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

BRIAN KRAMER,

Plaintiff,

v.

CASE NO: 37-2020-CA-000801
DIVISION:

BEVERLY R. McCALLUM, *et al.*,

Defendants.
_____/

AMENDED MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW BEVERLY R. McCALLUM, *pro se* defendant ("Candidate McCallum"), and pursuant to Fla. R. Civ. P. 1.140(b)(6), hereby moves to dismiss Plaintiff's Complaint for failure to state a cause of action and otherwise, and in support thereof states as follows:

I. INTRODUCTION

Plaintiff's Complaint turns entirely on a legally inapposite claim based on a factually distinguishable, lone-wolf advisory opinion about the post-election qualification and seating of circuit judges under Art. V, 8, Fla. Const.: that in order to qualify, State Attorney candidates are subject to a requirement beyond the plain language of Art. V, 17, Fla. Const., that governs qualification of State Attorneys.

Circuit judges are situated in the middle of the hierarchy of Florida judicial officials specifically, and near the top of the hierarchy of state criminal-justice officials generally. By contrast, State Attorney candidates vie for the far-subordinate role of a partisan advocate. In that important but relatively smaller constitutional role, State Attorneys are routinely subject to the decisions and oversight of judges who are endowed with various levels of authority. Since Plaintiff's lone, cited advisory opinion is factually distinguishable and legally inapplicable to the case at bar, his self-interested request for declaratory and injunctive relief invites pre-election

judicial speculation and the undermining of the bedrock of long-standing election law, Plaintiff's legal and equitable requests for relief do not state a claim pursuant to Fla. R. Civ. P. 1.140(b)(6) and must fail.

II. PROCEDURAL HISTORY

Plaintiff Brian Kramer, an Eighth Circuit State Attorney candidate who was qualified by the Department of State, Division of Elections ("the Division") as the only candidate from his political party for the 2020 general election, filed a lawsuit just hours after the close of the qualifying period against the only other qualified candidate and representative of a different political party: Candidate McCallum.

In his complaint, Plaintiff avers that he has a right to pre-election, declaratory and injunctive relief because Candidate McCallum is unqualified to appear on the ballot for the 2020 general election. In short, Plaintiff is trying to force state officials to keep Candidate McCallum off of the 2020 general-election ballot. Were he to succeed, he would be certified as unopposed and automatically become the top, state-level law-enforcement official in the Eighth Circuit – without a single voter's casting of a ballot. In addition to suing Candidate McCallum, Plaintiff simultaneously sues all six, Eighth Circuit Supervisors of Election and the Department of State, to further this plan.

III. ELECTION LAW: BEDROCK OF OUR DEMOCRACY

The political contest between Plaintiff and Candidate McCallum and instant case are governed by long-standing, well-settled election law. That body of law stands for the proposition that even close questions should be decided in favor of widening – not narrowing, the field of candidates on the ballot, so that the people have a right to vote for the candidate of their choice. *See State ex rel. Siegendorf v. Stone*, 266 So. 2d 345, 347 (Fla. 1972); *see generally Thomas v. State ex rel. Cobb*, 58 So. 2d 173, 174 (Fla. 1952) ("The Constitution is the charter of our liberties. It cannot be changed, modified or amended by legislative or judicial fiat. It provides

within itself the only method for its amendment.").

A. Memorandum of Law and Analysis

1. Motion to Dismiss Standard Applies.

"Whether a complaint is sufficient to state a cause of action is an issue of law." *W.R. Townsend Contracting Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. 4th DCA 1999) ("*Townsend*"). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Id.* at 300 (quoting *Perry v. Cosgrove*, 464 So. 2d 664, 665 (Fla. 2d DCA 1985) ("Perry")), Fla. R. Civ. P. 1.110(b). Though "courts must liberally construe, and accept as true, factual allegations in complaint and reasonably deductible inferences therefrom," courts "need not accept internally inconsistent claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Townsend* at 300 (citing *Response Oncology, Inc. v. Metrahealth Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997)). Therefore the question for the court to decide is whether, assuming all well-pleaded factual allegations in the Complaint are true, Plaintiff would be entitled to his requested relief. *Perry* at 665.

