

No. 06-4410/4484

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**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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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-Appellees,*

*- against -*

Jennifer Brunner, in her official capacity as the Secretary of State  
of Ohio,

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of Ohio

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**PROOF BRIEF OF APPELLEES**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellees hereby disclose the following corporate affiliations:

American Broadcasting Companies, Inc. is an indirect subsidiary of The Walt Disney Company, a public company.

The Associated Press has no parent corporations and no publicly held corporation owns 10% or more of the stock of The Associated Press.

Cable News Network, LP, LLLP is indirectly owned by Time Warner Inc., a public company.

CBS Broadcasting Inc. is a subsidiary of CBS Corporation, a public company.

Fox News Network, L.L.C. is an indirect subsidiary of News Corp., a public company.

NBC Universal, Inc. is 80% owned by The General Electric Company and 20% owned by Vivendi, Inc., both of which are public companies.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellees believe that oral argument would be of assistance to the Court in considering the fundamental constitutional issues raised by this appeal and respectfully request that oral argument be scheduled.

## JURISDICTIONAL STATEMENT

This action was commenced by American Broadcasting Companies, Inc., The Associated Press, Cable News Network LP LLLP, CBS Broadcasting, Inc., Fox News Network LLC, and NBC Universal Inc. (“Appellees”) against J. Kenneth Blackwell, the Secretary of State of Ohio (“Secretary”) pursuant to 42 U.S.C. § 1983.<sup>1</sup> The district court properly exercised jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction). The district court entered an Opinion and Order on September 26, 2006 (the “Opinion”), in which it (i) granted summary judgment to Appellees as to Counts I and III of their Second Amended Complaint, and denied the Secretary’s motion for summary judgment on those counts; and (ii) granted summary judgment for the Secretary on Count II of Appellees’ Second Amended Complaint, and denied Appellee’s motion for summary judgment on that count. (R. 62, Opinion; J.A. \_) Judgment was entered on September 27, 2006. (R. 64, Judgment Entry; J.A. \_) On October 25, 2006, the Secretary filed a timely notice of appeal challenging so much of the district court’s ruling as granted summary judgment to Appellees. On October 31, 2006, Appellees timely filed a notice of cross-appeal challenging the district court’s ruling to the extent it granted summary judgment to the Secretary on the vagueness claim asserted in Count II of the Second Amended Complaint. In light of the permanent injunction entered by the district court, Appellees are not pursuing their cross-appeal.

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<sup>1</sup> Secretary Blackwell was succeeded as Secretary of State by Jennifer Brunner on January 8, 2007. As a result, she is automatically substituted as the party defendant and appellant here. *See* Fed. R. App. P. Rule 43(c)(2).

## STATEMENT OF THE CASE

In anticipation of the presidential primary election held on March 2, 2004, on February 24, 2004, J. Kenneth Blackwell, then Secretary of State of Ohio, issued Advisory No. 2004-02 (the “February 2004 Advisory”) to all county election officials confirming that news organizations would be conducting exit polls at polling places in Ohio on that day.<sup>2</sup> The February 2004 Advisory, which was not challenged as part of this litigation, 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.

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<sup>2</sup> Exit polling, which is described much more fully below, is the collection of data from a random sample of voters after they have voted at a sample of polling places on Election Day for use in news reports and other analyses of voting trends and voter behavior.

(R. 47-14, Mitofsky Aff't ¶¶ 11-12; J.A. \_) (emphasis in original).

Consistent with the Secretary's advice, Appellees conducted polls of Ohio voters on March 2, 2004 within 100 feet of Ohio polling places without any complaint from the Secretary of State. (R. 47-14, Mitofsky Aff't ¶ 13; J.A. \_)

In May 2004, Appellees requested written confirmation from the Secretary of their right to conduct exit polls during the 2004 presidential election.<sup>3</sup> In response, the Secretary's office advised Appellees on July 6, 2004 that it would again distribute an advisory to the county election boards prior to Election Day, and attached a copy of the February Advisory discussed above. (R. 47-14, Mitofsky Aff't ¶¶ 14-17; J.A. \_)

#### The Secretary's Change of Position

Over the course of the next several months, Appellees repeatedly pressed the Secretary's Office in an effort to obtain the promised new advisory, without success. Finally, in October, the Secretary's office reported that a written advisory would be forthcoming, but this promise was followed by silence once again. Instead, as Appellees would later learn, on October 28, 2004 the Secretary held a conference call with county election officials in which he directed those officials — contrary to Ohio law, his own written advisory, and past practices — that they were not to permit any exit polls to be conducted within 100 feet of a polling place on Election Day. In doing so, the Secretary relied on Ohio Revised Code §§ 3501.30, 3501.35 and 3599.24 (the "Loitering Statutes") — the same statutes he had previously concluded could not be construed to ban exit polling activities.

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<sup>3</sup> A written confirmation assists the polling reporters in the event of any confusion at the local polling locations. (R. 47-14, Mitofsky Aff't ¶ 15; J.A. \_)

The Secretary's announcement, which has been referred to in this case as the "Oral Directive," was reiterated several days later in an official press release issued by the Secretary. The press release provided in relevant part:

The media are demanding they can enter polling place zones across Ohio to conduct exit interviews. The news media will of course still be allowed to do any exit polling they desire beyond the 100-foot protection zone. As Secretary of State, I've been elected to defend the only "poll" that matters, and that is the vote of the people, not exit polls. Included in that right to vote is a right to privacy and allowing anyone inside the mandated 100-foot protection zone aside from voters and election officials would violate Ohioans' right to vote in privacy - and I will not allow it.

\* \* \*

I have instructed the county Boards of Elections across Ohio to maintain the 100-foot protection zone around all polling stations, preventing lawyers, news media, Republican or Democratic officials and any others who are not official poll workers from violating voters' right to exercise their vote in privacy and without intimidation or harassment. The U.S. district court has agreed with my approach on previous issues in the last few weeks and I fully expect it will do so again this time.

(R. 55-3, Parziale Aff't, Ex 2; J.A. \_).

