

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

2006 SEP 29 PM 3:49  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA - MIAMI

CBS BROADCASTING INC., AMERICAN BROADCASTING  
COMPANIES, INC., THE ASSOCIATED PRESS, CABLE  
NEWS NETWORK LP, LLLP, FOX NEWS NETWORK,  
L.L.C. and NBC UNIVERSAL, INC.,

06-22463

Plaintiffs,

- v. -

SUE M. COBB, in her official capacity as Secretary of  
State of the State of Florida, and LESTER SOLA, in his  
official capacity as the Supervisor of Elections of  
Miami-Dade County, Florida and as proposed  
representative of a defendant class of all county  
Supervisors of Elections in the State of Florida,

Defendants.

MAGISTRATE JUDGE  
SECTION

**PLAINTIFFS' MOTION TO CERTIFY A  
DEFENDANT CLASS PURSUANT TO FED. R. CIV. P. 23  
AND ACCOMPANYING MEMORANDUM OF LAW**

PLEASE TAKE NOTICE that upon the Complaint in this action and the Memorandum of Law submitted herewith, Plaintiffs CBS Broadcasting Inc., American Broadcasting Companies, Inc., The Associated Press, Cable News Network, LP, LLP, Fox News Network, L.L.C., and NBC Universal, Inc., hereby move this Court for an order pursuant to Fed. R. Civ. P. 23 certifying a defendant class comprised of all Supervisors of Elections in the State of Florida.

1. The Plaintiffs in the instant action are challenging the constitutionality of Fla. Stat. §102.031(4)(a), (b) (2005). The statute prohibits any person, *inter alia*, from asking a voter

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a “fact” or “opinion” or from conducting a poll within 100 feet of the entrance to any polling place or early voting site.

2. Plaintiffs seek a preliminary injunction enjoining Defendants from prohibiting Plaintiffs’ exit polling activities within 100 feet of Florida polling places on November 7, 2006 and permanent relief in the form of a declaration that the statute is unconstitutional as applied to Plaintiffs’ newsgathering activities on the grounds that it violates the First Amendment to the United States Constitution and permanent injunctive relief.

3. The proposed defendant class is comprised of all county Supervisors of Elections in the State of Florida. Each county Supervisor of Elections is responsible for overseeing enforcement of Fla. Stat. §102.031(4)(a), (b) (2005), maintaining order at the polls, and designating the area within which soliciting a voter’s views is unlawful. Fla. Stat. §102.031(4)(c)(2005).

4. Fed. R. Civ. P. 23 provides that one or more members of a class may sue or be sued as representative parties on behalf of all if each of the four requirements listed in Fed. R. Civ. P. 23(a) are met and, in addition, at least one of the requirements of Fed. R. Civ. P. 23(b) is satisfied.

5. Plaintiffs request that the Court issue an Order certifying the Supervisors of Elections in each county of the State of Florida as a defendant class in this action with the Supervisor of Elections for Miami-Dade County, Lester Sola, designated as the class representative.

For the reasons set forth in the accompanying Memorandum of Law, certification of the defendant class is appropriate.

## MEMORANDUM OF LAW

Plaintiffs respectfully submit this Memorandum of Law in support of their Motion to Certify a Defendant Class consisting of all county Supervisors of Elections for purposes of challenging Fla. Stat. § 102.031(4)(a), (b) (2005), which, among other things, severely restricts plaintiffs' ability to conduct "exit polls" at Florida polling places.

### INTRODUCTION

The Plaintiffs in the instant action are challenging the constitutionality of Fla. Stat. §102.031(4)(a), (b) (2005), to the extent it prohibits Plaintiffs from conducting exit polls of voters within 100 feet of the entrance to any polling place or early voting site. Plaintiffs seek a preliminary injunction enjoining Defendants from prohibiting Plaintiffs' newsgathering activities within 100 feet of the polls, a declaration that the statute is unconstitutional as applied to Plaintiffs' activities on the ground that it otherwise violates the First Amendment to the United States Constitution and permanent injunctive relief.

The proposed defendant class is comprised of all county Supervisors of Elections in the State of Florida. Each county Supervisor of Elections is responsible for overseeing enforcement of Fla. Stat. §102.031(4)(a), (b) (2005), maintaining order at the polls, and designating the area within which it is unlawful to ask a voter a "fact" or "opinion" or to conduct a poll. Fla. Stat. §102.031(4)(c)(2005).<sup>1</sup> For the reasons set forth below, certification of the defendant class is both appropriate and warranted.

