

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**CASE NO. 04-22572-Civ-King/O'Sullivan**

AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, *et al*,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of  
Florida,

Defendant.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR COSTS  
AND ATTACHED BILL OF COSTS**

Plaintiffs AFL-CIO, AFSCME International, AFSCME Council 79, and SEIU, by and through counsel, respectfully submit this opposition to the Secretary of State's Motion for Costs and Attached Bill of Costs ("motion for costs" or "motion"). As discussed below, the Court should exercise its discretion to deny Defendant's motion because Plaintiffs' claims raised voting rights issues of critical public importance and the issues in the case were close and complex.

Alternatively, Defendant's motion should be denied to the extent that it seeks costs that are not statutorily authorized by 28 U.S.C. § 1920, or were incurred in defending an interlocutory appeal in which Plaintiffs prevailed. Defendant's request for costs associated with routine overhead expenses, including attorney travel and pro hac vice fees, should be denied because those costs are not compensable under § 1920. In addition, Defendant's request for costs incurred in defending Plaintiffs' interlocutory appeal of the order dismissing the original complaint should be denied because Defendant was not the prevailing party; to the contrary, Plaintiffs were entitled to, and were awarded, their costs associated with the appeal. Accordingly, Plaintiffs respectfully

request that the Court deny Defendant's motion for costs in its entirety or alternatively, as explained below, deny it in part.

## **BACKGROUND**

Plaintiffs in this case are four unions whose members include otherwise eligible Florida voters who were denied, and will be denied, the right to vote because their voter registration applications, which they timely submitted before the registration deadline, contained errors or omissions that the applicants were not permitted to correct prior to the election for which they were registering. On October 13, 2004, Plaintiffs filed a complaint to preserve the voting rights of more than 10,000 Floridians who were eligible to vote in the November 2, 2004 general election, and who submitted a voter registration application in advance of the October 4, 2004 registration deadline, but whose applications the Supervisors of Elections in several counties refused to process based on unduly restrictive registration practices and procedures in violation of the Voting Rights Act, National Voter Registration Act, and U.S. Constitution.

On October 26, 2004, the Court dismissed the complaint for lack of standing, and Plaintiffs appealed the order to the Eleventh Circuit Court of Appeals. On September 28, 2005, the Court of Appeals ruled that the district court had erred in dismissing the complaint for lack of standing, vacated the order, and remanded the case for further proceedings including the filing of an amended complaint. Plaintiffs sought and were awarded costs associated with the appeal.

On April 6, 2006, Plaintiffs filed a second amended complaint and on July 10, 2006, filed a third amended complaint. On February 27, 2007, in response to Defendants' motion to dismiss, the Court issued an order in which it held, *inter alia*, that Plaintiffs had stated a claim that Florida's twenty-nine day voter registration deadline, without a grace period during which applicants could correct incomplete applications

prior to the upcoming elections, constituted an unconstitutional burden on the right to vote. (D.E. No. 201 at 13) On October 8, 2007, Defendant moved for summary judgment, and on January 18, 2008, the Court denied the motion, ruling that there were “substantial issues of material fact barring summary judgment and requiring the resolution of said issues at a trial.” (D.E. No. 317 at 1)

Plaintiffs tried their claims in a five-day bench trial commencing on February 5, 2008. On March 25, 2008, the Court entered judgment in Defendant’s favor. Defendant now seeks to recover costs under 28 U.S.C. § 1920 not only associated with defending claims asserted in Plaintiffs’ Third Amended Complaint (some of which, as discussed below, are not statutorily authorized under § 1920), but also for costs incurred in defending Plaintiffs’ appeal of the order dismissing the original complaint, in which Plaintiffs prevailed.