The Secretary did not communicate his abrupt change in position to Appellees until after the close of business on Friday, October 29 — one business day before the election. (R. 55-2, Windle Aff't ¶¶ 2-5; J.A. \_); (R. 47-14, Mitofsky Aff't ¶¶ 18-23; J.A. \_)

#### The Filing of the Action

Appellees filed a complaint in the United States District Court for the Southern District of Ohio along with an emergency motion seeking to enjoin enforcement of the Oral Directive when the Court opened on the following Monday, November 1, 2004. (R. 1, Complaint); (R. 4, Plaintiffs' Motion for a Temporary Restraining Order) Appellees' motion cited numerous decisions from federal courts across the country holding that exit polling is speech protected by the First

Amendment and urged that the Secretary's actions could not be sustained consistent with the Constitution. (R. 4, Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order) The Secretary opposed the request for emergency relief, arguing that he was permitted to prohibit exit polling within 100 feet of Ohio polling places and that the restriction was necessary to prevent "potential commotion and turmoil" on Election Day. (R. 6, Defendant Blackwell's Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order ("Def. TRO Mem.") p. 2; J.A. \_\_)

That evening, after a hearing and the presentation of evidence by both parties, including live testimony from the Secretary's Director of Legislative Affairs, the district court granted Appellees' motion for a Temporary Restraining Order and enjoined the Secretary from prohibiting exit polling within 100 feet of Ohio polling places on Election Day. In so doing, the district court recognized that "exit polling is, on several levels, speech which is protected by the First Amendment" and held that "the Secretary's expressed concerns regarding the pollsters activities causing delays as voters leave the polling place is not a sufficiently compelling state interest to permit the proposed restriction on political speech." (R. 9, Order Granting Plaintiffs' Motion for a TRO, entered November 1, 2004 ("TRO") pp. 7-8; J.A. \_\_) Among other things, the district court observed that "citizens of the State of Ohio, and the nation as a whole, will benefit from the robust political participation of individuals who exercise their right to vote and engage in political speech" as a result of the injunction. TRO pp. 6, 9; J.A. \_\_.

Having no choice in the matter, the Secretary complied with the TRO by replacing the Oral Directive with Directive No. 2004-5 (the "November 2004 Directive"), which instructed Ohio election officials, *inter alia*, that exit polling could not be restricted under the Loitering Statutes consistent with the First

Amendment. Only due to the district court's TRO were Appellees able to successfully conduct exit polls in Ohio on November 2, 2004. Although some polling reporters encountered early difficulties because certain local election officials had not been properly advised of the Secretary's new directive, most of those issues were resolved over the course of the day. (R. 55-6, Windle Aff't ¶¶ 2-4; J.A. \_\_)

All told, exit polls were conducted at 50 polling places in the state. There was no complaint or report that any exit poll reporter interfered with the voting process or hindered voters in any manner on Election Day 2004. (R. 47-14, Mitofsky Aff't ¶¶ 25-26; J.A. \_\_)

#### The Beacon Journal Decision

Within hours of the filing of the district court's decision granting the motion for a Temporary Restraining Order in this action, this Court issued its decision in *Beacon Journal Publishing Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004), *cert. dismissed*, 544 U.S. 915 (2005). That litigation concerned Secretary Blackwell's decision to deny reporters from the *Beacon Journal* access to Ohio polling places to gather news and take traditional photographs of the voting process. On appeal from the district court's denial of the Beacon Journals' request for emergency injunctive relief, this Court held:

While we may assume, without deciding, that Ohio's interest in ensuring orderly elections is compelling, our evaluation of Defendants' proposed course of action may not cease with that conclusion. Instead, Defendants bear the burden of demonstrating that their application of [Loitering Statute] § 3501.35's blanket prohibition to members of the press — whose objective, far from interfering with the right to vote, is rather to report the news of the day to their fellow Ohio citizens — is necessary to further the state's aforementioned interest and “narrowly drawn to achieve that end.” *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Defendants have made no such showing. Indeed, the district court's fear of “turmoil that could be created by hordes of reporters and photographers” is purely hypothetical and cannot, therefore, support Defendants' proposed restriction of the First Amendment's guarantee that state conduct shall not abridge “freedom . . . of the press.” U.S. CONST. amend. I. This Court has recently observed that “[d]emocracies die behind

closed doors.” *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). It is for this reason that the public deputize[s] the press as the guardians of their liberty.” *Id.*

*Id.* at 685. Finding that the district court “failed to interpret [Loitering Statute] § 3501.35 consistent with the First Amendment, but instead interpreted and applied the statute overly broadly in such a way that the statute would be violative of the First Amendment,” this Court vacated the district court’s order and ordered Secretary Blackwell “immediately and forthwith” to permit *Beacon Journal* reporters and photographers “reasonable access to any polling place for the purpose of newsgathering and reporting so long as they did not interfere with poll workers and voters as voters exercise their right to vote.” *Id.*

Although the exigency of Appellees’ emergency motion passed with the election, it remained critical for Appellees to obtain permanent relief against further attempts by the Secretary to apply the Loitering Statutes to prohibit exit polling. Indeed, the Secretary had made it clear in opposing the TRO that he wanted to restrict exit polling within the 100 foot zone and that he believed it was constitutionally permissible to do so. Def. TRO Mem. pp. 2, 6-10; J.A. \_\_.

Accordingly, shortly after the 2004 election, Appellees filed their First Amended Complaint, adding a comprehensive claim seeking a declaratory judgment and permanent injunctive relief barring any effort by the Secretary to prohibit exit polling within 100 feet of Ohio polling places under the authority of the Loitering Statutes. In accordance with Rule 26 of the Federal Rules of Civil Procedure, the parties exchanged initial disclosures and filed a Rule 26(f) statement with the district court, stipulating that no genuine issues of material fact existed and that the matter should be postured for resolution by way of summary judgment at the earliest practicable time. (R. 18, Rule 26(f) Report of the Parties p. 2; J.A. \_\_)

## The Motions for Summary Judgment

On March 16, 2005, Appellees moved for summary judgment seeking permanent relief against re-issuance of the Oral Directive and on the new count that would protect them against any similar attempt by the Secretary to use the Loitering Statutes to restrict their exit polling activities. (R. 26, Motion for Summary Judgment by Plaintiffs) Although Secretary Blackwell could have stipulated to the entry of a permanent injunction at that time, he did not. Nor would he “un- equivocally represent” to the district court that he would not attempt to prohibit exit polling again in the future. Opinion p. 15. Instead, the Secretary chose to fight on and “continue[d] to advance the position that he [could] lawfully ban not only exit polls, but all First Amendment activity, within 100 feet of polling places.” Opinion p. 15.

In fact, in what he baldly admitted was an effort to “moot” plaintiffs’ claims (R. 29, Defendant’s Third Motion for Extension of Dispositive-Motion Deadline p. 1), the Secretary responded to the motion for summary judgment by rescinding the court-ordered November 2004 Directive and replacing it with the far more ambiguous Directive No. 2005-09 (the “April 2005 Directive”). See R. 44, Second Amended Complaint, Ex. C; J.A. \_\_; Opinion pp. 9-10. Thus, language in the court-ordered November 2004 Directive providing that “news media personnel . . . [m]ay be within 100 feet of the entrance of polling places to conduct exit polling,” was stricken and replaced in the April 2005 Directive with more confusing language stating, *inter alia*, that “the [Loitering] Statutes do not necessarily prohibit a person from conducting ‘exit polls’ within the designated area.” Opinion p. 9. Far from “mooting” plaintiffs’ claims, the Secretary’s decision to replace the clear language of the court-ordered November 2004 Directive with the April 2005 Directive demonstrated the ease with which the Secretary could rescind directives

(even court-ordered directives) and issue new ones in their place, thus further reflecting the need for permanent relief.

