**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

BRIAN KRAMER, candidate for State Attorney for the Eighth Judicial Circuit,

Plaintiff,

v. **Case No**: **2020 CA 801**

BEVERLY R. MCCALLUM, candidate for State Attorney for the Eighth Judicial Circuit,

and

FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, KIM A. BARTON, in her official capacity as Alachua County Supervisor of Elections, **NITA D. CRAWFORD**, in her official capacity as Baker County Supervisor of Elections, **TERRY VAUGHAN**, in his official capacity as Bradford County Supervisor of Elections, **CONNIE D. SANCHEZ**, in her official capacity as Gilchrist County Supervisor of Elections, **TAMMY JONES**, in her official capacity as Levy County Supervisor of Elections, **DEBORAH K. OSBORNE**, in her official capacity as Union County Supervisor of Elections,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT MCCALLUM'S AMENDED MOTION TO DISMISS

Plaintiff Brian Kramer, candidate for State Attorney for the Eighth Judicial Circuit, hereby responds in opposition to Defendant McCallum's Amended Motion to Dismiss. The Motion should be denied, as it fails to identify any basis for dismissal of Plaintiff's well-pleaded Complaint for declaratory and injunctive relief.

BACKGROUND

1. On April 24, 2020, Plaintiff filed a Complaint seeking declaratory and injunctive relief regarding the candidacy of Defendant Beverly R. McCallum for the office of State Attorney for the Eighth Judicial Circuit.

2. The Complaint identified the constitutional qualifications for the office of state attorney, including the requirement that a state attorney have been a member of the Florida Bar for the preceding five years, along with matters of public record casting doubt on Defendant McCallum's constitutional eligibility to hold office as State Attorney. Comp. at ¶¶ 12-18.

3. Specifically, the Complaint noted that on December 16, 2019, the Florida Supreme Court issued an opinion adjudicating McCallum guilty and suspending her from the practice of law for a period of fifteen days as a sanction for multiple violations of the Rules Regulating the Florida Bar. *The Florida Bar v. McCallum*, Case No. SC18-604, 2019 WL 6873032 (Fla. Dec. 16, 2019). Comp. at ¶ 16.

4. The Complaint cited recent Florida Supreme Court precedent holding that a lawyer who has been suspended from the practice of law is not a "member of the bar of Florida" during the time he or she is suspended for purposes of eligibility to hold an office requiring Florida Bar membership. *In re Adv. Op. to Gov. re Comm'n of Elected Judge,* 17 So. 3d 265, 267 (Fla. 2009) (construing article V, section 8, of the Florida Constitution regarding the eligibility requirements for a circuit court judge). Comp. at ¶ 13.

5. In light of these facts, the Complaint alleged that declaratory relief was necessary and appropriate because the Plaintiff had been placed in doubt regarding his rights with respect to the candidacy of Defendant McCallum; that the Complaint's allegations demonstrate a bona fide actual, present, and practical need for the declaration sought by the Plaintiff; that Florida law recognized circumstances under which a post-election challenge may be barred or estopped; that

the adverse and antagonistic interests were all before the Court by proper process; and that the request was not merely a request for legal advice or an advisory opinion. Comp. at ¶¶ 27-30.

6. The Complaint alleged that permanent injunctive relief was necessary and appropriate because the Plaintiff has a clear legal right to the relief requested, that he faces a likelihood of irreparable harm in the absence of the requested relief, that he has no remedy at law to address the harm described in the Complaint, and that the public interest favors entry of a permanent injunction. Comp. at ¶¶ 33-36.

ARGUMENT

Defendant McCallum's Motion to Dismiss should be denied. As set forth below, the Complaint's well-pleaded allegations plainly state a cause of action for the declaratory and injunctive relief sought by the Plaintiff. The Motion to Dismiss fails even to identify a single pleading insufficiency in the Complaint. Instead, the Plaintiff misuses the Motion to Dismiss to present improper legal argument directed to the merits of the underlying action. The Defendant's Motion also asserts affirmative defenses that are not authorized to be presented in a motion to dismiss under the plain language of Florida Rule of Civil Procedure 1.140. These defenses should be disregarded and do not present a valid basis for dismissal.

