UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

KELLS HETHERINGTON,

Plaintiff,

v. **CASE NO. 3:21-cv-671-MCR-EMT**

GINGER BOWDEN MADDEN, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, et al.

Defendants.
_____/

ORDER

This is a constitutional challenge to a provision of the Florida Election Code (the "Code") prohibiting candidates for nonpartisan office from campaigning based on party affiliation. *See* § 106.143(3), Fla. Stat. (2020). Plaintiff Kells Hetherington, who is a candidate for a nonpartisan office in the 2022 election, claims the provision violates the First Amendment to the United States Constitution, both on its face and as applied to him, because it prohibits core political speech during an election campaign. Hetherington has moved for a preliminary injunction, seeking to enjoin

Defendants[1] from enforcing the provision. On full consideration, the Court concludes that a preliminary injunction should issue.[2]

I. Background

The Florida Legislature regulates elections through the Code, which encompasses chapters 97-106, Florida Statutes. The Code "generally contemplates partisan elections." *See Orange County v. Singh*, 268 So. 3d 668, 671 (Fla. 2019). However, it also specifies that elections for certain offices—namely, judicial office and the office of school board member—must be nonpartisan. *See id.* at 672. Under

[1] The Court previously dismissed Hetherington's claims against the Florida Secretary of State and Attorney General because Hetherington lacked standing to sue them. *See* ECF No. 50. The remaining Defendants are Ginger Bowden Madden, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County (the "State Attorney"), Joni Alexis Poitier, in her individual capacity and official capacity as member and Vice Chair of the Florida Elections Commission, Barbra Stern, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes, in their individual capacities and official capacities as members of the Florida Elections Commission (collectively with Defendant Poitier, the "FEC Defendants"). For the reasons stated in the Court's prior Order, ECF No. 50, Hetherington has standing to sue the State Attorney and the FEC Defendants.

[2] Hetherington requests oral argument and that the Court advance the trial on the merits and consolidate it with a hearing under Fed. R. Civ. P. 65(a)(2). *See* ECF No. 12 at 2; *see generally* ECF No. 49. The FEC Defendants oppose consolidation. *See* ECF No. 28 at 17–18; *see generally* ECF No. 41. On full consideration of the parties' submissions, the Court finds that an evidentiary hearing is not required for entry of a preliminary injunction because the "facts in dispute are not material to the preliminary injunction sought." *See Transcontinental Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1169–70 (11th Cir. 2018) (citation omitted); *Bruce v. Reese*, 431 F. App'x 805, 806 (11th Cir. 2011). Accordingly, Hetherington's request for oral argument and consolidation is **DENIED as moot**. The Court will permit limited discovery before a trial on the merits.

the Code, " 'Nonpartisan office' means an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." *Id.* (quoting § 97.021(22), Fla. Stat.).

The provision of the Code at issue here, § 106.143(3), states

> Any political advertisement of a candidate running for partisan office shall express the name of the political party of which the candidate is seeking nomination or is the nominee. If the candidate for partisan office is running as a candidate with no party affiliation, any political advertisement of the candidate must state that the candidate has no party affiliation. **A political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation. This section does not prohibit a political advertisement from stating the candidate's partisan-related experience. A candidate for nonpartisan office is prohibited from campaigning based on party affiliation.**

(emphasis added). Hetherington challenges only the clauses of § 106.143(3) that pertain to candidates for nonpartisan office.[3] *See* ECF No. 12 at 1.

[3] The FEC Defendants argue that Hetherington's "motion seeking to enjoin enforcement of all of subsection (3) is overbroad and inappropriate." *See* ECF No. 28 at 1–2. To the extent Defendants assert that the challenged portions of § 106.143(3) pertaining to candidates for nonpartisan office are not severable from the portions of § 106.143(3) pertaining to candidates for partisan office, the Court disagrees. "Florida law clearly favors (where possible) severance of the invalid portions of a law from the valid ones." *Jones v. Governor of Fla.*, 950 F.3d 795, 831 (11th Cir. 2020) (citation omitted). Where a part of a statute has been declared unconstitutional, the remainder of the act may stand so long as