As a result of the Secretary's decision to rescind the court-ordered November 2004 Directive and replace it with a concededly more ambiguous one, plaintiffs sought the district court's leave to file a Second Amended Complaint challenging the constitutionality of the April 2005 Directive on vagueness grounds.<sup>4</sup> The district court granted the motion and the Second Amended Complaint was promptly filed.<sup>5</sup> Shortly thereafter, plaintiffs filed a renewed motion for summary judgment. R. 46. The Secretary opposed the motion once again and cross-moved for summary judgment urging that he had the authority to prohibit exit polling within 100 feet of Ohio polling places and also raising a host of jurisdictional and procedural arguments. (R. 52, Defendants Memorandum in Opposition to Plaintiffs' Renewed Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("Def. SJ Opp."))

#### The District Court's Decision

The district court granted summary judgment to Appellees on their substantive First Amendment claims (Counts I and III of the Second Amended Complaint): (i) declaring that the Oral Directive was a violation of Appellees' First Amendment rights; (ii) declaring that Ohio's Loitering Statutes cannot be interpreted to prohibit exit polls within the 100 foot designated area around polling places without violating the First Amendment; (iii) enjoining the Secretary from

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<sup>4</sup> R. 38, Motion for leave to File Second Amended Complaint and Memorandum in Support.

<sup>5</sup> R. 43, Order Granting Motion for leave to File Second Amended Complaint and Memorandum in Support.

enforcing the Oral Directive in the future; (iv) enjoining the Secretary from enforcing any rule, directive, advisory, policy or communication that would prohibit exit polling within the 100 foot designated area; and (v) ordering the Secretary to issue a new written directive that would prominently state that: “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 [] to prohibit exit polls within 100 feet of polling places.” Opinion p. 45. The district court denied summary judgment to Appellees on Count II, declining to hold that the then-current written directive was unconstitutionally vague.

As a preliminary matter, the district court rejected the Secretary’s remarkable claim — a claim the Secretary has wisely abandoned on this appeal — that there was ambiguity as to whether the Oral Directive was ever issued. “The Court finds the uncontroverted evidence shows defendant issued a directive to Ohio election officials in late October 2004 directing them, *inter alia*, to prohibit exit polls within 100 feet of polling places. There is no genuine issue of material fact as to whether defendant issued the Oral Directive.” Opinion p. 9. The court also noted that the Oral Directive was the “embodiment for defendant’s interpretation of the Loitering Statutes to bar exit polls” and, as such, the court “applie[d] the same analyses and reache[d] the same conclusions with respect to Counts I and III.” *Id.* at 27 n.2. In the end, the two counts present one analytical issue for the court: “whether defendant can lawfully bar exit polls within 100 feet of polling places.” *Id.*

The district court also rejected the Secretary’s argument that Appellees lacked standing to pursue their claims. First, the district court held that Appellees’ injury was real and not hypothetical or conjectural. “But for the TRO the Court issued on November 1, 2004, plaintiffs would have been excluded from conducting

exit polls within 100 feet of the polling places,” and “[a]bsent an injunction, defendant would be free to reissue the Oral Directive on the eve of an election.” Opinion p. 15. The district court based this finding on testimony, documentary evidence, the Secretary’s “proclivity to issue eleventh-hour directives” even during the pendency of the case, and the Secretary’s argument before the district court that the restrictions were constitutional and permissible. Similarly, the district court rejected the Secretary’s argument that Appellees’ claims were not ripe, again noting that Appellee’s would have been harmed but for the issuance of the TRO, and that the Secretary’s continued insistence that the restrictions were permissible led to a credible fear of enforcement in the future. Opinion p. 20.

The district court also held that the injury to Appellees was traceable to the Secretary, noting that the Secretary himself had represented to the court that he “is authorized by law to issue instructions” that the County Boards of Elections “are required to follow.” Opinion p. 16. Moreover, the court held, Ohio law explicitly vests the Secretary with authority over the conduct of elections and control of local election officials, and the Secretary had already demonstrated his ability to infringe on Appellees’ First Amendment rights by issuing the Oral Directive. *Id.* at 16-17.

The district court also rejected the Secretary’s claim of Eleventh Amendment immunity, noting that the Supreme Court has carved out an exception to that doctrine for precisely these circumstances, where a plaintiff seeks prospective injunctive relief to enjoin state officials from interfering with their federal rights. Opinion p. 23 (citing *Ex Parte Young*, 209 U.S. 123, 160-62 (1908)). This exception applied, according to the district court, because “the inquiry is not whether defendant has threatened to enforce a particular act which is itself unconstitutional, but whether his own conduct violated federal law” — a claim for which

state officers may “*always* be sued.” Opinion p. 24 (emphasis in original).

Turning to the merits, the district court chose to follow the unanimous line of cases holding that exit polling is speech protected by the First Amendment and expressly ruled that exit polling “cannot reasonably be construed as electioneering under any definition of that term.” Opinion p. 33. The court concluded that “[a]lthough the State of Ohio’s interest in preventing overcrowding and disruption at polling places is compelling,” the Secretary had failed to demonstrate that a flat ban on exit polling within 100 feet of Ohio polling places was narrowly tailored to serve the State’s interest. The district court concluded, as it had in granting the TRO, that “there are statutory mechanisms in place . . . which can be employed if a pollster’s activities impede a voter’s ability to exercise the right to vote.” Opinion p. 38 (quoting 11/1/04 Order p. 8). Whether analyzed under the strict scrutiny test or a more lenient intermediate scrutiny standard, the district court concluded that an outright ban on exit polling within 100 feet of Ohio polling places could not be sustained consistent with the First Amendment.

### STATEMENT OF FACTS

#### Appellees’ Newsgathering Activities

Appellees are six national news organizations who provide news and information to the public. In order to provide timely information about voting trends and behavior to their viewers and readers across the country and around the world, Appellees 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. (R. 47-14, Mitofsky Aff’t ¶¶ 5-7; J.A. \_)

Appellees' exit polls are conducted by two highly respected polling organizations, Mitofsky International and Edison Media Research Inc., and are rigidly controlled to ensure statistical reliability. One polling reporter is ordinarily assigned to each of the polling places randomly selected for Appellees' polls. Typically, that 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 Appellee news organizations. Polling reporters are instructed to be courteous and businesslike and not to interfere with the election process in any way. (R. 47-14, Mitofsky Aff't ¶¶ 1-7; J.A. \_)

Voter participation in exit polls is purely voluntary. Those voters who elect to complete the 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. (R. 47-14, Mitofsky Aff't ¶ 6; J.A. \_)

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.). Requiring exit poll reporters to stand 100 feet from

the place where voters exit the polling place has been shown to substantially reduce the statistical reliability and accuracy of their exit polls. (R. 47-14, Mitofsky Aff't ¶¶ 8-10; J.A. \_\_)