### **LEGAL STANDARD**

Federal Rule of Civil Procedure 54(d) provides that a prevailing party is entitled to costs other than attorneys’ fees unless the court otherwise directs. A court may exercise its discretion to deny costs where the issue presented is a close or difficult legal question. *See Haddon Zia v. Med. Staffing Network, Inc.*, 336 F. Supp. 2d 1306, 1310 (S.D. Fla. 2004) (denying costs where issue presented was a “close legal question”); *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10<sup>th</sup> Cir. 2004) (denying costs to a prevailing party may be warranted when issues in case are difficult and close). It may also be appropriate for a court to deny costs where a case presents issues of public importance, *Ass’n of Mexican-American Educators v. California*, 231 F.3d 572, 593 (9<sup>th</sup> Cir. 2000) (affirming denial of costs to prevailing defendants in a civil rights action because, in part, case presented issues of public importance affecting thousands of people and the state’s school system and the issues were close and complex), *White & White*,

*Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730-31, 733 (6<sup>th</sup> Cir. 1986) (affirming denial of costs based in part on difficulty of the case); or where taxing costs would chill the prosecution of related actions. See *U.S. ex rel. Pickens v. GLR Constructors, Inc.*, 196 F.R.D. 69, 77 (S.D. Ohio 2000) (defendant not entitled to costs in employee's False Claims Act suit due to chilling effect that taxing of costs would have on future FCA actions, public benefit of the case, and difficulty of the case, among other considerations). If a court declines to award costs under Rule 54(d), it must provide a reason for its denial of costs. *Head v. Medford*, 62 F.3d 351, 354 (11<sup>th</sup> Cir. 1995).

Expenses that a court may tax as a cost under the discretionary authority granted by Rule 54(d) are enumerated in 28 U.S.C. § 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Section 1920 provides that the following costs may be taxed:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

While a court may refuse to award costs, it does not have discretion to award costs beyond those specifically enumerated in § 1920, absent explicit statutory authorization to the contrary. *Crawford Fitting Co.* at 445; *EEOC v. W&O, Inc.*, 213 F.3d 600, 620 (11<sup>th</sup> Cir. 2000) (“a court may only tax costs as authorized by statute”); *Cline v. Home Quality Mgmt., Inc.*, CASE NO. 01-9016-CIV-MOORE/O’SULLIVAN, 2005 LEXIS 44733, at \*17 (S.D. Fla. May 18, 2005) (“[I]n exercising its discretion to tax costs, absent explicit statutory authorization, federal courts are limited to those costs specifically enumerated in 28 U.S.C. § 1920.”).

## ARGUMENT

In light of the important public nature of this case and the novel legal issues involved, the Court should exercise its discretion to deny Defendant's motion for costs. Alternatively, Defendant's motion should be denied to the extent that it seeks costs that are unauthorized under Section 1920 or costs associated with an appeal in which the Defendant did not prevail.

### **I. The Court Should Exercise its Discretion to Deny Defendant's Motion for Costs**

The Court should exercise its discretion to deny Defendant's motion for costs in light of the novel and complex legal issues pertaining to voting rights presented by this case. Plaintiffs brought this lawsuit on behalf of their members and thousands of other eligible Floridian voters to protect their voting rights. Plaintiffs filed the original complaint in October 2004 in response to reports that thousands of incomplete voter registration applications had been submitted to county supervisors of elections and were unlikely to be processed, or timely processed, in order for the applicants to vote in the November 2004 elections. The parties subsequently litigated Plaintiffs' standing to bring suit, and Plaintiffs filed several amended complaints. In response to Defendant's motion to dismiss the third amended complaint, the Court issued an order in which it held, *inter alia*, that Plaintiffs had stated a claim that Florida's twenty-nine day voter registration deadline, without a grace period during which applicants could correct incomplete applications prior to the upcoming elections, constituted an unconstitutional burden on the right to vote. (D.E. No. 201 at 13) This claim was without precedent.

To prosecute this claim, Plaintiffs propounded discovery requests related to the harm and burdens to eligible voter applicants caused by the lack of a grace period. Plaintiffs also sought discovery concerning Florida's purported justifications for the state's legislative judgment that a twenty-nine day registration deadline, without a grace

period, is necessary to achieve the state's interests. Defendant moved for summary judgment after the conclusion of discovery, and the Court denied the motion, holding that there were "substantial issues of material fact barring summary judgment and requiring the resolution of said issues at a trial." (D.E. No. 317 at 1)

