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

REPLY TO FEC DEFENDANTS' SUPPLEMENTAL MEMORANDUM

Pursuant to Local Rule 7.1(I) and this Court's order granting leave to file (ECF No. 48), Plaintiff Kells Hetherington submits the following reply to the FEC Defendants' (Attorney General Moody and FEC Commissioners Poitier, Stern, Smith, Allen, and Hayes) supplemental memorandum in opposition (ECF No. 41) to Mr. Hetherington's motion for preliminary injunction (ECF No. 12). For the following reasons, the Court should disregard the FEC Defendants' asserted need for discovery and consolidate the preliminary injunction hearing with trial on the merits under Fed. R. Civ. P. 65(a)(2).

I. First Amendment cases entail minimal or no discovery

This Court should reject the FEC Defendants' efforts to delay resolution of this case and augment the burdens of protecting Mr. Hetherington's First Amendment rights. Because of the "chilling" effect on fundamental First Amendment rights in cases involving campaign regulation, courts should adopt standards and procedures that allow "minimal if any discovery." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("*WRTL II*"). Thus, in rejecting a test that would have required detailed factual analyses, the Supreme Court held that "there generally should be no discovery or inquiry into the sort of 'contextual' factors highlighted by the FEC and intervenors." *Id.* at 474 n.7; *see also Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 47 (1st Cir. 2012) ("In addressing an as-applied challenge to campaign finance regulations, the Supreme Court cautioned lower courts against examining background information where such scrutiny could become 'an excuse for discovery or a broader inquiry' that might chill 'core political speech.'"). This case involves a First Amendment claim that is legal in nature. As discussed below, any factual issues are illusory and,

consistent with the Supreme Court's guidance, the FEC Defendants' attempt to delay resolution through irrelevant discovery should be denied.

II. THE PROPOSED DISCOVERY IS NOT PROPORTIONAL TO CASE NEEDS

Even were this not a First Amendment case where discovery should be minimal, the discovery the FEC Defendants propose in order to delay trial on the merits should be denied under Rule 26's general requirements. Because the material sought by the FEC Defendants is publicly available, already in its possession, or irrelevant, it would not be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1).

A. Proposed RFP 1 seeks materials already available to the FEC Defendants.

Where parties have "equal access" to materials, as when they are publicly available, one party cannot demand that the other supply them. *Hodge v. Tide Tamer Indus.*, No. 4:19cv575-MW/MAF, 2020 U.S. Dist. LEXIS 242354, at *6 (N.D. Fla. May 14, 2020). Proposed RFP 1 would require that Mr. Hetherington produce his candidate filing materials, but those materials are publicly available and already within

the FEC Defendants' reach. *See Candidate List*, https://bit.ly/3hQhJIh.[1] The FEC Defendants therefore have no need for this discovery.

B. Proposed RFPs 2 and 4 seek materials that the FEC Defendants should already have.

It is in no way proportional to the needs of this case to demand information that the FEC Defendants should already possess. Apart from negligence in maintaining one's own records, the costs of which other parties should not bear, the only reason for such a request is to harass or burden the other parties. Yet the FEC Defendants request records that they should already have—either because they created or already received them. *See* Proposed RFP 2 (requesting correspondence with the FEC); Proposed RFP 4 (requesting correspondence with FEC about possible consent agreement). There is, therefore, no need to burden Mr. Hetherington with this discovery.

---

[1] One must click on Mr. Hetherington's name to open the page with his filing information.

C. The remaining requests seek irrelevant materials and information.

The FEC Defendants have no need for the remaining proposed requests because they demand information that is not "relevant to any . . . claim or defense [or] proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The touchstone of relevance is whether information "has any tendency to make a fact more or less probable." Fed. R. Evid. 401(a). And a discovery request "should be quashed to the extent it seeks irrelevant information." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1329 (11th Cir. 2020). But, even if proposed discovery meets the relevancy requirement, the Court must still examine "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *accord CV Restoration, LLC v. Diversified Shafts Sols., LLC*, No. 8:17-mc-00020-EAK-JSS, 2017 U.S. Dist. LEXIS 73994, at *7 (M.D. Fla. May 16, 2017); *see also Azzia v. Royal Caribbean Cruises Ltd.*, 2018 U.S. Dist. LEXIS 242128, at *3 (S.D. Fla. Feb. 12, 2018) (noting that the "traditionally liberal scope of discovery must be juxtaposed against [the] proportionality

considerations" emphasized in the 2015 amendments). The FEC Defendants' other requests cannot meet these requirements.