#### Use of Exit Polling Data

The information gathered from exit polls is used by Appellees 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. (R. 47-14, Mitofsky Aff't ¶¶ 27-29; J.A. \_\_) On Election Night 2004, for example, the information gathered from Appellees' exit polls revealed that the majority of those who cared most about terrorism and moral values favored President Bush, while those who were most concerned with the economy and the war in Iraq favored Senator Kerry. *See, e.g.*, (R. 47-3, Frankovic Aff't ¶ 5; J.A. \_\_); (R. 47-5, Halperin Aff't ¶ 6; J.A. \_\_); (R. 47-12, Hannon Aff't; J.A. \_\_); (R. 47-7, Mokrzycki Aff't ¶ 6; J.A. \_\_); (R. 47-2, Moody Aff't ¶ 6; J.A. \_\_); (R. 47-15, Wheatley Aff't ¶ 6; J.A. \_\_). The following example is excerpted from the transcript of ABC News' election night coverage on November 2, 2004:

PETER JENNINGS, ABC NEWS: Let's go to our political director, Mark Halperin, to see what else you can contribute on the state of Ohio or for that matter on any other issue.

MARK HALPERIN, ABC NEWS: Well, Peter, the exit poll matches up what you found when you went to Cincinnati, it's nice when that works out that the reporting matches up with what we've managed to talk to voters [about]. In Ohio today, . . . [a] gay marriage ban on the ballot, it passed by a decisive margin. They asked Ohio voters if they supported banning gay marriage, and that passed decisively. And of the people who voted for the gay marriage ban, the President won 66 percent to 34 percent for Senator Kerry. Pretty decisive. Also, that issue was, we thought would be a key motivator for a key group, that strong vote for the president amongst White protestant churchgoers. They voted overwhelmingly for the president. And a key group not just in Ohio but in almost all the battleground states. That group voted 70 percent for the President, 30 per-

cent for Mr. Kerry. They voted in about the same proportions as they did four years ago.

And then one other number from Ohio, Peter. Kerry supporters, their top issue, 42 percent said it was the economy. For Bush supporters, moral values was cited by 38 percent. And obviously, a lot of those voters I'm sure were concerned with that gay marriage ban.

PETER JENNINGS: So 40 percent to 38 percent of the economy vis-a-vis the so-called moral character issues?

MARK HALPERIN: Again, for, for Kerry supporters the top issue for almost half of them, 42 percent was the economy. For Bush voters it was moral values 38 percent was their top issue.

PETER JENNINGS: Okay. Many thanks, Mark.

(R. 47-5, Halperin Aff't Ex. A, pp. 12-13; J.A. \_)

Appellees 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. For example, CNN reported a week after Election Day 2004 that analysis of the exit poll data revealed the existence of a "marriage gap:" married people of both genders favored President Bush, while unmarried people of both genders favored Senator Kerry. (R. 47-12, Hannon Aff't, Exhibit A; J.A. \_) Further examples of how the information gathered through exit polls is used in post-election night reporting are discussed in the Affidavits of Kathleen Frankovic (R. 47-3; J.A. \_), Mark Halperin (R. 47-5; J.A. \_), Michael Mokrzycki (R. 47-7; J.A. \_), and John Moody (R. 47-2; J.A. \_). In addition, the data gathered by Appellees is available to other subscribers, including newspapers in Ohio and throughout the country. Several examples of the use made of exit poll data by Ohio newspapers following the 2004 presidential election are attached to the Affidavit of Warren Mitofsky. (R. 47-14; J.A. \_)

In addition, the information gathered from Appellees' 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. (R. 47-8, Shapiro Aff't ¶¶ 3-12; J.A. \_); (R. 47-14, Mitofsky Aff't ¶ 29; J.A. \_)

### SUMMARY OF ARGUMENT

On this appeal, the Secretary does not appear to be challenging the merits of the district court's conclusion that exit polling is protected by the First Amendment and that the Loitering Statutes cannot constitutionally be construed to permit a blanket prohibition on exit polling within 100 feet of Ohio's polling places.<sup>6</sup> Any such challenge would be frivolous based on a clear application of this Court's First Amendment precedents and nearly twenty years of unanimous case law developed by federal courts across the country specifically considering the constitutionality of states' efforts to restrict exit polling activities. As demonstrated in Section I below, every court that has considered state efforts to restrict exit polling has either struck down or enjoined enforcement of the challenged statute or regulation. No court has ever held that a state's efforts to prohibit all exit polling activities near polling places can withstand constitutional scrutiny; the Secretary does not even begin to suggest that this Court should be the first.

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<sup>6</sup> We say that the Secretary does not appear to be challenging the merits of the district court's ruling because Appellant's brief contains no argument to that effect. Nonetheless we note that the "Statement of the Issues Presented" does appear to encompass such a challenge. See Brief of Appellant ("Opening Br.") at 1. The ambiguity is no doubt a consequence of the Secretary's newly adopted position that the Secretary has no future intention of seeking to prohibit exit polling activities, a position never advanced before the district court. See Opinion p. 15 ("Defendant does not unequivocally represent that he will not again seek to ban exits polls within the 100 foot zone.")

Rather than attack the substance of the district court's holding, the Secretary resorts instead to a rather desperate, throw-it-against-the-wall-to-see-if-it-sticks approach consisting of a series of jurisdictional and technical arguments, most of which were raised below and properly rejected by the district court and none of which provides this Court with any basis for reversing the district court's decision.

The first of these arguments, discussed in Section II(A) below, is that Appellees' claim under Count I (regarding the Oral Directive) is moot because the Secretary implemented the court-ordered November 2004 Directive and has not, at least to date, reissued the original Oral Directive. Thus, as the Secretary would have it, compliance with a court-ordered temporary injunction deprives a successful litigant of standing to make the relief permanent. Tellingly, the Secretary offers no support for this extraordinary proposition. In fact, the law is clear that because the Secretary never "irrevocably eradicated" the threat to Appellees' First Amendment rights, Appellees had standing to seek relief under Count I of their complaint. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

The Secretary's next argument is that Appellees' comprehensive First Amendment claim (pleaded in Count III) was not ripe for adjudication because Appellees never faced a "credible threat" to their First Amendment rights. As shown in Section II(B), it is well-settled that First Amendment claims are ripe whenever there is a "real and immediate" threat to First Amendment interests. Here, Secretary Blackwell openly admitted in November 2004 that he would not permit exit polling within 100 feet of Ohio's polling places on Election Day in the absence of the Court's intervention and subsequently continued to advance the argument that he had the unmitigated right to do so. The threat to Appellees' First Amendment rights could not have been more clear.