Also, where, as in this case, it is clear that Plaintiff cannot amend his Complaint to state a claim, dismissal with prejudice is proper. *See Hansen v. Central Adjustment Bureau, Inc.* 348 So. 2d 608, 610 (Fla. App. 4th DCA 1977) (citing 10 Fla. Jur., Dismissal §33, at page 544) ("A dismissal with prejudice for failure to state a cause of action should not be ordered without giving the party offering the defective pleading an opportunity to amend, unless it is apparent that the pleading cannot be amended so as to state a cause of action.").

2. Plaintiff's Request for Declaratory Relief in Count I and Injunctive Relief in Count II of the Complaint, Made after the Close of Qualifying and Contrary to Well-Established Election Law, Legal and Equitable Principles, Fails to State a Claim and Must be Dismissed as a Matter of Law.

In *State ex rel. Siegendorf v. Stone*, 266 So. 2d 345 (Fla. 1972) (*"Siegendorf*"), the

Florida Supreme Court denied equitable relief to one of two candidates for a county-court judicial position. The candidate in *Siegendorf* waited until after the close of the qualifying period to seek equitable relief that would have kept his only opponent off of the ballot. Siegendorf's argument was based on an alleged deficiency in a portion of his opponent's oath of office. In denying the requested relief, the Court reasoned as follows:

> Relator takes the position that "anything less than total compliance with the absolute statutory language [of the applicable statute] renders [his opponent's] oath of office legally defective as a matter of law so as to preclude his proper qualification and the [opponent's] subsequent certification of his candidacy. We cannot agree.
>
> Literal and "total compliance" with statutory language which reaches hypersensitive levels and which strains the quality of justice is not required to fairly and substantially meet the statutory requirements to qualify as a candidate for public office.

Id. at 346 (internal citation omitted).

The *Siegendorf c*ourt further reasoned as follows:

> So long as basic requirements have been met...[t]o reject or challenge the candidacy on these grounds now (when the period for qualifying has closed) comes too late. It would be a denial of due process and unfair treatment of the candidate who has justifiably acted upon the [Respondent Department of State's] acceptance and certification, to remove him from the ballot. It is better in such factual situations to let the people decide the ultimate qualifications of candidates unless they appear *clearly contrary to law*.
>
> The basic principle of our constitutional and democratic system is set forth as the very first words of our Florida Constitution: "Declaration of Rights §1. Political power, –All political power is inherent in the people." After citing these words in *State ex rel. Ayres v. Gray et al.*, 69 So. 2d 187, at page 193, (Fla. 1953) we stated: 'The tendency has been, and still, is to extend further the privilege of the people to participate in their government and to elect officers originally appointed, rather than to curtail such participation by the people.
>
> Summarily to remove [the name of Siegendorf's opponent] from the people's consideration, and his name from the ballot, would be *irremediable*....Our Fourth District in *McClung v. McCauley* 238 So.2d 667, 670 (Fla.App.4th 1970) concluded its opinion in such a matter by commenting in like manner: "It would afford the electorate the largest opportunity to select, at election, the candidate of their choice."

Id. at 347 (emphasis added).

The instant case, like *Siegendorf*, involves a post-qualification, pre-election attempt by a self-interested candidate to eliminate his only competition, thereby winning the office sought via declaratory and injunctive relief. *Siegendorf*. like the instant case, hinged on an alleged deficiency with the opposing candidate's candidate oath. Based on the Florida Supreme Court's decision in *Siegendorf*, Candidate McCallum fairly and substantially met the statutory requirements to qualify as a candidate and reasonably relied on her acceptance and certification by the Division.

