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, et al. *Defendants*.	Case No. 3:21-cv-671-MCR-EMT

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiff Kells Hetherington, by and through undersigned counsel, hereby moves this Court to preliminarily enjoin Defendants from enforcing Fla. Stat. § 106.143(3), barring candidates for nonpartisan public office from expressing partisan affiliation. In support of this motion, Mr. Hetherington relies upon the attached memorandum of points and authorities, his declaration, the exhibits, the complaint, and any other argument or material that the Court may receive or of which the Court may take judicial notice.

Because the case is essentially legal in character and poses no apparent factual disputes, Mr. Hetherington respectfully requests that the Court—upon notice to the Defendants—advance the trial on the merits and consolidate it with a hearing under Fed. R. Civ. P. 65(a)(2). Given the urgent need for relief from ongoing harm to First Amendment rights, however, Mr. Hetherington would waive the request for consolidation with a trial on the merits should the Court believe that discovery is warranted.

Oral Argument Requested

Because of the importance of the issues, Mr. Hetherington requests oral argument, with 30 minutes for each side.

Respectfully submitted this 26th day of April, 2021.

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Dated: April 26, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The First Amendment guarantees candidates the right to describe themselves however they wish. A candidate can identify as a Christian, a Satanist, or an atheist; a vegan or an omnivore; a Bernie Bro or a MAGA-maniac—and even, perhaps especially, as a Republican or a Democrat.

In prohibiting nonpartisan candidates from expressing their partisan affiliation, Florida unconstitutionally restricts a candidate's right "to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam). Candidates' "unfettered opportunity to make their views known" helps the electorate "intelligently evaluate the candidates' personal qualities and their positions on vital public issues." *Id.* at 52-53; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (noting "right to engage in unfettered political speech"). Expressing one's party affiliation "is shorthand" for "publicly taking a stance on" a number of "matters of current public importance," *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) ("*Winter*") (internal quotation marks omitted), and it is

therefore highly protected speech. Partisan affiliation is the baseline for voters as they evaluate a candidate's stands and approach to government and attempt "to place each candidate in the political spectrum." *Buckley*, 424 U.S. at 67.

That does not change merely because the state omits partisan affiliation from the ballot or declines to give political parties a role in designating the candidates for a particular race. The candidates have the right to label themselves however they wish.

Contrary to the First Amendment's guarantee, Florida law punishes candidates who share their partisan affiliation during their campaigns. Indeed, state officials have already fined Kells Hetherington for describing himself as a "lifelong Republican" when he ran for the Escambia County School Board in 2018.

Mr. Hetherington is once again running for public office, and once again, he would like to tell the voters that he is a Republican. He refrains from doing so, however, because he reasonably fears that Florida officials will again punish him for that expression. This Court should now enjoin enforcement of Fla. Stat. § 106.143(3), to protect Mr.

Hetherington's First Amendment rights to express his views and the rights of all Floridians to make and hear core political speech.

STATEMENT OF FACTS

Under Florida law, "A candidate for nonpartisan office is prohibited from campaigning based on party affiliation." Fla. Stat. § 106.143(3). In particular, "[a] political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation." *Id.*

The Division of Elections advises candidates running for nonpartisan office that they cannot "publicly represent or advertise [themselves] as . . . member[s] of any political party." Fla. Div. of Elections, Advisory Opinion DE 2003-02 at 2 (Feb. 21, 2003), https://bit.ly/2RxvpOR (Ex. A). But candidates may express past experience, "such as 'executive committee of _____ party' in campaign advertisements." *Id.* Florida even allows nonpartisan officeholders to express their affiliation—they just have to wait until the election is over. *See* Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010), https://bit.ly/3gkP8vF (Ex. B).

In 2018, Kells Hetherington ran for a nonpartisan seat on the Escambia County School Board. During the campaign, Mr. Hetherington described himself in the Escambia County voter guide as a "lifelong Republican." Final Order at 2, *Fla. Elections Comm'n v. Hetherington*, Case No. FEC 18-133, F.O. No. FOFEC 20-145W (FEC Sept. 25, 2020) (Ex. C).

Acting on a complaint filed by Escambia County resident and former PTA President Michelle Salzman, the FEC found probable cause to believe that Mr. Hetherington had violated Fla. Stat. § 106.143(3) when he stated that he was "[a] lifelong Republican." Final Order at 3 (Ex. C). On November 19, 2019, the FEC ordered Mr. Hetherington to pay a $500 fine, which it reduced upon reconsideration in August 2020 to $200. Final Order at 1, 4 (Ex. C). Mr. Hetherington paid the fine. Hetherington Decl. at ¶ 7.

Florida law recognizes an individual as a candidate for political office once she has filed qualification papers and subscribed to a candidate's oath, or once she has "appoint[ed] a treasurer and designate[d] a primary depository." Fla. Stat. § 97.021(7); *accord* Fla. Stat. § 106.011(3); *see also* FEC, Advisory Opinion DE 2010-02 at 2 (Ex. B)

("This usually occurs when a person first appoints a campaign treasurer and designates a primary campaign depository."). 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. Hetherington Decl. at ¶ 8. He also established a primary campaign depository. *Id*. at ¶ 9.

Mr. Hetherington intends to express his party affiliation in his current campaign, but he refrains from doing so because he fears enforcement of Fla. Stat. § 106.143 by Defendants. Hetherington Decl. at ¶¶ 10-12. His current campaign would otherwise include materially and substantially similar statements as his 2018 campaign. *See id*. at ¶ 11. 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. *Id*. at ¶ 10-11.

Mr. Hetherington also intends to make materially and substantially similar statements about his party affiliation in future nonpartisan campaigns. *Id*. at ¶ 13-14.

SUMMARY OF ARGUMENT

Florida's prohibition on expressing partisan affiliation during nonpartisan campaigns is a content-based restraint on political speech. Accordingly, the state must demonstrate that the law is narrowly tailored to serve a compelling state interest, and that there is no less restrictive alternative that would advance its goals. Because the state cannot carry this burden with respect to the challenged statute's general application—because that provision lacks any "plainly legitimate sweep," *United States v. Williams*, 553 U.S. 285, 292 (2008)—the restriction is facially unconstitutional. Florida's prohibition also cannot meet strict scrutiny's rigorous demands as applied to Mr. Hetherington's speech. Lastly, the challenged speech prohibition is also facially unconstitutional because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (internal quotation marks omitted); *accord FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303 (11th Cir. 2017).

The other considerations for granting preliminary injunctive relief also favor Mr. Hetherington. First Amendment injuries like that

inflicted on Mr. Hetherington are irreparable, and the government cannot have an interest in enforcing an unconstitutional law. Given irreparable First Amendment injury and the lack of a governmental interest, the balance of equities tips in Mr. Hetherington's favor. Accordingly, this Court should hold that Fla. Stat. § 106.143(3) is unconstitutional facially and as applied to this case's facts, and grant Mr. Hetherington injunctive relief.