Third, the Secretary contends that the district court somehow lacked sufficient evidence to grant summary judgment as to Count I because the specific polling places at which Appellees intended to conduct exit polls in 2004 were never clear in the record. Such information is necessary, the Secretary now claims, because the level of constitutional protection afforded to speech generally varies depending on whether the forum at issue is classified as “public” or “nonpublic.” As set forth in Section II(C) below, the Secretary’s argument fails because (i) the argument was not raised below; (ii) the 100 foot zones around Ohio polling places undoubtedly include public fora; and (iii) in any event, the Secretary’s efforts to restrict exit polling are plainly unconstitutional regardless of the level of constitutional scrutiny employed.

Fourth, the Secretary contends that the Loitering Statutes at issue are enforced by other officials and that any injury to Appellees could not be attributed to the Secretary. As shown in Section II(D), this argument is flatly inconsistent with governing law and the Secretary’s own contrary assertions to the district court.

Finally, the Secretary contends that the Eleventh Amendment provides immunity from Appellees’ claims. As demonstrated in Section II(E), the Supreme Court and this Court have both made clear that, in cases (such as this) where state officers are accused of violating a federal law, declaratory and injunctive relief are always appropriate. Accordingly, any protections otherwise afforded under the Eleventh Amendment are simply inapplicable here.

At the end of the day the Secretary’s arguments mostly boil down to the proposition that this Court should vacate the district court’s permanent injunction simply because the Secretary — having fought and lost the issue — is now finally willing to state that the Secretary of State’s office has no present intention of attempting to prohibit exit polling in the future. Of course, if the Secretary’s inten-

tions were as clear and as permanent as the district court’s order, one is left to ponder precisely why the Secretary chose to pursue this appeal or why, for that matter, any further litigation was necessary after the entry of the TRO. The Secretary had every opportunity to stipulate to the entry of permanent injunctive relief — as many other state officials have done in cases such as this — but he chose not to. Instead the Secretary vigorously defended his right to restrict Appellees’ First Amendment rights. There is no question that the district court had subject matter jurisdiction to vindicate those same rights.

### STANDARD OF REVIEW

The Court of Appeals “review[s] a district court’s order granting summary judgment *de novo*, and its findings of fact for clear error.” *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999); *accord ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 705 (6th Cir. 2005). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). As the parties to this appeal have agreed that there are no genuine issues of material fact in dispute, all of the issues properly before this Court are issues of law that are reviewed *de novo*.

### ARGUMENT

- I. THE DISTRICT COURT CORRECTLY RULED THAT THE LOITERING STATUTES CANNOT BE CONSTRUED, CONSISTENT WITH THE FIRST AMENDMENT, TO BAN ALL EXIT POLLING ACTIVITIES WITHIN 100 FEET OF OHIO POLLING PLACES

Every court that has considered state efforts to restrict exit polling has either struck down or enjoined enforcement of the challenged statute or regulation.

Beginning with a seminal opinion of the Ninth Circuit Court of Appeals in 1988 and culminating with decisions last year by federal courts in Florida and Nevada, these cases have been consistent, unanimous and unequivocal. No court has ever ruled to the contrary.

These decisions, spanning across nine states over a period of almost twenty years, are based at their core on the immutable principle that freedom to speak about elections, government and politics is at the heart of the First Amendment. In the landmark case of *Mills v. Alabama*, 384 U.S. 214 (1966), the 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.

*Id.* at 218-19. Since its decision in *Mills*, the Supreme Court has repeatedly reaffirmed that speech concerning political affairs and election matters is entitled to the fullest constitutional protection even when measured against a state's concededly important interest in ensuring fair elections. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *See also Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (recognizing that states have "a legitimate interest" in electoral integrity but that "when a State seeks to uphold that interest by restricting speech, the limitations on state au-

thority imposed by the First Amendment are manifestly implicated”).

In the seminal exit polling case, *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), the Ninth Circuit Court of Appeals struck down Washington’s ban on exit polling, declaring in no uncertain terms that “exit polling constitutes speech protected by the First Amendment.” *Id.* at 384. The Secretary of State in *Daily Herald*, similar to the Secretary here, urged that Washington’s ban on exit polling was justified as a means for protecting the peace, order and decorum of the polling place. Although the Ninth Circuit recognized that Washington had a legitimate interest in promoting decorum at the polls and preserving the integrity of the electoral process, the Court found that the statute at issue was not narrowly tailored to further those goals because it prohibited *all* voter polling, including non-disruptive polling. *Id.* at 385. The court also found that the statute was not the least restrictive means of advancing Washington State’s interest in preserving the sanctity of the polls because it was duplicative of other statutory provisions which already prohibited disruptive conduct at the polls, and because there existed numerous less restrictive means of advancing the State’s interest. *Id.* As the district court found, the same is true here. Opinion p. 38.

Since the decision in *Daily Herald* federal courts in Florida, Georgia, Kentucky, Montana, Minnesota, Nevada and Wyoming (as well as the court below) have considered challenges to various statutes that either explicitly banned, or had been interpreted to ban, exit polling within various distances of polling places. Each and every time, these courts have agreed with the decision in *Daily Herald*. In Minnesota, for example, the United States District Court for the District of Minnesota enjoined election officials from enforcing a statute that would have prohibited anyone “either inside a polling place or within 100 feet of the entrance to it [from asking] a voter how [he or she] intends to vote or has voted on any office or

question on the ballot.’” *CBS Inc. v. Growe*, No. 4-88-887, 15 Media L. Rep. (BNA) 2275, 2276 (D. Minn. Oct. 31, 1988) (annexed hereto) (quoting Minn. Stat. § 204C.06(l)). The court concluded that the statute was not narrowly tailored to serve the legitimate state interest in maintaining order at the polls and preserving the integrity of the electoral process.

Similarly, the United States District Court for the Middle District of Georgia permanently enjoined election officials in that state from prohibiting exit polling activities more than 25 feet from polling places. *National Broadcasting Co. v. Cleland*, 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 Co. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988). Likewise, the United States District Court for the Western District of Kentucky enjoined election officials, on First Amendment grounds, from enforcing a Kentucky statute insofar as it restricted exit polling. *Journal Broadcasting, Inc. v. Logsdon*, No. C 88-0147-L(A), 1988 U.S. Dist. LEXIS 16864 (W.D. Ky. Oct. 21, 1988) (annexed hereto). 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 Co. v. Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988) (annexed hereto).

Last October, the United States District Court for the Southern District of Florida enjoined Florida election officials from enforcing a statute that prohibited the “solicitation of opinion from all voters” within 100 feet of Florida polling places. *CBS Broadcasting, Inc. v. Cobb*, No. 06-22463-CIV, 2006 WL 3913757, at \*3 (S.D. Fla. Oct. 24, 2006) (annexed hereto). One week later, the United States District Court for the District of Nevada similarly enjoined the Secretary of State

there from prohibiting exit polling activities within 100 feet of Nevada polling places on election day. *American Broadcasting Cos. Inc. v. Heller*, No. 2:06-CV-01268 (D. Nev. Nov. 1, 2006) (annexed hereto).

