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 DEFENDANT MOODY'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff Kells Hetherington submits the following response in opposition to the motion to dismiss filed by Defendant Moody. (ECF No. 38). Attorney General Moody attempts to wash her hands of Mr. Hetherington's claim by asserting she was uninvolved in the previous enforcement of the statute and has no enforcement authority. However, Moody fails to recognize that Mr. Hetherington brought a pre-enforcement challenge, such that prior enforcement by the defendant is unnecessary. As the Attorney General is "the chief state legal officer,'" *U.S. v. Domme*, 753 F.2d 950, 956 (11th Cir. 1985), she is a required party. The motion should be denied.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). This standard does not require "evidence for the factual allegations," nor must the allegations strike the judge as probable. *Hi-Tech Pharm., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1197 (11th Cir. 2018) (emphasis removed).

"Plausibility is the key," *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010), and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

SUMMARY OF ARGUMENT

Attorney General Moody argues that she has no role over enforcement—that the Florida Election Commission ("FEC") has not referred any complaint to a state attorney, and that her supervisory role over state attorneys is inadequate to establish a role—such that she is not a proper defendant. *See* AG Mot. at 2-5. However, the Attorney General is a required party as she has a duty to direct and oversee state attorneys and an inherent power to enforce Florida's laws. Because Attorney General Moody has enforcement authority, her argument against the applicability of the *Ex parte Young* exception to the Eleventh Amendment must also fail.

ARGUMENT

I. ATTORNEY GENERAL MOODY IS A REQUIRED PARTY

A. Pre-enforcement challenges do not require prior enforcement by a party.

Defendant Moody argues that "the State Attorney acts only when the Florida Elections Commission refers a complaint, and since the FEC has not referred a complaint, there is no set of facts warranting a preliminary injunction, and no reason to believe that this will be appropriate in the future." AG Mot. at 3. To begin, even assuming *arguendo* that "there is no set of facts warranting a preliminary injunction," that is not an argument for dismissing Mr. Hetherington's complaint altogether.

Defendant Moody maintains that because Mr. Hetherington has "alleged no facts that the [FEC] has referred a complaint regarding Plaintiff to the State Attorney . . . [or] that any State Attorney in Florida has ever taken, or threatened to take, action against Plaintiff," that she is an improper defendant. *Id.* However, the fact that the FEC has not previously referred a complaint regarding Mr. Hetherington to the State Attorney is irrelevant in the determination of whether Attorney General Moody is a proper defendant. Mr. Hetherington has brought both a facial and as-applied pre-enforcement challenge to Florida's law as it is preventing him from speaking in his current campaign for the Escambia County School Board.

A plaintiff has pre-enforcement standing when he "alleges an intention to engage in conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (internal quotation marks omitted). Mr. Hetherington must merely show "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012) (internal quotation marks omitted). "[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, *even when that party has made no attempt to enforce the rule*." *Am. Civ. Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (citing *Diamond v. Charles*, 476 U.S. 54, 64 (1986)) (emphasis added). That is, he does not have to show past enforcement, although that is one way to demonstrate such a danger. *Ga. Latino All. For Hum. Rts.,* 691 F.3d at 1258. A plaintiff can instead show that "there is a credible threat of application." *Id.*

If Mr. Hetherington were to publicly declare tomorrow that he is a "lifelong Republican," under Fla. Stat. § 106.25(4), the FEC has the power refer a complaint to State Attorney Madden, who is directly supervised by Attorney General Moody. The fear of enforcement presently inhibits Mr. Hetherington from speaking and pre-enforcement actions exist precisely to protect against such harms. Hetherington is not required to gamble that the Attorney General's respect for his First Amendment rights would exceed that of the other defendants. But if he waits until the Attorney General initiates an enforcement action, Hetherington's claim here would likely be met by Defendant Moody's abstention assertion under *Younger v. Harris*, 401 U.S. 37 (1971). In *pre*-enforcement proceedings, the question is not what the defendant has done in the past, but what the defendant might do in the future. Given Attorney General Moody's independent authority to take up and act on violations of the challenged provision, Moody is a necessary party here.

B. The Attorney General errs in asserting that she has no role in enforcing Fla. Stat. § 106.143(3).

Two avenues exist by which a complaint may come before a state attorney: either through the FEC or directly from a complainant. First,

the FEC may refer complaints to a state attorney. The FEC "shall investigate all violations" submitted by sworn complaint or reported by the Secretary of State's Division of Elections. Fla. Stat. § 106.25(2). The Commission must "determine if the facts alleged" in the complaint or referred by the Division "constitute probable cause to believe that a violation has occurred." *Id.* at § 106.25(4). If it finds probable cause, the FEC may then "refer the matter to the state attorney for the judicial circuit in which the alleged violation occurred." *Id.* It is then "the duty of [the] state attorney . . . to investigate the complaint promptly and thoroughly; to undertake such criminal or civil actions as are justified by law; and to report to the commission the results of such investigation, the action taken, and the disposition thereof." *Id.* at § 106.25(6) (emphasis added).

