UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON,
Plaintiff,

CASE NO: 3:21-CV-671-MCR-EMT

v.
LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,
Defendants.
_____/

FEC DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO THE FEC DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Joni Alexis Poitier, Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes (collectively, "FEC Defendants"), by and through undersigned counsel, hereby reply to Plaintiff Kells Hetherington's ("Plaintiff" or "Hetherington") Opposition to FEC Defendant's Motion for Summary Judgment (DE #72), and state as follows:

INTRODUCTION

Florida law prevents Plaintiff from campaigning or advertising as a "lifelong Republican" in a local schoolboard election. Plaintiff attacks one portion of one statute in this lawsuit – § 106.143(3), Fla. Stat. Florida's statute prohibits just one thing: using a political party label in advertising and campaigning in certain nonpartisan elections. Although Plaintiff argues that this is a content-based

restriction on speech, it is merely a restriction on the use of party labels. Moreover, the prohibition is not a limitation on Plaintiff expressing ideas, messages, or statements of any kind on any issue – just the party label. It is a limitation on a label, and this label has no established meaning. Surely, Plaintiff has not provided a meaning. Notwithstanding Plaintiffs' Response, this Court should grant summary judgment in favor of the FEC Defendants because: (i) Plaintiff cannot dispute the relevant facts that compel judgment in favor of the FEC Defendants, (ii) nonpartisan elections are constitutionally proper, (iii) Plaintiff's complaints are not redressable, and (iv) the statute is Constitutional both facially and as-applied to Plaintiff.[1]

Argument

I. Plaintiff Cannot Dispute the Relevant Facts

In his response to FEC Defendants' Motion for Summary Final Judgment, Plaintiff sets out his own facts for consideration, but he does not point to any evidence in the record contradicting the undisputed facts set forth in FEC Defendants' motion for summary judgment. On the other hand, FEC Defendants dispute and object to many of Plaintiff's unsupported allegations of fact. (*See* DE #76, incorporated herein by reference). The FEC Defendants are entitled to summary

[1] Notably, Senate Joint Resolution 244 is currently pending in the Florida Legislature. In its current form, this resolution would place a constitutional amendment on the ballot to return school board elections to partisan races by 2024, if passed by the voters. *See* https://flsenate.gov/Session/Bill/2022/244/BillText/Filed/HTML.

judgment on the basis of the relevant facts contained in their Motion for Summary Final Judgment, which Plaintiff has failed to dispute.

II. Non-Partisan Elections are Proper

Plaintiff disputes Florida's definition of nonpartisan elections, *see* § 97.021(23), Fla. Stat. (defining "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"), and cites to several cases that fit Plaintiff's ideas of what "nonpartisan" should mean. However, none of Plaintiff's cases are relevant for purposes of this case. For example, the Code of Federal Regulations provision that Plaintiff cites is a definition regarding partisan activities of *federal employees*, and the cases Plaintiff cites operate under a different definition of "nonpartisan election." *See, e.g.*, *In re Springfield*, 818 F.2d 565, 566 (7th Cir. 1987) (cited at DE #67-1 at 22) (defining a nonpartisan election as "one without primary elections to choose parties' candidates."). The Courts that considered those other statutes did not hold that a definition like Florida's was improper, because those states did not have similar definitions.

III. Plaintiff's Complaint is Not Redressable

Plaintiff's complaint is not redressable because other Florida enactments prevent the relief he seeks.[2]

A. Plaintiff Does Not Attack Other Florida Enactments, and Therefore Accepts Them

Plaintiff's Complaint does not challenge the statutory provisions that implement and effectuate Article IX, Section 4(a) of the Florida Constitution – such as Section 97.021(23), Florida Statutes. Likewise, Plaintiff does not challenge Section 1001.361, Florida Statutes, which states that "the election of members of the district school boards shall be by . . . nonpartisan election[.]" Plaintiff's sole attack is against Section 106.143(3). Even if Plaintiff succeeded on his claims challenging § 106.143(3) – which he will not – the remaining legal framework would remain intact. Thus, his claims fail for lack of redressability. *See Renne v. Geary*, 501 U.S. 312 (1991).[3]

[2] Plaintiff essentially concedes lack of redressability in his Motion for Leave to File an Amended Complaint. (DE #74). This Court should not decide summary judgment on Plaintiff's proposed Amended Complaint because it raises new issues and fails to include Florida's Constitution and § 1001.361, Fla. Stat.

