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

RESPONSE IN OPPOSITION TO
DEFENDANTS LEE'S AND MADDEN'S MOTIONS TO STAY

Defendants Secretary Lee and State Attorney Madden have failed to demonstrate that the extraordinary remedy of a stay, pending resolution of their (meritless) dispositive motions, is appropriate. Their motions for stays, ECF Nos. 24 and 26, should be denied.

These motions amount to little more than an effort to delay adjudication in this case. Even after receiving a three week extension to respond to Mr. Hetherington's motion for a preliminary injunction, these Defendants waited until the last day to file their motions for stays, hoping to delay decision on the preliminary injunction motion

and furthering the harm to Mr. Hetherington's rights. But neither Defendant has made the showing necessary for a stay: Their motions to dismiss lack merit. They have not shown any harm to themselves, as briefing on the preliminary injunction motion is complete and no discovery is needed. On the other hand, a stay will perpetuate the harm to Mr. Hetherington's rights. And the public interest favors protection of the First Amendment rights at issue in this case.

BACKGROUND

On April 15, 2021, Mr. Hetherington filed the Complaint in this action, alleging that the restrictions on candidate speech at Fla. Stat. § 106.143(3) violated the First Amendment. (ECF No. 1). On April 21, 2021, in conference between opposing counsel, the Secretary stated that she would oppose a motion for preliminary injunction because she did not believe she should be a party. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction at 40 (ECF No. 12-1). Mr. Hetherington filed the motion for preliminary injunction on April 26, 2021, seeking relief from the irreparable harm to his First Amendment rights. (ECF Nos. 12 and 12-1). By Local Rule

7.1(E), Defendants' responses in opposition were due by May 10, 2021, but the Court granted all the parties an additional 22 days to respond, until June 1, 2021. (ECF No. 22). On the last day, rather than filing the ordered response, the Secretary filed a motion to dismiss and a motion to stay. (ECF Nos. 23-24). *But see* Local Rule 7.1(H) (discussing failure to oppose and granting motions by default). The same day, State Attorney Madden filed a motion to dismiss, a motion to stay, and a response in opposition to the preliminary injunction, which merely reiterated the motion to dismiss. (ECF Nos. 25-27).

ARGUMENT

I. STAYS ARE EXTRAORDINARY REMEDIES, NOT LIGHTLY GRANTED.

"A stay is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Granting one therefore undermines the public's interests in the efficient administration of justice. Accordingly, a stay is "extraordinary relief," *Robles v. Geico Indem. Co.*, No. 8:19-cv-1293-T-60AAS, 2020 U.S. Dist. LEXIS 80690, at *2 (M.D. Fla. May 7, 2020) (internal quotation marks omitted) (citing *Winston-*

Salem/Forsyth Cty. Bd. of Educ. v. Scott, 404 U.S. 1221, 1231 (1971) (Burger, C.J.)); *accord Stansell v. Revolutionary Armed Forces of Colom.*, No. 19-20896-CV-SCOLA/TORRES, 2019 U.S. Dist. LEXIS 147588, at *10 (S.D. Fla. Aug. 28, 2019). It "is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433 (internal quotation marks omitted).

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE THE HARDSHIP REQUIRED FOR A STAY.

The Court's power to grant a stay is discretionary, "incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). A movant "must 'make out a clear case of hardship or inequity in being required to go forward'" to justify a stay. *Fid. Land Tr. Co., LLC v. Sec. Nat'l Mortg. Co.*, 905 F. Supp. 2d 1276, 1278 (M.D. Fla. 2012) (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)); *accord Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004). And the stay should be denied if "there is even a fair possibility that the stay will damage someone else." *Id.* (citing *Landis*, 299 U.S. at 255).

The Supreme Court has given four factors that courts traditionally must use in exercising this discretion: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426 (internal quotation marks omitted).

