

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

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	)
AMERICAN BROADCASTING COMPANIES, INC., THE	)
ASSOCIATED PRESS, CABLE NEWS NETWORK LP,	)
LLLP, 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.	)

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Cause No.

**AFFIDAVIT OF  
WARREN MITOFSKY**

STATE OF NEW YORK	)	
	:	ss.:
COUNTY OF NEW YORK	)	

WARREN MITOFKSY, being duly sworn, hereby deposes and says:

1. I am the President and founder of Mitofsky International, a company that, together with Edison Media Research, Inc., has been retained by ABC, the Associated Press, CNN, CBS, Fox News and NBC (collectively, "Plaintiffs") to assist in their gathering of news and information in connection with the upcoming national election to be held on Tuesday, November 2, 2004. As part of Plaintiffs' efforts to gather news and report it to the public, my company is assisting Plaintiffs in conducting polls of voters after they have voted (commonly referred to as "exit polls") in selected precincts in Ohio and across the country. I submit this affidavit in support of Plaintiffs' motion for a Temporary Restraining Order. Unless otherwise noted, the information provided in this affidavit is based on my own personal knowledge.

2. From 1967 to 1990, I was the director of the Election and Survey unit of CBS News and was executive producer of its election night broadcasts. I conducted the first exit polls for CBS in 1967 and designed the first CBS News/*New York Times* Poll in 1975, an effort which I then directed for 15 years. I started and directed the first network election pool, Voter Research & Surveys, from 1990 to 1993, later to become known as Voter News Service (VNS). Since 1993, Mitofsky International has conducted exit polls in major elections around the world for both national and international news organizations.

#### Reporting News and Information on Election Day

3. Whenever an important presidential primary or an election of national significance is held, ABC, the Associated Press, CNN, CBS, Fox News and NBC present special programming or coverage of that election to the public

4. As part of their coverage of the elections, these news organizations have conducted exit polls throughout the United States. 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 in the most unobtrusive way by approaching voters after they leave the polling place in a scientifically pre-determined pattern (*i.e.*, every fourth voter, every fifth voter, etc.) and asking if they would be willing to fill out a brief questionnaire. As discussed in greater detail below, the information gathered through such polls is reported by our client news organizations on election night itself and in post-election analyses of the election results.

#### How Exit Polls Are Conducted

5. In order to assist our news organization clients in their coverage of the national elections, my company retains and trains exit poll reporters to gather information from

voters across the country regarding their views on the election. Those voters who elect to complete a short questionnaire are asked their views on the elections and on issues of public concern. Under the direction of our news organization clients, we also gather information about the reaction of voters in a particular state to contests for president, governor, and senator in applicable years as well as voters' opinions regarding issues of national and statewide importance. Demographic information about voters is also requested. As an example of the type of information gathered through our exit polls, I attach as Exhibit A a copy of the questionnaire that was used at selected polling places in Ohio to gather information for our news organization clients in connection with the November 2000 election.

6. In the past I have supervised the conduct of exit polls in the State of Ohio for both Mitofsky International (on behalf of our news organization clients) and during my tenure at CBS News. I know from personal experience that those polls have provided invaluable information about the views of Ohio voters on important social and political issues of the day.

7. Our exit polls are conducted as follows: Typically one polling reporter is assigned to each of the polling places randomly selected for the polls. The reporter stands just outside the exit of the building in which the polling place is located. Our polling reporters each wear a badge clearly identifying them as a representative of our client news organizations. They are instructed to be courteous and businesslike and not to interfere with the election process in any way. Voters, who are approached only after they have voted and have left the polling place, are informed that their participation is voluntary and that the questionnaire is anonymous. In the many years that I have been involved in the conduct of exit polls in Ohio, I cannot recall one instance where the Secretary of State of Ohio has made any complaint concerning the conduct of any of our polling reporters.

8. 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. In my experience, however, requiring our 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.

#### Use of Exit Poll Data by the News Organizations

9. The information gathered from our exit polls is utilized by our news organization clients for several purposes. The information has been used to analyze and report upon voters' attitudes about issues of public concern, as well as to analyze and report on particular candidates or issues. CNN, for example, maintains the historical results of past exit polls on its "allpolitics.com" website, where the public can retrieve, for example, detailed information concerning the opinions of voters in the 2000 general election. (*See* <http://www.cnn.com/ELECTION/2000/results/index.epolls.html>)

10. The utility of the information gathered from election day exit polls depends on its completeness. While discrete categories may be of independent value, it is the information, taken as a whole and after it has been cross-referenced, that provides the most guidance in analyzing election returns. The results of these polls are used by the Plaintiffs (and others, as discussed below) to analyze and report upon how and why people have voted and to identify and comment on social and political trends. For example, in 1980, exit polls provided the information from which the "gender gap" was first clearly identified and from which all subsequent analyses of this phenomenon have begun. Also in 1980, exit polls showed that Jimmy Carter's defeat was attributable to the importance placed on inflation and unemployment by voters, rather than Ronald Reagan's conservative credentials. During the 1984 presidential primaries, exit polls provided information that indicated that the gender gap was a continuing phenomenon and provided invaluable insights on voters' views concerning the first Black-American presidential candidate. In the 1992 Republican primary, exit polls showed the populist issues that led to Pat Buchanan's near-success and the reasons for President Bush's ultimate defeat in the general election. These examples illustrate the unique value of exit polls in permitting analysis of the voting patterns of various groups according to sex, age, income, race, religion and according to issues that are important to them.