I. The Complaint states a cause of action for declaratory and injunctive relief.

Whether a Complaint should be dismissed is a question of law. *City of Gainesville v. Fla. Dep't of Transp.*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001). A Complaint should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the Plaintiff could prove no set of facts that would entitle him to relief. *See Nicholson v. Kellin,* 481 So. 2d 931, 936 (Fla. 5th DCA 1985) ("A complaint which states a cause of action on ***any*** ground should not be dismissed for failure to state a cause of action.") (emphasis in original). The

elements of a complaint for declaratory judgment under Florida law are well-established. Individuals seeking declaratory relief must allege that:

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952)).

The Complaint here satisfies the pleading requirements for declaratory relief by alleging ultimate facts that—accepted as true—present a bona fide actual present and practical need for the declaration; that in the absence of a declaration Plaintiff would be placed in doubt or uncertainty as to his rights; that Defendant McCallum and the other Defendants have adverse legal interests to those of the Plaintiff; and that the relief sought is not merely a request for legal advice or an advisory opinion. *See, e.g.*, Comp. at ¶¶ 26-30. The Complaint also alleges ultimate facts, at paragraphs 31-36, to sufficiently plead a cause of action for permanent injunctive relief: a "clear legal right, an inadequate remedy at law[,] and that irreparable harm will arise absent injunctive relief." *See, e.g.*, *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 186 n. 7 (Fla. 2009).

The Motion to Dismiss fails to identify any pleading insufficiencies that would support a motion to dismiss. Instead, Defendant McCallum alleges that declaratory and injunctive relief are "unwarranted." Mot. at 7, 8. The Defendant also appears to argue that certain Florida Supreme Court precedent cited in the Complaint is distinguishable on the facts. Mot. at 8-9. Yet when

considering a motion to dismiss a complaint seeking declaratory relief, "the question is whether the plaintiff is entitled to a declaration of rights, not whether the plaintiff will prevail in obtaining the decree he or she seeks." *Smith v. City of Ft. Myers*, 898 So. 2d 1177 (Fla. 2d DCA 2005); *see also Lee v. St. Johns County Bd. of County Comm'rs*, 776 So. 2d 1110, 1113 (Fla. 5th DCA 2001) (in ruling on a motion to dismiss, court must treat the factual allegations of the Complaint as true and consider those allegations in the light most favorable to the Plaintiff).

Defendant McCallum's legal arguments directed to the underlying merits of the Complaint, while perhaps appropriately raised in a motion for summary judgment, provide no basis for dismissal of the Complaint for failure to state a cause of action under Florida Rule of Civil Procedure 1.140(b). The Motion to Dismiss for failure to state a cause of action should be denied.

II. The "affirmative defenses" asserted in the Motion to Dismiss do not present a basis for dismissal.

The Florida Rules of Civil Procedure generally provide for all defenses to a claim for relief in a pleading to be asserted in the responsive pleading, while explicitly authorizing six defenses to be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. Fla. R. Civ. Pro. 1.140(b). Unless facts apparent on the face of the complaint establish conclusively that the action is barred as a matter of law, other affirmative defenses "are not properly raised by a motion to dismiss, but should be pled as part of the answer." *Diaz v. Bravo*, 603 So. 2d 106, 107 (Fla. 3d DCA 1992); *Southeastern Integrated Medical, P.L. v. North Florida Women's Physicians, P.A.*, 50 So. 3d 21, 24 (Fla. 1st DCA 2010).

Defendant McCallum's Motion to Dismiss attempts to assert three affirmative defenses—

reliance, laches, and waiver, that are not among those authorized by Rule 1.140(b) and are not apparent from the face of the Complaint. *See* Motion at 10-11. Instead, each affirmative defense is based on factual allegations outside the four corners of the Complaint, including allegations regarding the Defendant's purported reliance on Division of Elections guidance and allegations regarding campaign activities of the Defendant. These unauthorized affirmative defenses are not properly presented in the Motion to Dismiss and fail to present a basis to dismiss the Complaint.

CONCLUSION

Based on the foregoing, the Amended Motion to Dismiss should be denied.

Respectfully Submitted,

/s/ Benjamin Gibson
DANIEL NORDBY (FBN 14588)
BENJAMIN GIBSON (FBN 58661)
AMBER STONER NUNNALLY (FBN 109281)

SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
dnordby@shutts.com
bgibson@shutts.com
anunnally@shutts.com
(850) 241-1721

Counsel for Brian Kramer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2020, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on all counsel of record.

/s/ Benjamin Gibson
BENJAMIN GIBSON