ARGUMENT

Florida's restriction on candidate speech is unconstitutional and should be enjoined. A plaintiff "seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) ("*NRDC*"); *see also Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009).

But "[i]n First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500,

511 (D.C. Cir. 2016) (internal quotation marks omitted); *see also Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016); *ACLU Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015). "[E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (internal quotation marks omitted). And the equities and public interest factors merge and favor an injunction when the government is enforcing an unconstitutional law. *See id.* (holding no interest when enforcing unconstitutional law); *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020) (noting merger). Thus, a First Amendment plaintiff like Mr. Hetherington "is entitled to relief if his claim is likely to succeed." *Scott*, 612 F.3d at 1297; *see also Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (accepting concession in a political speech case that "if we find that [plaintiff] is likely to succeed on the merits, the other requirements for a preliminary injunction are satisfied").

I. MR. HETHERINGTON WILL SUCCEED ON THE MERITS

A. Florida's speech restriction is facially unconstitutional

Florida's censorship of partisan candidate speech must satisfy the rigors of strict scrutiny both because it restricts political speech at the core of the First Amendment's protections, and because it imposes a content-based restriction on speech.

Political speech is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. The First Amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

Accordingly, "burden[s] [on] political speech" are subject to strict scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014) (requiring compelling interest and least restrictive means when

laws reduce "the quantity of expression" (quoting *Buckley*, 424 U.S. at 19)); *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) ("*White II*") (applying strict scrutiny to prohibition on expressing partisan affiliation during a judicial campaign). Because the state seeks to limit a candidate's ability to vigorously advocate her election with the messages that will best inform and appeal to her potential constituents—that is, because it "seeks to restrict directly the offer of ideas by a candidate to the voters"—the state must carry a heavy strict scrutiny burden. *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (requiring compelling interest); *see also Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002).

Moreover, strict scrutiny would apply even if this case did not involve political speech, as Fla. Stat. § 106.143 is a content-based restriction on speech. A law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2014). The challenged provision restricts a candidate's message only when it expresses particular content: "the candidate's political party affiliation." Fla. Stat. § 106.143(3). *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765,

768, 774 (2002) ("*White I*") (holding law content based that prohibited judicial candidates from announcing views on issues); *see also Siefert v. Alexander*, 608 F.3d 974, 981 (7th Cir. 2010) (holding law content based that prohibited expressing party affiliation during judicial campaign).

Thus, because Fla. Stat. § 106.143(3) both restricts core political speech and is a content-based restriction on speech, it must face strict scrutiny. "Laws subject to strict scrutiny are presumptively unconstitutional," *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016), and the state must demonstrate that its speech prohibition is narrowly tailored to advancing a compelling state interest, and that there is no less restrictive alternative. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (requiring that restriction be "the least restrictive means of achieving a compelling state interest"); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (requiring that restriction "be narrowly tailored to promote a compelling Government interest").

1. *Florida lacks a compelling interest to censor candidate speech for expressing partisan affiliation.*

"[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional

categories of expression long familiar to the bar." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (internal quotation marks and brackets omitted). These include unprotected expressions, such as incitement to violence, fraud, or child pornography, *id.,* where the state's regulatory interest is manifest. A political candidate's campaign speech is absent from that list.

The First Amendment guarantees a candidate's right "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54; *see also id.* at 52 (noting that candidates' ability to express their views "is of particular importance"). That includes the right to "vigorously and tirelessly to advocate his own election and . . . have the unfettered opportunity to make [his] views known so that the electorate may intelligently evaluate [his] personal qualities and [his] positions on vital public issues before choosing among them on election day." *Brown,* 456 U.S. at 53 (internal quotation marks omitted); *accord Buckley*, 424 U.S. at 52-53; *see also Davis*, 554 U.S. at 739 (noting "right to engage in unfettered political speech").

The only compelling state interest acknowledged by the Supreme Court with respect to the regulation of a candidate's campaign speech—

and that only with respect to judicial elections—has been the state's interest in "preserving the impartiality . . . [or] appearance of the impartiality of the state judiciary." *White I*, 536 U.S. at 775. And the Court limited the meaning of this interest to promoting "the lack of bias for or against either party to [a] proceeding," and perhaps in being open to persuasion. *White I*, 536 U.S. at 775-76, 778 (emphasis removed). Even in judicial elections, party affiliation does not automatically signal bias or a closed mind. *White II*, 416 F.3d at 755 ("any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party").

Indeed, the Seventh Circuit in *Siefert* held that a ban on expressing party affiliation—even in a judicial election—was unconstitutional for lack of a compelling interest. "The state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy." *Siefert*, 608 F.3d at 982. And, without an underlying interest in combatting such bias, the state could have no compelling interest in avoiding its appearance either. *Id*.

A more recent decision by the Sixth Circuit—again protecting even the speech of judicial candidates—likewise shows that there cannot be an interest in prohibiting the expression of partisan affiliation. It held that "candidates have a constitutional right to portray themselves as a member of a political party" because the First Amendment prohibits the government from interfering with candidates taking stands on public issues, and partisan affiliation "is shorthand for just that." *Winter*, 834 F.3d at 688.[1]

Given that there is no compelling interest in prohibiting expression of partisan affiliation in election campaigns, Fla. Stat. § 106.143(3) fails strict scrutiny and is thus unconstitutional on its face.[2]

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[1] Florida's Supreme Court once reprimanded a judge who had "introduced partisan political activity into a nonpartisan judicial election" by "represent[ing] himself as a registered Republican while being interviewed by a newspaper's editorial board," *Inquiry Concerning a Judge (Kollra)*, 268 So.3d 677, 680 (Fla. 2019), but in doing so, it did not weigh Florida's law against the First Amendment, much less establish a compelling interest in such a speech restriction.

[2] The state might also try to claim an interest "in preserving public confidence in the integrity of its judiciary," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015), but that fails here. By definition, of course, that interest is limited to the judiciary and could never sustain the sweep of the state's restriction. But it also arose in a very particular context, having nothing to do with the law here. The Court was

2. *The restriction is not narrowly tailored*

The speech restriction also fails strict scrutiny because it is not "narrowly tailored to promote a compelling Government interest." *Playboy Entm't Grp.*, 529 U.S. at 813. Assuming the existence of a compelling state interest in impartiality, Florida's speech restriction fails to advance that interest, is underinclusive as well as overinclusive, and is not "the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478.

a. Florida's law fails to promote any interest in impartiality

Under strict scrutiny, "fit matters." *McCutcheon*, 572 U.S. at 218. To the extent that impartiality refers to an interest in openmindedness—a desire to keep candidates "from aligning with particular views on issues

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concerned that the interest in combatting actual and apparent corruption related to campaign donations was not sufficient in the judicial context. In general, officeholders are expected to be responsive to their supporters, including their donors. *Id*. at 446-47. But judges are expected to be more impartial, giving no preference to one party over another but that justified by the facts of the case. Thus, the Court sanctioned an integrity interest that allows the state to control solicitations by judicial candidates. That interest is inapplicable here, where the law does not deal with campaign finances at all, much less solicitations that could be tied to the appearance of quid pro quo unfairness or bias.

by keeping them from aligning with a particular political party," *White II*, 416 F.3d at 754, this law does nothing to further that interest. It does nothing to keep candidates from expressing their views on issues or hewing to a party's preferences, but only bars candidates from expressing their partisan affiliation.