[3] Although Plaintiff disputes the strength of the discussion by the Supreme Court in *Renne* he cites to no countervailing case law.

B. Plaintiff's Arguments That the Florida Constitution and Section 1001.361, Fla. Stat. Do Not Preclude Redress are Incorrect

Plaintiff argues that the 1998 amendment to the Florida Constitution (mandating that members of local school boards be chosen in nonpartisan elections) and § 1001.361, Fla. Stat. (requiring school board elections to be nonpartisan) do not prevent redress of Plaintiff's complaints because they do not affirmatively state that they have enforcement power. Plaintiff also argues that his intended use of the party label is consistent with these two enactments. Both of Plaintiff's arguments are incorrect.

First, the Florida Supreme Court has recognized that power to enforce Florida law does not have to be expressly stated. "It must be assumed that a provision enacted by the legislature is intended to have some useful purpose." *Smith v. Piezo Tech. & Pro. Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) (recognizing a cause of action even though the relevant statute did not state that a cause of action existed).

Second, § 97.021(23), Fla. Stat., defining nonpartisan elections as prohibiting "campaigning … based on party affiliation," existed in its present form[4] prior to the amendment to Florida's Constitution (in 1998), and prior to the enactment of § 1001.361, Fla Stat.[5] Therefore, both the constitutional amendment and § 1001.361,

[4] 1994 Fla. Sess. Law Serv. Ch. 94-224 (H.B. 2325) (WEST).
[5] 2002 Fla. Sess. Law Serv. Ch. 2002-387 (S.B. 20–E) (WEST).

Fla. Stat. are presumed to have been enacted with the legislative definition as their underpinning. *See Woodgate Dev. Corp. v. Hamilton Inv. Tr.*, 351 So. 2d 14, 16 (Fla. 1977) (courts presume that statutes are passed with knowledge of prior existing statutes); *Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010) (applying a prior statutory definition to a later statute). Therefore, Plaintiff's argument that his intended speech would not be barred by the Florida Constitution and § 1001.361, Fla. Stat. is without merit, and his complaint fails for lack of redressability.

C. Plaintiff's Argument That This Court Should Rewrite Section 97.021(23), Fla. Stat. is Without Merit

Plaintiff did address § 97.021(23), Fla. Stat. even though it also has no stated enforcement power. This statute defines nonpartisan elections and prohibits "campaigning … based on party affiliation" for nonpartisan elections. This is clear language. Plaintiff proposes that this Court re-write the statute under the guise of "interpreting" it to effectively state that a candidate such as Plaintiff "can" campaign based on party affiliation. He proposes that the statute should be interpreted to mean that he can campaign that he is not only affiliated with the Republican party, but also that he is "a" Republican nominee for office – as long as he does not state that he is "the" Republican nominee for office.

Such an interpretation is obviously contrary to the plain language of § 97.021(23), Fla. Stat. and would confuse voters who are not presumed to know the

nuances of Florida's election laws and will obviously equate "a" Republican nominee with "the" Republican nominee.

Moreover, Plaintiff's proposed "interpretation" would not satisfy the compelling interest of Florida as expressed by its voters in amending its Constitution and by its Legislature in enacting the various related statutes that comprise the legal framework for nonpartisan elections in Florida. Specifically, Plaintiff's interpretation leaves the door open for highly partisan political elections. It would permit him to say "vote for me because I'm a Republican/Democrat," rather than "vote for me because of my ideas, my message, or my position on issues."

IV. Section 106.143(3) Is Constitutional as Applied to Plaintiff

A. Use of Party Affiliation is not Speech in the Context of Plaintiff's Discovery Responses, and a School Board Election

Throughout this litigation Plaintiff has failed to identify *any* idea or any message that he contends the law prevents him from communicating. That is precisely the point – the statute serves the state's well recognized interest in maintaining nonpartisan elections *without* burdening or restricting candidates' ability to communicate ideas or messages to the electorate. Plaintiff's responses to discovery confirm as much, and show that his goal was to garner votes based on his party, rather than on his speech.

