

**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; ASHLEY MOODY, in her official capacity as Florida Attorney General; GINGER BOWDEN MADDEN, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, Florida; JONI ALEXIS POITIER, in her individual capacity and official capacity as member and Vice Chair of the Florida Elections Commission; BARBRA STERN, HYMBERLEEE CURRY SMITH, JASON TODD ALLEN, and J. MARTIN HAYES, in their individual capacities and official capacities as member of the Florida Elections Commission,

Defendants.

Case No.: 3:21-CV-671

**RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

COMES NOW Defendant Ginger Bowden Madden, in her official capacity as State Attorney for the First Judicial Circuit, (the “State Attorney” or “Defendant”) by and through undersigned counsel, and respectfully submits her Response in

Opposition to Plaintiff's Motion for Preliminary Injunction ("Motion") showing the Court as follows ¹:

INTRODUCTION

1. Plaintiff filed his one (1) count complaint on or about April 25, 2021 alleging violations of his First Amendment right to free speech pursuant to 42 U.S.C. § 1983. Hetherington alleges that his right to free speech was violated during a 2018 election where Hetherington ran for a position with the Escambia County School Board.

2. Specifically, Hetherington alleges that he was fined by the Florida Elections Commission ("FEC") for describing himself as a "lifelong republican" during his 2018 campaign. *See* Complaint at ¶ 16. Hetherington states in his Complaint that the FEC received a complaint from a Former Escambia County PTA President, and the FEC found probable cause to support the PTA President's Complaint. *Id.* at ¶ 17. Hetherington further states that the FEC entered a decision to fine Mr. Hetherington in the amount of \$500.00 which was eventually lowered to \$200.00 upon the FEC's reconsideration. *Id.* at ¶ 18.

¹ The State Attorney has filed a Motion to Stay simultaneously with this Response in Opposition to Plaintiff's Motion for Preliminary Injunction. The State Attorney provides this response out of an abundance of caution should the Court decline to grant the State Attorney's Motion to Stay.

3. Hetherington does not allege any factual allegations in his Complaint that the State Attorney was involved in any of the incidents of election violations from his 2018 campaign.

4. Hetherington states that he intends to run for Escambia County School Board during the next election cycle in 2022. He further states that he intends to once again mention his political party affiliation in his campaign but alleges that he refrains from doing so due to fear of enforcement of Fla Stat. § 106.143(3) by Defendants. *Id.* at ¶¶ 19-20.

5. Hetherington filed his Complaint in a shotgun approach which includes Defendants who have no relation to the enforcement of Hetherington's previous fine, or whom have no responsibility in enforcing Fla. Stat. § 106.143(3), including the State Attorney. In fact, the only mention of the State Attorney in Plaintiff's Complaint is in Paragraph 8 wherein Plaintiff states what he believes to be the State Attorney's vested duties as it relates to Florida's election laws.

6. Plaintiff's claims against the State Attorney are without merit as the State Attorney is not the investigative and/or enforcing authority of Fla. Stat. § 106.143(3). Furthermore, Plaintiff fails to provide any specific facts in his Motion to support a finding that the State Attorney violated his First Amendment rights and that without an injunction against the State Attorney, Plaintiff will suffer irreparable harm. Thus, Plaintiff's Motion should be denied.

MEMORANDUM OF LAW

A. Plaintiff Has Not Established the Elements Required for Injunctive Relief.

(1) Standard for Granting Injunctive Relief.