If the law is targeted at impartiality in the sense of avoiding undue influence—for example, from those who have campaigned for a candidate or contributed to her, or from individuals in the party with whom she has a close relationship—the law again serves no purpose. It does not keep her from deciding issues in their favor. It just keeps others from knowing about the relationship.

This lack of fit demonstrates that the law is not tailored to these articulated interests.

b. The speech restriction is underinclusive

Florida's speech restriction "cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, [because] it leaves appreciable damage to" any alleged interests "unprohibited." *Reed*, 576 U.S. at 172 (quoting *White I*, 536

U.S. at 780). It is therefore "hopelessly underinclusive" and unconstitutional. *Id*. at 171.

First, the provision only prohibits *disclosure* of party membership, not party membership itself. But, if party membership were really so dangerous, it is difficult to believe that the state would have an interest in presenting a façade of impartiality to cover such a festering stew of favoritism and bias. "If the concern over [] partisanship and the influence of political parties [] truly underlies the [law], the authorization to belong (secretly) to a political party amounts to a gaping omission. A party's undisclosed potential influence on candidates is far worse than its disclosed influence[.]" *Carey v. Wolnitzek*, 614 F.3d 189, 202 (6th Cir. 2010).

Florida's law also demonstrates underinclusivity in allowing candidates to dance around the issue of partisan affiliation, so long as they do not utter a few magic words. That is, a candidate can all but declare that she is a Republican by sharing all her "partisan-related experience." Fla. Stat. § 106.143(3); *see also* Advisory Letter DE 2003-02 (Ex. A) (noting that candidates can state, for example, experience on the "executive committee of _____ party in campaign advertisements"

(internal quotation marks omitted)). Candidates are also permitted to discuss membership or experience with explicitly conservative or progressive organizations. All of these statements are proxies to inform the electorate of a candidate's political party affiliation, yet they are permitted under the statute, simply underscoring the lack of tailoring.

Furthermore, the statute is underinclusive in only applying during campaigns. If impartiality or integrity of nonpartisan officeholders is indeed an interest of the highest order, the prohibition on party affiliations would extend beyond the campaign. Yet, according to the Division of Elections, once candidates are elected to a nonpartisan office, they are permitted to publicize their party affiliation. Advisory Letter DE 2010-02 (Ex. B). While Mr. Hetherington was fined for declaring that he was a "lifelong Republican," a sitting school board member could have publicly made the same statement one day before starting his or her reelection campaign and as soon as the election was over.

In this respect, Florida's law mimics the laws in *White I* and *White II* in being "so woefully underinclusive as to render belief in" the government's purposes "a challenge to the credulous." *White II*, 416

F.3d at 758 (quoting *White I*, 536 U.S. at 780). The provision at issue in *White I* prohibited candidates from stating their views on disputed issues during their campaigns, 536 U.S. at 768, while the provision at issue in *White II* prohibited candidates during their campaigns from "identify[ing] themselves as members of a political organization," 416 F.3d at 745. The former was fatally underinclusive because, if the government's purpose "were truly to assure the openmindedness of" officeholders, the government "would not try to address it through a regulation that restricted speech only during a campaign." *White II*, 416 F.3d at 757-58. Displaying a similar temporal shortsightedness to Florida's restriction, the restriction there undermined the government's asserted interests "since candidates' views on contentious legal issues can be and are aired in the many speeches, class lectures, articles, books, or even court opinions given or authored before, during or after any campaign." *Id*. at 758.

The court in *White II*, reviewing a similar restriction to Florida's on expressions of partisan affiliation, declared the law unconstitutional: "A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial

campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness." *White II*, 416 F.3d at 758. The same is true here.

And, as in *White II*, any interest in the appearance of impartiality also fails tailoring here. Candidates may speak about their "views on disputed issues," such that nothing is served "by keeping a candidate from simply *associating* with a party that espouses the same or similar positions." *Id*.

c. The law is overinclusive

"[W]hen an overinclusive rule has the effect . . . of greatly curtailing an important part of the speech 'market,' the rule is deeply problematic." *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993). Florida's law curtails much more protected speech than necessary to meet any asserted interest.

The Sixth Circuit has held that the state may "prevent candidates from identifying themselves as *the* nominee of a political party for a judicial seat" in a nonpartisan judicial election. *Winter*, 834 F.3d at 688. But Florida's law goes far beyond that. Even though "[s]aying 'I am a Republican' is shorthand" for "taking a stance on matters of public

importance"—meaning that "candidates have a constitutional right" to do so, *id*. (internal quotation marks omitted)—Florida's restriction curtails all speech that mentions partisan affiliation, whether in voter guides, campaign rallies, debates, town halls, interviews, going door to door, or even saying hello at the supermarket.

Because the Florida law curtails substantially more speech than necessary, it is overinclusive and fails strict scrutiny.

d. A less restrictive alternative exists

Florida's restriction also fails scrutiny because the state has not chosen "the least restrictive means of achieving" its interests. *McCullen*, 573 U.S. at 478. Any state-asserted interest arising from having or expressing partisan affiliation could be served by recusal. *See White II*, 416 F.3d at 745; *see id*. at 745, 755-56 (discussing recusal as a less restrictive means to prohibiting identification "as members of a political organization").

Noting that a similar law "act[ed] to prohibit [a candidate's] speech on both his political views and his qualifications for office," the Seventh Circuit held that it failed tailoring because the government had failed to show that recusal was an "unworkable alternative." *Siefert*, 608 F.3d at

981-83. In particular, the court rejected any objection that recusal was impractical because it would force recusal whenever a litigant was a party member: "Without some specific, individualized relationship, the affiliation between a judge who is a member of a political party and other members of that political party is simply too diffuse to make it reasonable to assume that the judge will exhibit bias in favor of his fellow party members." *Id*. at 983.

Relatedly, the Sixth Circuit upheld another type of restriction, omitting party affiliation on the general ballot, only because judicial candidates were "entirely free to associate themselves with the parties of their choice and express their party affiliations publicly in [other] forums." *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 337 (6th Cir. 2016). That is, other restrictions that might serve Florida's interests were upheld only because candidates could do that which Florida prohibits—express their partisan affiliation.

* * *

For all these reasons, Florida's speech restriction fails strict scrutiny's narrow tailoring requirement, and it is facially unconstitutional.