At least for a school board position, a party label fails to inform voters of *any* position of the candidate. For example, a "lifelong Republican" might want higher

teachers' salaries to support education, or might want to reduce teachers' salaries to put more funding into educational aids, school sports, Magnet programs, or programs for special needs students. He might want to increase school funding for better education, or work within the funding already in place to be a good steward of the County's money. He might be anti-union or pro-union. He might want to focus on education basics, or might want to increase other aspects of education, school sports, or extracurricular activities. In short, there is no message regarding education created by uttering the phase "lifelong Republican." The only message is party affiliation.

Therefore, in this limited framework of concessions by Plaintiff in discovery and the nature of school board positions, the limitation in Florida's statute is not one of "speech." Plaintiff may still utter any speech on any topic imaginable. His communication of ideas is not impinged – only his desire to wrap himself in a party label.

B. If There is a Burden on Plaintiff's Speech, it is Exceedingly Light

For the same reasons discussed *supra* Section IV(A), any burden on Plaintiff's speech, is exceedingly light. Whatever message Plaintiff wants voters to receive from the phrase "lifelong Republican," is a message that Plaintiff can easily present in ways that do not transform the election into a partisan election that would thus stymie Florida voters' expressed intent. Florida's statute furthers an important

regulatory interest, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (holding that the proper test for the statute's constitutionality is a determination of whether the law furthers an "important regulatory interest."), without restricting what Plaintiff states about his position on the issues, or on the law, or regarding what he wants to accomplish if elected. *Contra McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 196 (2014) (cited DE #76 at 19); *Siefert v. Alexander*, 608 F.3d 974, 982 (7th Cir. 2010) (cited DE #76 at 25); *c.f. Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 336 (cited DE #76 at 26) (upholding ban on party affiliation on ballots in judicial elections because "of the extensive remaining ways" to share the information).

C. Section 106.143(3) Is Facially Constitutional and Constitutional as Applied to Plaintiff

To maintain his § 1983 claim, Plaintiff must satisfy two prongs: "First, the Plaintiff must [establish] that some person has deprived him of a federal right." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).[6] However, Plaintiff concedes that he is not harmed by the statute. Plaintiff concedes that he *is allowed* to advertise his partisan-related experience which he states "all but declare[s] that [he] is a Republican…" (DE #67-1 at 16). In Plaintiff's words, the *statements that the statute permits* are "proxies to inform the electorate of a candidate's political party

[6] Second, although not particularly relevant here, "he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Id.*

affiliation." *Id*. Therefore, from Plaintiff's own argument, he has not suffered any harm, and thus he cannot be heard to argue that he has been deprived of a federal right.

Florida is not restricting any expression of an idea. Florida's restriction is on a label. It is the party label that Floridians have deemed to be inappropriate for nonpartisan elections. Plaintiff would prefer otherwise. However, Plaintiff essentially concedes that the label of "lifelong Republican" does not have a particular meaning, and that he can still impart his Republican affiliation without violating the statute.

D. Florida's Law Survives Strict Scrutiny

1. Section 106.143(3) Satisfies the Compelling Interest Requirement under Strict Scrutiny

If strict scrutiny analysis applies, FEC Defendants are still entitled to summary judgment in their favor because the law is narrowly tailored to promote the State's compelling interest in ensuring the integrity of nonpartisan elections. Courts have repeatedly recognized the importance of this concept. *Cf. In re Code of Jud. Conduct* (Canons 1, 2, and 7(1)(B), 603 So. 2d 494, 497 (Fla. 1992) ("Maintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent is a compelling governmental interest.") (citing *Morial v. Jud. Comm'n*, 565 F.2d 295 (5th

Cir.1977), cert. denied, 435 U.S. 1013 (1978)) (as discussed below, the least restrictive alternative requirement would also be met.).

The voters of Florida, through their elected representatives, decided that the use of party labels in nonpartisan elections was inappropriate. Clearly, Floridians wanted nonpartisan elections to be determined based on ideas, rather than party labels. Florida voters then went a step further and voted to change their Constitution to make school board elections nonpartisan. The clear goals were: (1) Floridians determined that the nonpartisan *elections* (not the candidates), shall be free of political party labels; (2) that permitting candidates to advertise and campaign on party affiliation in a nonpartisan election causes confusion to voters; and (3) the statute will minimize the impact of politics on the education of Florida's children. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983). Further, protecting voters from the confusion and undue influence that could arise if a candidate were permitted to campaign based on party affiliation in a nonpartisan election is a legitimate State interest. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989). Thus, the law clearly furthers compelling state interests.