A preliminary injunction is an extraordinary and drastic remedy and should not be granted routinely but only when the movant, by a clear showing, carries the burden of persuasion. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). A party seeking a preliminary injunction must meet the significant burden of establishing, (1) a substantial likelihood of success on the merits; (2) irreparable injury if the injunction were not granted; (3) that the threatened injury outweighs any harm an injunction may cause the defendant; and (4) that granting the injunction is not adverse to the public interest. *Johnson & Johnson Vision Care, Inc. v. 1-800-Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir. 2002). A preliminary injunction will not issue if the movant fails to carry his or her burden of persuasion as to any one of these prerequisites. *Movie & Video World v. Board of County Commissioners*, 723 F. Supp. 695 (S.D. Fla. 1989). The movant must "clearly establish [] the burden of persuasion" for each of these four elements. *Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (internal quotation marks omitted). Because a litigant must meet all four prerequisites to obtain a preliminary injunction, failure to satisfy just one dooms the request. See *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016)

a. Plaintiff is Unlikely to Succeed on the Merits.

To succeed on a claim such as Plaintiff's, Plaintiff must show that the violative conduct "was committed by a person acting under the color of state law" and that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Bevan v. D'Allasandro*, 2005 U.S. Dist. LEXIS 33585, *9; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Fullman v. Graddick*, 723 F.2d 553, 561 (11th Cir. 1984). Section 1983 cases are subject to a heightened pleading standard requiring the Plaintiff to plead specific facts which set out the claim. *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003). A causal connection between the alleged conduct of defendant and the constitutional deprivations must be established by the moving party. *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001) (en banc).

Here, Plaintiff fails to plead any specific facts that establish he suffered a deprivation of rights. Instead, Hetherington blanketly asserts his First Amendment rights were violated, but never shows how the State Attorney's actions, which were none, relate to this alleged violation. Plaintiff cannot establish a likelihood of success on the mertis as Plaintiff has failed to carry his burden that if the case were to proceed to trial, which it should not, the relief sought against the State Attorney would be granted. Specifically, Plaintiff's 51-page Motion goes into a lengthy constitutional law analysis without providing any specific application to any of the named

Defendants including the State Attorney. Moreover, Plaintiff's Motion does not provide any factual allegations which would provide the Court with the necessary information to determine what, if any, involvement the State Attorney had/has in the issuing of civil penalties relating to Fla. Stat. § 106.143(3). Plaintiff has not established how the State Attorney has allegedly violated his First Amendment rights and thus, he cannot establish a likelihood of success on the merits. As it is well settled that a movant must satisfy all four (4) prongs in order to be successful in obtaining a preliminary injunction, and he cannot, Plaintiff's Motion should be denied.

b. Plaintiff Has Not Established Irreparable Injury.

The asserted irreparable injury in a motion for preliminary injunction must be neither remote nor speculative, but actual and imminent. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 22, 24 (2008) (“Issuing a preliminary injunction based on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”).

Here, Plaintiff has failed to provide the Court with any facts that would support actual and imminent harm if the State Attorney were not enjoined from

enforcing a statute for which she is not the enforcing authority.² Instead, Plaintiff's Motion states that "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claims." *See Motion at pg. 33.* Because Plaintiff has failed to allege any facts which would provide the Court with any causal connection between the alleged violation and the State Attorney to succeed in the first prong of the analysis, this second prong of irreparable harm cannot be presumed. Furthermore, when a movant fails to prove irreparable harm, the Court need not analyze the remaining elements to issue a preliminary injunction. *See City of Jacksonville*, 896 F.2d at 1285 ("We need not address each element because we conclude that no showing of irreparable injury was made."). Thus, Plaintiff's Motion should be denied.

CONCLUSION

For the foregoing reasons, the State Attorney respectfully requests that the Court deny Plaintiff's Motion for Preliminary Injunction and dismiss Plaintiff's Complaint against the State Attorney in its entirety.

[DATE AND SIGNATURE ON FOLLOWING PAGE]

² The State Attorney has filed her Motion to Dismiss concurrently with this Response which sets forth her argument and supporting legal authority for this proposition.

Respectfully submitted this 1st day of June 2021.

/s/ Jennifer K. Sniadecki
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*Counsel for Ginger Bowden Madden,
in her capacity as the State Attorney
for the First Judicial Circuit*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 1st day of June 2021.

/s/ Jennifer K. Sniadecki
Jennifer K. Sniadecki, Esq.