B. Florida's speech restriction is unconstitutional as applied to Mr. Hetherington

Florida's speech restriction also fails strict scrutiny as applied to Mr. Hetherington. Not only does the state lack a compelling interest in restricting his speech, but the prohibition is not narrowly tailored to—or the least restrictive means of achieving—any compelling interest.

1. *The state lacks a compelling interest in restricting Mr. Hetherington's speech*

As noted above, "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression," none of which are manifest here. *Alvarez*, 567 U.S. at 717 (internal quotation marks and brackets omitted). To the contrary, the First Amendment guarantees a candidate's right "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. The closest interests the state could assert relate entirely to "preserving the impartiality . . . [or] appearance of the impartiality of the state judiciary," *White I*, 536 U.S. at 775, or in "in preserving public confidence in the integrity of its judiciary," *Williams-Yulee*, 575 U.S. at 446. But these interests by definition apply only in the judicial context. Mr. Hetherington is running for Escambia

County School Board, where he is expected to take positions on issues and be responsive to his constituents. *Cf. White II*, 416 F.3d at 755 (noting definition of impartiality as preventing alignment with issues); *Williams-Yulee*, 575 U.S. at 446-47 (noting need for responsiveness in general elections but not judicial ones). Judicial elections are "categorically different" from that in which Mr. Hetherington runs. *Id.* at 434.

Accordingly, the state lacks any compelling interest in restricting Mr. Hetherington's speech.

2. *The restriction fails tailoring as applied to Mr. Hetherington's speech.*

Section 106.143(3)'s tailoring problems apply equally, if not with greater force, in Mr. Hetherington's circumstances as they do elsewhere. The speech restriction does nothing to advance actual or apparent impartiality or integrity, because it leaves him free to take positions and only conceals relationships that might suggest bias.

The provision is just as underinclusive in allowing Mr. Hetherington's secret membership in political parties; in allowing him to share partisan experience that proclaims his affiliation—as long as he doesn't utter the magic words; and in allowing him to openly

proclaim his party membership as soon as he wins office, just not while seeking it.

And the provision is just as overinclusive as applied to Mr. Hetherington's circumstances. In the nonjudicial race in which Mr. Hetherington is running, partisan affiliation "is shorthand" for taking positions on public issues that voters are rightfully interested to learn. *Winter*, 834 F.3d at 688. Potential constituents would want to know how he will address the issues that come before the school board, as those positions might be indicated through his statements about party affiliation and otherwise. And they would want him to be responsive to their concerns.

Furthermore, the validity of recusal as a less restrictive means of achieving any governmental interest only increases in Mr. Hetherington's circumstances. Even with respect to judicial candidates, proponents of such speech restrictions "significantly overstate[] the likelihood of bias toward particular litigants." *Siefert*, 608 F.3d at 983. Party membership does not involve the close relationships of "smaller, more cohesive organization[s]," and merely being a member does not demonstrate the "intricate relationship with party politics that would

create the appearance of bias." *Id.* Put differently, more is required to make recusal necessary merely for presiding over a situation involving a party member. But in Mr. Hetherington's situation, the risk related to bias is also much less a concern—because he seeks a position where he is expected to take positions and be responsive to constituents.

Consequently, in the at-most rare situations where Mr. Hetherington would be called to put on an adjudicator's hat as a school board member, the standard for recusal would be much different than that for a judge: "the mere appearance of bias that might disqualify a judge will not require disqualification of Board members acting in an adjudicative capacity." *Seiden v. Adams*, 150 So.3d 1215, 1220 (Fla. Dist. Ct. App. 2014).

* * *

The state lacks any compelling interest in restricting Mr. Hetherington's speech, and it has not tailored the restrictions of his speech to any conceivable interests. Accordingly, Florida's restriction is unconstitutional as applied to Mr. Hetherington.

C. Florida's speech restriction is facially unconstitutional because it is overbroad

Even if the restriction here were valid in some circumstances, this Court should still hold it unconstitutional as facially overbroad.

"States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." *Williams-Yulee*, 575 U.S. at 446. Accordingly, defendants might argue that however problematic the challenged provision might be in the school board election context, it might nonetheless be valid in the judicial election context. But that argument would be unavailing because the challenged provision would control far more speech than could be constitutionally countenanced as within its "plainly legitimate sweep." *Williams*, 553 U.S. at 292; *cf. Houston v. Hill*, 482 U.S. 451, 462 (1987) (holding ordinance facially invalid because speech prohibition was not limited to fighting words or obscene language).

Florida imposes the challenged speech restriction broadly outside the judicial election context, where the governmental interests in impartiality are inapplicable. For example, it is not the primary or even a regular duty for most nonpartisan offices to sit in judgment between other parties, requiring the actual or apparent impartiality demanded

by due process. *See White II*, 416 F.3d at 753 (discussing due process).[3] And this includes a minimal risk of sitting in adjudication where "it would be in [one's] financial interest to find against one of the parties." *White I*, 536 U.S. at 776 (citing various cases). They do not carry the risk of "sitting in a case in which one of the parties was a previously successful litigant against" a judge. *Id*. Nor do nonjudicial offices carry the risk of presiding over a criminal trial in which the adjudicator had indicted the defendant. *Id*. And the fact that these examples are so inapplicable outside the judicial context only highlights the overbreadth of Florida's restriction.

More to the point, there is a fundamental difference between judicial and nonjudicial offices: "Politicians are expected to be appropriately responsive to the preferences of their supporters." *Williams-Yulee*, 575 U.S. at 446 (quoting *McCutcheon*, 572 U.S. at 227). A judge, on the other hand, "must observe the utmost fairness, striving to be perfectly and completely independent, with nothing to influence or controul [sic]

[3] And, if the state truly had an interest in protecting against bias in the rare cases in which a nonjudicial official had to act in a judicial capacity and had a financial interest or other source of real bias, the state could simply require recusal.

him but God and his conscience." *Id.* at 447 (internal quotation marks omitted). And these differences are intrinsic to our constitutional form of government: Due process demands fairness and impartiality from the judiciary, *see White II*, 416 F.3d at 753, thus permitting some impositions on First Amendment rights. But those due process demands do not apply outside that context, such that while judicial elections may be regulated "differently," *Williams-Yulee*, 575 U.S. at 446, with stronger limits and restrictions, those regulations must also fail outside that context. In situations where "responsiveness is key to the very concept of self-governance through elected officials," *id.* at 446 (internal quotation marks omitted), our form of government requires open conversation where candidates must be free to outline their positions on issues—including the positions communicated in shorthand by party membership. Indeed, one court upheld prohibitions of party affiliation on ballots only because candidates could share that information during their campaigns. *See Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 178 (4th Cir. 2017); *cf. Ohio Council 8 Am. Fed'n of State*, 814 F.3d at 336 (upholding prohibition of party affiliation on general election

ballot for judicial offices because "of the extensive remaining ways" to share the information).

