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 POITIER, STERN, SMITH, ALLEN, AND HAYES' MOTIONS TO DISMISS

Mallory Rechtenbach (pro hac vice)
Owen Yeates (pro hac vice)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Ste. 801
Washington, DC 20036
mrechtenbach@ifs.org
oyeates@ifs.org
Tel.: 202-301-3300

Counsel for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

FEC Defendants maintain that Mr. Hetherington has failed to state a claim, while admitting that they have previously enforced a content-based statute against Mr. Hetherington's pure political speech. Mr. Hetherington simply requests the opportunity to freely speak during his campaign for public office instead of silencing himself out of fear that the FEC Defendants will punish him again. Furthermore, FEC Defendants are not entitled to qualified immunity as they violated Mr. Hetherington's clearly established constitutional right. 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 Pharms., 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) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

According to FEC Defendants, Mr. Hetherington fails to state a claim because Fla. Stat. § 106.143(3) is a "modest" and "constitutionally permissible" restriction that is "reasonably necessary to effectuate the legislative decision to have nonpartisan offices fill on a nonpartisan basis." FEC Mot. at 3. Far from a modest restriction, this law is a content-based restraint on pure political speech because it prohibits any message containing the words "Republican" or "Democrat" during a campaign for public office. The Supreme Court has held that both content-based laws and restrictions on political speech are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). While the FEC Defendants may believe this law is "reasonably

necessary to effectuate a legislative decision," that is not the applicable test. *Id.* Instead, content-based restrictions on speech, particularly political speech, can survive only where the government satisfies its burden by proving that the law in question serves a compelling governmental interest through the least restrictive means. FEC Defendants have not and cannot satisfy their burden.

In addition, the FEC Defendants repeatedly misstate Mr. Hetherington's claim, asserting that Hetherington "wishes to convey" that he is "running 'as a lifelong Republican.'" FEC Mot. at 4. However, Mr. Hetherington has not challenged Florida's choice to remove party labels from the ballot or omit party primaries. Nor did he state he is "*running as* a Republican."

Lastly, FEC Defendants argue that even if the law violates the Constitution, they are entitled to qualified immunity against Mr. Hetherington's individual capacity claims seeking nominal damages. Because this statute's enforcement violates Mr. Hetherington's clearly established constitutional right to freely advocate for his candidacy, the FEC Defendants are not entitled to qualified immunity from nominal damages.

ARGUMENT

I. FLORIDA'S LAW VIOLATES THE FIRST AMENDMENT.

FEC Defendants argue that they must be able to punish Mr. Hetherington for uttering the words "lifelong Republican" in order to conduct a nonpartisan election. They err. Hetherington does not challenge Florida's ability to hold nonpartisan elections. Nor does he ask to be listed as a Republican on the ballot or to represent himself as the Republican Party's nominee for the Escambia County School Board. Any number of candidates for the same seat may declare their identification as Republicans, without involving the state in the selection or designation of an official Republican nominee.

FEC Defendants contend that Florida's law imposes only a "slight burden," and, therefore, that the Court should apply a lower standard of scrutiny from *Timmons v. Twin Cities Area New Party*. 520 U.S. 351 (1997). But *Timmons* is inapposite for two reasons. First, *Timmons* examined whether a Minnesota law which prohibited a candidate from appearing on the ballot for multiple parties violated the plaintiffs' First Amendment associational rights. Unlike this case, *Timmons* did not address the free speech rights of political candidates but rather the

associational rights of a political party. Defendants selectively quote *Timmons* for the proposition that "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 358. In the same paragraph, however, the Court plainly states that this test is applied "[w]hen deciding whether a state election law violates First and Fourteenth Amendment *associational* rights." *Id.* (emphasis added). Accordingly, when the Court discusses "lesser burdens" on "plaintiffs' rights," they are specifically discussing plaintiffs' associational rights, which receive a lower level of scrutiny, not speech rights as the FEC Defendants represented.

Second, the "lesser burden" discussed in *Timmons* stemmed from a law specifically regulating how a candidate appeared on the ballot. Even though a party has a right to select its own candidate, the Court held that a party is not "absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359. The Court justified this limitation of associational rights in part by reasoning that the "[p]arty remain[ed] free to endorse whom it like[d], to ally itself with others, to nominate candidates for office, and to spread its message to

all who will listen." *Id.* at 361. In other words, the state could constitutionally limit First Amendment associational rights on the ballot because doing so did not further limit the party's ability to speak and campaign.