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature

Based on § 106.143(3), Florida's Division of Elections advises candidates for nonpartisan office that they "may not publicly represent or advertise [themselves] as . . . member[s] of any political party," but that they may "list partisan related experience such as 'executive committee of _____ party' in campaign advertisements."[4] Fla. Div. of Elections, Advisory Opinion DE 2003-02 at 2 (Feb. 21, 2003), https://bit.ly/2RxvpOR, ECF No. 12-3. The Division of Elections further advises candidates for nonpartisan office that § 106.143(3) only applies to "candidates" for nonpartisan office and that, once elected, nonpartisan officeholders "are not prohibited from publicly representing their party affiliation unless and until they again become a 'candidate' at which point they are precluded from campaigning based on party affiliation." Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010), https://bit.ly/3gkP8vF, ECF No. 12-4

> would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Id. (citation omitted). Florida law "adopts a strong presumption of severability, and squarely places the burden on the party challenging severability." *Id.* Defendants do not address any of the four requirements of severability and have therefore not met their burden to demonstrate that the challenged portions of § 106.143(3) pertaining to candidates for nonpartisan office are not severable from the remainder § 106.143(3). *See id.* at 832 ("Absent some concrete evidence or even a persuasive argument to that effect, we conclude the unconstitutional application is severable.").

[4] The Code requires that the Florida Elections Commission "must, in all its deliberations and decisions, adhere to . . . advisory opinions of the [D]ivision [of Elections]." § 106.26(13), Fla. Stat.

In 2018, Hetherington ran for a seat on the Escambia County School Board. *See* Pl.'s Decl. [ECF No. 12-2] ¶ 2. During the campaign, Hetherington described himself as a "lifelong Republican" in a candidate statement published on the Escambia County Supervisor of Elections' website. In May 2018, the Florida Elections Commission ("FEC") initiated an investigation after it received a complaint about Hetherington's candidate statement. *See* ECF No. 12-5. On November 19, 2019, the FEC imposed a $500 fine on Hetherington after determining that his candidate statement violated § 106.143(3) because it expressed Hetherington's party affiliation. *See* ECF No. 12-5. The FEC later reduced the amount of the fine to $200, which Hetherington paid. *See* Pl.'s Decl. ¶¶ 6–7.[5]

On March 30, 2021, Hetherington established his candidacy for the 2022 Escambia County School Board election. *See* Pl.'s Decl. ¶¶ 8–9. Hetherington desires to express his party affiliation in his current campaign but refrains from doing so because he fears enforcement of § 106.143(3) by Defendants. *See* Pl.'s Decl. ¶¶

[5] The FEC Defendants assert that discovery is necessary "[t]o determine the facts bearing upon a possible defense of accord and satisfaction arising from the settlement of [Hetherington's] prior dispute with the FEC, pursuant to which a fine amount was substantially reduced." *See* ECF No. 41 at 4. As Hetherington points out, however, the Code provides that "[a] consent agreement is not binding upon either party unless and until it is signed by the respondent and by counsel for the [FEC] upon approval by the [FEC]." *See* § 106.25(4)(i)2, Fla. Stat. Thus, in the absence of a signed consent agreement, any such evidence has no bearing on the likelihood of Hetherington's success on the merits. Moreover, any evidence regarding the settlement would already be in the FEC Defendants' possession.

10–13. Consequently, Hetherington filed this suit, seeking a declaration that § 106.143(3) is unconstitutional and an injunction barring its enforcement.

II. Preliminary Injunction Standard

"A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). A preliminary injunction is an "extraordinary and drastic remedy" and should not be granted unless "the movant clearly establishe[s] the 'burden of persuasion' as to each of the four prerequisites." *Id.* "Although the initial burden of persuasion is on the moving party, the ultimate burden is on the party who would have the burden at trial." *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

III. Discussion

A. Hetherington is substantially likely to succeed on the merits[6]

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). "The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[7] *Id.* (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *see Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) ("A candidate's speech during an election campaign 'occupies the core of the protection afforded by the First Amendment.' " (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)). Accordingly, restrictions on "core political speech" are subject to strict

[6] The Court addresses the merits because likelihood of success on the merits is one of the prerequisites for a preliminary injunction. Statements in this Order about the merits should be understood only as statements about the likelihood of success as viewed at this early stage in the proceedings.