Considering Florida's widespread running of nonpartisan, nonjudicial races, the speech restriction's "overbreadth [is] substantial, [both] in an absolute sense, [and] also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. For example, Florida has 358 school board seats.[4] And the elections for each of these 358 seats is nonpartisan.[5] That number does not include the other nonjudicial, nonpartisan elections in the state, such as elections for county mayor, county commissioner, property appraiser, fire and rescue district seats, community development district seats, and soil and water district seats. Thus, given the sheer number of nonjudicial elections in which the First Amendment rights of candidates are violated, the overbreadth of this statute is substantial in an absolute sense. And it is all the more substantial in cutting off all communication about partisan affiliation in

[4] *See* "Florida School Board Composition Information," Florida School Boards Association, https://bit.ly/3sfXVBe (noting 58 boards with 5 members, 6 boards with 7 members, 1 board with 8 members, and 2 boards with 9 members).

[5] *See* "2016-2017 Florida School Board Fast Facts," Florida School Boards Association (May 22, 2016), https://bit.ly/3sno2X1.

these elections, failing to "leave open ample alternative channels for communication of the information." *Willson v. City of Bel-Nor*, 924 F.3d 995, 1003 (8th Cir. 2019) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Furthermore, the speech restriction's overbreadth is substantial in a relative sense. Consider the 2020 election: Jacksonville held elections for 25 nonjudicial, nonpartisan seats, 15 judicial, nonpartisan seats, and 2 partisan seats;[6] Hillsborough County held elections for 2 nonjudicial, nonpartisan seats, 28 judicial, nonpartisan seats, and 8 partisan seats;[7] Miami-Dade County held elections for 28 nonjudicial, nonpartisan seats, 54 judicial, nonpartisan seats, and 1 partisan seat;[8] Orange County held elections for 7 nonjudicial, nonpartisan seats, 19 judicial, nonpartisan seats, and 8 partisan seats;[9] and Pinellas County

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[6] *See* "City elections in Jacksonville, Florida (2020)," Ballotpedia, https://bit.ly/3tz9Yex.

[7] *See* "Municipal elections in Hillsborough County, Florida (2020)," Ballotpedia, https://bit.ly/32oJVdH.

[8] *See* "Municipal elections in Miami-Dade County, Florida (2020)," Ballotpedia, https://bit.ly/2Qvc7ZH.

[9] *See* "Municipal elections in Orange County, Florida (2020)," Ballotpedia, https://bit.ly/2ORGadL.

held elections for 16 nonjudicial, nonpartisan seats, 22 judicial, nonpartisan seats, and 9 partisan seats.[10] Thus, out of a total of 244 seats up for election in 2020 in those five jurisdictions, 78 (or 32%) were nonjudicial, nonpartisan, 138 (or 57%) were judicial, nonpartisan races, and 28 (or 11%) were partisan races. Assuming similar distributions across other cities and counties, these figures show that Florida's law substantially infringes on the protected speech of nonjudicial candidates. And those figures do not include any of the nonpartisan schoolboard seats.

Even if it were constitutional to censor partisan campaign speech in judicial elections, there is no need for the prohibition to sweep over all these other elections. The censorship provision's sweep is "substantial . . . relative to the scope of the law's plainly legitimate applications," *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (internal quotation marks omitted), even assuming—contrary to persuasive authority—that its judicial election applications were legitimate. And, as the candidates for many of these seats lack either the support of political parties or the

[10] *See* "Municipal elections in Pinellas County, Florida (2020)," Ballotpedia, https://bit.ly/3diGLP9.

support held by candidates for major offices, the unconstitutional enforcement of Florida's law is less likely to be challenged. Indeed, this appears to be the first such challenge to this longstanding restriction.

This is precisely the sort of situation the Court had in mind in establishing the overbreadth doctrine. Many silenced candidates, lacking party support, will "abstain from protected speech" "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation," and this will harm those candidates and "society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* at 119 (citation omitted). Florida's prohibition of partisan expression in *all* nonpartisan races is unconstitutionally overbroad, even if it could be countenanced in some situations.

II. THE VIOLATION OF MR. HETHERINGTON'S FIRST AMENDMENT RIGHTS INFLICTS IRREPARABLE HARM

The second requirement for injunctive relief, that Mr. Hetherington suffer irreparable harm, *NRDC*, 555 U.S. at 20, is also met. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020); *see also KH Outdoor, LLC v. City of Trussville*, 458 F.3d

1261, 1272 (11th Cir. 2006). Indeed, "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Sindicato Puertorriqueño de Trabajadores v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012); *see also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1229 (11th Cir. 2017) (noting presumption); *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (noting that presumption arises because "chilled free speech" cannot be "compensated for by money damages"). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as 'timing is of the essence in politics' and '[a] delay of even a day or two may be intolerable.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008)).

III. THE EQUITIES BALANCE IN FAVOR OF MR. HETHERINGTON

In balancing the equities, courts "must give the benefit of any doubt to protecting rather than stifling speech . . . [w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S.

449, 469, 474 (2007). On the one hand, Florida "has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC*, 458 F.3d at 1272. On the other hand, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury." *Id*. Accordingly, the balance of equities tips in favor of injunctive relief. *Id.* (noting that "the threatened injury . . . clearly outweighs whatever damage the injunction may cause" the government).

IV. ENFORCING THE FIRST AMENDMENT IS IN THE PUBLIC INTEREST

"For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance." *Id*. Indeed, the First Amendment "was fashioned to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), denying government the authority "to select which issues are worth discussing or debating in the course of a political campaign," *White I,* 536 U.S. at 782. Thus "the public interest is [in fact] served in promoting First Amendment values." *Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d

1257, 1276 (11th Cir 2001). Accordingly, granting injunctive relief is in the public interest.

* * *

Given that all the considerations for injunctive relief stand in Mr. Hetherington's favor, this Court should grant a preliminary injunction.

V. THE RULE 65(C) BOND REQUIREMENT SHOULD BE WAIVED

Waiving any security requirement would be "proper" in this case. Fed. R. Civ. P. 65(c). "[I]t is well-established that the amount of security required by [Rule 65(c)] is a matter within the discretion of the trial court . . . [,and] the court may elect to require no security at all." *BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Serv., LLC*, 425 F.3d 964, 971 (11th Cir. 2005) (internal quotation marks omitted).

All three considerations indicating a bond is not required are readily apparent here. In issuing a preliminary injunction, courts should dispense with the bond requirement "(1) when the party seeking the injunction has a high probability of succeeding in the merits of its claim, (2) when the party to be enjoined is a municipality or county government that likely would not incur any significant cost or monetary damages from the issuance of the injunction, (3) when demanding a

bond from the party seeking the injunction would injure the constitutional rights of the party or the public." *Univ. Books & Videos, Inc. v. Metro. Dade Cty.*, 33 F. Supp. 2d 1364, 1374 (S.D. Fla. 1999) (internal citations omitted). "Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right." *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009).