In the course of striking down or enjoining the enforcement of the various state statutes at issue, these courts have emphasized many of the same points emphasized by the Ninth Circuit in *Daily Herald*: that exit polls provide invaluable information to the public, *see, e.g., Cleland*, 697 F. Supp. at 1209; *Grove*, 15 Media L. Rep. at 2278; that exit polls do not disrupt activities at the polls; *see, e.g., CBS Inc. v. Smith*, 681 F. Supp. 794, 804 (S.D. Fla. 1988); and that the distance restrictions at issue so burdened the press' ability to gather information as to render the restrictions unconstitutional, *see, e.g., Smith*, 681 F. Supp. at 801; *Cleland*, 697 F. Supp. at 1209-1210; *Journal Broadcasting*, 1988 U.S. Dist. LEXIS 16864, at \*2; *Karpan*, slip op. at 7; *Cobb*, 2006 WL 3913757, at \*6; *Heller*, slip op. at 17, 21.

The Secretary's only answer to this unbroken and unambiguous line of authority was to urge to the district court that this long line of cases was somehow superseded by the Supreme Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992) and that these numerous rulings could not be reconciled with this Court's decision in *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004). The Secretary has wisely abandoned those arguments on appeal. As the district court found, the Supreme Court's decision in *Burson* and this Court's decision in *United Food* doom rather than advance the Secretary's cause.

The plurality in *Burson* held that states may restrict *campaign activities* within 100 feet of polling places. 504 U.S. 191 (1992). The regulation at issue in that case did not restrict exit polling. The same is true of *United Food*, in which

this Court considered whether Ohio could regulate the solicitation of signatures, an activity it characterized as “electioneering activity,” at polling places. As the district court found, unlike the activity in *Burson* and *United Food*, “exit polling cannot reasonably be construed as a form of electioneering under any definition of that term.” Opinion p. 33.<sup>7</sup> Moreover, while the Supreme Court recognized a “wide spread and time tested consensus” that electioneering leads to voter intimidation and election fraud, *Burson*, 504 U.S. at 206, there is no such evidence with respect to exit polling. *Id.*

In fact, in a critical passage the *Burson* plurality went out of its way to observe that its decision did *not* apply to exit polling. *Id.* at 207. (“[T]here is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud . . . [but] simply no evidence that political candidates have used other forms of solicitation or *exit polling* to commit such electoral abuses.”) (emphasis added). The plurality further observed that “allow-

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<sup>7</sup> Attorneys General across the country have also consistently concluded that exit polling activities do not constitute electioneering. See, e.g., Louisiana Op. Att’y Gen. 05-0101, 2005 WL 3556205, at \*4 (Nov. 14, 2005) (“Exit polls conducted by the media are permissible within 600 feet of the polling place . . .”); Arkansas Op. Att’y Gen. 2004-268, 2004 WL 2270856, at \*2 (Oct. 5, 2004), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) (“My predecessor concluded and I agree, that this subsection [banning ‘electioneering’ within 100 feet of polling places] has no applicability to exit polling activities”); Arkansas Op. Att’y Gen. 99-330, 2000 Ark. AG LEXIS 2, at \*4-\*5 (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 (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”).

ing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors.” *Id.* Citing that passage, the district court properly concluded that “[t]he presence of the press at polling places would likely serve as a *deterrent* to fraud and intimidation.” Opinion p. 34 (emphasis added).

Moreover, as this Court has recently explained, *Burson* provides no authority for states to restrict political speech, even in electioneering cases, where the asserted state interest does not rise to the level of the prevention of voter intimidation and corruption:

*Burson* permits states to create buffer zones around polling places for two purposes only: the prevention of voter intimidation and the prevention of corruption. [The distance restriction] was not selected for these permissible purposes, but was intended to prevent voters from being bothered by constitutionally protected speech. This *Burson* does not permit.

*Anderson v. Spear*, 356 F.3d 651, 661-62 (6th Cir.), *cert. denied*, 543 U.S. 956 (2004).

In *Anderson*, this Court found that an asserted interest in reducing congestion and annoyance of voters was insufficient to support a 500-foot prohibition on *electioneering* activity outside polling places. *Id.* at 663-666. These are just the types of interests on which the Secretary relied in seeking to justify application of the Loitering Statutes to exit polling:

If pollsters in Ohio are allowed to stand within the 100-foot zone . . . they will potentially cause problems with crowding near the doors, which will affect voters coming in and going out of the polls. It will add to the general stress and confusion of an election that promises to bring more people to the polls than at any time in history. . . . Because of the turnout, there is a potential for long lines, including potentially lines that snake out of the polling place and into the 100-foot zone.

Def. TRO Mem. p. 6; J.A. \_\_. The interests asserted by Defendant, like the interests considered in *Anderson*, are a “far cry from the prevention of intimidation and cor-

ruption” that justified the restrictions on electioneering at issue in *Burson*. 356 F.3d at 660.

In *Beacon Journal*, this Court rejected the Secretary’s attempts to ban media from the 100 foot zone on the same ground, finding that “fear of turmoil that could be created by hordes of reporters and photographers is purely hypothetical and cannot, therefore, support Defendant’s proposed restriction of the First Amendment’s guarantee that state conduct shall not abridge freedom . . . of the press.” 389 F.3d at 685 (citation and internal quotation marks omitted). The Secretary offers no basis upon which the Court might depart from that holding here.

The other interest advanced by Secretary Blackwell as a justification for criminalizing exit polling activities within 100 feet of Ohio’s polling places was the right of Ohio voters to be left alone. *See* (R. 55-3, Parziale Aff’t, Ex 2; J.A. \_). This interest too is a wholly insufficient one to justify a ban on constitutionally protected political speech as this Court explicitly ruled in *Anderson*. Responding to the state’s suggestion there that “many voters simply do not want to be approached on their way to the voting booth,” this Court held:

Again, this interest is a far cry from the prevention of corruption and intimidation — the only justifications the Supreme Court recognized in *Burson* to meet the requirements of exacting scrutiny. The Supreme Court has long recognized that “[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the [First Amendment] rights so vital to the maintenance of democratic institutions.

*Anderson*, 356 F.3d at 660 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939))

Based on these cases, the district court properly granted Appellees’ motion for summary judgment. In reaching its decision, the court applied a strict scrutiny standard, *see* Opinion p. 35, requiring the Secretary to show that his attempt to restrict Appellees’ exit polling activities was “narrowly drawn . . . to

serve a compelling state interest.” *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). The Secretary now contends that the district court should have instead applied a less rigorous test, because the Loitering Statutes are “content neutral.” Opening Br. pp. 35-37. That argument is nothing more than an attempt to rewrite history. While the Loitering Statutes are in fact content-neutral, this case is, and always has been, about the Secretary’s efforts to use those statutes to ban exit polling, a *specific* form of First Amendment protected speech. The district court’s application of strict scrutiny was plainly appropriate.