2. Section 106.143(3) is Narrowly Tailored

The challenged statute is not overly broad or under-inclusive. It contains a very limited and narrow restriction on speech. The restriction is only broad enough to achieve the goals of Florida's voters, and does not encompass more than the speech that fits Florida's compelling interest. Unlike the cases that Plaintiff relies upon, Florida's law merely restricts Plaintiff's ability to advertise or campaign in the nonpartisan schoolboard election "based on party affiliation." § 106.143(3). Plaintiff may speak on any subject and convey any intention he has regarding carrying out his office if he is elected. As the Supreme Court has held in interpreting similar regulations, Plaintiff "retains great latitude in [his] ability to communicate ideas to voters[.]" *Timmons*, 520 U.S. at 363.

Contrary to his response, the statute "does not prohibit a political advertisement from stating the candidate's partisan-related experience." § 106.143(3), Florida Statutes. It does not prohibit Plaintiff answering a question at the grocery store, or elsewhere, as to his party membership, despite Plaintiff's assertion otherwise.[7] (DE #67-1 at 20). The statute's scope is limited to advertising party affiliation and campaigning based on party affiliation. There is no lesser means available to satisfy the government's compelling interest in making these elections nonpartisan. If a candidate may freely advertise that he is a lifelong Republican, he

[7] Plaintiff was vague regarding his examples that included a greeting of "hello" at a grocery store. Defendants assume that he intended a scenario similar to what Defendants address here.

is effectively advertising that he is running as a Republican candidate. This would turn a nonpartisan election into a partisan one. Thus, the statute is not overinclusive.

Nor is it underinclusive. While an underinclusive statute can cast doubt on the purpose of the statute, *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002), the narrow breadth of Section 106143(3) clearly reinforces its targeted purpose. In contrast, *White* dealt with a statute providing that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues, *id*. at 768, but the restriction was held to be underinclusive because it did not extend past the election. A restriction on announcing views on disputed issues would logically carry over past the election, for judges. On the other hand, Florida's statute pertains only to the party label during the election process to avoid voter confusion and remain consistent with Florida's Constitution and other related statutes discussed herein. Once the person is elected to a school board position, there is no further need to ensure that the *election process* is nonpartisan. This Court should not lightly dismiss Floridians' concerns and choices.

V. This Court Should Decline to Decide Summary Judgment Based on Plaintiff's Proposed Amended Complaint

In response to FEC Defendants' Motion for Summary Final Judgment, Plaintiff has moved this Court for leave to file an Amended Complaint attacking the constitutionality of an additional statute, Section 97.021(23), Florida Statutes. (*See* DE ##73-74). Plaintiff argues that if this Court is inclined to rule in favor of FEC

Defendants on summary judgment, it should instead accept Plaintiff's proposed Amended Complaint and then enter summary judgment as to Plaintiff's Amended Complaint by "apply[ing] the same reasoning to both §§ 97.021(23) and 106.143(3)." (DE #74 at 2). It would obviously be improper for this Court to enter summary judgment on Plaintiff's Amended Complaint without giving FEC Defendants the opportunity to respond to Plaintiff's new attacks against Section 97.021(23). *See Barney v. Escambia Cty., Fla.*, No. 3:17CV3-MCR-CJK, 2018 WL 4113369, at *7 (N.D. Fla. May 30, 2018), report and recommendation adopted, No. 3:17CV3-MCR-CJK, 2018 WL 4107904 (N.D. Fla. Aug. 29, 2018) (holding that the general rule is that an amended complaint renders all prior complaints as nullities, and that pending motions for summary judgment are moot.); *Bujduveanu v. Dismas Charities, Inc.*, No. 11-20120-CIV, 2012 WL 13129841, at *5 (S.D. Fla. Sept. 28, 2012) (same).

CONCLUSION

For all the foregoing reasons, FEC Defendants are entitled to summary judgment. Accordingly, this Court should enter an order granting Defendants' Motion For Summary Final Judgment, and granting such other and further relief as this Court deems equitable and just.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY that the foregoing response contains 3,241 words, and is thus within the limitation of the Local Rules of this Court.

/s/ Glen A. Bassett
Glen A. Bassett
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January 2022, I electronically filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will serve all attorneys of record.

/s/ Glen A. Bassett
Glen A. Bassett
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