Mr. Hetherington is seeking an injunction against government defendants, who would not incur any cost or monetary damages if they are enjoined from enforcing the unconstitutional speech prohibition at issue. Furthermore, requiring a bond would injure Mr. Hetherington as he seeks to defend his fundamental constitutional right to speak freely as a candidate for public office. Accordingly, Mr. Hetherington respectfully requests that the Court waive the bond requirement.

VI. THE PRELIMINARY INJUNCTION HEARING SHOULD BE CONSOLIDATED WITH THE TRIAL ON THE MERITS

Mr. Hetherington also requests that the Court exercise its discretion to consolidate the hearing on the preliminary injunction with the trial on the merits. *See* Fed. R. Civ. P. 65(a)(2); *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1204 (5th Cir.

1977). Exercising such discretion is especially appropriate when the case is essentially legal in character and discovery is unnecessary, as is the case here. *See Am. Train Dispatchers Dep't of the Int'l Bhd. of Locomotive Eng'rs v. Fort Smith R.R.*, 121 F.3d 267, 270 (7th Cir. 1997); *Able v. United States*, 44 F.3d 128, 132 (2d Cir. 1995); *Drummond*, 563 F.2d at 1204.

The present case rests solely on a matter of law—whether Fla. Stat. § 106.143(3) violates the First Amendment—and the same facts which are the subject of the preliminary injunction hearing are those that will support a final decision on the merits. *See Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1319 (N.D. Fla. 2001) (noting agreement "that the entire action appeared to present only issues of law"). There is no point in expending further judicial and litigation resources to answer the narrow, dispositive legal questions raised at this stage. Judicial economy warrants consolidation with a trial on the merits under Rule 65(a)(2).[11]

[11] Given the urgent need for relief from ongoing harm to First Amendment rights, Mr. Hetherington would waive the request for consolidation with a trial on the merits should the Court believe that discovery is warranted.

CONCLUSION

For the foregoing reasons, Mr. Hetherington respectfully requests that this Court grant the motion for a preliminary injunction.

Dated: April 26, 2021

/s/ *Owen Yeates*

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CERTIFICATE OF ATTORNEY CONFERENCE

Pursuant to N.D. Fla. Loc. R. 7.1, I certify the following: On April 19, 2021, I emailed the Secretary of State's office and the State Attorney's office, and I called Glen Bassett at the Attorney General's office (who would also represent the Commissioners), asking whether they would consent to the Preliminary Injunction Motion. On April 21, 2021, I spoke with Glen Bassett at the Attorney General's office, Ashley Davis at the Secretary of State's office, and Greg Marcille at the State Attorney's office.

On April 22, 2021, I emailed Glen Bassett, Ashley Davis, and Greg Marcille, asking whether the defendants would consent to consolidation. On April 23, 2021, I spoke with Glen Bassett and Greg Marcille about the motion and consolidation.

Parties could not resolve the issues in this case. The Secretary of State opposes the motion and consolidation, as she does not believe she should be a party. The State Attorney does not yet have positions. The Attorney General and the Commissioners oppose.

Dated: April 26, 2021

/s/ *Owen Yeates*
Owen Yeates (pro hac vice)
Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

I certify that the foregoing memorandum complies with the word limits at N.D. Fla. Loc. R. 7.1(F). As measured by Microsoft Word's internal count, the memorandum is 7,304 words, exclusive of the case style, tables of contents and authorities, signature block, and certificates.

Dated: April 26, 2021

/s/ *Owen Yeates*
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing by emailing or mailing it to counsel for the parties:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON, *Plaintiff*, v. LAUREL M. LEE, *et al*, *Defendants*.	Case No. 3:21cv671-MCR-EMT

DECLARATION OF KELLS HETHERINGTON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Kells Hetherington, declare as follows:

1. I am the Plaintiff in the above referenced action. I am competent to make the statements contained herein and declare the following based on my personal knowledge.

2. After moving to Pensacola, Florida, in 2017, I ran in the 2018 election for a seat on the Escambia County School Board. I grew up watching my father serve our community, holding positions on a town council and other municipal boards, and his service inspired me to do the same. I am especially concerned about the rising cost of public

education in Escambia County coupled with the lagging performance of the school system. Escambia County public schools consistently rank among the worst in the state of Florida. Having said that, I firmly believe in the virtues of public education and I look forward to having my child in the schools here. I want the schools to be excellent for her and for every other young person in Escambia County.

3. During the 2018 campaign, I visited thousands of homes and had countless discussions with voters to explain my positions on important issues and why they should vote for me. I also wrote a statement for the Escambia County voter guide, in which I described myself as a "lifelong Republican," to help the voters learn more about my background and values.

4. In May 2018, Michelle Salzman, the former president of the Parent Teacher Association filed a complaint with the Florida Elections Commission ("FEC" or "Commission") alleging multiple violations of Florida's elections laws.

5. The FEC's staff conducted an investigation and recommended to the Commission that there was probable cause to support one charge: expressing my partisan affiliation in a nonpartisan election.

6. On November 19, 2019, the FEC entered a decision ordering me to pay a $500 fine for describing myself as a "lifelong Republican." After reconsidering the order in August 2020, the FEC reduced the fine to $200.

7. I paid the fine on March 23, 2021, by sending a check to the FEC. The bank posted the cleared check to my account on April 7, 2021.

8. On March 30, 2021, I established my candidacy for the 2022 Escambia County School Board election by filing Form DS-DE 9, which appoints a campaign treasurer and designates a campaign depository.

9. On April 7, 2021, I established my primary campaign depository.

10. In my current campaign, I will again speak personally with voters, in their homes, in meetings, and on the street and other public locations. I will communicate with them on social media, in mailings, and in other campaign literature. And I will again share my candidate statement in the Escambia County voter guide. In all these situations I intend to share my political party affiliation, telling them that I am a lifelong Republican, to help communicate my positions on issues that are important to the voters. Sharing that I am a lifelong Republican gives voters an important overview or representation of my values when

I don't have the time or opportunity to share every aspect of my platform.

11. For example, in interviews with the media, candidates are often asked for a single quote. Stating that I am a Republican is the fastest way to share the most information. Similarly, in the candidate statement for the Escambia County Supervisor of Elections, it is important to have the freedom to share my party affiliation.

12. I am currently refraining from sharing my party affiliation with voters, however, out of fear that I will again have to face investigation, hearings, and a fine for violating Fla. Stat. § 106.143(3). The previous enforcement action took over two years to complete and I'm worried about enduring that process once again.

13. That the schools are run well is important to me and the future of my family. So, whether I win or lose in the 2022 election, I will run for Escambia County School Board in future elections. I will also run for other nonpartisan offices in my community. It is important to be free to share my party affiliation with the voters regardless of the position I am running for.

