

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED

NOV 01 2004

JAMES BONINI, Clerk
CINCINNATI, OHIO

AMERICAN BROADCASTING COMPANIES, INC., THE
ASSOCIATED PRESS, CABLE NEWS NETWORK LP,
LLP, CBS BROADCASTING INC., FOX NEWS
NETWORK LLC and NBC UNIVERSAL, INC.,

Plaintiffs,

- against -

J. KENNETH BLACKWELL, in his official capacity as
the SECRETARY OF STATE OF OHIO,

Defendant.

Cause No.

1:04 CV 750

Judge Watson

Magistrate Judge Black

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Federal Rule of Procedure 65(b), and in light of violations of Plaintiffs' First Amendment rights, Plaintiffs respectfully apply for a temporary restraining order.

Plaintiffs learned on Friday, October 29, 2004 that the Secretary of State had made an eleventh-hour decision to prohibit lawful newsgathering activities at polling places across the state during tomorrow's general election, contrary to Ohio's past practices and prior written opinions from the Secretary himself. Because this prohibition will, unless enjoined, unlawfully restrict Plaintiffs' speech and commentary about the political process in violation of the First Amendment, thus causing Plaintiffs irreparable harm for which there is no adequate remedy at law, Plaintiffs respectfully submit this request and ask that it receive the Court's urgent attention.

Dated: November 1, 2004.

Respectfully submitted,

FROST BROWN TODD LLC

By:


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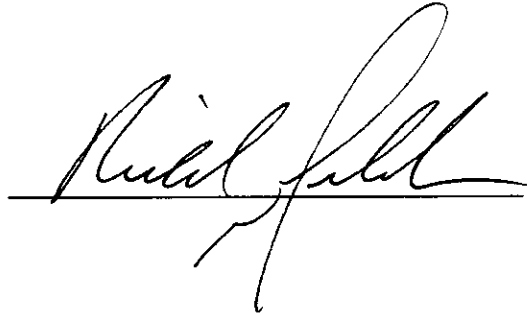
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Motion for Temporary Restraining Order was served via facsimile and hand delivery this 1st day of November, 2004 upon the following individuals:

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Ohio Secretary of State
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Columbus, OH 43215

Arthur James Marziale, Jr.
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A handwritten signature in cursive script, appearing to read "Paul J. Kelly", is written over a horizontal line.

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Defendant.

Cause No.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

This memorandum is respectfully submitted on behalf of plaintiffs American Broadcasting Companies, Inc. ("ABC"), The Associated Press ("AP"), Cable News Network LP, LLLP ("CNN"), CBS Broadcasting Inc. ("CBS"), Fox News Network LLC ("Fox News") and NBC Universal, Inc. ("NBC") (collectively "Plaintiffs") in support of their motion for a temporary restraining order enjoining the Secretary of State from prohibiting the conduct of exit polls within 100 feet of polling places in Ohio on Tuesday, November 2, 2004.

PRELIMINARY STATEMENT

Plaintiffs are the three national broadcast networks (ABC, CBS and NBC), two national cable news networks (CNN and Fox News) and The Associated Press. All of the Plaintiffs are engaged in the business, *inter alia*, of providing news and information to the public.

For many months, Plaintiffs have been preparing to cover the upcoming national election and to provide timely and newsworthy information to the public about this important

event. In connection with their election night coverage (and their post-election night analyses of the election results), Plaintiffs have retained two nationally-known and highly respected polling organizations to assist them in gathering information from voters on election day. They intend to gather that information by conducting polls of voters (after they have voted) in selected polling places in Ohio (50 polling places in all) and in selected polling places in each of the other 49 states (and the District of Columbia) this coming Tuesday.

Plaintiffs have conducted these voter polls (commonly referred to as "exit polls") in Ohio in the past, most recently in connection with Ohio's presidential primary election held in March of this year. In preparing to cover Ohio's presidential primary election, Plaintiffs' representatives communicated with election officials in Ohio (as they do elsewhere) to ensure that those officials were informed of Plaintiffs' planned activities on election day. To that end, Plaintiffs' representatives contacted the Office of the Ohio Secretary of State to advise of their planned activities and to confirm that their exit poll reporters could approach willing voters (after they voted) to fill out a short questionnaire inquiring as to the voter's views on the various candidates and their positions on issues of the day. In response to those communications, the Secretary of State confirmed that no provision of Ohio law prohibited the conduct of exit polling and advised that Plaintiffs could conduct their exit polls within 100 feet of Ohio polling places as long as they did so in a non-disruptive manner. That advice was communicated by the Secretary of State to Ohio election officials across the State in late February. Exit polls were successfully conducted at selected polling places in Ohio in March without incident.