The case was tried in a five-day bench trial that commenced on February 5, 2008. On March 25, 2008, the Court entered judgment in Defendant's favor. As the judgment makes clear, the legal issues presented were complex and concerned matters of significant public importance: the right of thousands of eligible Floridians to correct their voter registration applications and become registered to vote. Given the novel voting rights claim prosecuted by Plaintiffs and the significant public interests at stake, the Court should exercise its discretion to deny Defendant's motion for costs in its entirety. *See* Fed. R. Civ. P. 54(d); *Haddon Zia*, 336 F. Supp. 2d at 1310 (denying costs where legal issues were "close"); *Rodriguez*, 360 F.3d at 1190 (denying costs may be warranted when issues in case are difficult and close); *Ass'n of Mexican-American Educators*, 231 F.3d at 593 (affirming denial of costs in a civil rights action because, in part, case presented issues of public importance and the issues were close and complex), *White & White, Inc.*, 786 F.2d at 730-31, 733 (affirming denial of costs based in part on difficulty of the case); *U.S. ex rel. Pickens*, 196 F.R.D. at 77 (defendant not entitled to costs in employee's False Claims Act suit due to chilling effect the taxing of costs would have on future FCA actions, public benefit of the case, and difficulty of the case, among other considerations).

**II. Alternatively, Defendant's Motion for Costs should be Denied Insofar as it Seeks Costs Unauthorized by § 1920**

**A. Defendant's Attorney Travel Costs Are Unrecoverable, Regular Overhead**

Defendant has sought a total of \$12,832.08 in attorney travel expenses incurred in travel from counsel's offices in Tallahassee and Washington, DC to Miami, for court

appearances or in one instance, preparation for argument. Because attorney travel is not one of the § 1920 enumerated costs, it cannot be taxed. *See* 28 U.S.C. § 1920.

Courts in the Eleventh Circuit have repeatedly held that attorney travel is not a taxable cost and instead falls under “regular overhead” which may not be taxed under § 1920. *See Johnson v. Commc’ns Supply Corp.*, CASE NO.: 05-60510-CIV-ALTONAGA/Turnoff, 2006 U.S. Dist. LEXIS 90344, at \*\*8-9 (S.D. Fla. Dec. 14, 2006) (attorney travel expenses not taxable under Section 1920; rejecting *Cullens v. Georgia Dep’t of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994)<sup>1</sup>); *State Contracting & Engineering Corp. v. Condotte Am., Inc.*, CASE NO. 97-7014-CIV, 2002 U.S. Dist. LEXIS 28213, at \* 9 (S.D. Fla. Aug. 28, 2002) (“Plaintiff is not entitled to long distance charges and attorney travel costs, as such charges are considered regular attorney overhead, and are not specifically taxable by Section 1920”); *Dictiomatic, Inc. v. U.S. Fidelity & Guaranty Co.*, CASE NO. 93-2123-CIV-PAINE, 2000 U.S. Dist. LEXIS 19226, at \*\*45-46 (S.D. Fla. May 2, 2000) (travel expenses not taxable under § 1920); *Camina Serv., Inc. v. Shell Oil Co.*, CASE NO.: 90-1400-CIV-MARCUS, 1993 U.S. Dist. LEXIS 1195, at \* 6 (S.D. Fla. Jan. 5, 1993) (same).<sup>2</sup> Since it is well settled that attorney travel may not be taxed under § 1920, Defendant’s request for costs incurred in attorney travel should be stricken from his bill of costs.

---

<sup>1</sup> Defendant cites *Cullens v. Georgia Dep’t of Transportation*, 29 F.3d 1489, 1494 (11th Cir. 1994), for the proposition that attorney travel is a taxable cost. *Cullens*, however, is an anomalous departure from the general rule that such costs are not taxable. In *Johnson v. Communication Supply Corp.*, 2006 U.S. Dist. LEXIS 90344 at \*\*8-9, the court acknowledged *Cullens*, yet nevertheless held that “travel expenses are not taxable pursuant to § 1920.”

