

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. 1:04CV750  
District Judge Michael Watson

**EMERGENCY MOTION OF PLAINTIFFS PURSUANT TO FRCP 70  
TO ENFORCE THIS COURT'S JUDGMENT AND DECREE  
(EXPEDITED RELIEF SOUGHT)**

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Pursuant to Rule 70 of the Federal Rules of Civil Procedure, and the Court's inherent power to enforce its own judgments and decrees, Plaintiffs American Broadcasting Companies, Inc., The Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., Fox News Network LLC and NBC Universal, Inc. respectfully move this Court for an order enforcing its Opinion and Order of September 26, 2006 and further issuing its own order, *inter alia*, reciting the decree and injunction previously entered by the Court, and directing Defendant J. Kenneth Blackwell, in his official capacity as the Secretary of State of Ohio, to provide copies of that order to all Ohio election officials. The grounds supporting this Motion are fully set forth in the Memorandum of Law and the Affidavit of Richard M. Goehler, each filed separately herein. Two proposed Orders granting the relief sought are provided.

Because Election Day, November 7, 2006, is quickly approaching, Plaintiffs seek an expedited ruling on this motion and respectfully suggest an expedited briefing schedule, allowing Defendant to respond to the Motion by October 26, 2006 and Plaintiffs to file a reply on October 30, 2006.

Dated: October 23, 2006

Respectfully submitted,

FROST BROWN TODD LLC

By: /s/ Richard M. Goehler  
Richard M. Goehler

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion of Plaintiffs to Enforce Court's Judgment and to Hold Defendant in Contempt for an was served upon Defendant electronically via the court's electronic filing system this 23<sup>rd</sup> day of October, 2006.

/s/Richard M. Goehler

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

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. 1:04CV750  
District Judge Michael Watson

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION  
PURSUANT TO FRCP 70 TO ENFORCE THIS COURT'S JUDGMENT AND DECREE**

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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, L.L.C. (“Fox News”) and NBC Universal, Inc. (“NBC”) (collectively “Plaintiffs”) in support of their motion for an order enforcing the Court’s judgment and decree in this action.

It is with deep regret that Plaintiffs are forced to return for further relief from this Court, but the actions of Defendant Blackwell in response to this Court’s clear and unambiguous decree of September 26, 2006 have given us no choice. As described more fully below, Defendant’s newly adopted directive to Ohio election officials deliberately flouts this Court’s decree, deprives Plaintiffs of the relief awarded by this Court, and is a direct affront to the authority of this Court.

#### **STATEMENT OF FACTS**

On September 26, 2006, this Court issued its decision on the parties’ cross-motions for summary judgment and entered its final order and decree. The decree provided:

For the above reasons, the Court **ORDERS, ADJUDGES AND DECREES** as follows:

1. The Oral Directive violates the First Amendment of the U.S. Constitution and is therefore void.
2. Ohio’s Loitering Statutes, Ohio Rev. Code §§ 3501.30, 3501.35 and 3599.24, cannot be interpreted to prohibit exits polls within the 100 foot designated area around polling places without violating the First Amendment to the U.S. Constitution.

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3. The Court permanently enjoins defendant and all those acting in concert with him from enforcing the Oral Directive.
4. The Court permanently enjoins defendant and all those acting in concert with him from enforcing or issuing any rule, directive, advisory, policy or communication that would prohibit exit polls within the 100 foot designated area around polling places.
5. The Court orders defendant to issue a written directive by **October 15, 2006** to Ohio election officials which shall prominently include the following language: “It would be unlawful, and a violation of the First Amendment to the U.S. Constitution, to interpret, apply, or enforce Ohio’s election Loitering Statutes, Ohio Rev. Code §§ 3501.30, 3501.35 and 3599.24, to prohibit exit polls within 100 feet of polling places.

September 26, 2006 Opinion and Order at 44-45.

On October 12, 2006, Plaintiffs’ counsel requested counsel for Defendant Blackwell to provide a courtesy draft of the directive that was required to be issued by October 15, 2006 in the hopes of avoiding any dispute as to its content. Counsel for Defendant Blackwell denied the request. *See* Affidavit of Richard M. Goehler (“Goehler Affidavit”) at ¶¶ 4-5. Counsel for Plaintiffs then requested that a copy of the directive be provided as soon as it was issued by the Secretary of State’s office. No such copy was ever provided. *See* Goehler Affidavit ¶¶ 6-7, 9.