In preparation for this Tuesday's election, Plaintiffs' representatives again contacted the Secretary of State's Office to advise of their planned activities and to confirm that those activities could be conducted within 100 feet of Ohio polling places. In June, they were assured that the same advisory would be issued by the Secretary of State's Office in advance of Tuesday's election. Yet, on Friday evening of this past week, one business day before the

election, Plaintiffs were informed by the Secretary of State's Office that, despite the Secretary's prior directive advising that no Ohio law could be interpreted to prohibit exit polling, the Secretary had changed his mind and had instructed all Ohio election officials that Ohio's loitering statute should be enforced against exit polling activities this coming Tuesday thus prohibiting the conduct of exit polls within 100 feet of Ohio polling places on election day.

As we demonstrate below, the Secretary of State's surprising and unprecedented last-minute change of position cannot be reconciled with either Ohio law or the mandates of the First Amendment. As the Secretary recognized as recently as this past March, no provision of Ohio law can be interpreted to prohibit Plaintiffs' journalistic activities at Ohio's polling places. And, despite his last minute about-face, no provision of Ohio law can be construed consistent with the Constitution to prohibit that conduct either.

To date, seven federal courts across the country have considered whether efforts of state officials to restrict Plaintiffs' exit polling activities can be tolerated consistent with the First Amendment. All seven have concluded that they cannot be. For the reasons set forth herein, we respectfully urge that a temporary restraining order should issue enjoining the Secretary of State from prohibiting the conduct of exit polls within 100 feet of Ohio polling places on Tuesday.

STATEMENT OF FACTS

Plaintiffs' Newsgathering Activities

In order to provide informative and timely information to the public about voting trends and behavior, Plaintiffs have conducted exit polls throughout the United States for many years. Properly defined, the term "exit poll" refers to the collecting of data from a random sample of voters at a sample of polling places on election day. This is accomplished by asking voters to fill out a short questionnaire as they leave the polling place in a scientifically pre-determined pattern. (Complaint ¶ 11, Mitofsky Aff't ¶ 4) Typically, one polling reporter

is assigned to each of the polling places randomly selected for Plaintiffs' polls. The reporter stands just outside the exit of the building in which the polling place is located. Polling reporters wear badges clearly identifying them as representatives of the Plaintiff news organizations. They are instructed to be courteous and businesslike and not to interfere with the election process in any way. (Complaint ¶ 11, Mitofsky Aff't ¶ 7)

Voter participation in the exit polls is purely voluntary. Those voters who elect to complete a questionnaire are asked their views on the elections and on issues of public concern. Voters are also asked for their reactions to contests for president, governor, and senator in applicable years as well as their opinions relating to issues of national and statewide importance. Demographic information about voters is also gathered. (Complaint ¶ 11, Mitofsky Aff't ¶ 5)

Exit polls provide accurate data about voter behavior because of the near certainty that the persons interviewed have actually voted. The greater the distance from the polling place that the polling reporter is required to stand, however, the less reliable is the information gathered. There are several reasons for this. As a polling reporter moves farther and farther away from the polling place, the likelihood of a voter getting into his or her car and driving away, or of melding into a crowd of non-voters, increases. Second, as distance increases, it becomes harder to discern those who are voters from those who are not. Third, as distance increases, the statistical reliability of the sample itself decreases because it becomes impossible to interview in the scientifically selected pattern (*i.e.*, every fourth voter, every fifth voter, etc.). A distance restriction will have a different impact on exit polling at any particular precinct depending on the particular layout of the area — for example, how close the parking lot is to the polling place. However, requiring exit pollers to stand at least 100 feet from the place where voters exit the polling place at all precincts is likely to substantially impact their exit polling activities and, accordingly, to substantially reduce the statistical reliability and accuracy of their exit polls. (Complaint ¶ 12, Mitofsky Aff't ¶ 8)

Use of Exit Poll Data

The information gathered from exit polls is used by Plaintiffs in a variety of ways on election night. The information is used to analyze and report upon voters' attitudes about issues of public concern, as well as to analyze and report on who voted for particular candidates and why. The following excerpts from the transcripts of ABC News' election night coverage in 2000 are illustrative of the significant and timely information that exit polls provide:

PETER JENNINGS: Now — thanks, George. I wanted to go to Lynn Sherr, and Lynn, you, I gather, can tell us a little bit about how George Allen beat Chuck Robb in Virginia?