Proposed RFP 3 and ROG 6 are irrelevant because Mr. Hetherington has already shown his constitutional injury, and the proposed evidence would not disprove that. The FEC Defendants' proposed requests miss the point. A prohibition on any speech is a constitutional injury, and as Mr. Hetherington has shown this injury—by declaring that he is refraining from engaging in protected speech because he fears Defendants' enforcement of the challenged provision—the State bears the burden of meeting strict scrutiny for its content-based prohibition. The restriction violates candidates' rights to an "unfettered opportunity to make their views known." *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam); *see also Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (noting "constitutional right to" share party affiliation as "shorthand" for stances on multiple "matters of current public importance" (internal quotation marks omitted)); *Carey v. Wolnitzek*, 614 F.3d 189, 202 (6th Cir. 2010) (noting that sharing party affiliation is "a shorthand way of announcing one's views on *many* topics of the

day" (emphasis in original)). Mr. Hetherington does not need to demonstrate any further consequential damage beyond his inability to utter the prohibited speech.

The FEC Defendants' proposed request for information related to "a possible defense of accord and satisfaction," Proposed RFP 4, suffers from multiple flaws. While Florida law allows the Commission and respondents to end an action with a consent agreement, such agreements are "not binding upon either party unless and until it is signed by the respondent and by counsel for the commission upon approval by the commission." Fla. Stat. § 106.25(4)(i). Thus, even had there been an attempt to come to a consent agreement, anything that might have been said would not be binding here. Moreover, such settlement discussions would likely be inadmissible under Fed. R. Evid. 408. And in any event, the FEC would have been a party to such discussions, and thus any relevant, non-privileged information would already be in the FEC Defendants' possession.

Most importantly, the Commission's Final Order does not even hint at an agreement between the Commission and Mr. Hetherington, but is

instead based on the Commission's investigation, findings, and conclusions. *See* Final Order, ECF No. 12-5. The Final Order discusses the staff's investigation, the Commission's findings of fact, the Commission's conclusions of law, and its order of a $200 fine. *Id*. Thus, even if Mr. Hetherington had made some assertions about future actions, the Final Order made no mention of them, much less relied on them. And, given the lack of a signed consent agreement, anything that might have been said would not be binding. Thus, any request for information about accord and satisfaction should be denied as irrelevant, and it certainly is not important enough to delay resolution of the deprivation of Mr. Hetherington's constitutional right.

Proposed ROG 1 would ask whether all or only part of Fla. Stat. 106.143(3) must be struck down. That, however, is a question of law that Mr. Hetherington cannot determine, and one that does not require evidence. Mr. Hetherington has argued that the statute is unconstitutional because it restricts his ability to state his partisan affiliation, that he is a lifelong Republican. The Court may find it necessary to strike down the entire subsection, but that does not depend

on Mr. Hetherington's opinions, but rather on questions of law surrounding severability: whether Florida law in general favors severability, whether the elections code contains a relevant severability provision, whether the subsection would function without the unconstitutional restriction, and whether the Florida legislature would have passed the provision without the unconstitutional restriction. *See, e.g.*, *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1348 (11th Cir. 2004) (noting factors to be considered). These are all legal questions, and any thoughts by Mr. Hetherington relating to these questions are irrelevant. There is no justification to delay resolution of the case for investigation into Mr. Hetherington's opinions.

Proposed ROGs 2, 7, and 8 are irrelevant because this is a pre-enforcement challenge. For such a challenge, Mr. Hetherington does not need to show that he previously ran for office and shared his partisan affiliation. He need only "allege[] an intention to engage in a course of 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). The only proof required is a minimal showing of whether there is a "credible threat of prosecution," *id.*, which would be obvious even without the State's previous enforcement against Mr. Hetherington. It is up to the State to demonstrate that there is no longer a credible threat when it has already enforced the speech restriction. *Cf. City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982) (noting that the government must do more than merely cease conduct to defeat jurisdiction); *Jacksonville Prop. Rights Ass'n v. City of Jacksonville*, 635 F.3d 1266, 1274 (11th Cir. 2011) (same). Any information underlying Proposed ROG 2—whether the FEC will enforce the speech restriction again—must come from the FEC. And Proposed ROGs 7 and 8—whether Mr. Hetherington previously ran for nonpartisan or partisan elective office and disclosed his affiliation—seek information beyond what is required to substantiate a pre-enforcement action. None of these Proposed ROGs should be used to delay resolution of the case.

