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

KELLS HETHERINGTON, *Plaintiff*, v. GINGER BOWDEN MADDEN, in her official capacity as State Attorney, et al., *Defendants*.	Case No. 3:21-cv-671-MCR-EMT

PLAINTIFF KELLS HETHERINGTON'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The FEC Defendants assert that "Florida's citizens have spoken to say that they wish" the speech restriction at Fla. Stat. § 106.143(3), FEC OPP at 2 (ECF No. 75), as if that should prove the law's constitutionality. *See also id*. at 13, 19. But "[t]he First Amendment is a counter-majoritarian bulwark against tyranny," and it "places out of reach of the tyranny of the majority the protections of the First Amendment." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1327 (11th Cir. 2017) (Pryor, J., concurring). Indeed, when a government restriction is "embraced and advocated by increasing numbers of people," that "is all

the more reason to protect . . . First Amendment rights." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).

Notwithstanding such distractions in the oppositions by the State Attorney ("Madden OPP," ECF No. 70) and the FEC Defendants, the issues in this case remain simple and clear. Does strict scrutiny apply because Florida imposes a content-based restriction on political speech? If so, can the Defendants meet their burden of proof by showing that Florida's speech restriction is narrowly tailored to a compelling governmental interest? Strict scrutiny does apply, and Defendants fail to meet their burden of proof.

I. STRICT SCRUTINY APPLIES TO FLORIDA'S CONTENT-BASED RESTRICTION ON POLITICAL SPEECH

Florida prohibits "a candidate running for nonpartisan office [from] . . . stat[ing] the candidate's political party affiliation" in any "political advertisement." Fla. Stat. § 106.143(3). But, contrary to the FEC's representation, FEC OPP at 17, 23 ¶ J, the scope of the speech restriction far exceeds paid political advertisements. It broadly restricts any speech that the Defendants may shoehorn into the category of campaign speech: "A candidate for nonpartisan office is prohibited from

campaigning based on party affiliation." Fla. Stat. § 106.143(3).

Indeed, Florida has construed these provisions to prohibit any communications it might construe as "done to bring about a candidate's election." Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010).[1] Under this guise, Florida says that candidates for nonpartisan office cannot even post their party affiliation on their *personal* Facebook pages. *Id.* at 1.

Mr. Hetherington's history with the FEC demonstrates the restriction's broad scope. He was fined for stating—in a non-advertisement, amid a much longer discussion of his background—"On weekends you'll find me on my Sunfish sailing on Big Lagoon. A lifelong Republican, I was raised in the Congregationalist Church." Ex. 3 to Salzman Complaint, Fla. Elections Comm'n file at 89, Case No. 18-133.[2]

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[1] Available at http://opinions.dos.state.fl.us/searchable/pdf/2010/de1002.pdf.

[2] Available at http://www.fec.state.fl.us/FECWebFi.nsf/0/91B84EFF9ACDDF35852585C9006817C4/$file/18-133+Hetherington,+Kells_Redacted.pdf. Reviewing Mr. Hetherington's past speech, it is hard to credit the FEC's assertion "that he is running as a Republican candidate" and thus

Given that the Defendants have construed that communication as campaigning based on party affiliation, they can and will punish any communication mentioning party affiliation.

Defendants have not even tried to deny that Florida created a content-based restriction on speech. Florida's speech restriction applies to expressions of "the candidate's political party affiliation" or whenever officials construe speech to involve "campaigning based on party affiliation." Fla. Stat. § 106.143(3). The restriction applies under the first clause "because of the topic discussed or the idea or message expressed," and it applies under the second whenever the speech serves a particular "function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It is therefore subject to strict scrutiny. *Id*. at 164.

Indeed, the provision is a particularly pernicious content-based regulation. It risks discriminatory enforcement by allowing "enforcement authorities to examine the content of the message that is

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turning the "election into a partisan one." FEC OPP at 18. Unless the Commission would also argue that he had been running as the sailing and Congregationalist candidate, or turned that election into a regatta and ministerial selection.

conveyed to determine wither a violation has occurred," here to determine whether it constitutes campaigning based on affiliation. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks omitted); *see also Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020) (quoting *McCullen*).