LYNN SHERR: Indeed, Peter. This is the first of what we'll probably see more of during the evening. Call it the Clinton factor. Let's take a look at the numbers. We asked voters how they felt about President Clinton personally, not job approval — how they — how they felt about him as a man. Fifty-eight percent in Virginia today said unfavorably. Only 38 percent said they had a favorable impression of the president. Now, think about that 58 percent number. That's a big number. How did those folks vote? Let's take a look. Of those who had an unfavorable view of the president, 73 percent voted for George Allen. Only 27 percent voted for Chuck Robb. . .

* * *

PETER JENNINGS: Lynn, in Michigan the gun issue.

LYNN SHERR: It was such a big issue there, Peter, as you say. Charlton Heston was there. The NRA tried to make a very big issue out of it, but according to our exit polling, 55 percent of those today in Michigan said they prefer gun control and of them, Al Gore got 69 percent of their vote, so it really cut for him.

* * *

PETER JENNINGS: I want to go first to Lynn Sherr, because I think Lynn, by looking at the exit polls, you can tell us why Pennsylvania's proving such a struggle.

LYNN SHERR: We certainly can, Peter and the way we're going to do it is by showing you what Mr. Gore's strengths are and what Mr. Bush's strengths are. And that will make you understand why this one is absolutely too close to call. Let's first take a look at the numbers for Al Gore. Those who are supporting him big-time include union voters. A third of the vote, 59 percent going for Al Gore

today. Another very important group, those who say Social Security is their most important issue, 66 percent for Al Gore. Finally, those over 65 years old, about a quarter of the voting population in Pennsylvania today, 58 percent going for Al Gore. OK, those are big numbers. But now let's take a look at the numbers for George Bush, because they're equally big on his side. First of all, White Protestants, that make up about half the voting population in Pennsylvania today, 64 percent for George W. Bush. Those who say taxes is an important issue, a huge number voting for George Bush today, and finally, those who live in the suburbs, this is a group everyone's been fighting for, this is the volatile, the new group and the Republicans and the Democrats going for them, 52 percent going for George Bush.

* * *

PETER JENNINGS: Welcome back. We want to go straight ahead to Lynn Sherr, who has been looking at our exit polls all night to see if we can get some handle, now, on why Mr. Gore has done badly in Tennessee. Lynn.

LYNN SHERR: His home state, Peter, and an awful lot of people were thinking he really ought to be winning it. What we've discovered is that Tennessee is — the vote is pretty much split equally between Democrats and Republicans. Those who made the difference politically were the independents. Twenty-three percent of the vote in Tennessee today. Let's take a look at how they split. Independent voters in Tennessee, 55 percent for George Bush, only 38 percent for Al Gore. So, clearly he lost that very important independent vote, which is what put Mr. Bush over the top.

* * *

PETER JENNINGS: Now, Wisconsin is still outstanding, so let's go to our exit poll corner and ask Lynn Sherr about one particular group. Lynn, Catholics in Wisconsin.

LYNN SHERR: Yes, Peter, white Catholics, a very important swing voter group this year as they have been in the past, representing 40 percent of the voting population in Wisconsin today. How did they vote? Let's take a look. White Catholics in Wisconsin — take a look at this — 49 percent for George Bush, 49 percent for Al Gore. Right down the middle. That's why it's so close.

(Mitofsky Aff't ¶ 11)

Plaintiffs also use the information gathered through exit polls to prepare post-election night news reports and other programming analyzing and commenting upon the results of the election and the significance of any particular vote. (Complaint ¶ 13, Mitofsky Aff't ¶ 9)

In addition, the information gathered from the Plaintiffs' exit polls is archived after each election at the Roper Center at the University of Connecticut and at the Inter-University Consortium at the University of Michigan. The information is available through those archives to historians, social scientists, and others worldwide and benefits scholarship in the areas of politics and social science, among others. (Complaint ¶ 14, Mitofsky Aff't ¶14)