<sup>2</sup> *See also Ass’n for Disabled Ams., Inc. v. Integra Resort Mgmt.*, 385 F. Supp. 2d 1272, 1304 (M.D. Fla. 2005) (denying bill of cost insofar as it requested costs incurred in attorney travel); *Reinhold v. Durango Steakhouse of Titusville, Inc.*, Case No. 6:0-cv-1090-Orl-22JGG, 2007 U.S. Dist. LEXIS 9860, at \*2 (M.D. Fla. Feb. 13, 2007) (attorney travel not taxable because does not fall under § 1920); *Scelta v. Delicatessen Support Svcs.*, 203 F. Supp. 2d 1328, 1339 (M.D. Fla. 2002) (same); *Coss v. Sunbelt Rentals, Inc.*, Case No. 8:03-cv-129-T-30EAJ, 2005 U.S. Dist. LEXIS 34324, at \*3 (M.D. Fla. Aug. 30, 2005) (same); *Calderon v. Witvoet*, 112 F.3d 275, 276 (7<sup>th</sup> Cir. 1997) (same); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5<sup>th</sup> Cir. 1993) (same).

B. Defendant's Pro Hac Vice Fees Are Unrecoverable, Regular Overhead

Defendant requests that the court tax fees, in the total amount of \$225, associated with his counsel's pro hac vice motions. Pro hac vice fees, however, fall outside the categories of expenses enumerated under § 1920; therefore, they may not be taxed and should be stricken from Defendant's bill of costs. *Eagle Ins. Co. v. Johnson*, 982 F. Supp. 1456, 1459-60 (M.D. Ala. 1997), *aff'd*, 162 F.3d 98 (11th Cir. 1998) (pro hac vice fee not taxable as cost); *Sanfilippo v. Comm'r of Soc. Sec.*, Case No: 8:04-CV-2079-T-27MSS, 2008 U.S. Dist. LEXIS 36619, at \*\*15-16 (M.D. Fla. May 5, 2008) (pro hac vice fee not taxable); *Cathey v. Sweeney*, cv-205-202, 2007 U.S. Dist. LEXIS 33595, at \*4 (S.D. Ga. May 8, 2007) ("The pro hac vice fee is an expense of counsel, not the client, and is thus not recoverable.").

C. Defendant's Costs Incurred in an Interlocutory Appeal in which Plaintiffs were the Prevailing Parties are Unrecoverable

Defendant seeks costs for attorney travel in the total amount of \$1,024.25 and printing in the amount of \$329.91 incurred in defending Plaintiffs' interlocutory appeal of this Court's order dismissing the original complaint for lack of standing. The attorney travel of \$1,024.25 cannot be taxed for several reasons. First, as explained above, attorney travel cannot be taxed because it does not fall under any of the categories enumerated in § 1920. Second, a large portion of the attorney travel for which Defendant seeks costs was not necessary to the defense of this action. Of the \$1,024.25 in attorney travel sought, \$474.26 consists of airfare, lodging, and parking incurred when Defendant's out-of-town appellate counsel traveled from Washington, DC to Miami for a moot court. That travel was unnecessary to the defense of this action. Finally, costs incurred in defending Plaintiffs' appeal are not recoverable because Defendant was not the "prevailing party" in the appeal. After the Eleventh Circuit ruled in Plaintiffs' favor, Plaintiffs sought and were awarded costs associated with the appeal in accordance with

Federal Rule of Appellate Procedure 39(a)(4).<sup>3</sup> Because Defendant was not the prevailing party in that appeal, he should not be awarded any costs, including attorney travel and printing, in defending the appeal. *See* Fed. R. Civ. P. 54(d).

C. Defendant's Request for the Preparation of Unspecified Documents Paid to the Florida State Archives should be Denied

Defendant seeks costs in the amount of \$97.75 for costs paid to the Florida State Archives for preparation of unspecified documents. Because Defendant has failed to identify the documents prepared and explain their relevance to this case, Defendant's request for taxation in the amount of \$97.75 for the preparation of these documents should be denied. 28 U.S.C. § 1920(4) (limiting taxation of costs to "[f]ees for exemplification and copies of papers *necessarily obtained for use in the case*") (emphasis supplied).

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion for Costs and Attached Bill of Costs in its entirety or alternatively, deny in part Defendant's motion for costs to the extent that it includes attorney travel costs (\$12,832.08), pro hac vice fees (\$225.00), costs incurred in defending Plaintiffs' appeal of this Court's order dismissing the complaint for lack of standing, in which Plaintiffs were the prevailing parties (\$1024.25 for attorney travel, which is included in the \$12,832.08 for attorney travel listed above, and \$329.91 for printing), and unspecified printing costs (\$97.75).

Miami, Florida  
May 12, 2008

---

<sup>3</sup> "[I]f a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders." FRAP 39(a)(4).

