

Board has the same duties and responsibilities as all other county Superintendents of Elections, the Fulton County Board, as class representative, can fairly and adequately protect the interests of the defendant class of Superintendents. As stated in *Marcera v. Chintlund*, *supra* 595 F.2d at 1239:

Rule 23(a)(4) does not require a willing representative by merely an adequate one. It will often be true that, merely by protecting his own interests, a named defendant will be protected the class. Where, as here, the legal issues as to liability are entirely common to members of the defendant class, there is little reason to fear unfairness to absentees.

See also Clean-Up '84, *supra* 582 F.Supp. at 127 ("all Florida sheriffs are actively in concert and participat[e] on a daily basis with defendant [class representative] Heinrich in enforcing the state's laws."); *Kane v. Fortson*, 369 F.Supp. 1342 (N.D. Ga. 1873) (in suit challenging the constitutionality of sections of the Georgia elections law, defendant members of one county board of registrars held to be adequate class representatives of all members of county boards of registrars).

The court now turns to whether plaintiffs' action satisfies one of the requirements of Rule 23(b). The court holds that the action is properly maintainable as a class action under Rule 23(b)(1)(A), Fed. R. Civ. P. Rule 23(b)(1)(A) requires that:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

There are 159 county Superintendents of Elections in Georgia and prosecution of separate actions against individual members of the defendant class would create a serious risk of inconsistent or varied adjudications with respect to individual members of the class and would establish incompatible standards of conduct for plaintiffs. The court believes that such a result would be at odds with the policies underlying Rule 23. *See* Louisell and Hazard, *Pleading and Procedure: State and Federal* 719 (1962) (quoted in Notes of Advisory Committee on Rules, Fed. R. Civ. P. 23). In the alternative, plaintiffs' action is properly brought as a class action under Rule 23(b)(2) in that the relief plaintiffs seek is identical as to each mem-

ber of the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. *See Doss v. Long*, 93 F.R.D. 112, 119 (N.D.Ga. 1981) ("[i]t is now settled that 23(b)(2) is an appropriate vehicle for injunctive relief against a class of local public officials.") (quoting *Marcera v. Chintlund*, *supra* 595 F.2d at 1238).

CONCLUSION

In summary, the court GRANTS plaintiffs' motion for summary judgment, DENIES defendants' motion for summary judgment and GRANTS plaintiffs' motion to certify the class. By this order, the court permanently enjoins the operation of Ga. Off'l Code Ann. §21-2-414(a) beyond 25 feet of the exit of any building in which a "polling place" is located.

CBS INC. v. GROWE

U.S. District Court
District of Minnesota
Fourth Division

CBS INC., AMERICAN BROADCASTING COMPANIES INC., and NATIONAL BROADCASTING COMPANY INC. v. JOAN ANDERSON GROWE, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, HUBERT H. HUMPHREY III, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA, and DALE G. FOLSTAD, IN HIS OFFICIAL CAPACITY AS COUNTY AUDITOR FOR HENNEPIN COUNTY, MINNESOTA AND AS A REPRESENTATIVE OF A DEFENDANT CLASS OF ALL COUNTY AUDITORS IN THE STATE OF MINNESOTA, Civil No. 4-88-887, October 31, 1988

NEWSGATHERING

Access to places—Public institutions—In general (§40.111)

Access to people—In general (§42.01)

Minnesota statute, Minn. Stat. 204C.06, subd. 1, that specifically prohibits its questioning of voters concerning ballot issues either inside polling place or within

100 feet of entrance to polling place is unconstitutional, since it is content-based restriction that is not narrowly tailored to serve compelling governmental interest.

Broadcasting networks challenge constitutionality of state statute prohibiting exit polling of voters. On plaintiffs' motion for preliminary injunction and declaratory relief.

Granted.

Floyd Abrams and Susan Buckley, of Cahill, Gordon & Reindel, New York, N.Y., and Harold D. Field Jr., of Leonard, Street & Deinard, Minneapolis, Minn., for plaintiffs.

Hubert H. Humphrey, III, attorney general, and Peter M. Ackerberg, special assistant attorney general, St. Paul, Minn., for defendants Growe and Humphrey.

Thomas L. Johnson, Hennepin County attorney, and Arthur W. Katzman, assistant county attorney, Minneapolis, Minn., for defendant Dale G. Folstad.