[7] The Court rejects Defendants' argument that a candidate's expression of his party affiliation "convey[s] little or nothing in the way of specific information regarding issues." *See* ECF No. 28 at 8. To the contrary, party affiliation is "shorthand" for "publicly taking a stance on 'matters of current public importance.' . . . which means candidates have a constitutional right to portray themselves as a member of a political party." *See Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 781–82 (2002) ("*White I*")).

scrutiny.[8] *See Weaver*, 309 F.3d at 319. Moreover, content-based restrictions—"those that target speech based on its communicative content"—are "presumptively unconstitutional" and are also subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "That's because, 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 862 (11th Cir. 2020) (quoting *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Thus, because § 106.143(3) restricts "core political speech" and targets speech "based on its communicative intent,"[9] it is presumptively unconstitutional and subject to strict scrutiny. It is therefore the government's burden to prove that the restriction is narrowly tailored to serve a compelling state interest and that there is no less restrictive alternative. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

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[8] The First Amendment's "prohibition on laws abridging the freedom of speech has been incorporated into the Fourteenth Amendment so that it also applies to state governments." *Weaver*, 309 F.3d at 1318.

[9] There can be no question that § 106.143(3) is a content-based restriction because "enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *See Otto*, 981 F.3d at 862. Indeed, § 106.143(3)'s prohibition on political advertisements stating the candidate's party affiliation "is about as content-based as it gets." *See id.* (quoting *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020)); *cf. Siefert v. Alexander*, 608 F.3d 974, 981 (7th Cir. 2010) (finding Wisconsin's Code of Judicial Conduct's ban on party membership was "a content-based restriction on speech subject to strict scrutiny").

" '[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (citation omitted); *see Otto*, 981 F.3d at 862 ("Laws or regulations almost never survive this demanding test . . . .").

Defendants assert that § 106.143(3) serves two compelling state interests. The first is Florida's interest in protecting its citizens' decision to make certain elections nonpartisan. According to Defendants, "[a]llowing candidates to attach the label of Republican or Democrat would make a mockery of th[is] decision." *See* ECF No. 28 at 9. The second is Florida's interest in avoiding voter confusion. Defendants assert that § 106.143(3) prevents confusion among voters who, after learning the party affiliation of a candidate for nonpartisan office, "may expect to see the party label on the ballot next to [the candidate's] name, and then speculate regarding the reason for the absence of the party label." *See* ECF No. 28 at 5–6. While there can be no dispute that Florida's decision to hold nonpartisan elections for certain elected offices is a proper exercise of its "broad power to regulate the time, place, and manner of elections,"[10] *see Eu*, 489 U.S. at 222, and that avoiding voter confusion

[10] To be clear, Florida "is entirely free to decline running primaries for the selection of party nominees and to hold nonpartisan general elections in which party labels have no place on the ballot." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 464 (2008) (Scalia, J., dissenting) (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 585–86 (2000)). But Florida's "broad power" to regulate elections "does not extinguish [its] responsibility to observe

is a compelling state interest,[11] *see Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 792 (11th Cir. 1983), Defendants have not met their burden to demonstrate that § 106.143(3) is narrowly tailored to advance these interests.[12]

Section 106.143(3) is both "seriously underinclusive [and] seriously overinclusive" when judged against its asserted justifications and therefore fails to survive strict scrutiny. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011); *Otto*, 981 F.3d at 879 (Martin, J., dissenting) ("A law fails to survive [strict scrutiny] if it is either underinclusive (that is, if it does not regulate enough conduct) or overinclusive (if it regulates too much conduct)."). Section 106.143(3) is underinclusive because, as Hetherington points out, it permits candidates for nonpartisan office to "dance around the issue of partisan affiliation, so long as they do not utter a few magic words." *See* ECF No. 12-1 at 17. For instance, a candidate's political advertisements may state the candidate's "partisan-related experience," and

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the limits established by the First Amendment rights of [its] citizens." *See Eu*, 489 U.S. at 222 (citation omitted).

[11] The Court notes, however, that "[i]nformational bans premised on the fear that voters cannot handle the disclosure have a long history of being legislatively tried and judicially struck, whether in the election setting or elsewhere." *See Carey v. Wolnitzek*, 614 F.3d 189, 203 (6th Cir. 2010).