To avoid any doubt, however, the district court also applied the intermediate scrutiny test urged by the Secretary. Even under that less demanding standard, the court found that Appellees’ exit polling activities could not be prohibited consistent with the First Amendment. Opinion p. 36. In so doing, the court found “*no evidence* that [exit polls] caused disruption” at the polls, *id.* at 38 (emphasis added), and further concluded that a more effective and less intrusive alternative to the Secretary’s attempted restrictions already existed under Ohio law. *See* Opinion p. 38 (“[T]here are statutory mechanisms already in place . . . which can be employed if a pollster’s activities impede a voter’s ability to exercise the right to vote”). In short, the district court correctly held that prohibiting all exit polling activities within the 100-foot zone cannot survive constitutional scrutiny of any kind.

## II. THERE IS NO BASIS FOR REVERSING THE DISTRICT COURT’S DECISION

The Secretary does not attack the merits of the district court’s ruling on Appellees’ First Amendment claims in his brief to this Court. Instead the Secretary offers a series of arguments as to why the district court should have declined to address the merits of Appellees’ claims at all. As demonstrated below, none of

these arguments provides a basis for reversal.

A. Appellees' Claims Were Not Moot

The Secretary's first argument in support of reversal is that Appellees had no standing to pursue their challenge to the Oral Directive (Count I) once the Secretary had complied with the TRO issued on Election Day 2004. While it is true that the Secretary complied with the TRO, that fact did not even begin to moot the threat embodied in the Oral Directive. Without an order of permanent relief, there could be no assurance whatsoever that the unlawful policy embraced by the Secretary at the start of this litigation would not be enforced against Appellees' protected activities thereafter.

While the Oral Directive was in fact superseded by the November 2004 Directive (and later by Directive No. 2006-75), that happened only as a result of the district court's TRO. What assurances could there be, beyond permanent relief, that the Secretary would not simply issue another directive at the conclusion of this case? Certainly Secretary Blackwell provided none. Instead, he "vigorously defended the prohibition on exit polls within the 100 foot zone" (Opinion p. 7) and, in so doing, made clear to Appellees, to the public, and to the district court that he wanted to, and thought he could, prohibit exit polling under the Loitering Statutes. As the district court observed:

In the TRO proceedings and his press release, defendant openly declared his intention to exclude exit polling within 100 feet of polling places. But for the TRO the Court issued on November 1, 2004, plaintiffs would have been excluded from conducting exit polls within 100 feet of the polling places. The Secretary does not unequivocally represent that he will not again seek to ban exit polls within the 100 foot zone at some point in the future. Indeed, in the memoranda present before the Court, defendant continues to advance the position that he may lawfully ban not only exit polls, but all First Amendment activity, within 100 feet of polling places.

Opinion p. 15. As a result, Appellees had, and continued to have, genuine reasons

to fear that the Oral Directive could be reissued at a moment's notice, or that the Secretary could issue a similar directive interpreting the Loitering Statutes to prohibit exit polling.<sup>8</sup>

It is true, as the Secretary points out, that the district court's TRO expired on November 11, 2004, and the Secretary could have "re-issued" the Oral Directive "had he desired." Opening Br. p. 25 n.9. But that fact hardly provided Appellees with any comfort that their exit polling activities would remain protected. Any decision by the Secretary during the pendency of this litigation to "re-issue" a directive that had been struck down would almost certainly have been met with the scorn of the district court, not to mention another motion by Appellees for preliminary relief pending permanent resolution of this dispute. The Secretary's decision merely to preserve the status quo following the district court's TRO was no great concession and did not by any means eliminate the ongoing threat to Appellees' First Amendment rights.

Indeed, even after the district court entered its permanent injunction in this case, the Secretary still gave Appellees reason to fear a return to the unconstitutional restrictions on their exit polling activities. On November 5, 2006 — ten days after the court's decision and two days before the last election — a spokesman for the Secretary boasted to a Cincinnati Enquirer reporter, in complete disregard of the district court's judgment, that:

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<sup>8</sup> As the district court observed, the Secretary has a history of issuing "eleventh-hour directives affecting plaintiffs' First Amendment rights." *See* Opinion p. 15 (referring to the November 2004 Directive, which was issued just prior to the 2004 Election; and the April 2005 Directive, which was issued while Appellees' motion for summary judgment was still pending). This "proclivity" to issue ever-changing directives further demonstrates the fleeting nature of any current acquiescence by the Secretary and offers little comfort against future repetitions of the Secretary's unconstitutional conduct.

[T]here is legal precedent preventing exit polling within 100 feet of a polling place. State law forbids loitering and interfering with voters.”

Jon Craig, THE CINCINNATI ENQUIRER, November 5, 2006, at A10.<sup>9</sup>

In any event, the law is clear that public officials may not escape adverse rulings by repudiating earlier conduct and promising it will never happen again. In such situations the typical standard — the one the Secretary would have this Court adopt — simply does not apply. Instead, as the Supreme Court and this Court have clearly articulated:

[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot . . . [unless] (1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

*County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citations and internal quotation marks omitted) (omission in original); *Anderson*, 356 F.3d at 656.

Applying this standard, courts have held that the “burden of demonstrating mootness [based on voluntary cessation of unlawful conduct] is a heavy one,” to be borne by the party asserting it. *Id.* at 631 (citation and internal quotation marks omitted). If the rule were any different, officials would be free to “return to [their] old ways” after the threat of a lawsuit had passed. In cases like this where there is “some cognizable danger of recurrent violation,” the mootness standard is simply not met. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*,

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<sup>9</sup> This Court may take judicial notice of this newspaper article. *Logan v. Denny's, Inc.*, 259 F.3d 558, 578 n.9 (6<sup>th</sup> Cir. 2001) (“it was proper for an appellate court to take judicial notice of newspaper articles even when the articles were not before the district court”) (citing *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000)).

*Inc.*, 528 U.S. 167, 189 (2000) (“[The standard for] determining whether a case has been mooted by the defendant’s voluntary conduct is stringent . . . [requiring that] ‘subsequent events [make] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur’ . . . [and t]he ‘heavy burden of persua[ding]’ the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness.”) (emphasis added) (quoting *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)); *American Canoe Ass’n v. City of Louisa Water & Sewer Commission*, 389 F.3d 536, 543 (6th Cir. 2004).

This controlling case law, noticeably absent from the Secretary’s brief, plainly demonstrates that Appellees had standing to seek the permanent relief ultimately awarded by the district court.