Mr. Hetherington does not challenge Florida's decision to remove party labels from the ballot and has never requested to be labeled as a Republican on the ballot. The speech at issue in this case is Hetherington's own political speech, not the government's ballot. Therefore, *Timmons* is inapposite.

The only other case cited by FEC Defendants, *Burdick v. Takushi*, 504 U.S. 428 (1992), is similarly irrelevant. The plaintiff in *Burdick* complained that Hawaii violated his right to vote by refusing to count his ballot for "Donald Duck." *Id.* at 437-38. The Court held that Hawaii's "ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote." *Id.* at 439. Hawaii never prevented Burdick from advocating for Donald Duck's election or identifying, in the political or any other sense, as a cartoon character. *Burdick* provides no support for FEC Defendants' position as it relates to the right of association with respect

to the ballot rather, and does not address a candidate's freedom of speech.

FEC Defendants fail to provide any pertinent support for the application of a lower standard of scrutiny, likely because the Supreme Court has unequivocally held that "burden[s] [on] political speech" are subject to strict scrutiny. *Citizens United*, 558 U.S. at 340; *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 v. Valeo*, 424 U.S. 1, 19 (1976))); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (requiring strict scrutiny when the state "seeks to restrict directly the offer of ideas by a candidate to the voters"). Moreover, strict scrutiny also applies because Florida's law is a content-based restriction on speech as it pertains "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. As Fla. Stat. § 106.143(3) only proscribes candidates from uttering one message, their party affiliation, it is content-based and must be justified by a compelling governmental interest.

While FEC Defendants' assert that prohibiting candidate speech is a mere "modest restriction" which is "reasonably necessary," FEC Mot. at 3, it is not the least restrictive means of achieving a nonpartisan election. The state already has ample means to control partisanship without censoring political discourse. Florida already omits party labels from the ballot and eschews party primaries. *Id*. Any state-asserted interest arising from having or expressing partisan affiliation could be served by recusal rather than censorship. The state has failed to demonstrate that recusal is an "unworkable alternative." *Siefert v. Alexander*, 608 F.3d 974, 983 (7th Cir. 2010).

Moreover, Florida's law is anything but "narrow in its focus." FEC Mot. at 3. Contrary to the challenged statute's plain terms, FEC Defendants claim that "Plaintiff does not allege, nor could he, that the statute at issue prevents him from stating any fact regarding his history or his views on any issue." *Id*. Not only does Mr. Hetherington allege that the challenged statute prevents him from "stating [a] fact regarding his history," but also that FEC Defendants have already punished him for stating the fact that he is "a lifelong Republican." Especially considering their enforcement history, it is simply

disingenuous for FEC Defendants to maintain that the statute only prevents candidates from "advertis[ing] themselves as running as representatives of any political party," not for "disclos[ing] [his] history of party affiliation" *Id*.

Furthermore, in attempting to quote Mr. Hetherington, FEC Defendants made a subtle but powerful addition to his statement in claiming that "Plaintiff wishes to convey" that he is "running '*as* a lifelong Republican.'" FEC Mot. at 4 (emphasis added).

Mr. Hetherington never declared that he is "running as" a lifelong Republican, the Republican party nominee, or "that he has the support of the Republican party" as FEC Defendants suggest. FEC Mot. at 4. He simply stated the fact that is he is "a lifelong Republican," and that is what he wants to do now. But Florida's speech restriction prevents him from disclosing this fact to the electorate in his current campaign. And the narrow exception at Fla. Stat. § 106.143(3), allowing candidates to divulge "partisan-related experience," does nothing to relieve the Statute's constitutional violation. According to Advisory Letter DE 2003-02, which the FEC Defendants cited in their previous enforcement action against Mr. Hetherington, a candidate may only discuss

"partisan related experience" if they held specific positions such as "executive committee of _____ party." (Ex. A).

This interpretation of the statute leads to incongruous and unequal outcomes. For example, if two candidates run for nonpartisan office and one was previously on the executive committee of the Republican Party, while the other was merely a member of the Republican Party, only the former could share her "partisan related experience" without violating the statute. Therefore, in practice, candidates like Mr. Hetherington are indeed penalized for "disclos[ing] their history of party affiliation." FEC Mot. at 3.

Contrary to FEC Defendants' contention, controlling any mention of a candidate's party affiliation is far from a "narrow" and "modest restriction," FEC Mot. at 3, particularly considering that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office," *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). Partisan affiliation "is shorthand" for "publicly taking a stance on" a variety of "matters of public importance." *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (internal quotation marks

omitted). This is particularly true in the American two-party system where most issues of public importance are viewed through the lens of "Right" and "Left," "Republican" or "Democrat." This lens remains in place even if the state decides to institute a nonpartisan election.