Florida's speech restriction must also pass strict scrutiny because it "burden[s] political speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *see also* Hetherington OPP FEC at 16-18 (ECF No. 72); Hetherington Memo. at 10-11 (ECF No. 67-1). To avoid the strict scrutiny thus required, Defendants attempt to turn this case into a challenge to the existence of nonpartisan elections altogether, or to the basic mechanisms of elections—what messages may go on the ballots and what conduct and speech may occur at polling places.

Mr. Hetherington does not challenge nonpartisan elections. He is not challenging the state's right to prohibit party selection of the nominees for office or the listing of party nomination on the ballot. He merely challenges restrictions on his speech during the entirety of the election period. And in attempting to define nonpartisan elections as a type of

speech restriction, Florida has created a novel nonpartisan election scheme, one that Defendants have failed to sustain as a compelling governmental interest. *See* Hetherington OPP FEC at 8-12.

Instead, they try to support their novel scheme with cases about nonpartisan elections or elections in general. They don't even try to find support in the most on-point cases available about controlling speech in nonpartisan elections—those dealing with speech restrictions during nonpartisan judicial elections—because those cases completely undermine the Defendants' positions. Even when dealing with judicial elections, where the governmental interests are if anything higher, courts have held that restrictions like those here are unconstitutional. *See* Hetherington OPP FEC at 25-26 (discussing cases).

Instead, Defendants look farther afield, to cases dealing with ballots and polling places. But those cases cannot apply here, because those courts explicitly distinguished the present situation. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 360-61 (1997) (imposing *Burdick* test for *associational* rights, distinguishing from impositions on speech rights to endorse and spread message); *Burdick v. Takushi*, 504

U.S. 428, 441 (1992) (noting that ballot restriction left "other means available" to share protest message). Moreover, Defendants' cases deal with situations where the governmental interests are higher or the laws are less restrictive in time or location: state control over ballots; the use of time, place, and manner restrictions at polling places; or the qualifications for and methods of choosing candidates.[3] They did not deal with a prohibition on particular speech over the entire election.

More importantly, Defendants' theory would vacate 45 years of Supreme Court caselaw. If any challenge even tangentially related to "a state's election law" were governed by the "*Anderson-Burdick* sliding scale," Madden OPP at 7, then there would have been no need for *Buckley*'s strict scrutiny of campaign expenditure limits. *McCutcheon v.*

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[3] *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 186 (2008) (Stevens, J., plurality op.) (photo identification law for voting); *Tashjian v. Republican Party*, 479 U.S. 208, 210-11 (1986) (controlling who could vote in primary); *Foster v. Love*, 522 U.S. 67, 68 (1997) (addressing open primary law); *Soltysik v. Padilla*, 910 F.3d 438, 441-42 (9th Cir. 2018) (party label requirement on ballots); *EH Fusion Party v. Suffolk Cty. Bd. of Elections*, 401 F. Supp. 3d 376, 379 (E.D.N.Y. 2019) (requiring that candidates prove nominations); *see also Sugarman v. Dougall*, 413 U.S. 634, 635, 647 (1973) (addressing employment requirement, mentioning candidate and voter qualifications in dicta).

FEC, 572 U.S. 185, 197 (2014) (Roberts, C.J., controlling op.) (discussing "exacting scrutiny"). Or for strict scrutiny of a prohibition on corporate speech. *Citizens United*, 558 U.S. at 340. Or for strict scrutiny of de facto speech restrictions created by differential contribution limits for self-funded candidates. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736, 740 (2008). Or for the closely drawn scrutiny repeatedly applied to contribution limits. *See, e.g.*, *McCutcheon*, 572 U.S. at 197.