RESPECTFULLY SUBMITTED,

/s/ Robert Harris

Robert Harris, Esq.  
Florida Bar No.: 0817783  
Stack Fernandez Anderson & Harris, P.A.  
1200 Brickell Avenue, Suite 950  
Miami, Florida 33131  
Telephone: 305-371-0001  
Fax: 305-371-0002  
E-mail: rharris@stackfernandez.com

\* Elizabeth S. Westfall  
Advancement Project  
1730 M. Street, NW, Suite 910  
Washington, DC 20036  
Phone: 202-728-9557  
Fax: 202-728-9558  
E-mail: [ewestfall@advancementproject.org](mailto:ewestfall@advancementproject.org)

*Attorneys for Plaintiffs*  
\*Admitted pro hac vice

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 12th day of May 2008, to counsel for the parties listed in Exhibit A, attached hereto.

By: /s/ Elizabeth S. Westfall

\* Elizabeth S. Westfall  
Advancement Project  
1730 M. Street, NW, Suite 910  
Washington, DC 20036  
Phone: 202-728-9557  
Fax: 202-728-9558  
[ewestfall@advancementproject.org](mailto:ewestfall@advancementproject.org)

**EXHIBIT A**

**SERVICE LIST**

***Counsel for Defendants***

Peter Antonacci  
Allen C. Winsor  
GrayRobinson, P.A.  
301 South Bronough Street, Suite 600  
P.O. Box 11189  
Tallahassee, Florida 32302-3189  
Phone: 850-577-9090  
Fax: 850-577-3311  
email: [pva@gray-robinson.com](mailto:pva@gray-robinson.com),  
[awinsor@gray-robinson.com](mailto:awinsor@gray-robinson.com)  
*Attorneys for Secretary of State*

*Counsel For Plaintiffs*

Mary Jill Hanson  
Hanson, Perry & Jensen, P.A.  
400 Executive Center Drive, Suite 207  
West Palm Beach, Florida 33401  
Tel: (561) 686-6550  
Fax: (561) 686-2802  
Email: [mjhanson@hpjlaw.com](mailto:mjhanson@hpjlaw.com)

Robert Harris, Esq.  
Stack Fernandez Anderson  
& Harris, P.A.  
Suite 950, 1200 Brickell Avenue  
Miami, Florida 33131  
Phone: 305-371-0001  
Fax: 305.371.0002  
E-mail: [rharris@stackfernandez.com](mailto:rharris@stackfernandez.com)

\* Thomas P. Abt, Esq.  
\* Sarah Kroll-Rosenbaum, Esq.  
\* Sarah A. Nolan, Esq.  
Paul, Weiss, Rifkind, Wharton  
& Garrison LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Phone: 212-373-3000  
Fax: 212-492-0111  
email: [mhalberstam@paulweiss.com](mailto:mhalberstam@paulweiss.com)

\*\* Jonathan P. Hiatt  
AFL-CIO  
815 Sixteenth Street, NW  
Washington, DC 20006  
Phone: 202-637-5053  
Fax: 202-637-5323  
email: [jhiatt@aflcio.org](mailto:jhiatt@aflcio.org)

Manny Anon, Jr.  
Florida Public Employees Council 79  
3064 Highland Oaks Terrace  
Tallahassee, Florida 32301  
Phone: 850-222-0842

---

\*\* Pro hac vice motion to be filed.  
\* Admitted pro hac vice.

Fax: 850-224-6926  
email: [m\\_anon@afscmefl.org](mailto:m_anon@afscmefl.org)

**\*\* Judith Schaeffer**  
People for the American Way Foundation  
2000 M Street, Suite 400  
Washington, DC 20036  
Phone: 202-467-2360  
Fax: 202-293-2672  
Email: [jschaeffer@pfaw.org](mailto:jschaeffer@pfaw.org)

**\*\* Judith A. Scott**  
**\*\* John J. Sullivan**  
SEIU  
1313 L. Street, NW  
Washington, DC 20005  
Phone: 202-898-3453  
Fax: 202-898-3323  
email: [sullivaj@seiu.org](mailto:sullivaj@seiu.org)  
[sullivaj@seiu.org](mailto:sullivaj@seiu.org)