Thus, to prevent Candidate McCallum from appearing on the ballot would strain the quality of justice; disenfranchise third-party voters who prefer her, since Candidate McCallum's qualifications are in no way "clearly contrary to law"; and constitute unfair treatment of Candidate McCallum that denies her due process. It is not as if the Division and, or Eighth Circuit Supervisors of Election affirmatively approached the Governor for guidance on how to perform their duties in the instant case. Instead, the instant case is a self-interested maneuver by one of only two State Attorney candidates – one who knowingly brought suit after the close of qualifying and close to the election. Indeed, by this suit, Plaintiff attempts to become the top, state law-enforcement official in a large part of Florida by judicial fiat. If the court grants such request, the damage to Candidate McCallum would be "irremediable"; instead, the people should be allowed to choose the more qualified candidate.

Similarly, in *Schurr v. Sanchez-Gronlier*, 937 So. 2d 1166 (Fla. 3rd DCA 2006) ("*Schurr*"), a candidate for circuit judge made a post-qualification, pre-election request for declaratory and injunctive relief, suing his primary election opponent, the Department of State and Supervisor of Elections to remove the opponent's name from the ballot. *Schurr* involved several challenges as to an opponent's candidate-qualifying documents and what turned out to be an actual violation of §106.021, Fla. Stat. However, the offending opponent had relied on online

information and a qualifying memorandum from the Division. *Id.* at 1168.

Although there had been an actual violation, the *Schurr* court deemed the harm *de minimis*, found that any such harm had been subsequently cured without harm to the public's interest in fair elections, and denied the suing candidate's request for injunctive relief directed to the Department of State and Supervisor of Elections to disqualify his opponent. In doing so, the *Schurr* court noted that binding precedent holds that §106.021, Fla. Stat. "does not provide for a private right of action." *Id.* at 1170. (citing *Goff v. Ehrlich*, 776 So. 2d 1011 (Fla. 5th DCA 2001)) The court in *Schurr* emphasized the following about its holding:

> the Court's conclusions here comport with the strong public interest of providing electoral choice. Indeed, in *Republican Executive Committee v. Graham*, 388 So.2d 556, 558 (Fla. 1980), the Supreme Court stated: "If two equally reasonable constructions might be found, this Court in the past has chosen the one which enhances the elective process by providing voters with the greater choice in exercising their democratic rights."

Schurr at 1170.

The case at bar, like the *Schurr* case, entails a candidate's self-interested request to remove his opponent from the ballot, and the former's suing and diverting the resources of both the Department of State and the Supervisor of Elections. Even where there was an actual violation of the law in *Schurr*, overriding election law and public policy concerns dictated that both candidates could appear on the ballot. The facts of the instant case rest well within the bounds of *Siegendorf* and *Schurr* holdings, so the people of the Eighth Circuit should have the right to choose between Candidate M^{c}Callum and Plaintiff in November 2020.

In *State ex rel. Haft v. Adams*, 238 So.2d 843 (Fla. 1970) ("*Haft*"), the Florida Supreme Court once again took up a judicial candidate's attempt to obtain declaratory and equitable relief, effectively to deem himself victor at the expense of his opponents, based on the former's allegedly having been the only "duly qualified" candidate. *Id.* at 844. The case facts involved several opponents' having been allegedly disqualified due to a temporary shift in the correct

amount of the candidate-qualifying fee.

Instead of rewarding the litigant with the requested relief, the Court reasoned that the requested, equitable relief was not a right but extraordinary and involving "exercise of a sound judicial discretion and upon equitable principles...not...allowed in cases of doubtful right...but as subject to the equitable doctrine of laches." *Id.* at 844. (internal citation omitted) The *Haft* Court noted that equitable relief (*i.e.*, a writ of mandamus) was to be denied if issuance would lend aid to the effectuation of a probable injustice. *Id.* The Court ultimately denied the requested relief, noting it was "not disposed to lend [its] aid to Relator in furtherance of his plan to belatedly take advantage of what may be some confusion in the amount of the qualifying fee." *Id.* at 845.