Each of those cases involved some restriction on activity during the campaign, which the government felt was necessary to maintain the election process's integrity. Under Defendants' reasoning, the *Anderson-Burdick* test should have applied in each of them. But it did not. Rather, the *Buckley* line of cases exists, and the strict scrutiny it requires for burdens on speech must be applied here.

II. FLORIDA'S SPEECH RESTRICTION CANNOT SURVIVE STRICT SCRUTINY

Defendants have the burden to prove that Florida's speech restriction survives strict scrutiny: that a compelling interest supports the restriction, and that the restriction is narrowly tailored to that interest. *McCutcheon*, 572 U.S. at 197, 210; *Citizens United*, 558 U.S. at

340. Defendants' assertions about the size of Mr. Hetherington's burden, for example, are irrelevant to whether the government pursues a compelling interest or whether the law furthers that interest. Given a First Amendment violation, the state must show that it has a compelling need and that it has pursued the least restrictive means to achieve it.

A. There is no compelling governmental interest

Defendants have failed to demonstrate a compelling interest. The only recognized interest for restricting political speech is combatting actual or apparent corruption. *See McCutcheon*, 572 U.S. at 206-07 ("consistently rejected attempts to suppress campaign speech based on" any "legislative objective[]" other than "preventing corruption or [its] appearance"); *see also* Hetherington OPP FEC at 22; Hetherington Memo. at 12-15; *cf. Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) ("fraud and corruption" (citing to *Buckley*)). Defendants have not raised this interest, nor can they, as there are no "dollars for political favors" here. *McCutcheon*, 572 U.S. at 192.

Without any support that it is a compelling interest, the State

Attorney raises an "interest in maintaining the integrity of its nonpartisan elections." Madden OPP at 9. The FEC raises that interest, but citing to an inapposite judicial conduct case. FEC OPP at 13. As discussed further below, Florida's speech restriction is not narrowly tailored to this interest.

The FEC also raises an interest in avoiding confusion and undue influence, FEC OPP at 14, but that is a *legitimate* and not a compelling interest, *Eu*, 489 U.S. at 228. And the interest cannot be raised to support a law like Florida's speech restriction: it is an interest in "fostering an informed electorate," and laws that "restrict[] the flow of information to [citizens] must be viewed with some skepticism." *Id.* (internal quotation marks omitted).

B. The speech restriction is not narrowly tailored

Given that there is no hint here of dollars for political favors, Florida's speech restriction cannot further the interest in combatting actual or apparent corruption. Likewise, as it restricts information, the provision is not narrowly tailored to combatting confusion and undue influence. *Id.* That interest requires more information, not less.

Moreover, the speech restriction is not tailored to any interest in maintaining nonpartisan elections. As explained in Mr. Hetherington's other briefs, that interest would sustain laws that prohibited parties from selecting nominees, prohibited assertions of party nomination on ballots, and, perhaps, assertions in campaign speech that a candidate is a party nominee. Those are all less restrictive alternatives, and the law therefore fails tailoring. Hetherington Memo at 21-23; Hetherington OPP FEC at 30-31. Moreover, other courts have already recognized—in the judicial context, where the government's interests may be higher—that the interest does not sustain restrictions on speech like Mr. Hetherington's. *See* Hetherington OPP FEC at 23-26. And, as this Court has already recognized, the speech restriction fails tailoring because it is underinclusive and overinclusive. Order at 10-13 (ECF No. 51); *see also* Hetherington Memo. at 15-20; Hetherington OPP FEC at 29-30.

III. THE SPEECH RESTRICTION IS UNCONSTITUTIONALLY OVERBROAD

Defendants do not attempt to refute the argument that the speech restriction is unconstitutionally overbroad, perhaps because the FEC hopes to avoid the argument through its motion to strike. But even if

the Commission succeeded in striking the statistics discussed in Mr. Hetherington's memorandum, he still shows that the law is unconstitutionally overbroad.