Second, while the FEC is specifically tasked with investigating and acting on violations of Florida's election law, "nothing . . . limits the jurisdiction of any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this code." Fla. Stat. § 106.25(1). Indeed, complainants choosing to first approach the FEC must state in their "sworn complaint . . . whether a

complaint of the same violation has been made to any state attorney." *Id.* § 106.25(2). That is, Florida law gives the state attorney authority separate and apart from the FEC to receive, investigate, and pursue complaints.

Florida law requires the Attorney General to supervise and direct the state attorneys. Fla. Stat. § 16.08. "The Florida Constitution designates the Attorney General as 'the chief state legal officer.'" *Domme*, 753 F.2d at 956 (quoting Fla. Const. art. IV, § 5). As such, the Attorney General "is vested with broad authority to act in the public interest and, when she deems it necessary, to defend statutes against constitutional attack." *Support Working Animals, Inc. v. Desantis*, 457 F. Supp. 3d 1193, 1211 (N.D. Fla. 2020) (quoting Attorney General brief). Indeed, Florida law states that the Attorney General "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions," including civil cases, "in which the state may be a party, or in anywise interested." Fla. Stat. § 16.01(4). The District Court for the Southern District of Florida similarly held that "Florida's Attorney General, as an officer charged with enforcing state statutes, is a proper defendant in a suit challenging the constitutionality of a state criminal statute." *Teltech Sys. v.*

McCollum, No. 08-61664-CIV-Martinez-Brown, 2009 U.S. Dist. LEXIS 138513, *6 (S.D. Fla. June 29, 2009).

Other circuits have also held that "a dispute with a state suffices to create a dispute with the state's enforcement officer [the Attorney General of Virginia] sued in a representative capacity." *Mobil Oil v. Att'y Gen. of Va.*, 940 F.2d 73, 76 n.2 (4th Cir. 1991). "[A] plaintiff challenging the constitutionality of a state statute has a sufficiently adverse legal interest to [the Attorney General]." *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987); see also *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (holding Nebraska's Attorney General was proper defendant as he possessed "broad powers to enforce the State's constitution and statutes," including "policing compliance with this constitutional amendment").

As in *Support Working Animals*, this is not a case where a private right of action bypassing state enforcement exists or where "the Attorney General plays no role in enforcing" the law restricting Mr. Hetherington's speech. 457 F. Supp. 3d at 1213 (internal quotation marks omitted). To the contrary, "the Attorney General could superintend and direct the state attorneys to bring prosecutions" to

enforce Fla. Stat. § 106.143(3)'s "civil . . . penalties." *Id.* (internal quotation marks omitted). The Attorney General "could independently institute such prosecutions" under her common law authority, "and she could intervene in the trial of the case or on appeal." *Id.* (citation omitted). Thus, as in *Support Working Animals*, the Attorney General's powers and enforcement role are "sufficient to bring [Mr. Hetherington's] claims against her within *Ex parte Young*." *Id.*

Attorney General Moody nonetheless argues that because she is not the statute's enforcer, Mr. Hetherington lacks Article III standing to seek relief against her, citing *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020). The Attorney General's reliance on *Jacobson* is misplaced. The *Jacobson* plaintiffs lacked standing as to the Secretary because the Secretary had no supervisory power over the county supervisors, and no other role whatsoever in printing ballots. *Id.* at 1208 (noting that supervisors "not subject to the Secretary's control"). In the case at hand, the Attorney General has direct supervisory power over the state attorneys.

The conclusion that "the Attorney General [is] a proper defendant in this case is consistent with decades of Supreme Court precedent finding

standing in pre-enforcement constitutional challenges to state laws." *Support Working Animals, Inc.*, 457 F. Supp. at 1213 (collecting cases). Mr. Hetherington need not wait for another enforcement action to protect his rights, nor must he "sit on [his] hands until" state actors other than the FEC enforce the law against him. *Id.*

C. The *Ex parte Young* exception to the Eleventh Amendment applies.

Ex parte Young holds that "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

The Attorney General's claim to Eleventh Amendment immunity fails as it must rise or fall with her enforcement authority—and here, she has such authority. As discussed above, the Attorney General's enforcement role is much greater than the "some connection" required to trigger Ex parte Young's exception to Eleventh Amendment immunity. *Ex parte Young*, 209 U.S. 123, 157 (1908).

CONCLUSION

Mr. Hetherington respectfully requests that the Attorney General's motion to dismiss be denied.

Dated: July 6, 2021

/s/ Mallory Rechtenbach

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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 2,273 words, exclusive of the case style, signature block, and certificates.

Dated: July 6, 2021

/s/ *Mallory Rechtenbach*
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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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