Thus, while Mr. Hetherington could "convey facts regarding his views on the school district's budget, curriculum, or issues unrelated to the school district, such as abortion, national debt, [or] foreign affairs," FEC Mot. at 3, he has instead chosen to represent his myriad political views under the umbrella of "lifelong Republican." While that characterization may not provide specific details or policy plans, it is arguably the simplest, quickest, and most understandable way to communicate with the voters.

Particularly in local elections, candidates do not have the opportunity to sit down for lengthy televised interviews or otherwise generate extensive media exposure. Instead, campaigning is done through handshakes with neighbors and quick conversations at the grocery store or in the pickup line at school. In his 2018 election, Mr. Hetherington had a few paragraphs to share his personal history with the community through Escambia County's voter guide. For many

voters, that voter guide was likely the only information they would receive regarding the candidates. While Mr. Hetherington may have aspired to give his views on each of the issues FEC Defendants noted, doing so was not feasible. By describing himself as "a lifelong Republican," Hetherington gave voters a general sense of his views on a myriad of subjects.

Mr. Hetherington merely desires the "unfettered opportunity to make [his] views known" so his fellow citizens can "intelligently evaluate" his candidacy before exercising their fundamental right to vote. *Buckley*, 424 U.S. at 52-53.

II. FEC DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

"Qualified immunity shields [government] officials from money damage unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U. S. 731, 735 (2011)(internal quotation marks omitted). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that law.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v.*

Howards, 566 U.S. 658, 664 (2012). "[W]e should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration. The 'salient question' . . . is whether the state of the law gave the defendants 'fair warning' that their alleged conduct was unconstitutional." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In other words, a constitutional right can be "clearly established" even if there are "notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *U.S. v. Lanier*, 520 U.S. 259, 269 (1997). "When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." *Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002).

As the Eleventh Circuit has previously noted, "there need not be a case 'on all fours . . . .'" *Holloman v. Harland*, 370 F.3d 1252, 1277 (11th Cir. 2004). Specifically, it is not "unreasonable" to expect government officials to be able to apply a standard "notwithstanding the lack of a

case with material factual similarities" as officials are not "free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation." *Holloman*, 370 F.3d at 1278.

FEC Defendants cite *Lane v. Franks* in support of their argument for sovereign immunity. 573 U.S. 228, 234 (2014). First, FEC Defendants claim, "[t]he Supreme Court also held in a First Amendment case . . . 'that Franks was entitled to qualified immunity as to the damages claims because a reasonable government official in [Franks'] position would not have had reason to believe that the Constitution protected [Lane's] testimony." FEC Mot. at 9-10 (quoting *Lane*, 573 U.S. at 234) (internal quotation marks omitted). However, this holding that the FEC Defendants ascribe to the Supreme Court was actually the district court's holding. See *Lane*, 573 U.S. at 234. Second, *Lane* revolved around the speech of a government employee and is therefore an inapt case to apply to a private citizen's protected political speech.

Several "reasonably well-defined doctrinal test[s]" and "broad statements of principle" are "clearly established" such that FEC Defendants should have applied them to the facts at hand. *Holloman*,

370 F.3d at 1278. First, the Supreme Court has maintained for over forty years that a candidate has the right "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (noting "right to engage in unfettered political speech"). That includes the right to "vigorously and tirelessly 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).

Second, the Supreme Court has unequivocally held that content-based laws are subject to strict scrutiny, *Reed*, 576 U.S. at 163, and are thus "presumptively unconstitutional," *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016). As discussed above, a law is content-based if it applies "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Florida's law is content-based as it applies to only one topic: party affiliation. As conceded by the FEC Defendants, candidates for nonpartisan office are permitted to make any statement and publicize

their candidacy in any way, other than using the words "Republican" or "Democrat." FEC Mot. at 8. Therefore, the law is admittedly content-based and presumptively unconstitutional.

Mr. Hetherington's statement, for which the FEC punished him, was spoken during his campaign for public office while advocating on behalf of his candidacy for the Escambia County School Board. To introduce himself to the electorate, Mr. Hetherington discussed his family, career, hobbies, and mentioned that he was a "lifelong Republican." This was pure political speech, which under binding Supreme Court precedent entitled Mr. Hetherington "to speak without legislative limit . . . ." *Buckley*, 424 U.S. at 54. FEC Defendants disregarded "clearly established" Supreme Court precedent protecting political speech, instead applying a content-based statute in order to punish Mr. Hetherington for uttering two words: "lifelong Republican."