The Secretary of State's Changing Positions

In anticipation of the presidential primary election held on March 2, 2004, on February 24, 2004, Secretary of State Blackwell issued Advisory No. 2004-02 (the "February Advisory") to all county election officials confirming that news organizations would be conducting exit polls at polling places in Ohio on that day. The February Advisory stated in relevant part:

Exit polling will be conducted by news organizations for the March 2 Primary Election. The boards are reminded that R.C. 3501.30, 3501.35 and 3599.24 collectively prohibit *anyone*, on election day, from:

- Engaging in election campaigning within 100 feet of the entrance to a polling place.
- Entering a polling place for any reason other than to vote, unless the person is an election official, a challenger or witness appointed pursuant to R.C. 3505.21, or a police officer.
- Loitering, congregating, hindering or delaying a person from reaching or leaving the polling place.

These statutes do not regulate or specifically address exit polling. Boards are advised that, in keeping with Ohio's past practices, exit pollsters should not be disturbed solely because they are conducting exit polling within the 100-foot boundary. However, if election officials and/or law enforcement officers determine that an exit pollster has unduly hindered or delayed a voter from entering or exiting the polling place, or has been disruptive in violation of the law, appropriate action should be taken.

Exit polling is *not* permitted, under any circumstance, inside any building where the voting is conducted.

It is anticipated that exit pollsters from news organization will conduct themselves in a professional and cooperative manner. Please advise your precinct officials of the possibility of exit pollsters at their precincts.

A copy of the February Advisory is attached to the Complaint as Exhibit A.

Consistent with the Secretary's advice, Plaintiffs conducted polls of Ohio voters on March 2, 2004 within 100 feet of Ohio polling places without incident. (Mitofsky Aff't ¶ 19)

In anticipation of the November 2, 2004 election, Plaintiffs' representative contacted the Secretary of State's office once again in May and requested that a similar advisory be issued in connection with the November 2, 2004 general election. (Complaint ¶ 19).

In response to Plaintiffs' request, on July 6, 2004, the Secretary of State's office advised as follows:

We will provide to all 88 county boards of elections an advisory on exit polling as we did in February for Ohio's March primary. I am attaching a copy of that advisory. I will forward a copy of the exit polling advisory that this office will send in October for the November election when we send it to the boards.

(Mitofsky Aff't, Exhibit B)

Notwithstanding that advice, months passed without the issuance of the promised advisory. Instead, as Plaintiffs would later learn, on October 28, in a conference call with county officials, the Secretary of State's office abruptly changed course and directed county election officials, contrary to Ohio law and contrary to past practices, that they were not to permit any exit polls to be conducted within 100 feet of a polling place this Tuesday. It was not until the close of business on Friday, October 29, 2004 — 1 business day before the election — that the Secretary of State's office notified Plaintiffs of the Secretary's changed decision. (Windle Aff't ¶ 4)

This litigation ensued.

STANDARDS FOR AWARDING THE RELIEF REQUESTED

The court is authorized to issue a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. In determining whether such an order should issue, courts commonly balance the following factors: (1) whether the party seeking the injunction has shown a substantial likelihood of success on the merits; (2) whether the party seeking the injunction will suffer irreparable harm absent the injunction; (3) whether an injunction will cause others to suffer substantial harm; and (4) whether the public interest would be served by the preliminary injunction. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999).

As demonstrated below, Plaintiffs satisfy each of the criteria for obtaining a temporary restraining order.

ARGUMENT

I. PLAINTIFFS ARE HIGHLY
LIKELY TO SUCCEED ON THE MERITS

As we demonstrate below, the Secretary of State's recent decision to prohibit the conduct of exit polls within 100 feet of Ohio polling places is wholly unsupported by the statutes on which he purports to rely, as he himself has previously conceded. That issue aside, the Secretary's decision cannot be reconciled with controlling constitutional principles. There can be no dispute that exit polling is conduct subject to the most stringent protections of the First Amendment, as every court that has considered the issue has held. Moreover, the Secretary of State cannot demonstrate — as he must — that his blanket decision to prohibit all exit polls in proximity to Ohio polling places — however they may be conducted — is a narrowly tailored means of advancing any significant government interest whatsoever.