Proposed ROG 3—requesting information on which future campaigns Mr. Hetherington will enter—is irrelevant. The FEC Defendants do not

dispute that today, Mr. Hetherington is a candidate for the Escambia County School Board; and that as such, Mr. Hetherington is, today, subject to the challenged provision. If this case is still ongoing once that election concludes, and the FEC Defendants then sought to raise a mootness claim, it would fail. The Supreme Court has already rejected the need for detailed information to show continuing justiciability. Election-related challenges "fit comfortably within the established exception for disputes capable of repetition, yet evading review." *WRTL II*, 551 U.S. at 462 (compiling cases). "[E]lection cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Am. Civil Liberties U. v. Lomax*, 471 F.3d 1010, 1017 (9th Cir. 2006) (internal quotation marks omitted). Should the FEC Defendants someday claim mootness, Mr. Hetherington need only rely on his assertions assert that future campaigns will be "materially similar." *WRTL II*, 551 U.S. at 463. Like the Federal Election Commission in *WRTL II*, the FEC Defendants here "ask[] for too much" information.

Id. Proposed ROG 3 should be denied, and resolution of this case should not be delayed for it.

Proposed ROG 4—seeking other speech that Mr. Hetherington might want to make in violation of Florida's speech restriction—is irrelevant to Mr. Hetherington's actual claim, that Florida unconstitutionally restricts him from sharing that he is a lifelong Republican, and to his requested relief, a declaration that preventing him from sharing his affiliation with the Republican party is unconstitutional and an injunction protecting his right to do so. The state has no right to expand or change the scope of his claims or requested relief, yet that is what the FEC Defendants attempt to do with Proposed ROG 4. It would create new claims and requests, not address that which Mr. Hetherington in fact made. It therefore requests irrelevant information and should be denied.

Proposed ROG 5's request related to nominal damages should likewise be denied. The point of nominal damages is to grant an award where evidence of actual damages is impossible or not supplied. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) ("[Nominal

damages] are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages."); *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1535 (2020) ("When a plaintiff 's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury."); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (noting nominal damages are appropriate upon proof of First Amendment violations despite lack of "compensable injury," and affirming award of $100 (internal quotation marks omitted)); *In re Facebook Privacy Litig.*, No. C-10-02389-RMW, 2015 U.S. Dist. LEXIS 18306, at *7 (N.D. Cal. Feb. 13, 2015) (noting that nominal damages claims do not require "any additional discovery because nominal damages require no proof of actual damages"). The amount here requested in nominal damages—$17.91, reflecting the year of the First Amendment's ratification—is a pittance in comparison to the attorney's fees that the state seems intent on racking up under Section 1988 before even getting to the merits of the case. The nominal damages requested here is certainly reasonable

when compared to amounts other courts have granted. *See*, *e.g.*, *KH Outdoor*, 465 F.3d at 1261 (granting $100). Accordingly, resolution of this case should not be delayed for any requests related to Mr. Hetherington's nominal damages.

CONCLUSION

For the foregoing reasons, the Court should hold that the discovery proposed by the FEC Defendants is not necessary and consolidate the preliminary injunction hearing with trial on the merits.

Dated: July 12, 2021

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

Certificate of Compliance

I hereby certify that the foregoing 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 2,360 words, exclusive of the case style, signature block, and certificates.

Dated: July 12, 2021

/s/ Owen Yeates
Owen Yeates

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
Bradley Robert McVay
FLORIDA DEPARTMENT OF STATE
500 South Bronough St., Ste. 100
Tallahassee, FL 32399-0250
ashley.davis@dos.myflorida.com
brad.mcvay@dos.myflorida.com
Counsel for the Secretary of State

Jennifer Sniadecki
Mark Leonard Bonfanti
HALL GILLIGAN ROBERTS & SHANLEVER
1241 Airport Road, Suite A
Destin, FL 32541
jsniadecki@hgrslaw.com
mbonfanti@hgrslaw.com
Counsel for the State Attorney

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
Counsel for the Commissioners and the Attorney General

Dated: July 12, 2021

/s/ Owen Yeates
Owen Yeates