A. The Secretary is not likely to succeed on the merits.

As demonstrated in Mr. Hetherington's Response in Opposition to Defendants' Motions to Dismiss, neither the Secretary nor the State Attorney are likely to succeed on the merits. Neither of these Defendants has even argued that the state may constitutionally enforce Fla. Stat. § 106.143(3) against Mr. Hetherington. They claim only that they have no role in enforcement, such that they should be dismissed from the case—the Secretary casting her argument in the form of a 12(b)(1) motion for lack of jurisdiction and the State Attorney casting hers in the form of a 12(b)(6) motion for failure to state a claim against her. As explained in Mr. Hetherington's opposition to both motions,

these arguments fail. These Defendants are both required parties because of their roles in enforcing Fla. Stat. § 106.143(3), and Mr. Hetherington cannot obtain complete relief without an injunction against them. Accordingly, Mr. Hetherington has standing to sue them, and they cannot show that they are likely to succeed on their motions to dismiss, the bases for their requested stays.

B. The Secretary and State Attorney have not demonstrated hardship or inequity.

Ms. Lee and Ms. Madden have failed to demonstrate irreparable injury or inequity if a stay is denied. *Nken*, 556 U.S. at 426; *Fid. Land Tr.*, 905 F. Supp. 2d at 1278. If it were correct that they had no power to enforce the statute, they would merely be enjoined from enforcing a statute they cannot enforce. On the other hand, if they do have a role in enforcement, they will merely be enjoined from enforcing an unconstitutional statute.

Turning to the litigation itself, it involves a question of law with no apparent factual disputes. (*See* Lee Mot. at 3 (ECF No. 24) (noting Mr. Hetherington's arguments that issues are legal and not factual)). Thus, the Secretary and the State Attorney will not suffer from extensive

discovery, especially before the preliminary injunction motion is decided. The Secretary's cases dealing with discovery are simply inapposite (Secretary Mot. at 3). These Defendants have already had the opportunity to file any desired briefing on the preliminary injunction motion, and the extended deadline to file oppositions has passed. Further delays would not alleviate any hardship or inequity.

C. Granting a stay would extend the harm Mr. Hetherington is suffering in being denied his First Amendment rights.

The third factor—whether granting a stay will injure the other parties—favors denial of the Secretary's and State Attorney's motions for a stay. *Nken*, 556 U.S. at 426. If a stay is granted and delays consideration of Mr. Hetherington's motion for a preliminary injunction, he will continue to suffer irreparable harm to his First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (noting irreparable harm). Indeed, the deadline to respond to Mr. Hetherington's motion was already extended, creating additional time in which Mr. Hetherington could not speak. Defendants Lee and Madden then waited until the very last day of the Court's extension on the other motion to file their motions to dismiss and requests for a stay, delaying still

further the protection of Mr. Hetherington's rights, even though Ms. Lee knew long before that deadline that she would move to dismiss. Mr. Hetherington should not have to wait still longer because of their delays to obtain protection of his rights.

D. The public interest favors Mr. Hetherington.

The fourth factor, examining the public interest, also favors denying the requested stays. *Nken*, 556 U.S. at 426. Florida "has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

In fact, not only does Florida have no interest in restricting Mr. Hetherington's speech, the public interest lies in protecting it. 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), such that "the public interest is always served in promoting First Amendment values . . . ." *SunTrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257, 1276 (11th Cir 2001).

III. THE PRELIMINARY INJUNCTION AND DISPOSITIVE MOTIONS SHOULD BE HEARD CONCURRENTLY.

Considering the public interest in enforcing the Constitution, even if the Court finds some merit in the Secretary's assertions that her motion to dismiss raises jurisdictional issues that must be resolved first, a stay would be unnecessary. The Court should hear the preliminary injunction motion and the motions to dismiss at the same time. After all, briefing on all motions is complete. No discovery is contemplated or necessary, particularly in resolving the motion for a preliminary injunction. (Secretary Mot. at 3). Hearing the motions together would lessen any further delay and the attendant harm to Mr. Hetherington's rights.

CONCLUSION

Defendants' Motions to Stay should be denied.

Dated: June 15, 2021

/s/ Owen Yeates

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply 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 1,542 words, exclusive of the case style, signature block, and certificates.

Dated: June 15, 2021

/s/ Owen Yeates
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed through the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all counsel of record, constituting service on those parties they represent:

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