A. Ohio's Statutory Restrictions On Loitering, Congregating or Electioneering Do Not Apply to Plaintiffs' Newsgathering Activities

In his advisory opinion issued earlier this year, Secretary of State Blackwell confirmed that Plaintiffs' newsgathering activities are not prohibited under Ohio law and are not subject to the 100-foot restriction that govern electioneering, loitering or congregating at polling places. See OHIO REV. CODE ANN. §§ 3501.30, 3501.35 and 3599.24.¹ On the contrary, as the Secretary stressed then, "in keeping with Ohio's past practices, exit pollsters should not be disturbed solely because they are conducting exit polling within the 100-foot boundary."

There has been no intervening change to the legislative scheme that could render applicable statutes that until now were understood not to apply to exit polling. Nor could the Secretary of State's oral directive on the issue redefine the scope of a statute. There is accord-

¹ There is no doubt that states can restrict electioneering and other partisan campaign activities within a reasonable distance from the polls on election day in an effort to prevent voter intimidation and fraud. *Burson v. Freeman*, 504 U.S. 191 (1992). There is also no doubt that "exit polling" cannot be viewed as electioneering. See, e.g., Arkansas Op. Att'y Gen. 99-330, 2000 Ark. AG LEXIS 2, at *4 (Jan. 27, 2000), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) ("The most relevant question is whether 'exit polling' can be classified as 'electioneering of any kind.' In my opinion the answer to this question is 'no' . . . [E]xit polling does not fit within the definition of 'electioneering,'""); Maryland Op. Att'y Gen. 92-035; 1992 Md. AG LEXIS 49, at *4 n.3; 77 Op. Atty. Gen. Md. 62 (Oct. 20, 1992) ("[t]he electioneering ban does not prohibit exit polling by the media within the 'depoliticized' zone."); Kentucky Op. Att'y Gen. 92-73, 1992 Ky. AG LEXIS 73, at *4 (Apr. 27, 1992) (exit polling did not fall within "the scope of electioneering, since exit polling occurs after a voter has cast his ballot and could not in any sense be deemed an effort to influence the voter's decision."). See also *Journal Broadcasting of Kentucky, Inc. v. Logsdon*, No. C88-0147-L(M), 1988 U.S. Dist. LEXIS 16864, at *5 (W.D. Ky. Oct. 21, 1988) (state's distance regulation of "electioneering" does not apply to exit polling; "electioneering is a much different process from exit polling"). Indeed in *Burson* itself, the Supreme Court distinguished legitimate exit polling from activities that could be said to contribute to voter intimidation or electoral fraud. See *Burson*, 504 U.S. at 207.

ingly no basis for subjecting Plaintiffs to the 100-foot limit which the Secretary of State has previously conceded does not apply to this activity.

B. Ohio Law Cannot Be Construed Consistent With The First Amendment To Apply To Plaintiffs' Newsgathering Activities

There can be no dispute that the Secretary of State's eleventh-hour oral directive would restrict Plaintiffs' ability to speak freely with willing individuals in Ohio, after they have voted, about important political issues. As a result, Plaintiffs' ability to communicate with the public about how and why people have voted in the State of Ohio is clearly curtailed by the directive. Yet, the freedom to speak about elections, government, and politics lies at the core of the First Amendment.

In *Mills v. Alabama*, 384 U.S. 214 (1966), the seminal case on the interrelationship between First Amendment rights and legislative efforts to assure "purer" elections, the United States Supreme Court unanimously invalidated a broadly phrased corrupt practices law that imposed criminal penalties on newspapers for publishing editorials on election day urging the public to vote in favor of a particular ballot issue. The Court concluded that:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.

384 U.S. at 218-19.

It was just these principles that led the Court of Appeals for the Ninth Circuit to conclude that Plaintiffs' exit polling activities are protected — indeed encouraged — by the First Amendment. *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988). There, the court concluded:

The media plaintiffs' exit polling constitutes speech protected by the First Amendment, not only in that the information disseminated based on the polls is speech, but also in that the process of obtaining the information requires a discussion between pollster and voter. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates." *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Moreover, the First Amendment protects the media's right to gather news. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen."); *Branzburg, v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). Exit polling is thus speech that is protected, on several levels, by the First Amendment.

Having concluded that exit polling is protected by the First Amendment, the Ninth Circuit went on to consider whether Washington's effort to prohibit the activity was narrowly tailored to advance a substantial governmental interest. Although the Court recognized that states have an interest in promoting peace, order and decorum at polling places, the Court concluded that there were far less constitutionally offensive means at the State's disposal to advance that interest — such as barring disruptive conduct directly — than to prohibit the conduct of all exit polls.