Full Text of Opinion

Doty, J.:

This action for declaratory and injunctive relief is presently before the Court upon plaintiffs' motion for an order, pursuant to Fed.R.Civ.P. 65, preliminarily enjoining the enforcement of the 1984 amendment to Minn. Stat. §204C.06, subd. 1 (1986),¹ which prohibits exit polling.²

Section §204C.06, in general, regulates conduct in and near polling places. In 1984, the Minnesota Legislature amended this section to prohibit anyone "either inside a polling place or within 100 feet of the entrance to it [from asking] a voter how the voter intends to vote or has voted on any office or question on the ballot." Minn. Stat. §204C.06, subd. 1 (1986). Plaintiffs commenced this action contending that this clause is, on its face, a content-based restriction on speech protected by the first amendment to the United

¹ Plaintiffs also initially moved for certification of a class of defendants defined as all county auditors within Minnesota. That motion was withdrawn at the October 27, 1988 hearing.

² Exit polling as used here means questions pertaining to how a voter has voted, or intends to vote, on any office or question on the ballot.

States Constitution as applied to the states through the fourteenth amendment to the Constitution.

Plaintiffs CBS, ABC and NBC are national broadcast networks engaged in the collection and public dissemination of news. As part of their coverage of national elections, the networks conduct election day polls immediately outside a polling place soliciting voter responses to questions on various political topics, as well as questions requesting voters to identify how they just voted. On election night, and thereafter, the networks use the information obtained from exit polls to project the outcome of an election, to explain the election results, and to identify and comment on social and political trends (Mitofsky Affidavit at pars. 9-12). Information obtained from exit polls is made available in various forms to researchers for use in their studies of the American electoral and political process. Plaintiffs assert that exit polls are a "uniquely reliable" source of information about the American electoral process because they correlate actual votes with voters' opinions on other related subjects allowing a precise demographic study. (Ladd Affidavit at pars. 13-16). Plaintiffs further contend that it is impossible to gather such information from voters at a distance of 100 feet from the polls. (Mitofsky Affidavit at pars. 16-17). Accordingly, the networks have raised this challenge to §204C.06, subd. 1 claiming that the statutory language effectively prohibits exit polling.

Defendants contend that the subject language is an appropriate restriction on the activities of persons near a polling place to insure that voters are not discouraged from voting and the polling place is not made inconvenient to voters.

DISCUSSION

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." Except for specified exceptions, the Supreme Court has consistently held that the first amendment proscribes all but the most severely limited governmental restrictions on speech and only when such restrictions are designed to achieve important governmental interests.

The standard developed by the Supreme Court, and applied to evaluate the constitutionality of a statute regulating speech, is dependent upon numerous fac-

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tors. First, it must be determined whether a statute imposes its restrictions with or without regard to the content of speech. Any restrictions on protected speech must be content neutral unless the restriction is narrowly tailored to achieve a compelling governmental interest. *Consolidated Edison of New York v. Public Serv. Comm'n.*, 447 U.S. 530, 537 [6 Med.L.Rptr. 1518] (1980).

Statutes that are content neutral may, nevertheless, be constitutionally infirm if they regulate the time, place, or manner of protected speech and are not narrowly tailored to serve a significant state interest. *United States v. Grace*, 461 U.S. 171, 177, (1983). This standard is relaxed when the statute regulates speech occurring on a public property that has not traditionally been dedicated to public assembly and debate. *Id.* at 178 (1983); *Perry Educational Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983). In such cases, restrictions need only be content neutral and reasonable in light of the use to which the building and grounds are located. *Grace*, 461 U.S. at 178.

Here the State does not contest the characterization of exit polling as speech entitled to constitutional protection. Indeed, the Supreme Court has held that one of the principal concerns of the first amendment is the free discussion of governmental affairs, *Mills v. Alabama*, 384 U.S. 214, 218 [1 Med.L.Rptr. 1334] (1966), and that the first amendment protects the media's right to gather information. *Branzburg v. Hayes*, 408 U.S. 665, 681 [1 Med.L.Rptr. 2617] (1972). See also *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988). Thus, exit polling, which involves gathering and disseminating information on governmental affairs, is protected by the free speech clause of the first amendment.