On October 17, 2006, five days after the initial request by Plaintiffs’ counsel, counsel for Defendant Blackwell finally indicated by e-mail (in response to another request from Plaintiffs’ counsel) that a copy of the directive should be available on the Secretary of State’s

website. *See* Goehler Affidavit at ¶ 8. Upon reviewing the directive, dated October 13, 2006 (“October 13 Directive”), it became all too clear why Defendant Blackwell was unwilling to share its contents with Plaintiffs’ counsel before it was issued.

The October 13 Directive begins with a recitation of Ohio Rev. Code §§ 3501.30, 3501.35 and 3599.24 (collectively referred to by the Court in its decision as the “Loitering Statutes”). After setting forth the text of the statutes, the October 13 Directive then purports to summarize and explain them as follows:

“Thus, according to the above Statutes:

- no person who is within the designated area between the polling place and the small flags and, if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line, is permitted to “loiter,” “congregate,” “engage in any kind of election campaigning” or otherwise “in any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector’s ballot”
- no person, not an election official, employee, observer, or police officer, shall be allowed to enter the polling place during the election except for the purpose of voting or assisting another person to vote as provided in section 3505 of the Revised Code.

If a person conducting exit polls is “loitering” or “congregating” within the designated area, or otherwise “hindering” or “delaying” an elector from leaving the polling place, that person could be in violation of one or more of the Statutes. Under no circumstances is any person permitted to conduct “exit polls” within any polling place.

Of course, to the extent possible, the Statutes should be construed to protect both the fundamental right to vote and the freedom of speech, rights which are guaranteed by the Ohio constitution and the United States Constitution. And, in accordance with an order issued on September 26, 2006, from Judge Michael H. Watson of the United States District Court for the Southern District of Ohio, we have been instructed to state:”

The reader must then turn to page 3 of the document where the following passage appears in type smaller than any other in the entire document. It reads in substance and in form as follows:

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It would be unlawful, and a violation of the First Amendment to the U.S. Constitution, to interpret, apply, or enforce Ohio's election Loitering Statutes, Ohio Rev. Code §§ 3501.30, 3501.35 and 3599.24, to prohibit exit polls within 100 feet of polling places.

After setting forth the language of this Court's Order (albeit in type smaller than any other to be found in the document), the October 13 Directive continues in its entirety and to its conclusion as follows:

On election day it is the responsibility of county election officials and, more specifically precinct judges and clerks — working in cooperation with local police officers (see R.C. 3599.31) — to enforce the Statutes at each polling place. Any person charged with a violation of one or more of the Statutes may be subject to prosecution by the county prosecutor or local municipal authorities, as applicable.

This Directive supersedes all previous directives, advisories or other instructions from this office concerning the foregoing Statutes or polling place access.

If you have any questions regarding the interpretation of any of the foregoing Statutes, or their application (or potential application) to a specific context, I encourage you to contact your county prosecutor. If you have any questions regarding this Directive, please contact the Elections Division of this office at 466-2585.

October 13 Directive at pp. 2-3.<sup>1</sup> The complete text of the October 13 Directive is appended to this brief and is attached as Exhibit 5 to the Goehler Affidavit.

The October 13 Directive is, in a word, an outrage. In the face of this Court's decree that "Ohio's Loitering Statutes . . . cannot be interpreted to prohibit exit polls within the 100 foot designated area around polling places without violating the United States Constitution," the Secretary has told Ohio election officials that they can be. In the face of this Court's decree that the Court's order was to be **prominently**<sup>2</sup> set forth in the Directive, the Court's language is buried on page 3 in typeface smaller than any other used in the entire document. The

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<sup>1</sup> Unlike his prior directives, Secretary Blackwell didn't even bother to sign the October 13 Directive himself.

<sup>2</sup> *Webster's II College Dictionary* defines "prominent" as "immediately noticeable: CONSPICUOUS."

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Secretary's behavior is both unconscionable and contumacious.

### ARGUMENT

The Court will recall that this litigation began after the Secretary rescinded his directive of February 24, 2004, a directive that made clear that the Loitering Statutes did not apply to exit polling activities and that exit polling was to be permitted at Ohio polling places in connection with the presidential primary elections in March of 2004. A copy of the February 2004 Directive is attached as Exhibit 6 to the Goehler Affidavit. The Court will also recall that on November 2, 2004, in compliance with this Court's ruling of November 1, 2004, the Secretary issued a directive clearly stating that this Court had ordered that media personnel were to be permitted to conduct exit polling within 100 feet of polling places. A copy of the November 2, 2004 directive is attached as Exhibit 7 to the Goehler Affidavit. What both of those directives make clear in this context is that the Secretary is more than capable of explaining that exit polls are to be permitted within 100 feet of Ohio polling places when he wants to.<sup>3</sup> Apparently, and despite two years of litigation and two clear and unambiguous rulings of this Court, the Secretary still doesn't want to.