14. I will make materially and substantially similar statements about my party affiliation in future campaigns for Escambia County School Board, as well as for other nonpartisan positions in my community.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2021

Kells Hetherington

EXHIBIT A:
ADVISORY OPINION DE 2003-02

February 21, 2003

The Honorable Buddy Dyer
c/o Mark Herron, Esquire
Messer, Caparello & Self
Post Office Box 1876
Tallahassee, Florida 32302-1876

RE: DE 03-02
Activities of Political Parties Relating to Candidates for Nonpartisan Municipal Office §97.021(18), §106.08(2), §106.021(3), Florida Statutes

Dear Senator Dyer:

This is in response to your request for an advisory opinion. As a candidate for Mayor of the City of Orlando, the division has the authority to issue an opinion to you pursuant to section 106.23(2), Florida Statutes.

You ask essentially the following questions:

1. Can political advertising for or on behalf of a candidate for a nonpartisan mayoral office refer to the political party affiliation of the candidate?

2. To what extent may a political party make a contribution to or on behalf of a candidate for a nonpartisan mayoral office, and conversely, to what extent may a candidate for a nonpartisan mayoral office accept a contribution of a political party made to or on behalf of such candidate?

3. May a political party make a 3-pack expenditure pursuant to section 106.021(3), Florida Statutes; and, if so, what are the respective reporting responsibilities of the political party and the candidate for nonpartisan mayoral office regarding such an expenditure?

4. May a political party make an independent expenditure for or on behalf of a candidate for a nonpartisan mayoral office?

You represent in your letter that the municipal office of Mayor is a nonpartisan office pursuant to the Orlando City Charter. Please note that Chapter 106, Florida Statutes, is specifically applicable to municipal offices.

In order to answer your questions, we must first look to the statutory definition of "nonpartisan office." Section 97.021(18), Florida Statutes, defines a "nonpartisan office" to mean, "an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." This definition applies to all nonpartisan offices.

As to Question 1, as a candidate for a nonpartisan municipal office you are prohibited from campaigning based upon party affiliation. Therefore, you must be very careful that your political advertising cannot be construed as such. Each advertisement would have to be reviewed independently to determine whether it meets this test. However, pursuant to section 97.021(18), Florida Statutes, as a nonpartisan municipal candidate, you may not publicly represent or advertise yourself as a member of any political party. Thus, information stating your political affiliation may not appear in your political advertising. It is permissible, however, for you to list partisan related experience such as "executive committee of _____ party" in campaign advertisements. In doing so you would simply be providing information on past experiences as opposed to "campaigning based on party affiliation." Political advertisements done by others in consultation with you would have to meet the same requirements.

As to Question 2, a political party may make a contribution to a candidate for a nonpartisan mayoral office and a candidate for a nonpartisan mayoral office may accept a contribution from a political party. Such contributions would be subject to the limitations contained in section 106.08(2), Florida Statutes.

As to Question 3, pursuant to section 106.021(3), Florida Statutes, a political party may make direct expenditures for "obtaining time, space, or services in or by any communications medium for the purpose of jointly endorsing three or more candidates." Further, pursuant to that section any such expenditures shall not be considered a contribution or expenditure to or on behalf of any such candidate for the purposes of Chapter 106. A nonpartisan mayoral candidate may be endorsed by any or all political parties. Therefore, a political party may make a 3-pack expenditure that would include a candidate for a nonpartisan mayoral office. A political party would report it as an expenditure, but not as a contribution. The candidate would have no responsibility to report it.

As to Question 4, a political party may make an independent expenditure regarding a candidate for a nonpartisan mayoral office.

SUMMARY

A candidate for a nonpartisan mayoral office may not state their political affiliation in their campaign advertising. They may, however, list partisan related experience such as "executive committee of _____ party" in campaign advertisements. A political party may make a contribution to a candidate for a nonpartisan mayoral office and a candidate for a nonpartisan mayoral office may accept a contribution from a political party. Such contributions would be subject to the limitations contained in section 106.08(2), Florida Statutes. A political party may make a 3-pack expenditure that would include a candidate for a nonpartisan mayoral office. A political party may make an independent expenditure regarding a candidate for a nonpartisan mayoral office.

Sincerely,

Edward C. Kast
Director, Division of Elections

Prepared by:
Sharon D. Larson
Assistant General Counsel

EK/SDL/ccm

EXHIBIT B:

ADVISORY OPINION DE 2010-02

FLORIDA DEPARTMENT of STATE

CHARLIE CRIST
Governor

KURT S. BROWNING
Secretary of State

March 3, 2010

Honorable Scott J. Brock
Mayor, City of Coral Springs
9551 W. Sample Road
Coral Springs, Florida 33065

RE: DE 10-02
Advertising; Nonpartisan Candidate – posting party affiliation on Internet social networking websites
§ 97.021(20), Florida Statutes.

Dear Mayor Brock:

This letter responds to a request for an advisory opinion submitted by your city attorney on behalf of the City Commission of the City of Coral Springs. Because the members of the City Commission are persons engaged in political activities, the Division of Elections has authority to issue the City Commission an opinion pursuant to section 106.23(2), Florida Statutes (2009).

Your city attorney asks:

> May an elected nonpartisan City Commissioner or a candidate for such position post his or her party affiliation on [his or her] personal Facebook page, or does such posting constitute an improper political advertisement or public representation of his or her political affiliation under Chapter 106, Florida Statutes?

Your attorney states that your city ordinance provides "each candidate for elected municipal office shall not campaign as a member of any political party or publicly represent or advertise himself as a member of any political party." The ordinance further provides that elections for municipal office in Coral Springs are nonpartisan. The Division of Elections has no authority to interpret provisions of municipal charters or ordinances; therefore, this opinion limits itself to the interpretation of Florida's Election Code (chapters 97-106, Florida Statutes).

Section 97.021(20), Florida Statutes (2009), defines a nonpartisan office as one "for which a candidate is prohibited from campaigning or qualifying for election or retention in office based upon party affiliation." The Election Code does not define "campaigning." According to *Black's Law Dictionary*, it includes all acts done to bring about a candidate's election.[1] Therefore, the Election Code precludes a *nonpartisan candidate* from doing any act to bring about the candidate's election *based upon party affiliation*. This prohibition would include campaigning for a nonpartisan office based upon party affiliation on an Internet social networking site. We adhere to our statements in *Division of Elections Opinion* 03-02 (February 21, 2003), where we stated to a nonpartisan candidate concerning his political advertisements:[2]

> [A]s a nonpartisan municipal candidate, you may not publicly represent or advertise yourself as a member of any political party. Thus, information stating your political affiliation may not appear in your political advertising. It is permissible, however, for you to list partisan related experience such as "executive committee of _____ party" in campaign advertisements. In doing so you would simply be providing information on past experiences as opposed to "campaigning based on party affiliation."