To date, every court that has considered state efforts to restrict exit polling has agreed with the *Daily Herald* decision. Federal courts in Florida, Georgia, Kentucky, Montana, Minnesota, Washington and Wyoming have all considered challenges to various statutes that have either explicitly attempted to ban exit polling within various distances of polling places or have been interpreted by state officials as doing so. For the convenience of the Court, copies of each of these decisions and the decision in *Daily Herald Co. v. Munro* are included in the attached Appendix. Each time, the court struck down or enjoined enforcement of the challenged statutes, holding that exit polling is protected by the First Amendment.

In litigation instituted by ABC News, CBS News, NBC News and The Miami News, the United States District Court for the Southern District of Florida enjoined Florida election officials from enforcing a Florida statute that prohibited the "solicitation of voters'

opinions” within 150 feet of Florida polling places during that state’s presidential preference primary on March 8, 1988. *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988). The district court found that it was “clear that the conduct of exit polling and journalistic interviews are protected by the First Amendment guarantees of free speech and free press.” *Id.* at 802. The court went on to state:

The gathering of news of political consequence is a necessary corollary to the freedom to report about politics and government. See *Richmond Newspapers Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 576 (1980). Simply put, news-gathering is a basic right protected by the First Amendment; “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *In re The Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982). And, indeed, without the ability to collect information, viewpoints, and opinions from voters, the right to report and publish political news would be left with little means of fulfillment. [The Florida statute at issue] constricts not only the ability to gather important news about voters’ preferences and opinions, but perhaps even more basic, the right to speak freely about matters of undisputed public importance. We add that while the exact contours of the protections afforded various categories of speech by the First Amendment have been widely debated “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The ability to speak on matters of public importance is fundamental to self-government.

Id. at 802-03.

In Georgia, the United States District Court for the Middle District of Georgia permanently enjoined Georgia election officials from prohibiting exit polling activities more than 25 feet from Georgia polling places. *National Broadcasting Company, Inc. et al. v. Cleveland*, 697 F. Supp. 1204 (N.D. Ga. 1988). In Montana, the United States District Court there enjoined state officials from enforcing that state’s 200-foot ban on exit polls in connection with the Montana presidential preference primary. *National Broadcasting Company, Inc., et al. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988). In Kentucky, the United States District Court for the Western District of Kentucky enjoined election officials from enforcing that state’s statute prohibiting exit polls and entered judgment declaring that the statute at issue was unconstitutional as applied to exit polling activities. *Journal Broadcasting of Kentucky, Inc. v. Logsdon*,

1988 U.S. Dist. Lexis 16864 (W.D. Ky. 1988). In Wyoming, the United States District Court there struck down Wyoming's 300-foot ban on polling activities and permanently enjoined state officials from enforcing it. *National Broadcasting Company, Inc. v. Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988). Finally, in Minnesota, state officials were enjoined from enforcing that state's 100-foot ban on exit polls during the 1988 national election. *CBS, Inc. v. Grove*, 15 Med. L. Rep. 2275 (D. Minn. 1988).

In the course of striking down (or enjoining the enforcement of) the various state statutes at issue in these cases, the courts emphasized many of the same points that had been emphasized by the Ninth Circuit in *Daily Herald*: that exit polls provide invaluable information to the public, *see, e.g., National Broadcasting Company, Inc. v. Cleland*, 697 F. Supp. at 1209; *CBS Inc v. Grove*, 15 Med. L. Rep. at 2278; that exit polls do not disrupt activities at the polls; *see e.g., CBS Inc. v. Smith*, 681 F. Supp. at 804; and that the distance restrictions at issue so burdened the press' ability to gather information as to render the restrictions unconstitutional, *see e.g., id.* at 801; *National Broadcasting Company, Inc. v. Cleland*, 657 F. Supp. at 1209-1210; *Journal Broadcasting of Kentucky, Inc. v. Logsdon*, 1988 U.S. Dist. LEXIS 16864, at *2; *National Broadcasting Company, Inc. v. Karpan, supra*, slip op. at 7.

Given this unanimity of authority, the Secretary of State cannot begin to suggest that this Court should go out of its way to construe Ohio's statutory law to restrict the conduct of exit polls — a position that the Secretary of State could not himself countenance back in February. The Secretary's last-minute attempt to stretch existing Ohio law to restrict Plaintiffs' exit polling activities cannot be reconciled with the First Amendment.