11. Examples of the information gathered through exit polls in 2000 and presented as part of ABC News' election night coverage are highlighted in the following excerpts from the transcript of that broadcast:

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. . .

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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.

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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.

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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.

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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.

12. The information gathered from exit polls has also been used by our news organization clients in their election night coverage in formulating projections of the outcome of certain contests.

13. ABC, the Associated Press, CNN, CBS and NBC also use the information gathered through exit polls after the election in preparation of new reports and programming analyzing and commenting upon the results of the election and the significance of any particular vote.

#### Use of Exit Poll Information by Others

14. The information gathered from exit polls conducted by and on behalf of news organizations (including our clients) is archived after each election at the Roper Center at the University of Connecticut and at the Inter-University Consortium at the University of Michi-

gan. The information is available through those archives to historians, social scientists, and others worldwide.

15. The information gathered from the exit polls have also been used by elected officials in their study of voting trends and issues and as an aid to understanding their own electoral mandate.

16. Information gathered through the use of exit polls has also been incorporated in numerous scholarly publications including: G. Pomper, *The Election of 1984* (1985); K. Schlozman, *Elections in America* (1987); C. Mueller, *The Politics of the Gender Gap* (1988); G. Orren and N. Polsby, *Media and Momentum* (1987).

#### Plans for November 2, 2004

17. We will be assisting our news organization clients in gathering news for their coverage of the November 2, 2004 general election by conducting exit polls at approximately 50 precincts in Ohio, 23 of which are within this district.

18. In conducting these exit polls, our polling reporters are instructed to follow the procedures outlined above and to in no way impede the election process.

19. We have conducted such exit polls immediately outside the exit of the building place at selected Ohio polling places during prior elections, including the 2000 general election and the 2004 presidential primary election, and I am not aware of any complaint from the Secretary of State that any of our exit poll reporters interfered with the voting process or hindered any voters in any manner.

20. I am informed by my staff that Patricia Wolfe, the Election Director in the Secretary of State's office, provided our office with a copy of Advisory No. 2004-02, dated Feb-

ruary 24, 2004 and signed by Defendant J. Kenneth Blackwell (the "February Advisory"), together with an e-mail. A copy of the e-mail and attached Advisory are attached as Exhibit B.

21. The February Advisory notified "all boards of elections, members, directors, and deputy directors" that our exit poll reporters would be present at certain polling places to collect and compile primary election night results. The February Advisory summarized various Ohio election statutes regulating election campaigning and other activities within 100 feet of a polling place and specifically advised the boards of elections that the "statutes do not regulate or specifically address exit polling." The boards were further 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." The February Advisory further stated that the Secretary of State "anticipated that exit pollsters from news organizations will conduct themselves in a professional and cooperative manner."

22. In her July 6, 2004 e-mail forwarding a copy of the February Advisory to our office, Ms. Wolfe stated that the Secretary of State would provide another such advisory to all 88 county boards of elections in advance of the November 2004 general election, advised my office to call her if we encountered any difficulty with exit polling, and requested a list of the polling places at which we would be conducting exit polls, which we did.

23. I am informed by my staff that they made numerous attempts to obtain a copy of the promised new advisory during September and October 2004, without success.

24. On Thursday, October 28, 2004, I was informed by a county elections official that he and other officials had been instructed by the Secretary of State's office in a telephone conference call on Thursday, October 28, 2004 to prohibit exit polling within 100 feet of the polling place. On the same day, I contacted Ms. Wolfe in the Secretary of State's office in an

attempt to confirm this information and clarify the Secretary's position. Ms. Wolfe informed me that a lawyer from her office would call me back, which never happened.

25. Over that day and the next I made dozens of attempts to reach Ms. Wolfe by telephone, without success. I also asked Penny Windle, an attorney representing the Plaintiffs, to attempt to contact someone in the Secretary of State's office to obtain clarification of that office's position with respect to exit polling and I am informed that she made numerous attempts to do so by telephone and e-mail.

26. I am advised that a representative of the Secretary of State finally returned Ms. Windle's messages after the close of business on Friday, October 29, 2004 and informed her that, contrary to the Secretary of State's written Advisory of February 24, 2004 and "Ohio's past practices" as noted in that Advisory, county officials were directed by the Secretary of State's office not to allow exit polling within 100 feet of polling places during the November 2, 2004 general election.

  
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Warren Mitofsky

Sworn to before me this  
31st day of October, 2004.

  
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Notary Public

**DOROTHY M. WIGMORE**  
Notary Public, State of New York  
No. 31-4828098  
Qualified in New York County  
Commission Expires 3-4-05