In addressing and ultimately denying Haft's request for injunctive relief, the Court found that the consideration of public interests involved in the denial of extraordinary writs also applied as to requested injunctive relief. *Haft,* 238 So.2d 843, 845. Further, the Court reasoned that the candidate who litigated to disqualify his opponents had waited to involve the jurisdiction of the Court, as follows:

> well knowing that the first primary election in Florida this year is scheduled for September 8th and that it would be necessary to print ballots, mail out absentee ballots, and make other arrangements for the orderly holding of such primary election. To undertake to interfere with the election process at this late date, even if a clear legal right were shown, would result in confusion and injuriously affect the rights of third persons.

Id.

Accordingly, the high court held that the suing candidate "has come with 'too little, too late' " and not shown a clear legal right. *Id.* Haft's case was dismissed and writ quashed.

As in the *Haft* case, Plaintiff in the instant matter seeks declaratory and equitable relief, to win without election against a single opponent, claiming to be "duly qualified," Plaintiff's Complaint at par. 1, and is diverting the limited resources of the heart of the Florida government. Only in the instant case, the self-interested diversion comes at the worst possible time: during a world-wide pandemic and COVID-19-related public state of emergency. Since election law and

public policy are applicable to the instant request for declaratory and equitable relief, the court should not entertain the request and should instead dismiss the complaint with prejudice.

a. Declaratory Relief is Unwarranted.

As to the declaratory aspect of Plaintiff's requested relief under §86.011, Fla. Stat., there must be a *bona fide* dispute between the parties and *bona fide* need for the declaration in order to ensure that a declaratory proceeding is judicial in nature, *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952). Declaratory relief under Chapter 86 "should not be 'perverted' by permitting its use as a 'catch all.'" *Ribaya v. Bd. of Trustees of the City Pension Fund for Firefighters & Police Officers in the City of Tampa*, 162 So. 3d 348, 353 (Fla. 2d DCA 2015); s*ee also*, *George Washington MacNeil v. Crestview Hospital* (Fla. 1st DCA 2020).

In the instant case, there is nothing *bona fide* on which to predicate Plaintiff's requested declaratory relief, anymore than there was in the *Siegendorf*, *Haft* and *Schurr* cases. This sort of holding back by one candidate, until the other pays the large, non-refundable qualifying fee, then suing to knock the opponent out of the race and win by default, is contrary to election and other law, public policy, and inappropriate on those undisputed facts of the instant case.

Plaintiff's instant request is speculative and hypothetical, going so far as painting for this court a denigratory picture: of Candidate McCallum's standing with a siphon hose at the ballot box to "attempt to siphon away votes from Plaintiff." Plaintiff's Complaint at par. 35. The case at bar – filed by a self-interested candidate hours after the April 2020 qualifying deadline, is an attempt to invoke judicial fiat that would amount to an advisory opinion or means to satisfy Plaintiff's curiosity about whether or not he will become State Attorney.

Plaintiff is clearly not the first candidate to employee the "too little, too late," gotcha method to try to clench a quick victory. However, that does not translate into a legally colorable right or dispute at issue that would warrant the grant of declaratory relief; indeed, Plaintiff has set

forth none, so the requested relief should be denied.

b. Injunctive Relief is Unwarranted.

Likewise, as to his request for injunctive relief, Plaintiff has no basis for claiming imminent or irreparable harm, although he has sought relief on an expedited basis that includes the allegation, tellingly, that Candidate McCallum could "attempt to siphon away votes *from* Plaintiff" (emphasis added). Yet factually and legally, that is not how free and fair elections work. Plaintiff doesn't have a some special right to win this race, or to a particular citizen's vote, between now and November. Instead, like Candidate McCallum, Plaintiff must work to be worthy of eventual votes. Like the suing candidates in *Siegendorf*, *Haft*, and *Schurr*, Plaintiff is trying to "win" without earning the mandate of the majority of registered voters in the contested election.