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<sup>1</sup> Section 102.031(c) provides:

- (c) Each supervisor of elections shall inform the clerk of the area within which soliciting is unlawful, based on the particular characteristics of that polling place. The supervisor or clerk may take any reasonable action necessary to ensure order at the polling places, including, but not limited to, having disruptive and unruly persons removed by law enforcement officers from the polling place or the 100-foot zone surrounding the polling place.

**ARGUMENT**

Fed. R. Civ. P. 23 provides that one or more members of a class may sue or be sued as representative parties on behalf of all if each of the four requirements listed in Fed. R. Civ. P. 23(a) are met and, in addition, at least one of the requirements of Fed. R. Civ. P. 23(b) is satisfied. The burden of proof to establish the propriety of class certification rests with the advocate of the class. *Valley Drug Co. v. Geneva Pharmaceuticals*, 350 F.3d 1181, 1187 (11th Cir. 2003). This Court may properly certify a defendant class of the county Supervisors of Election pursuant to Fed. R. Civ. P. 23 because all of the prerequisites set out in the Federal Rules of Civil Procedure are satisfied.

A. The Action Satisfies The Prerequisites of Fed. R. Civ. P. 23(a)

The four prerequisites to a class action specified in Fed. R. Civ. P. 23(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

1. Persons Comprising The Defendant Class Are So Numerous That Joinder Of All Members Is Impracticable

This Court has previously held that joinder of all sixty-seven Supervisors of Elections is impracticable, thus satisfying the numerosity requirement of Fed. R. Civ. P. 23(a). *CBS v. Smith*, 681 F. Supp. 794, 802 (S.D. Fla 1988). *See also, Clean-Up '84 v. Heinrich*, 582 F.Supp. 125 (M.D. Fla 1984) (certifying defendant class of Florida sheriffs in suit seeking injunctive relief enjoining enforcement of Fla. Stat. §104.36, which banned the solicitation of, *inter alia*, voter signatures or opinions within 300 feet of polling places);

*Florida Businessmen for Free Enterprise v. City of Hollywood*, 673 F.2d 1213 (11<sup>th</sup> Cir. 1982) (certifying defendant class of sixty-seven Florida Sheriffs and state attorneys in seeking injunctive relief enjoining enforcement of Florida’s “Head Shop” law). Because it is plainly not practical for Plaintiffs to join all 67 Supervisors in a single suit, the first criteria for class certification is satisfied.

2. The Major Issue Presented In This Action Is A Question Of Law Common To The Entire Class

The second requirement under Fed. R. Civ. 23(a), “commonality,” is plainly satisfied as well. The only major question of law in this matter — whether § 102.031(4)(a)(b)(2005) violates the First Amendment by prohibiting Plaintiffs from conducting exit polls within 100 feet of the entrance to Florida polling places — is common to the entire proposed defendant class. *Smith*, 681 F.Supp. at 802.<sup>2</sup>

3. The Claims And Defenses That The Proposed Representative Defendant, Miami-Dade County Supervisor Of Elections, Lester Sola, Are Typical Of The Claims And Defenses That All Of The Supervisors Of Elections Would Advance.

The “typicality” requirement of Fed. R. Civ. 23(a) is met when the defenses of the class representative arise from the same pattern or practice and are based on the same legal theory. *Edmonds v. Levine*, 233 F.R.D. 638, 641 (S.D. Fla. 2006). Here, any defenses and legal arguments advanced by the proposed class representative, Miami-Dade County Supervisor of Elections, Lester Sola, will undoubtedly be typical of the defenses that any of the other Supervisors of Elections might raise. *See Clean-Up ’84*, 582 F.Supp. at 127 (defendant class of sheriffs are nominal parties that cannot “argue either for or against the

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<sup>2</sup> The staff analysis reports for Fla. Stat. §102.031(4)(a), (b) (2005) make clear that the legislature considered the opinions of the Supervisors of Elections, who are charged with overseeing compliance with the statute, before enacting the bill into law.

validity of a state statute which by law they are sworn to enforce until or unless enjoined from doing so by lawful authority”). Thus, the third requirement of Fed. R. Civ. P. 23(a) is also satisfied.