Consider the reader of the October 13 Directive. He would not know on reading the October 13 Directive that on September 26, 2006 this Court issued a permanent injunction barring the Secretary of State and all those acting in concert with him from prohibiting exit polling within 100 feet of Ohio polling places. September 26 Opinion and Order at 45. He would

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Even the Secretary's now-superseded directive of April 2005 — which rescinded the November 2004 Directive issued in response to this Court's initial ruling — made clear that the “[Loitering] Statutes do not necessarily prohibit a person from conducting “exit polls” within the designated area.” No such admonition — or anything approaching it — is included in the October 13 Directive.

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not know that this Court specifically decreed that the Loitering Statutes “cannot be interpreted to prohibit exit polls within the 100 foot designated area[.]” *Id.* He would not know that this Court had “permanently enjoin[ed] defendant and all those acting in concert with him from enforcing or issuing any rule, directive, advisory, policy or communication that would prohibit exit polls within the 100 foot designated area around polling places.” *Id.* Indeed, he would not know that this Court’s decree of September 26, 2006 had any effect whatsoever on Secretary Blackwell or on those acting at his direction.

What he **would** know from reading the October 13 Directive is that polling officials are permitted to conclude that exit polls *per se* can be prohibited as “loitering” and that exit polls *per se* can be prohibited on the grounds that they “delay” voters from leaving the polls. In fact, he would know that **first**; that is how the explanatory portion of the directive begins. He would also know from reading the October 13 Directive that this Court had asked Defendant Blackwell to “state” something — as if this Court’s decree were some scholarly commentary without any binding effect on Ohio election officials — and that that something is then “stated” in miniscule type. He would also know that the county prosecutor is the person best to be consulted about the application of the Loitering Statutes to exit polling activities, as if this Court had not spoken at all.

The October 13 Directive deliberately flouts this Court’s judgment, decree and injunction and is a direct affront to this Court’s authority. It is no wonder that Defendant declined to share a draft of this Directive with Plaintiffs’ counsel in advance and no wonder that Defendant refuse to provide a copy to Plaintiffs’ counsel when it was issued.

There can be no question that courts have the inherent power to enforce compliance with their lawful orders and decrees. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966) (courts have inherent power to enforce compliance with their orders); *United States v. Produc-*

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*tion Plated Plastics, Inc.*, 61 F.3d 904 (Table), 1995 WL 428451, at \*7 (6th Cir. July 19, 1995) (unpublished) (where defendants failed to obey a court order by the time specified in the order, the court had inherent authority to fashion equitable relief and enforce its own orders by appointing a receiver to identify and liquidate assets to achieve compliance with that order); *cf. Peacock v. Thomas*, 516 U.S. 349, 868 (1996) (observing that ancillary jurisdiction flows from a court's inherent power to enforce its judgments, and that "[w]ithout jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" (citation omitted)). That authority is also reflected in Rule 70 of the Federal Rules of Civil Procedure. Under Rule 70, "a district court may direct a party to complete a specific act where the district court previously directed the same party to perform the same act in its final judgment and the party has failed to comply." *Analytical Engineering, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 451 (7th Cir. 2005); *see also Production Plated Plastics*, 1995 WL 428451, at \*7 (approving district court's reliance on Rule 70 as a basis of authority for appointing a receiver to enforce court order); *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980) ("where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance[,] specifically including Rule 70). Without doubt, the October 13 Directive convincingly demonstrates that Defendant violated this Court's order and failed to take reasonable steps to comply with this Court's injunction and decree.

This Court should exercise its inherent power to enforce its own orders and decrees as well as its power under Rule 70 and put an end to the Secretary's gamesmanship. To that end, Plaintiffs respectfully request that this Court issue its own order, tracking the language of the decree and injunction previously entered by the Court, and direct Defendant to provide copies of that order to all Ohio election officials together with a cover directive: 1) instructing

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election officials to abide by and enforce this Court's injunction and decree and 2) rescinding the October 13 Directive.

Dated: October 23, 2006

Respectfully submitted,

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