In the thick of the ongoing political contest, what Plaintiff seeks amounts to a last-minute advisory opinion based on hypotheticals, unwarranted deductions and speculation, or an exercise of judicial fiat that would force Plaintiff, who has never been publicly elected to constitutional office, onto the people of the Eighth Circuit without their being able to choose between two, capable candidates. That said, the filing and maintenance of this lawsuit is a travesty because it has needlessly pulled at the heart of our government and court system at a time when government has more to do than ever, and when the voters needed their candidates to engage with and reassure them in the midst of the present emergency.

3. Plaintiff's Claim that the Aforementioned Requests for Relief are Properly Grounded in Reliance on an Advisory Opinion about a Circuit Judge Who was Suspended for More than 90 Days at the Time He was to Take Office, is Contrary to the Instant Facts and Existing Law, Fails to State a Claim and Must be Dismissed as a Matter of Law.

State Attorney candidates qualify pursuant to Art. V, 17, Fla. Const., which mandates, in pertinent part, that a candidate for State Attorney must be and have been a member of the Florida

Bar for the preceeding five years. As part of the qualification process, State Attorney candidates must also swear an oath of qualification pursuant to §§ 99.021, 99.061(7)(a)(2) Fla. Stat., attesting that they have satisfied requirements to include the foregoing, five-year membership in the Florida Bar. Plaintiff's claims for declaratory and injunctive relief based on a single advisory opinion requested by a public servant in the discharge of official duties concerning whether to seat circuit court judge winner despite the latter's being then-suspended by the Florida Bar for over 90 days and without any guarantee of readmission, do not accord with applicable, existing law or the facts of the instant case.

The role of State Attorneys in the criminal-justice hierarchy is at a lower level *vis-a-vis* judges generally, but Circuit Judges in particular. Unlike State Attorneys, Circuit Judges have the authority to convict and remand individuals to jail or prison; therefore a higher level of qualifications could be expected for a Circuit Judge candidate versus a State Attorney candidate.

Advisory opinions to the Governor are not binding precedent in the case of one candidate suing the other, *see generally Collins v. Horten*, 111 So. 2d 746, 751 (Fla. 1st DCA 1959), and the advisory opinion cited by Plaintiff involves a different constitutional provision than, and facts and circumstances that are not even close to the case at bar. Circuit Judges and State Attorneys are very different constitutional officers and governed by different provisions of the Florida Constitution as to what their qualifications are.

Plaintiff alleges in his Complaint that because Candidate McCallum, a member of the Florida Bar since 2003, did not have the privilege of practicing law for 15 days beginning on December 20, 2019, she did not qualify as a member of the Florida Bar for purposes of Art. V, 17, Fla. Const. However, this claim, and every claim in Plaintiff's Complaint failed to state a cause of action, where State Attorney candidates are governed under a separate provision of the

Florida Constitution from Circuit Judges and where there was no notice given by the Division to active 2020 candidates of any such sweeping change.

B. Affirmative Defenses

Affirmative Defense 1: Defendant Acted in Good-faith Reliance on the Constitution and Division of Elections Guidance in Qualifying as a State Attorney Candidate.

1. At all times relevant to the instant cause, the Defendant Beverly R. McCallum (hereafter "Candidate McCallum"), was a member of the Florida Bar, having been admitted thereto on April 14, 2003.
2. Article V, 17, Fla. Const., governs qualification of States Attorney. In pertinent part, the plain language of the relevant constitutional provision requires a State Attorney candidate to be and have been a member of the Florida Bar for the preceeding five years. *Id.*
3. The State Qualifying Handbook of the Department of State, Division of Elections ("the Division") recites the same requirement and constitutional provision set forth above in paragraph 2, and the memorandum from the Division regarding qualifying requirements for State Attorney candidates in the 2020 election did not put State Attorney candidates on notice to the contrary.
4. Candidate McCallum, in good-faith reliance on the existing law concerning State Attorney candidates, used voter contributions to pay the qualifying fee of $10,173.24 on April 15, 2020, and was thereafter qualified by the Division.
5. Candidate McCallum was briefly suspended from the practice of law for the 15 days from December 20, 2019, until January 3, 2020, pursuant to orders of the Florida Supreme Court dated December 16, 2019 and December 20, 2020.
6. Pursuant to Rule Regulating the Florida Bar 3-5.1(e), Candidate McCallum

"continue[d] to be a member of The Florida Bar" during the period detailed above in paragraph 5.

7. Candidate McCallum reasonably relied on the section of the Florida Constitution that applied to her race and applicable Bar rule as to this matter. Plaintiff's obtaining judicial fiat after the close of qualifying and payment of a now-nonrefundable, sizeable qualifying fee, in order to force additional qualifications onto Candidate McCallum without her having been given reasonable, prior notice would deny her due process of law, treat her unfairly and negatively impact third-party voters who contributed toward her qualifying fee and, or who would thereby be deprived of the right to vote for her in the November 3, 2020, general election.

Affirmative Defense 2: The Doctrine of Laches Applies to the Instant Case and Bars Plaintiff's Requested Equitable Relief.

8. The instant action was brought inequitably too late. Rather than raising his issues in advance, Plaintiff waited until just hours after the close of qualifying on Friday, April 24, 2020 to file the instant lawsuit, by which time voters had contributed towards Candidate McCallum's qualifying fee of $10,173.24, and Candidate McCallum's qualifying fee had become non-refundable.

Affirmative Defense 3: Plaintiff's has Waived His Right to Bring the Instant Request for Relief and is Thus Barred from Doing So.

9. Prior to the qualifying deadline, Plaintiff publicly acknowledged Candidate McCallum as his opponent and took her on, on issues of policy via his campaign social media.

10. At no time prior to filing of the instant case, did Plaintiff contact Candidate McCallum to put her on notice that he questioned her ability to qualify for the 2020 State Attorney race.

11. Plaintiff waived any claim to relief by bringing the instant action without giving reasonable, advance notice to Candidate McCallum, with whom Plaintiff had appeared at public events in advance of the April 2020, qualifying deadline.

IV. CONCLUSION

Both Plaintiff and Candidate McCallum are duly qualified attorneys and Florida Bar members. Both have had long careers in government and law enforcement, and each would bring something unique to the office of State Attorney. The instant issues before this court are ones of law and equity, but no applicable law, equitable principle, set of facts or public policy supports Plaintiff's proposed foisting away the voters' right – from Gainesville to Macclenny, from Lake Butler to Cedar Key on the Gulf of Mexico, to vote by mail or in person and choose between their two candidates to be the next state attorney of the Eighth Judicial Circuit.

WHEREFORE, There is no constitutional or other basis to bar Defendant Beverly R. McCallum from the 2020 general election ballot, since she is qualified to run for Eighth Circuit State Attorney as a matter of law, and this Court should deny the legal and equitable relief sought by the Plaintiff and dismiss his complaint with prejudice, retaining jurisdiction of the instant matter in order to award attorneys fees to the Defendant McCallum pursuant to Florida Statute §57.105, together with any other legal or equitable relief that this Court deems just and proper.

DATED this 17th day of May, 2020.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Motion to Dismiss Plaintiff's Complaint has been furnished to Benjamin Gibson, Esq., Counsel for Plaintiff (to bgibson@shutts.com and mabramitis@shutts.com); Ronald A. Labasky, Esq., Counsel for Defendants Crawford, Vaughan, Sanchez, Jones and Osborne (to rlabasky@bplawfirm.net and fsase@bplawfirm.net); Corbin F. Hanson, Esq. (to cfhanson@alachuacounty.us) and Robert C. Swain, Esq. (bswain@alachuacounty.us and CAO@alachuacounty.us), Counsel for Defendant

Barton; and Ashley E. Davis, Esq., Counsel for Defendant Florida Department of State (to ashley.davis@dos.myflorida.com and candice.edwards@dos.myflorida.com), by e-mail service this 17th day of May, 2020.

s/ *Beverly R. McCallum* (as to Motion and Certificate)
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