Content-based restrictions limit communication because of the subject matter of the speech. *Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980). Although the State acknowledges that exit polls constitute protected speech, it contends that §204C.06, subd. 1, is content neutral and is, therefore, subject only to minimal scrutiny and is constitutionally acceptable.³ This Court cannot agree with the

³ The State relies upon *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [12 Med.L.Rptr. 1721] (1986) to support its contention that since the challenged restriction is directed at eliminating the secondary effects of exit poll-

State's analysis, as the questioned language relates to one specific inquiry, how a person voted, and is, therefore, specifically content based. The statute does not prohibit all polling, but bans only one inquiry, and individual's answers to questions posed on a ballot. The statute allows polls to be conducted within the 100-foot zone, provided the pollster refrains from requesting individuals to identify how they will vote or have voted. Thus, the statutory language in question directly regulates the speech of the person asking how a voter voted within the 100-foot zone of the polling place, and indirectly regulates the speech of a cooperating voter in answering the question, as well as any speech by the polling party or person using the data gathered, that would flow from the response.

In addition to being a content-based restriction, the challenged provision is a time, place, or manner restriction, since it does not prevent every inquiry into the nature of an individual's vote, but only prohibits such an inquiry within 100 feet of a polling place. Further, the areas within 100 feet of a polling place are often public areas constituting traditional pub-

ing — citizens becoming discouraged from exercising the right to vote because of congested polls and harassment by pollsters — it is content neutral. The analysis adopted by the Supreme Court in *Renton*, however, is inapplicable in this case. The Supreme Court expressly stated that the resolution of *Renton* was dictated by its earlier decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 [1 Med.L.Rptr. 1151] (1976), and that the analysis used in *Young* was limited to laws regulating sexually explicit materials. *Renton*, 475 U.S. at 49 & n.2 (citing *Young*, 427 U.S. at 70 (plurality opinion)). See also *Boos v. Barry*, 108 S.Ct. 1157, 1172 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("*Renton* itself seemed to confine its application to 'businesses that purvey sexually explicit materials.'"). Additionally, although numerous statutes similar to Minn. State. §204C.06, subd. 1 have been challenged, no court has applied the analysis set forth in *Renton*. See e.g., *Daily Herald Co. v. Munro*, 838 F.2d 380 [14 Med.L.Rptr. 2332] (9th Cir. 1988); *Journal Broadcasting of Kentucky v. Logsdon*, C 88-0147-L-(A) (W.D. Ky. October 21, 1988); *National Broadcasting Co. v. Karpan*, C 88-0320 (D. Wyo. October 21, 1988); *National Broadcasting Co. v. Cleland*, 1:88-CV-320-RHH (N.D. Ga. June 13, 1988); *CBS, Inc. v. Smith*, 681 F.Supp 794 [15 Med.L.Rptr. 1251] (S.D. Fla. 1988). For these reasons, this Court declines to apply the analysis set forth in *Renton* to the facts of this case.

lic fora, such as streets and sidewalks. *Munro*, 838 F.2d at 384. As the challenged language is a content-based, time, place, and manner is constitutionally valid only if it is narrowly tailored to accomplish a compelling governmental interest. *Id.* at 540.

The State asserts here that the restriction was added to preserve the sanctity of the polling place, to prevent harassment of voters, to prevent congestion and confusion around the polling place, and to encourage voter participation.

States do have a legitimate "interest in maintaining peace, order, and decorum at the polls and 'preserving the integrity of their electoral process.'" *Munro*, 838 F.2d at 385 (quoting *Brown v. Hartlage*, 456 U.S. 45, 52 (1982)). Plaintiffs do not dispute the State's power to proscribe disruptive behavior in and around the polling place. However, plaintiffs contend that the statute is not narrowly tailored to achieve the stated purpose because it is both severely overinclusive and underinclusive. The Court agrees with the plaintiffs' analysis and finds that the statute is overinclusive because it prohibits all exit polling, including nondisruptive exit polling, and is underinclusive because it does not prohibit other types of polls from being taken within the 100-foot zone, although they may be more disruptive than an exit poll.

While there were a few remarks made during the debates on the amendment that would tend to support the State's assertion that the purpose of the challenged provision is to preserve the decorum of polling places, clearly, the predominant purpose voiced by legislators was to prevent early projections of the likely outcome of the election.⁴ The recorded statements indicate that legislators were primarily concerned with alleviating the threat that people might be discouraged from voting if a projection indicates that a particular outcome of an election is almost a certainty.

Such a purpose is not a sufficient basis for restricting otherwise constitutionally protected speech. Other courts have held that states do not have a legitimate interest in regulating speech merely to eliminate an indirect affect the speech may have on

⁴ The parties included with their submissions to the Court the entire recorded debates concerning the amending language by both houses of the Minnesota Legislature. (See Exhibits 1 and 2 to Buckley Affidavit and Exhibit to Helmich Affidavit).

a voter's choice. *E.g.*, *Munro*, 838 F.2d at 387. See also *Hartlage*, 456 U.S. at 60. ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.") Because the reasons given by the State for inclusion of the language do not provide a compelling state interest, the 1984 amendment to §204C.06, subd. 1 cannot be sustained on this basis.

