limit on behalf of [their] own candidac[ies]” in order to help electors “intelligently evaluate the candidates’ personal qualities and their positions on vital public issues.” *Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976) (per curiam).

27. Therefore, “political speech must prevail against laws that would suppress it, whether by design or inadvertence.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

28. Fla. Stat. §§ 106.143(3) and 97.021(23) prohibit core political speech during an election campaign in violation of the First Amendment, and they are therefore facially invalid.

29. Fla. Stat. §§ 106.143(3) and 97.021(23) are invalid as applied to Mr. Hetherington’s expression of identification as a “lifelong Republican,” as the First Amendment guarantees his right to express his affiliation and other issues that might be important to voters during his campaigns for political office.

30. By enforcing Fla. Stat. §§ 106.143(3) and 97.021(23), Defendants, under color of law, are presently depriving Plaintiff of his right to free speech in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff is thus damaged in violation of 42 U.S.C. § 1983 and is therefore entitled to declaratory and injunctive relief against continued enforcement of Fla. Stat. §§ 106.143(3) and 97.021(23), nominal damages, and attorney’s fees and expenses under 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Kells Hetherington requests that judgment be entered in his favor and against Defendants as follows:

A. A declaration that Fla. Stat. §§ 106.143(3) and 97.021(23) are facially unconstitutional as they violate the First Amendment right of free speech;

B. A declaration that Fla. Stat. §§ 106.143(3) and 97.021(23), as applied to Mr. Hetherington's expression of affiliation with the Republican Party while running for nonpartisan public office, unconstitutionally violate the First Amendment right of free speech;

C. Preliminary and permanent injunctive relief barring Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing Florida Stat. §§ 106.143(3) and 97.021(23) or any successor sections thereto.

D. Preliminary and permanent injunctive relief barring Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing Florida Stat. §§ 106.143(3) and

97.021(23) or any successor sections thereto against Plaintiff Kells Hetherington's expression of identification with the Republican Party while running for nonpartisan public office;

E. Against Defendants Poitier, Stern, Smith, Allen, and Hayes, nominal damages in the amount of \$17.91.

F. Attorney's fees and expenses pursuant to 42 U.S.C. § 1988;

G. Ordinary taxable costs of suit; and

H. Any other relief this Court may grant in its discretion.

Respectfully submitted,

s/ Owen Yeates

Owen Yeates (pro hac vice)

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