FEC Defendants are not "free of the responsibility to put forth at least some mental effort" in applying the "reasonably well-defined doctrinal tests" to Mr. Hetherington's statement. *Holloman*, 370 F.3d at 1278. Because they violated Mr. Hetherington's constitutional right to "engage in unfettered political speech" by ignoring clearly defined

Supreme Court caselaw, *Davis*, 554 U.S. at 739, the FEC Defendants are not entitled to qualified immunity.

III. MR. HETHERINGTON IS ENTITLED TO NOMINAL DAMAGES.

Kells Hetherington suffered, and continues to suffer, real and actual injury to his First Amendment rights at FEC Defendants' hands. Their demonstrated commitment to fining him for his protected speech has compelled and continues to compel his silence, in violation of Section 1983. Nominal damages have long been available to compensate individuals censored in violation of their First Amendment rights.

Nominal damages are "a judicial declaration that the plaintiff's right has been violated." *Ela v. Destefano*, 869 F.3d 1198, 1204 (11th Cir. 2017) (quoting *Nominal Damages*, Black's Law Dictionary (10th ed. 2014). "When a right is violated, that violation imports damage in the nature of it and the party injured is entitled to a verdict for nominal damages." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) (internal quotation marks omitted).

The Eleventh Circuit has repeatedly held that "[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right . . . ." *Pelphrey v. Cobb Cnty.*, 547 F.3d

1263, 1282 (11th Cir. 2008) (quoting *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003). "[N]ominal damages are similarly appropriate in the context of a First Amendment violation." *KH Outdoor, L.L.C. v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006). Indeed, courts routinely permit plaintiffs to bring nominal damages claims against government officials in their individual capacities. *See Larez v. Los Angeles*, 946 F. 2d 630, 636 (9th Cir. 1991) (affirming the district court's ruling awarding $7 in nominal damages against a police chief in his individual capacity); *Stern v. Shouldice*, 706 F.2d 742, 750 (6th Cir. 1983) (affirming the district court's ruling awarding nominal damages against two college professors in their individual capacities); *Jones v. Meeks*, No. 5:18-cv-211-TKW-MJF, 2020 U.S. Dist. LEXIS 184958 (N.D. Fla. 2020) (granting default judgement against defendant in his individual capacity for nominal damages totaling $1).

The only remarkable aspect of Mr. Hetherington's damages claim is the brazenness of the FEC Defendants' violation. One would hope that government officials think twice before censoring the purely political speech of a candidate for public office. In any event, like all responsible

defendants, if FEC Defendants do not wish to be exposed to damages claims, they should respect others' rights.

CONCLUSION

Mr. Hetherington respectfully requests that FEC Defendants' motion to dismiss be denied.

Dated: July 6, 2021

/s/ Mallory Rechtenbach

Mallory Rechtenbach (pro hac vice)
Owen Yeates (pro hac vice)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Ste. 801
Washington, DC 20036
mrechtenbach@ifs.org
oyeates@ifs.org
Tel.: 202-301-3300
Counsel for Plaintiff

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 3,856 words, exclusive of the case style, signature block, and certificates.

Dated: July 6, 2021

/s/ *Mallory Rechtenbach*
Mallory Rechtenbach

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:

Ashley E. Davis
Deputy General Counsel
FLORIDA DEPARTMENT OF STATE
500 South Bronough St., Ste. 100
Tallahassee, FL 32399-0250
Ashley.Davis@dos.myflorida.com

Greg Marcille
OFFICE OF THE STATE ATTORNEY
1st Judicial Circuit
190 Governmental Center
Pensacola, FL 32501
gmarcille@osa1.org

Glen A. Bassett
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
400 S. Monroe St., PL-01
Tallahassee, FL 32399
Glen.Bassett@myfloridalegal.com

Jennifer Sniadecki
HALL, GILLIGAN, ROBERTS & SHANLEVER
4987 E. County Highway
Santa Rosa Beach, FL 32459
jsniadecki@hagrslaw.com

Mark Leonard Bonfanti
HALL, GILLIGAN, ROBERTS & SHANLEVER
1241 Airport Road, Suite A
Destin, FL 32541
mbonfanti@hgrslaw.com

Dated: July 6, 2021

/s/ *Mallory Rechtenbach*
Mallory Rechtenbach