Even if the State's principal purpose were a sufficient basis for the regulation of speech, the statute is not narrowly tailored to achieve that purpose since it is significantly overinclusive. As found, the primary purpose of the statute is to prevent the media from broadcasting election result projections. Broadcasts of election day projections, however, are only one of the uses of the exit polls. Researchers and elected officials use the data collected to further their study of voting trends and the political process and the news media use the data after election night to analyze and explain the election results. The Minnesota statute at issue here would prevent those uses of exit poll data in addition to achieving the intended result. The effect the statute would have on those protected, and unobjectional uses of exit poll data, further supports the conclusion that the statute is unconstitutional. *Munro*, 838 F.2d at 388. Further, it is clear that the prohibition contained in the statute might apply to those areas, such as sidewalks and areas of assembly, which have enjoyed traditional protections for free speech and does not comply with the standard adopted in *Perry*.

Plaintiff's request for preliminary injunctive relief is governed by the test articulated in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 [6 Med.L.Rptr. 2163] (8th Cir. 1981) (en banc):

[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Id.*, 640 F.2d at 114.

None of the *Dataphase* factors by itself is determinative; "rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction."

West Publishing Company v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986).

Based upon the foregoing discussion, it is apparent that there is a strong likelihood that plaintiffs will succeed on the merits. Further, deprivation of the right to free speech, no matter how momentary, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Because of the likelihood of success on the merits, it is extremely debatable whether the State has a valid interest in having the statute in question enforced, while the public has a strong interest in preventing enforcement of a statute that is likely to be found unconstitutional.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for a preliminary injunction enjoining the State of Minnesota, its agents, servants, employees, and all persons in active concert or participation with them from enforcing that part of Minn. Stat. §204C.06, subd. 1 (1986) which states:

... No one, either inside a polling place or within 100 feet of the entrance to it, shall ask a voter how the voter intends to vote or has voted on any office or question on the ballot
is granted.

2. Plaintiffs will not be required to provide security as there is no evidence that a preliminary injunction will damage the State monetarily.

MOSESIAN v. MCCLATCHY NEWSPAPERS

California Court of Appeal
Fifth Appellate District

PAUL MOSESIAN v.
MCCLATCHY NEWSPAPERS et al.,
No. F008696, October 26, 1988

REGULATION OF MEDIA CONTENT

1. Defamation—Determining public official/public figure (§11.20)

Public official is someone in government's employ who (1) has, or appears to public to have, substantial responsibility for or control over conduct of governmental affairs, (2) who usually enjoys significantly greater access to mass media than private individual, (3) who holds position

which has such apparent importance that public has independent interest in his or her qualifications, and (4) who holds position which invites public scrutiny and discussion entirely apart from scrutiny and discussion occasioned by particular controversy.

2. Defamation—Determining public official/public figure (§11.20)

Libel plaintiff who was not government employee is not, as matter of law, public official, even though he held interest in corporation whose subsidiary was licensed by state horse racing board, and even though he was licensed as general manager of horse racing meet.

3. Defamation—Standard of liability— Actual malice (§11.301)

California trial court did not err, in libel action against newspaper for articles reporting that government investigation had uncovered "trail of tangled financial dealings" involving plaintiff and others, by determining that reasonable jury could not find that actual malice had been shown with convincing clarity and by thus ruling that plaintiff had made insufficient showing of actual malice to create triable issue of fact.

Defamation action against newspaper. The California Superior Court for Fresno County granted summary adjudication and summary judgment for defendants and plaintiff appeals.

Reversed and remanded.

[Ed. Note: The court has indicated that this opinion is "certified for publication with the exception of part II."]

Roger T. Nuttall, of Nuttall, Berman & Magill, Fresno, Calif., for appellant.

William Shubb and Charity Kenyon, of Diepenbrock, Wulff, Plant & Hannegan, Sacramento, Calif., for respondent.

Full Text of Opinion

Woolpert, J.:

This appeal follows orders granting summary adjudication and summary judgment in favor of defendants in a defamation action. The trial court first ruled plaintiff was a public official and candidate for public office at the time of the publications. Later, on the summary judgment motion, the court determined plaintiff's evidence was of insufficient