4. The Class Representative Will Fairly And Adequately Protect The Interest Of The Defendant Class.

Rule 23(a)(4) requires that the representative party in a class action adequately protect the interests of those he purports to represent. *Valley Drug. Co.*, 350 F.3d at 1189. This “adequacy representation” involves two separate inquiries: (1) whether any substantial conflicts of interest exist between the representative and the class; and (2) whether the representative will adequately prosecute the action. Any conflict must be fundamental, *i.e.* go to the specific issues in controversy. *Id.*

Here, Mr. Sola is empowered with the same election law enforcement and oversight functions as all other county Supervisors of Elections in the State of Florida. As such, he can fairly and adequately protect the interests of the proposed defendant class. Plainly, there are no substantial or fundamental conflicts between the duties of each county Supervisor of Elections that go to the specific issue in controversy in this litigation.. Thus, the fourth requirement under Fed. R. Civ. P. 23(a) is also satisfied.

B. Plaintiffs’ Action Satisfies The Requirements Of Rule 23(b)

The proposed defendant class also satisfies each of the requirements under Fed. R. Civ. P. 23(b). First, it is indisputable that “the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct” for plaintiffs. *See* Fed. R. Civ. P. 23(a)(1)(A). *See also*

*Smith*, 681 F. Supp at 801-02 (finding this requirement to be met solely by virtue of the fact that there are no fewer than 67 different county Supervisors).

In the alternative, the action is properly maintainable as a class action under Fed. R. Civ. P. 23(b)(2) because the relief Plaintiffs seek is identical to each member of the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.<sup>3</sup>

C. This Court Has Previously Held That The Proposed Defendant Class Is Proper

In *Smith*, this Court certified the exact same defendant class that is proposed here. 681 F.Supp. at 801-02. This Court held that the requirements of Fed. R. Civ. P. 23(a) had been met in that the Defendant class of Supervisors of Elections for each of the sixty-seven counties in Florida was so numerous that joinder of all members was impracticable. This Court found that the Plaintiffs had raised only one major question of law regarding soliciting by the media of an opinion from voters within 150 feet of the polling place as violative of the First Amendment, and that question was common to the entire Defendant class. The defenses raised by Defendant Leahy, the Supervisor of Elections for Dade County at the time that suit was instigated, were found to be typical of the defenses of the entire Defendant class. Finally the Supervisor of Elections of Dade County was held by this Court to be empowered with the same election law enforcement and oversight functions as every other county Supervisor of Elections and able to fairly and adequately protect the interests of the Defendant class of Supervisors. *Id.*

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<sup>3</sup> Rule 23(b)(2) requires that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

This Court also found that the Plaintiffs' action was properly maintainable as a class action under Rule 23(b)(1)A) stating,

inasmuch as there are sixty-seven county Supervisors throughout the State and the prosecution of separate actions against individual members of the Defendant class would create substantial risk of inconsistent or varied adjudications with respect to individual members of the class and would establish incompatible standards of conduct for Plaintiffs in each county. *Id.*

The rationale underlying this Court's analysis in *Smith* is the same today as it was in 1988.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request the Court enter an Order pursuant to Fed. R. Civ. P. 23(c)(1) certifying a defendant class consisting of all county Supervisors of Elections in the State of Florida.

WHEREFORE, the Plaintiffs American Broadcasting Companies, Inc., The Associated Press, Cable News Network, LLP, CBS, Inc., Fox News Network LLC, and National Broadcasting Company, Inc., respectfully request this Honorable Court enter its order certifying a Defendant class of all Supervisors of Elections in the State of Florida and providing such other and further relief as this Court deems just.

Dated this 29<sup>th</sup> day of September, 2006.

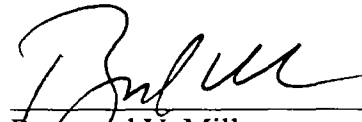
Respectfully Submitted,

Co-Counsel for Plaintiffs

Susan Buckley, Esq.  
Kevin J. Burke, Esq.  
Brian Markley, Esq.  
CAHILL GORDON & REINDEL LLP  
80 Pine Street  
New York, New York 10005

GUNSTER, YOAKLEY & STEWART P.A.  
*Attorneys for Plaintiffs*  
One Biscayne Tower, Suite 3400  
2 South Biscayne Boulevard  
Miami, Florida 33131  
Telephone: (305) 80 Pine Street 376-6000  
Facsimile: (305) 376-6010


By:



Raymond V. Miller  
Florida Bar No.: 328901

**CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing is being served upon the Defendants along with the Complaint and Summons.

By:  FRW: P12054  
for Raymond V. Miller

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