C. The Secretary of State's Unilateral Decision to Ban Exit Polling Within 100 Feet of Ohio Polling Places Is Not Narrowly Tailored to Advance a Significant State Interest

Even if one were to assume — contrary to the Secretary's own written opinion — that Ohio law could be read to support the Secretary's new view that Plaintiffs' exit polling

activities should be prohibited within 100 feet of the polls, such a law — even if it did exist — would be unconstitutional because it would not be narrowly tailored to advance a substantial governmental interest.

If he could point to such a law, the Secretary of State would undoubtedly argue that it would promote peace, order and decorum at Ohio polling places. But by his own admission — contained in the February Advisory — a “law” prohibiting all exit polls is not narrowly tailored because it would prohibit disruptive and non-disruptive conduct alike. The State already has the power to prohibit disruptive conduct. Prohibiting all exit polls — no matter how peacefully and unobtrusively they may be conducted — is not a “law” that is narrowly tailored to promote peace, order and decorum at the polls.

In *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988), the State of Florida also argued that its law was designed to preserve peace, order and decorum at the polls. However, the court found that the 150-foot ban was not sufficiently tailored to this interest, holding that Florida law:

impermissibly restricts Plaintiffs from gathering and reporting basic information about the political process to the general public on election day. This statute broadly and wrongfully restricts virtually every form of expression between persons within 150 feet of the polling place; it neither exempts from its ambit streets or sidewalks or other public forums traditionally open to the public for expressive purposes; and it is neither narrowly tailored to accomplish the significant state interest in protecting the orderly functioning of the electoral process . . .

681 F. Supp. at 796.

The Sixth Circuit, in affirming an injunction against a state regulation implicating First Amendment rights, similarly explained that:

The [regulation] impermissibly restricts more expressive activity than is necessary to accomplish those goals, and is not narrowly tailored to meet these goals. Instead, the permitting scheme regulates a significant amount of casual and spontaneous speech that is unlikely to implicate these significant concerns. In determining whether regulation of expressive activity is narrowly tailored, we look to determine whether the substantial government interest would be achieved less effectively without the [regulation]. Particular types of individual activity that might

cause damage, endanger public safety, or interfere with other speakers, can be governed just as effectively, if not more so, by regulations prohibiting or limiting such actions directly

Parks v. Finan, 385 F.3d 694, 703 (6th Cir. 2004) (internal citation omitted).

The Secretary of State's February Advisory, did not run afoul of *Parks*, because it addressed disruptive actions directly rather than resorting to a blanket prohibition on expressive conduct. The Secretary, after acknowledging Plaintiffs' general right to conduct exit interviews, directed that "if election officials and/or law enforcement officers determine that an exit pollster has unduly hindered or delayed a voter from entering or exiting the polling place, or has been disruptive in violation of the law, appropriate action should be taken." The authority of election officials to remove anyone who disrupts a polling place is codified in OHIO REV. CODE ANN. §§ 3501.35 and 3599.24, and is appropriately independent of the prohibitions defined in reference to a 100-foot perimeter. No one has suggested, and Plaintiffs readily concede, that exit pollers may lawfully be asked to move should their individual activity in fact prove to hinder the proper functioning of the election at any particular polling place at any particular time. Ohio's legislative scheme, as previously interpreted, and its past practices were appropriately suited to address any actual disruption of the conduct of elections, whether from newsgathering activities or otherwise. Now, however, the Secretary seeks to abridge Plaintiffs' First Amendment rights without any corresponding increase in the State's ability to conduct orderly elections. As was true in Washington, Florida, Georgia, Kentucky, Montana and Minnesota the Ohio Secretary of State has ignored — indeed has inexplicably abandoned — alternatives that were narrowly tailored to directly serve the government's asserted interest. No state interest is served by this unnecessary change in policy.

Because the statutes plainly do not, and never have, applied to Plaintiffs' newsgathering activities and because they cannot now be construed to apply on any theory consistent with firmly established First Amendment legal precedent, there is a substantial likelihood that Plaintiffs will succeed on the merits of their challenge to Defendant's directive.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM
UNLESS TEMPORARY INJUNCTIVE RELIEF IS GRANTED

The Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As the Sixth Circuit has recognized in cases involving the infringement of fundamental constitutional rights, a court may find irreparable injury “stem[ming] from ‘. . . the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.’” See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998) (quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989)). Because Secretary Blackwell’s directive so severely restricts Plaintiffs’ and voters’ rights under the First Amendment, a temporary restraining order should issue.