A law is unconstitutionally overbroad when it encompasses more speech than may be countenanced as within its "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). The only authority that the Commission provides for a compelling governmental interest is one related to judicial elections. FEC OPP at 13. Apart from that, it might assert a compelling interest in prohibiting partisan affiliation on ballots. In either case, the speech restriction goes beyond the plainly legitimate sweep of the governmental interest—controlling speech outside the judicial context and during the entire election.

The statistics produced from Ballotpedia and the Florida School Boards Association were just icing on the cake, unnecessary to demonstrate the restriction's overbreadth. The law does that facially. But, if it so desires, the Court may take judicial notice of the same information from the County Election websites. *See* Fed. R. Evid. 201; *Dippin' Dots v. Frosty Bites Distrib.*, 369 F.3d 1197, 1204 (11th Cir.

2004) (affirming judicial notice); *Dimanche v. Brown*, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015) (taking notice); *Support Working Animals v. Desantis*, 457 F. Supp. 3d 1193, 1203 n.1 (N.D. Fla. 2020) (same). For the 2020 election, they show the following: In Hillsborough county, 21 partisan seats, 6 judicial seats, and 36 other nonpartisan seats;[4] in Orange county, 18 partisan seats, 6 judicial seats, and 11 other nonpartisan seats;[5] in Miami-Dade county, 19 partisan seats, 6 judicial seats, and 43 other nonpartisan seats;[6] in Pinellas county, 17 partisan seats, 5 judicial seats, and 10 other nonpartisan seats;[7] and in Duval county (home of Jacksonville), 9 partisan seats, 7 judicial seats, and 12

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[4] Hillsborough County, 2020 General Election: Official Results, https://enr.electionsfl.org/HIL/2772/Summary/

[5] Orange County, 2020 Official Results, https://www.ocfelections.gov/sites/default/files/media/forms/Election%20Records%20and%20Turnout/election%20records/10866-2020%20GENERAL%20ELECTION/10866-official-election-results-summary.pdf

[6] Miami-Dade County, 2020 General Election, https://enr.electionsfl.org/DAD/2779/Summary/

[7] Pinellas County, General Election: November 3, 2020, https://enr.votepinellas.com/FL/Pinellas/106209/web.264614/#/summary

other nonpartisan seats.[8] This gives a total of 84 partisan seats, 30 judicial seats, and 112 other nonpartisan seats, in just five counties. Because Florida's speech restriction proscribes speech in 79% of the nonjudicial nonpartisan contests, it is constitutionally overbroad.

IV. DEFENDANTS' OTHER ARGUMENTS ARE INAPPOSITE

A. The State Attorney is a required party

The arguments whether the Court should dismiss the State Attorney are well-trod, and this Court has already rejected her motion to dismiss because of her power to enforce Chapter 106. Dismissal Order at 11-13 (ECF No. 50); *see also* Hetherington OPP Madden at 7-15 (ECF No. 71).

The State Attorney argues for dismissal because she cannot enforce penalties. But § 106.25 recognizes her authority to enforce the speech restriction. Fla. Stat. § 106.25(2) (noting that a complaint to the Commission "shall state whether a complaint of the same violation has been made to any state attorney").

She now argues that she should be dismissed because she has only

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[8] Duval County, 2020 General: Official Results, https://enr.electionsfl.org/DUV/Summary/2745/

found cases where the state attorney made criminal charges. But the inability to find cases where a state attorney pursued civil penalties does not prove a lack of authority to do so. And the explicit language of the Florida Statutes is to the contrary: "The state attorney shall . . . prosecute . . . all suits, applications, or motions, civil or criminal . . . ." Fla. Stat. § 27.02(1); *see also Cullen v. Cheal*, 586 So. 2d 1228, 1229 (Fla. Dist. Ct. App. 1991) (including State Attorney among the "governmental entit[ies] having enforcement jurisdiction" to file "civil action[s]"). Furthermore, Fla. Stat. § 106.19(1)(d) would allow her to pursue criminal penalties for expenditures on advertisements in violation of § 106.143(3).