Again, the Election Code's prohibition is against a nonpartisan *candidate* "campaigning" or qualifying for elected office *based upon party affiliation*. Once candidates are elected, they are no longer "candidates" until they again satisfy the definition of "candidate" contained in sections 97.021(4) and 106.011(16), Florida Statutes. This usually occurs when a person first appoints a campaign treasurer and designates a primary campaign depository. Under state law, therefore, nonpartisan officeholders are not prohibited from publicly representing their party affiliation unless and until they again become a "candidate" at which point they are precluded from campaigning based upon party affiliation.

SUMMARY

Florida's Election Code defines a nonpartisan office as one "for which a candidate is prohibited from campaigning or qualifying for election or retention in office based upon party affiliation." Therefore, a nonpartisan candidate may never campaign based upon party affiliation. This prohibition would include campaigning for a nonpartisan office based upon party affiliation on Internet social networking sites. However, the Election Code does not prohibit nonpartisan officeholders from publicly representing their party affiliation unless and until they again

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[1] *Black's Law Dictionary* (6th Ed. 1990).

[2] A "political advertisement" means a paid expression in a statutorily-prescribed communications media which expressly advocates the election or defeat of the candidate. § 106.011(17), Fla. Stat. (2009). A message by a candidate on a social networking site posted without any cost to the candidate would not constitute a paid expression; therefore, it would not be a "political advertisement." However, depending on the content of the message, such a posting may constitute "campaigning."

become a "candidate" at which point they are precluded from campaigning based upon party affiliation.

Sincerely,

Donald L. Palmer
Director, Division of Elections

cc: Samuel S. Goren, City Attorney, City of Coral Springs

EXHIBIT C:

FEC, FINAL ORDER (SEPT. 25, 2020)

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

Florida Elections Commission,
Petitioner,

v.

Kells Hetherington,
Respondent.
_____/

Agency Case No.: FEC 18-133
F.O. No.: FOFEC 20-145W

FINAL ORDER

THIS MATTER was heard at an informal hearing held before the Florida Elections Commission (Commission) on November 19, 2019.

APPEARANCES

For Commission	Stephanie J. Cunningham Assistant General Counsel 107 West Gaines Street Collins Building, Suite 224 Tallahassee, FL 32399
For Respondent	No Appearance

STATEMENT OF THE ISSUE

Whether Respondent violated Section 106.143(3), Florida Statutes, as alleged in the Order of Probable Cause.

PRELIMINARY STATEMENT

On May 25, 2018, the Commission received a sworn complaint alleging violations of

Florida's election laws. Staff of the Commission conducted an investigation to determine whether the facts alleged in the complaint constituted probable cause to believe that Respondent violated the Florida Election Code.

On July 11, 2019, staff recommended to the Commission that there was probable cause to believe that the Florida Election Code was violated. On September 4, 2019, the Commission entered an Order of Probable Cause finding that there was probable cause to charge Respondent with the following violation(s):

Count 1:

On or about May 25, 2018, Kells Hetherington violated Section 106.143(3), Florida Statutes, when he campaigned based on party affiliation, even though the office for which he was running was nonpartisan.

Respondent did not timely elect to have a formal administrative hearing before an administrative law judge from the Division of Administrative Hearings and, therefore, the matter was set for an informal hearing before the Commission. At the informal hearing, the Commission adopted the undisputed facts set forth in the Staff's Recommendation as its findings of fact and imposed upon Respondent a fine of $500.

Following the informal hearing, Respondent requested that this matter be reconsidered and filed a written statement with the Commission. Therefore, a final order was not filed after the informal hearing.

During its August 26, 2020, meeting, the Commission considered Respondent's request for reconsideration and lowered the amount of the civil penalty imposed upon Respondent.

FINDINGS OF FACT

1. Respondent was a 2018 candidate for Escambia County School Board, District 2.

2. On April 27, 2018, Respondent acknowledged that he had been provided access to

Chapter 106, Florida Statutes. Additionally, Respondent's filing officer provided Respondent with a copy of the *2018 Candidate and Campaign Treasurer Handbook* as well as the *2018 Escambia County Candidate Handbook*.

3. The race for Escambia County School Board, District 2 was a nonpartisan race. On June 22, 2018, Respondent filed a nonpartisan candidate oath.

4. Respondent published a candidate statement on the Escambia County Supervisor of Elections' website stating the following: "A lifelong Republican, I was raised in the Congregationalist Church. . . . I appreciate your taking the time to take a look at my candidacy and I would be honored to serve as your District 2 School Board [M]ember."

5. The Division of Elections issued advisory opinions DE 03-02 and DE 10-02 regarding the interpretation of Section 106.143(3), Florida Statutes.

6. Respondent campaigned based on political party affiliation when he supplied a statement to be published on his filing officer's website that stated that he was a Republican.

CONCLUSIONS OF LAW

7. The Commission has jurisdiction over the parties to and subject matter of this cause, pursuant to Section 106.26, Florida Statutes.

8. Respondent's conduct was willful. Respondent committed the acts while knowing that, or showing reckless disregard for whether, the acts were prohibited, or failed to commit an act while knowing that, or showing reckless disregard for whether, the acts were required.

9. Respondent committed 1 count of violating Section 106.143(3), Florida Statutes, when he campaigned based on political party affiliation even though the office for which he was running was nonpartisan.

10. In determining the amount of the civil penalty, the Commission considered the

mitigating and aggravating circumstances set forth in Section 106.265, Florida Statutes.

ORDER

The Commission finds that Respondent has violated Section 106.143(3), on 1 occasion, and imposes a fine of $200.

Therefore, it is

ORDERED that Respondent shall remit a civil penalty in the amount of $200, inclusive of fees and costs. The civil penalty shall be paid to the Florida Elections Commission, Collins Building, Suite 224, 107 West Gaines Street, Tallahassee, Florida 32399, within 30 days of the date this Final Order is filed with the Commission and must be paid by money order, cashier's check or attorney trust account check.

DONE AND ORDERED by the Florida Elections Commission on August 26, 2020.

Joni Alexis Poitier, Vice Chair
Florida Elections Commission

Copies furnished to:
Stephanie J. Cunningham, Assistant General Counsel
Kells Hetherington, Respondent
Michelle Salzman, Complainant

NOTICE OF RIGHT TO APPEAL

This order is final agency action. Any party who is adversely affected by this order has the right to seek judicial review pursuant to Section 120.68, Florida Statutes, by filing a notice of administrative appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Florida Elections Commission at 107 West Gaines Street, Suite 224, Collins Building, Tallahassee, Florida 32399-1050 and by filing a copy of the notice of appeal with the appropriate district court of appeal. The party must attach to the notice of appeal a copy of this order and include with the notice of appeal filed with the district court of appeal the applicable filing fees. **The notice of administrative appeal must be filed within 30 days of the date this order is filed with the Commission.** The date this order was filed appears in the upper right-hand corner of the first page of the order.