

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ et al.,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of
Florida, et al.,

Defendants.

**PLAINTIFFS' SUR-REPLY
IN RESPONSE TO REPLIES
OF DEFENDANTS SOLA
AND COWLES**

Plaintiffs submit this sur-reply in opposition to Defendant Lester Sola's Motion for Judgment on the Pleadings and to the replies therein by Defendants Sola and Cowles. The Motion continues to be without merit and should be denied.

Preliminary Statement

In their replies, Defendants Sola and Cowles present raise an entirely new claim, moving for dismissal under Rule 19 for failure to join indispensable parties. This sur-reply addresses only this claim, as Defendants' other arguments have been fully addressed and rebutted.

Defendants' new argument is both unsupported by law and untimely. Defendants cite no legal authority supporting their novel supposition that if Plaintiffs' sue one Supervisor of Elections, they must sue them all, regardless of injury or standing. *Friedman v. Snipes*, the lone case cited by Defendants, remains inapposite. In fact, in *Wexler v. Anderson*, the 11th Circuit recently rejected a similar claim in another voting rights case.

Argument

I. Defendants' argument is unsupported by legal authority.

Defendants offer no valid legal authority in support of their Rule 19 argument. Instead, they persist in misinterpreting *Friedman v. Snipes* and its holding. 345 F.Supp.2d 1356 (S.D. Fla. 2004).² In *Friedman*, voters sued two Supervisors of Elections and Florida's Secretary of State, alleging violations with regard to absentee voting, and moved for a preliminary injunction requesting injunctive relief. At the evidentiary hearing, plaintiffs withdrew their demand for injunctive relief as to the Secretary of State. With only the two Supervisors of Elections remaining, the court denied the voters' motion, noting that "[b]y dismissing [the Secretary of State] from this action, granting Plaintiffs' requested relief would ensure the unequal application of the law..." 345 F.Supp.2d at 1381.

Friedman is distinguishable from the present matter in at least two ways. First, prior to finding that plaintiffs had failed to join necessary parties, the court carefully noted that "[p]laintiffs' counsel acknowledged that this... was not a class action." *Id.* at 1358. Rule 19(d) states that the rule "is subject to the provisions of Rule 23," thus excepting class actions from its scope. *See Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 456 n.3 (S.D. Fla. 1988). In the present matter, a class action, Rule 19 simply does not apply. Second, in this case the Secretary of State remains a party and is subject to all of Plaintiffs' claims for relief, thus the *Friedman* court's concern with inconsistent treatment under the law is not present here.

² Defendants' also transparently attempt to mischaracterize the language in Plaintiffs' opposition papers. Substituting wordplay for legal authority, Defendants make much of Plaintiffs' statement that Supervisors of Elections are "indispensable parties to this litigation." Pls. Opp. at 1. Indeed they are, but Plaintiffs were clearly referring to the *Supervisors of Elections whom they have sued in the present action*. Defendants seize upon this language as a concession, but when viewed in context, this is clearly erroneous.

In addition to failing to provide legal support for their argument, Defendants also ignore contrary legal authority previously cited in this matter. In *Wexler v. Anderson*, the 11th Circuit recently rejected a similar equal protection claim with regard to touchscreen voting systems. 452 F.3d 1226 (11th Cir. 2006). In *Wexler*, elected officials and voters sued two Supervisors of Elections and the Secretary of State, claiming that the use of touchscreen systems in some counties but not others violated plaintiffs' right to equal protection of the laws. In affirming the district court's dismissal of the action, the 11th Circuit rejected plaintiffs' claim, finding that the "mere possibility" of disparate treatment did not override the State's important reasons for employing different voting systems. 452 F.3d at 1232-33. In the present case, the possibility of inconsistent treatment is even more remote.

It should also be noted that in *Wexler* neither the defendants nor the court objected to the presence of some, but not all, of Florida's Supervisors of Elections in the litigation. See also *Harris v. Iorio*, No. 96-2682, 1998 WL 34309464 (11th Cir. Jan. 26, 1998) (affirming dismissal of § 1983 claim against County Supervisor of Election without questioning whether single official was appropriate defendant); *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276 (11th Cir. 2004) (affirming dismissal of § 1983 claim against County Supervisor because controversy was moot, not because single County Supervisor was not appropriate defendant). Similarly, in the present case, there is also no reason to require that all, or none, of the Supervisors of Elections to be parties.³

³ The above arguments and authority notwithstanding, should the Court agree with Defendants that all Florida's Supervisors of Elections are necessary parties to this action, joinder, and not dismissal, is the clear remedy under the law. It is well-established that dismissal under Rule 19 is appropriate only when necessary parties cannot be joined. See *Focus on the Family v. Pinellas Suncoast Trans. Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003) (reversing district court's dismissal of action for failure to join); *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1289-90 (11th Cir. 1982) (reversing district court's stay of action, finding parties absent parties not indispensable and ordering joinder).

II. Defendants' newly-raised claim is untimely.

Defendants' argument under Rule 19 is untimely. The new argument is equivalent to a motion to dismiss for failure to join an indispensable party under Rule 12(b)(7). *Ilan-Gat Engineers, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 242 n. 9 (D.C. Cir. 1981) (reversing district court's dismissal of action for failure to join indispensable party). Such motions should be made early in the proceedings. *Id.* at 242; *see also* Rule 12(b)(7) ("A motion making any of these defenses shall be made before pleading..."). While untimely motions to dismiss for failure to join an indispensable party are not automatically waived, courts should "in equity and good conscience" consider the timing of the motion when weighing its merits. *Ilan-Gat Engineers*, 659 F.2d at 242; *see also* 7 Wright, Miller & Kane, *Federal Practice and Procedure* § 1609 (3d ed. 2001). In this case, Defendants could have raised this claim at the outset of the matter, and at numerous points thereafter, but failed to do so. The Court should treat such eleventh hour efforts with skepticism.

III. Conclusion.

For the foregoing reasons, Defendants' newly-raised argument under Rule 19 is without merit. Accordingly, Plaintiffs respectfully request that the Court dismiss Defendants' Motion for Judgment on the Pleadings.

Dated: New York, New York
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RESPECTFULLY SUBMITTED,

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