B. There are no redressability concerns

The FEC again asserts that—because of constitutional and statutory requirements for nonpartisan school board elections, as well as a definition of nonpartisan elections that includes speech during the entire election cycle—Mr. Hetherington's injuries are not redressable. FEC OPP at 6-8. But none of these provisions give Defendants enforcement authority parallel to that at § 106.143(3).

Two of the provisions merely require nonpartisan elections for school board seats. *See* Fla. Const. art. IX, § 4(a); Fla. Stat. § 1001.361. The third defines nonpartisan office as one "for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." Fla. Stat. § 97.021(23). That definition does not necessarily include Mr. Hetherington's speech—it could merely cover assertions that a candidate is the party nominee for office. Regardless, it is a definition, not a grant of enforcement authority or a requirement that Defendants punish candidates for mentioning party affiliation.

Furthermore, to the extent that § 97.021(23) does raise redressability concerns, Mr. Hetherington moved for leave to file an amended complaint, allowing the Court to strike the speech restriction at both § 97.021(23) and § 106.143(3) and removing any redressability concerns.

C. Incorrect assertions that Mr. Hetherington misconstrued Florida law

Although it has little relevance to whether the government has met its burden, the FEC spends pages discussing supposed errors in Mr. Hetherington's brief. In particular, the FEC claims that Mr.

Hetherington misrepresented the state's goals.

Rather than creating and refuting strawmen—given the Commission's past failure to assert any compelling interests, *see* Hetherington Memo at 12-13—Mr. Hetherington raised the strongest interests that he could on behalf of the state, to demonstrate that the speech restriction could not pass strict scrutiny even under those interests. That the Commission rejects those goals and interests only strengthens his case.

The FEC repudiates any interest in combatting the dangers of partisanship, asserting merely an interest in combatting the appearance of partisanship. *See* FEC OPP at 21-22 ¶ D (rejecting claim "that party membership was 'dangerous,'" and asserting that "[n]othing in the statute suggests that Floridians feel that party membership is 'dangerous'"); *id*. at 22 ¶ F (rejecting claim that "Floridians must be concerned over party influence over the candidates"); *id*. at 22 ¶ G (rejecting concern with party influence over officeholders); *id*. at 23 ¶ H, 24 ¶¶ N, O (rejecting concern with bias from party affiliation).

Forgetting that "the extreme of injustice is [for a candidate] to seem

to be just when one is not," Plato, *The Republic of Plato* 361a (Allan Bloom, trans., Basic Books 2d ed. 1991), the FEC has turned the governmental interest into a strawman. An empty husk of an interest—one that that is all appearance and no substance—cannot be compelling.

Specifically, if there is no concern over officeholder bias from party affiliation, there can be no concern in creating an appearance of partisan affiliation by sharing one's party membership. In fact, in that situation, the only possible purpose for Florida's nonpartisan scheme is to control disfavored speech, and that simply seals the speech restriction's fate. Not only is the speech restriction content based on its face, but it also targets speech because it disagrees with the message. *Reed*, 576 U.S. at 163-64. And, in the face of an interest that finds no foundation in concerns over officeholder bias, but only in voter dislike of partisan speech, Florida's speech restriction simply cannot withstand strict scrutiny's presumption of unconstitutionality. *Id*. at 163.

CONCLUSION

For all the reasons given here and in previous briefing, the Court should grant Mr. Hetherington's summary judgment motion.

Dated: January 25, 2022

/s/ Owen Yeates

Owen Yeates (pro hac vice)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Ste. 801
Washington, DC 20036
oyeates@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 3,169 words, exclusive of the case style, tables of contents and authorities, signature block, and certificates.

Dated: January 25, 2022

/s/ Owen Yeates
Owen Yeates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will serve all attorneys of record.

Dated: January 25, 2022

/s/ Owen Yeates
Owen Yeates