Not only would enforcement of the Ohio statute against Plaintiffs restrict Plaintiffs’ and voters’ First Amendment rights, it would also result in the loss of valuable voter information during this Presidential election year. See *Mitofsky Aff’t* ¶ 8; *CBS v. Smith*, 681 F. Supp. at 805. “Because of the very nature of exit polls, there are no alternative days or different methods to collect the data they gather.” *CBS v. Smith*, 681 F. Supp. at 805; see also *Journal Broadcasting of Kentucky*, 1988 U.S. Dist. Lexis 16864 at *3. If the injunction is denied, the important information that would otherwise have been gathered will be forever lost. Such an irretrievable loss of valuable information constitutes irreparable harm which cannot be recompensed by a monetary award. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (affirming district court’s grant of preliminary judgment for plaintiffs who alleged violation of their First Amendment rights); see also *Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002) (“[c]ourts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plain-

tiffs constitutional rights.”). This factor weighs decidedly in favor of granting Plaintiffs’ Motion for a temporary restraining order.

III. THE REQUESTED ORDER WILL CAUSE NO SUBSTANTIAL HARM

That the requested order —which simply seeks restoration of the *status quo* — will cause no substantial harm is clear from Ohio’s past practices allowing exit polling with no resulting harm. The February Advisory — after specifically referencing these past practices — noted that “[i]t is anticipated that exit pollsters from news organizations will conduct themselves in a professional and cooperative manner.” Secretary Blackwell thus acknowledged that there is no reason to anticipate any harm based on the conduct of exit pollsters. Nothing has changed. If actual disruption occurs, election officials still retain the authority to appropriately address any disruptive behavior.

IV. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING PLAINTIFFS’ REQUEST FOR A TEMPORARY RESTRAINING ORDER

The public interest will be served in two important and related respects by granting Plaintiffs the relief requested. First, the citizens of Ohio and of the United States as a whole have an interest in the robust and free debate of public issues. In particular, all citizens have an interest in unfettered communication and commentary about elections, government, and politics — issues that are at the heart of representative democracy and self-government. *See Mills v. Alabama, supra*, 384 U.S. at 218-19; *Brown v. Hartlage, supra*, 456 U.S. at 52-3; *Roth v. United States*, 354 U.S. 476, 484 (1957) (the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”). The interchange that occurs during the exit polling process is one that goes to the core of the First Amendment and touches upon the very essence of self-governance in a democracy. In the present case, more speech about this upcoming elec-

tion and voters' actions, not less, is in the public interest. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Brown v. Hartlage*, *supra*, 456 U.S. at 61. Furthermore, it is axiomatic that "it is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (citing *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), *cert. denied*, 535 U.S. 1073 (2002)).

First Amendment rights have historically been accorded stringent protection, not only because of the intangible nature of the benefits flowing from the exercise of those rights, but also because of the fear that if such rights are not jealously safeguarded persons will be deterred, even if imperceptibly, from exercising those rights in the future. The public interest will be better served by the prevention of any such chilling effect, which would deprive citizens, political leaders, journalists, and scholars of some or all of the uniquely accurate and detailed information that is provided by such polling. Thus, the public interest factor of the inquiry also weighs in favor of granting Plaintiffs' motion for a temporary restraining order.

CONCLUSION

A temporary restraining order should issue enjoining the Secretary of State from prohibiting exit polling activities within 100-feet of Ohio polling places on election day and directing the Secretary of State to so advise state election officials forthwith.

Dated: November 1, 2004.

Respectfully submitted,

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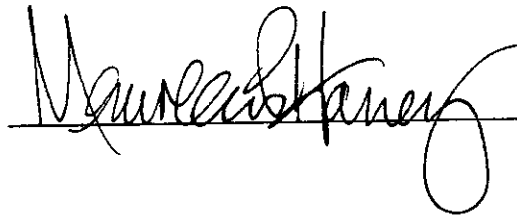
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order was served via facsimile and hand delivery this 1st day of November, 2004 upon the following individuals:

J. Kenneth Blackwell
Ohio Secretary of State
180 E. Broad St. 16th Floor
Columbus, OH 43215

Arthur James Marziale, Jr.
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A handwritten signature in black ink, appearing to read "Maureen Haney", written over a horizontal line. The signature is cursive and somewhat stylized.