[12] Of course, Florida "does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing these views by proxy." *See Siefert*, 608 F.3d at 982.

§ 104.143(3) does not prohibit candidates from campaigning based on their membership or experience with other types of explicitly partisan organizations. Moreover, § 106.143(3)'s prohibitions apply only to *candidates* for nonpartisan office and do not apply to nonpartisan *officeholders*. *See* Fla. Div. of Elections, Advisory Opinion DE 2010-02 at 2 (Mar. 3, 2010). Thus, a candidate for nonpartisan office may advertise that he is a "lifelong member of the executive committee of the Democratic Party" but not that he is a "lifelong Democrat," and a nonpartisan officeholder could advertise that he is a "lifelong Republican" the day before establishing his campaign for reelection to the same nonpartisan office without running afoul of §106.143(3). If the purpose of § 106.143(3) is to protect Florida's decision to have nonpartisan offices filled on a nonpartisan basis and to prevent voter confusion, § 106.143(3) is "woefully underinclusive" because it permits campaigning based on "partisan-related experience" and only prohibits expressions of party affiliation by nonpartisan officeholders during a campaign. *See White I*, 536 U.S. at 783 (finding that Minnesota Supreme Court's prohibition on candidates for judicial election "announcing their views on disputed legal and political issues" was "woefully underinclusive" because it only applied "at certain times and in certain forms" that "cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times");

Republican Party of Minn. v. White, 416 F.3d 738, 757–58 (8th Cir. 2005) ("*White II*") (finding Minnesota Supreme Court's prohibition on candidates for judicial election "identify[ing] themselves as members of a political organization" was "woefully underinclusive" because it "restrict[ed] association with a political party only during a judicial campaign").

Section 106.143(3) is also overinclusive because it broadly prohibits candidates for nonpartisan office's political advertisements from stating their party affiliation and further prohibits those candidates from "campaigning based on party affiliation." If the objective of § 106.143(3) is to prevent candidates for nonpartisan office from falsely and misleadingly stating that they are running as *the* official candidate or nominee of a political party, Florida could have employed far less restrictive means to further its interest, such as prohibiting candidates for nonpartisan office from making precisely this type of false or misleading claim. *Cf. Winter*, 834 F.3d at 688 ("Kentucky has a right to prevent candidates from identifying themselves as *the* nominee of a political party for a judicial seat."). Instead, § 106.143(3) curtails all speech that mentions party affiliation—"an instance of burning the house to roast a pig." *See NetChoice, LLC v. Moody*, --- F. Supp. 3d ----, 2021 WL 2690876, at *11 (N.D. Fla. June 30, 2021) (citing *Reno v. ACLU*, 521 U.S. 844, 882 (1997) and *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989)).

Because § 106.143(3) is both underinclusive and overinclusive, it fails strict scrutiny's narrow tailoring requirement. Hetherington has therefore demonstrated a substantial likelihood of success on the merits.

B. Hetherington has established the remaining requirements for a preliminary injunction

Hetherington meets the remaining requirements for a preliminary injunction "as a necessary legal consequence of" the Court's holding on the merits. *See Otto*, 981 F.3d at 870. The second requirement is met because an ongoing violation of the First Amendment constitutes an irreparable injury. *See id.* And because the nonmovants here are state officials, "the third and fourth requirements—'damage to the opposing party' and 'public interest'—can be consolidated." *See id.* "It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional [law]." *See id.* (citing *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

Accordingly, **IT IS ORDERED**:

1. Hetherington's Motion for Preliminary Injunction, ECF No. 12, is **GRANTED**.[13]

[13] The Court finds that it is "proper" to waive the requirement under Rule 65(c) that Hetherington post security. *See Curling v. Raffensberger*, 491 F. Supp. 3d 1289, 1326 n.25 (N.D. Ga. 2020).

2. Defendants are **ENJOINED**, until further order of this Court, from enforcing the clauses of § 106.143(3), Fla. Stat. pertaining to candidates for nonpartisan office, which provide: "A political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation. This section does not prohibit a political advertisement from stating the candidate's partisan-related experience. A candidate for nonpartisan office is prohibited from campaigning based on party affiliation." The preliminary injunction binds Defendants and their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

DONE AND ORDERED this 14th day of July 2021.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE