SC2024-1314

IN THE SUPREME COURT OF FLORIDA

ADAM RICHARDSON,
Petitioner,
v.
SECRETARY, FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, ET AL.,
Respondents.

BRIEF OF AMICI CURIAE LIBERTY COUNSEL ACTION AND LIBERTY COUNSEL IN SUPPORT OF RESPONDENTS

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IDENTITY OF AMICI CURIAE

Amicus Liberty Counsel Action ("LCA") is a public policy education, training, and advocacy organization with offices in Florida and Washington D.C. Founded in 1986, LCA focuses on advancing the sanctity of human life, the family, religious freedom, and responsible government, national security, and support for Israel at the federal, state, and local levels. LCA spearheads grassroots efforts to influence local and state policy, including opposing initiatives and legislation that conflict with its objectives. As a leading organization in opposing Amendment 4, LCA has an interest in ensuring that government officials may freely speak out against the impact of the proposed amendment if it is approved.

Amicus Liberty Counsel is a nonprofit legal advocacy organization with offices in Florida, Virginia, and Washington, DC. As a public interest law firm whose attorneys litigate in state and federal courts in Florida and nationwide, Liberty Counsel has an interest in advancing the First Amendment's speech protections for all Americans, including elected officials.

SUMMARY OF ARGUMENT

Petitioner's attempt to silence Respondents' lawful political advocacy under the guise of "election interference" runs afoul of the First Amendment. The Supreme Court has long held that elected officials have a constitutional right to speak freely about matters of public concern. Far from being a misuse of their official authority, Governor DeSantis and Attorney General Moody's advocacy against Amendment 4 is precisely the type of discourse the First Amendment protects. Their participation in the public debate over Amendment 4—a controversial political issue of critical importance to Floridians—is not only permissible but essential. To adopt Petitioner's position would ignore the foundational principle that, far from being constitutional orphans, elected officials have an obligation to educate the public about their positions on proposed laws and state policy through uninhibited expression.

Petitioner's argument against the Agency's communications on its website and social media posts by Respondent Weida similarly overlooks the well-established government-speech doctrine. This doctrine permits government entities to articulate their views and collaborate with private parties so long as they control the message.

Petitioner's accusation against Attorney General Moody for joining a conference call with *Amicus* Liberty Counsel's Founder and Chairman, Mathew Staver, is meritless because government officials are entitled to engage with private parties to advance a government-controlled message.

Finally, Petitioner's claim that Respondents are violating section 104.31, Florida Statutes, is frivolous. The statute explicitly preserves the right of elected officials to express their opinions on political subjects and candidates. Tellingly, Petitioner does not even mention, let alone address, these exceptions. The Court should dismiss this baseless Petition because it not only willfully ignores the law but also threatens to impose dangerous constraints on the free-speech rights of elected officials.

ARGUMENT

I. Elected Officials Have a First Amendment Right to Participate in Public Discourse.

Petitioner contends that Respondents "have waged a campaign to interfere with the election" (Pet. 1), namely by "using their official authority or influence for the purpose of interfering with the election for Amendment 4." (*Id.* at 10.) Notwithstanding that Petitioner is

misleadingly describing Respondents lawful political activity as election interference, the First Amendment actively protects and encourages the free speech of elected officials. *See generally* 16B C.J.S. Constitutional Law § 933. Indeed, the United States Supreme Court has long recognized that such speech is vital to the health of a democratic society.

A. Government officials retain the right to speak on matters of public concern in their official capacities, especially on issues affecting the constituents they serve.

The United States Supreme Court has unequivocally recognized that the First Amendment "promises an elected representative … the right to speak freely on questions of government policy." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022). "And the role that elected officials play in that process 'makes it all the more imperative that they be allowed to freely express themselves.'" *Id.* (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002)). Thus, the Supreme Court has emphasized that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd,* 385 U.S. 116 (1966).

In *Bond*, for example, the Supreme Court rejected the State of Georgia's argument that it was "constitutionally justified in exacting a higher standard of loyalty from its legislators than from its citizens" and thus the State could refuse to seat the plaintiff in the Georgia House of Representatives because his statements about the Vietnam War, in the State's view, demonstrated that he did not sincerely swear to his oath of office. 385 U.S. at 135. The Court reaffirmed the principle that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 136 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Court explained:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators *have an obligation* to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

Id. at 136–37 (emphasis added). The Court thus held that the disqualification of the plaintiff from membership in the George House because of his statements violated his right of free expression under the First Amendment. *See id.* at 137.

Wood v. Georgia is likewise instructive. 370 U.S. 375 (1962). In *Wood*, a state court convicted an elected county sheriff for criticizing an ongoing grand jury investigation. *See id.* at 379, 382–383. The Supreme Court reversed the conviction, rejecting the State's argument that the sheriff's "right to freedom of expression must be more severely curtailed than that of an average citizen" because he was an elected official. *Id.* at 393. The Court noted that the sheriff "was an elected official and had the right to enter the field of political controversy," *id.*, and that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves," *id.* at 395.

The above cases show that the Supreme Court has consistently upheld the First Amendment's robust protection of elected officials' speech, particularly on matters of government policy and public concern. The Court has emphasized that the freedom of elected representatives to speak is not just a personal right but a core function of their role in representative democracy. *See Bond*, 385 U.S. at 136. Officials must be free to engage in uninhibited public discourse, which includes informing their constituents about their positions on controversial political questions.

B. The Petition seeks to unconstitutionally restrict government officials from engaging in public debate on public policy issues

The advocacy of Governor Ron DeSantis and Attorney General Ashley Moody against Amendment 4 is a quintessential example of the free and open discourse that lies at the heart of our democratic system. As elected officials, Governor DeSantis and Attorney General Moody are not mere bystanders in public debates on policy; they are central participants. Their voices are vital in informing the public about the effect of state policy and laws, including proposed constitutional amendments. By accusing Respondents of engaging in election interference, Petitioner simply ignores the fundamental principles of representative government, where the freedom to speak on controversial issues is not a privilege but an *obligation* of those who have been elected to serve the public. *Cf. Werkheiser v. Pocono Twp.*, 210 F. Supp. 3d 633, 640 (M.D. Pa. 2016) ("The obligation on elected officials to take positions on controversial political question[s] ensures that their constituents are fully and adequately represented in governmental debates.").

The First Amendment does not draw distinctions between the speech of private citizens and that of their elected representatives. If

anything, the need for robust and candid expression is even greater for those who hold public office. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971) ("[T]he entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment."). Indeed, the essence of representative democracy is that officials must be able to communicate their views on the policies that affect their constituents. As the Supreme Court explained, "[g]overnment officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." *Keller v. State Bar of California*, 496 U.S. 1, 12 (1990). "With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process." *Id.*

Here, Respondents' advocacy against Amendment 4 communication is essential for an informed electorate, enabling Florida voters to understand the positions of their leaders and how a

proposed constitutional amendment would affect the State. Indeed, if Governor DeSantis and Attorney General Moody cannot express their views about a proposed constitutional amendment, then the very foundation of democratic governance—the accountability of leaders to the people—is eroded.

Moreover, to suppress the speech of elected officials simply because it is critical or contentious would create a chilling effect that undermines the freedom of expression. The Supreme Court has recognized that erecting a wall between government officials and disagreeable speech would "radically transform[]" the process of government by silencing those elected and appointed to carry out the very policies that are the subject of such vigorous debate. *Keller*, 496 U.S. at 13. Democracy depends on the free flow of ideas, and this principle applies with special force to those who have been elected to represent the people. Public debate on issues of great consequence—such as Amendment 4—demands that all perspectives, especially those of government leaders who are elected to influence and shape policy, be heard. Preventing officials from voicing their opinions on Amendment 4 would not only stifle debate but also deprive Floridians of hearing the perspectives of their elected officials.

At its core, Petitioner's call to restrict the speech of Respondents wholly ignores the First Amendment. The voices of Governor DeSantis and Attorney General Moody, like those of any elected representative, must remain part of the public discourse about the scope and effect of Amendment 4. Far from being "interference," Respondents' advocacy against Amendment 4 is an affirmation of the principles of free speech and representative government. And, far from being a constitutional orphan, the speech of Florida's highest elected officials is entitled to the same robust protection as any other speech. Petitioner's position is plainly without any merit.

II. A Government Agency Has the Right to Speak for Itself and Select the Views it Wishes to Express.

Petitioner takes issue with the Agency for Health Care Administration's webpage informing citizens about Florida's current abortion laws. He accuses the Agency of making "highly critical, indeed inflammatory, statements about Amendment 4." (Pet. 4.) He also takes offense at Respondent Weida's social media posts highlighting the Agency's webpage. (Pet. at 4–5.) The Court should reject Petitioner's arguments because both the Agency's and Respondent Weida's communications are lawful government speech.

A. A government agency and its representatives have the right to speak for themselves and to say what they wish.

The Supreme Court has made clear that "[a] government entity has the right to 'speak for itself[,]' … 'to say what it wishes,' and to select the views that it wants to express," because "'[i]t is the very business of government to favor and disfavor points of view.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (citations omitted). Indeed, governmental speech is critical because "it is not easy to imagine how government could function if it lacked this freedom." *Id.* at 468. "To govern, government has to say something, and a First Amendment heckler's veto of … the government's voice in the 'marketplace of ideas' would be out of the question." *Id.* (citation omitted).

"When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022). Examples of governmental speech exempt from First Amendment scrutiny include the choice of "[p]ermanent monuments displayed on public property," *Summum*, 555 U.S. at 470; the issuance of specialty automobile license plates,

see Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015); and a promotional advertising campaign for beef in which the government established the message and exercised final approval authority, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005).

Johanns is instructive. In that case, two associations challenged a federal law requiring beef producers to subsidize promotional print and television messages to support the beef industry. 544 U.S. at 554–55. The Supreme Court determined that when "the government sets the overall message to be communicated and approves every word that is disseminated," the speech is government speech. *Id.* at 562. In finding that the advertising constituted government speech, the Court noted that "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government," that "Congress and the Secretary [of Agriculture] … set out the overarching message and some of its elements, and … left the development of the remaining details to an entity whose members are answerable to the Secretary," and that "the Secretary exercise[d] final approval authority over every word used in every promotional campaign." *Id.* at 560–61. *Johanns* thus stands for the proposition

that when the government determines an overarching message and retains power to approve the words disseminated at its behest, the message is attributed to the government.

B. The Agency and its representative, Respondent Weida, engaged in lawful government speech.

Considering the above principles, the Agency's website and Respondent Weida's posts are lawful government speech. Both are crafted, approved, and disseminated by a government entity and a government official speaking in his official capacity. The Agency's website and Respondent Weida's posts reflect the Agency's official stance on Amendment 4 and their response to the Sponsor's misleading attacks on Florida's current abortion laws. Just like "the message set out in the beef promotions is from beginning to end the message established by the Federal Government," *Johanns*, 544 U.S. at 560–61, so too, the content presented on the Agency's website and Weida's social media posts is developed under the authority of the State of Florida. *Cf. Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 329 (1st Cir. 2009) (holding that officials' actions in setting up and controlling a town website constituted "government speech"). Just as the Court in *Johanns* observed that the government—not private

entities—crafted and authorized every detail of the promotional campaigns, the Agency's website and Weida's posts are curated by the government to communicate its views on Amendment 4.

Because the speech at issue is government speech, it is not subject to First Amendment limitations applicable to regulations of private speech. The Agency, acting through its officials like Respondent Weida, is entitled to promote its policies and viewpoints, just like the federal government was permitted to promote the beef industry in *Johanns*. As the Supreme Court observed, "[i]t is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000). To accept Petitioner's thirst for censorship against the State for expressing views he disagrees with would require a wholesale abandonment of the government speech doctrine, which permits the government to convey messages it believes are in the public interest. *See Summum*, 555 U.S. at 467. In the final analysis, the Agency chose to express its view on what it saw as the Sponsor of Amendment 4's mischaracterization and lies about

Florida's current abortion laws. One of the guiding principles of First Amendment law is that the solution to "falsehood and fallacies" is "more speech, not enforced silence." *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). The Agency's and Respondent Weida's efforts to set the record straight about Florida's current abortion laws was simply the exercise of their right, "to advocate and defend its own policies." *Southworth*, 529 U.S. at 229.

C. Government officials may collaborate with private parties to advance the government's message.

Petitioner accuses (Pet. at 6–7) Attorney General Ashley Moody of impropriety for joining Mathew Staver, *Amicus* Liberty Counsel's Founder and Chairman, on a conference call organized by Governor DeSantis' Faith and Community Initiative to discuss the ramifications of Amendment 4. That contention is meritless. The Supreme Court has long recognized that the government is entitled to express its views on matters of public concern, and "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Summum*, 555 U.S. at 468;

accord Johanns, *supra*, 544 U.S. at 562 (noting that the government "is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

Governor DeSantis' Faith and Community Initiative is a government-sponsored project that engages with community leaders and stakeholders on issues of significant public interest, including Amendment 4.[1] Attorney General Ashley Moody's participation in this initiative, including her discussion with Mathew Staver, is a constitutionally permissible extension of her official duties to inform the public on legislative and legal issues facing the State of Florida. As the Supreme Court has made clear, when the government controls the overarching message, it may lawfully seek collaboration from private individuals or organizations to help convey that message. *See Summum*, 555 U.S. at 468. The Governor's Faith and Community Initiative's involvement of Mathew Staver and *Amicus* Liberty Counsel in this context is entirely consistent with these principles, as the

[1] *See About Us*, Governor Ron DeSantis' Faith & Community Initiative, https://faithandcommunityflorida.com/AboutUs.htm (last accessed Sep. 23, 2024).

Governor's Executive Office controlled the topic and execution of the event.

In short, Petitioner's claim amounts to little more than an attempt to chill lawful and constitutionally protected government speech by cloaking it in an unsubstantiated accusation of misconduct. But the very notion of public discourse, including the government's ability to educate and to advocate for a particular position, is simply incompatible with Petitioner's desired heckler's veto on government speech.

III. The Petition is a Frivolous Attempt to Censor Lawful Speech.

Petitioner's contention that that Respondents are violating section 104.31, Florida Statutes, runs into a fatal problem—the statute itself. Section 104.31 provides: "No officer or employee of the state, … except as hereinafter exempted from provisions hereof, shall…. Use his or her official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof." § 104.31 (1) (a), Fla. Stat.

But Petitioner's argument suffers a glaring textual problem: The section contains several dispositive exceptions that consign his Petition to the wastebasket: "All such persons shall retain the right to vote as they may choose *and to express their opinions on all political subjects* and candidates." § 104.31(1)(c), Fla. Stat. (emphasis added). As such, "[t]he provisions of paragraph (a) shall not be construed so as to limit the political activity in a general, special, primary, bond, referendum, or other election of any kind or nature, of elected officials or candidates for public office in the state or of any county or municipality thereof." *Id.* And "[t]he provisions of paragraph (a) shall not be construed so as to limit the political activity in a general, special, primary, bond, referendum, or other election of any kind or nature of the Governor, the elected members of the Governor's Cabinet, or the members of the Legislature." *Id.* As one leading treatise explained:

> These prohibitions may not be construed so as to prevent any person from becoming a candidate for and actively campaigning for any elective office in the state, and the officers and employees affected by such prohibitions retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

21 Fla. Jur 2d Elections § 231.

Tellingly, Petitioner wholly fails to mention these exceptions. That is unsurprising given that the statute is crystal clear: While it prohibits state officers from using their official positions to improperly influence elections, it unequivocally preserves their right to speak out on political matters. *See* § 104.31(1)(c), Fla. Stat. Petitioner's failure to acknowledge—let alone address—these fatal flaws in his Petition is not just an oversight; it is willfully misleading. The statute explicitly carves out that the restrictions of section 104.31(1)(a) "shall not be construed so as to limit the political activity" of the Governor, Cabinet members, and legislators in any type of election. By leveling accusations against Attorney General Moody and Governor DeSantis for engaging in the political advocacy the statute explicitly protects, Petitioner attempts to twist the law into something it simply is not. The exceptions are not ambiguous or arguable—they are a black-and-white rejection of Petitioner's entire premise and condemn his claims to failure. Put simply, Petitioner's allegation is frivolous on its face.

More broadly, Petitioner is asking this Court to establish a dangerous precedent with sweeping implications for government speech. Petitioner seeks to subordinate the voice of government

agencies and officials to an inferior status relative to private expression, imposing an unjustifiable constraint on the ability of government officials to speak on matters of public concern. *Cf.* 16A Am. Jur. 2d Constitutional Law § 488 ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest possible latitude to express their views on issues of policy, and a state may not apply to its legislators stricter standards than it applies to its citizens as to the protection afforded by the free speech guarantee of the First Amendment.").

Worse still, granting the Petition would weaponize section 104.31 by threatening Florida government officials with first-degree misdemeanor charges simply for expressing views that may offend a contrary private speaker like Petitioner. Such coercive tactics would be unconstitutional if used by the government to stifle private speech, and they are equally intolerable when invoked by a private party to silence government expression. This form of intimidation, no matter who wields it, is an affront to the fundamental principles of free speech.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Dated: September 23, 2024

/s/ Mathew D. Staver

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the Florida Courts E-Filing Portal to counsel for all parties on September 23, 2024.

Dated: September 23, 2024

/s/ Mathew D. Staver
Mathew D. Staver

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2), and contains less than 20 pages in compliance with Floria Rule of Appellate Procedure 9.370(b).

/s/ Mathew D. Staver
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