#### B. Appellees’ Claims Were Ripe

The Secretary’s argument that Appellees’ claims under Count III (challenging the application of the Loitering Statutes to exit polling activities) were not ripe because Appellees faced no “credible threat” must fail for similar reasons. The law is clear that “[e]specially where First Amendment rights and freedoms are involved, courts do not require that a litigant actually undergo criminal prosecution in order to challenge an allegedly unconstitutional enactment.” *Henry v. City of Cincinnati*, No. C-1-03-509, 2005 WL 1198814, at \*4 (S.D. Ohio Apr. 28, 2005) (citations omitted) (annexed hereto). Indeed, for their claims to be ripe, Appellees were required to show either (i) an actual injury, *or* (ii) a “real and immediate, not conjectural or hypothetical” threat of future injury. *Id.* at \*4 (quoting *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995)). *See also Deja Vu, Inc. v. Metropolitan Government*, 274 F.3d 377, 399 (6th Cir. 2001) (“A mere threat to First Amendment interests is a le-

gally cognizable injury.”), *cert. denied*, 535 U.S. 1073 (2002).

The threat of injury in this case has been established beyond dispute. As noted, the Secretary openly admitted to the district court in November 2004 that he would not permit exit polling within 100 feet of Ohio’s polling places on Election Day in the absence of the Court’s intervention and urged that he had the unmitigated right to do so. The Secretary’s public threat of enforcement against Appellees could not have been more clear and unambiguous as demonstrated by the November 2004 press release embodying the Oral Directive:

*The media are demanding they can enter polling place zones across Ohio to conduct exit interviews. The news media will of course still be allowed to do any exit polling they desire beyond the 100-foot protection zone. As Secretary of State, I’ve been elected to defend the only “poll” that matters, and that is the vote of the people, not exit polls. Included in that right to vote is a right to privacy and allowing anyone inside the mandated 100-foot protection zone aside from voters and election officials would violate Ohioans’ right to vote in privacy - and I will not allow it.*

(R. 55-3, Parziale Aff’t, Ex. 1; J.A. \_) (emphasis added). Although the Secretary now claims that enforcement of the Loitering Statutes against Appellees’ exit polling activities presents a “distant and abstract legal issue,” that is plainly not the case. Accordingly, Appellees claims with respect to Count III were ripe.

C. The Record Does Not Lack Evidence  
To Support The District Court’s Decision

The Secretary also argues that the district court should be reversed with respect to Count I (but not Count III) because the record below does not reveal whether Appellees intended to conduct exit polls in public fora surrounding polling places. Opening Br. p. 33. As a threshold matter, the Secretary never urged that there was any evidentiary failure in opposing plaintiffs’ motion for summary judgment before the district court. As a result, the Secretary has waived the ability to assert that argument now. *See United States v. Ninety-Three (93) Firearms*, 330

F.3d 414, 424 (6th Cir. 2003) (observing that the Court “has repeatedly held that it ‘will not consider arguments raised for the first time on appeal’”) (citation omitted); *Niecko v. Emro Marketing Co.*, 973 F.2d 1296, 1299 (6th Cir. 1992) (“It is well settled law that this court will not consider an error or issue which could have been raised below but was not.”).<sup>10</sup>

In any event, there can be no serious dispute that the 100-foot zone surrounding Ohio’s polling places includes public fora. *See United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 747 (6th Cir. 2004) (considering application of Ohio Loitering Statutes to public sidewalk within 100 foot zone). *See also Daily Herald*, 838 F.2d at 384 (concluding that areas around polling places were “traditional public forums because they traditionally are open to the public for expressive purposes, including random interviews by reporters, and encompass streets and sidewalks”); *Cobb*, 2006 WL 3913757, at \*3 (observing that area surrounding Florida polling places included “quintessential public forums . . . ‘which by long tradition or by government fiat have been devoted to assembly and debate’”) (citation omitted). Furthermore, the Loitering Statutes and the Oral Directive itself apply equally in public and non-public fora alike, meaning that the stricter scrutiny required for regulating speech in public fora is appropriate. *See, e.g., Krantz v. City of Fort Smith*, 160 F.3d 1214, 1216, 1219 (8th Cir. 1998) (applying “the constitutional standard applicable to public forums because the ordi-

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<sup>10</sup> In his opposition to Appellees’ renewed motion for summary judgment below, the Secretary set forth all the various standards, then argued that the court should find that his actions were constitutional regardless of whether the fora at issue were public or non-public. Def. SJ Opp. pp. 42-43. The Secretary never argued below that there was some “lack of evidence” in the record that required the district court to assume that the relevant fora are all non-public for purposes of its constitutional analysis.

nances appeared to regulate both public and private forum speech”), *cert. denied*, 527 U.S. 1037 (1999)<sup>11</sup>; *Cohen v. California*, 403 U.S. 15, 19 (1971) (statute was unconstitutional because it was “applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the [specific place] where Cohen was arrested must fail in the absence of any [language limiting the statute’s application to certain locations].”). Thus, there is simply not support for the “reasonableness” test advanced by the Secretary. Opening Br. p. 35.<sup>12</sup>

But even if this Court were to accept the Secretary’s insupportable argument that a “reasonableness” test should be applied in this case, there is still no basis for reversing the district court’s decision. It is well settled that the State may not prohibit speech, even in a content-neutral manner and even in a nonpublic forum, if the regulation does not further a cognizable government interest. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 357 (6th Cir. 1998) (holding that “the state must prove . . . that its rules and its application of the rules in fact serve a *legitimate interest of the state*” and that it is not sufficient for a State merely to “defer[ ] to the unproven subjective determinations of state officials” when regulating speech). Here, there is no evidence of any reasonable state interest served by

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<sup>11</sup> While this Court has questioned whether *Krantz* involved any public fora, the Court has not taken issue with the conclusion that a blanket restriction applicable to both types of fora must survive the higher scrutiny applicable to public fora. *See Jobe v. City of Catlettsburg*, 409 F.3d 261, 273-74 (6th Cir. 2005).

<sup>12</sup> Tellingly, the Secretary does not, because he cannot, attempt to demonstrate that his efforts to restrict exit polling can withstand either a strict scrutiny or intermediate scrutiny test.

enforcing the Loitering Statutes against exit polling activity.<sup>13</sup>

As the district court found, “there is *no evidence* that exit polls caused disruption, overcrowding, or interfered with the voting process in any way.” Opinion p. 38 (emphasis added) *See also Daily Herald*, 838 F.2d at 385 n.8 (“There isn’t one iota of testimony about a single voter that was upset, or intimidated, or threatened” by exit polling.) (citation omitted); *Smith*, 681 F. Supp. at 803 (“[T]here has been no showing that exit polls . . . have disrupted any polling place in this state.”); *Heller*, slip op. at 21 (“[T]he Secretary has not produced any evidence that a voter has decided not to vote because of exit polls or that exit poll reporters have been the cause of harassment or disruption in the past.”); *Cobb*, 2006 WL 3913757, at \*2 (finding no demonstrated harm and observing that “[i]n a review of 5,090 complaints submitted to the Election Incident Reporting System by Florida voters, not one of those citizen complaints referenced exit-polling behavior”) (internal quotation marks and alteration omitted). Simply put, the Secretary’s efforts to restrict exit polling cannot survive any standard of constitutional scrutiny.

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<sup>13</sup> In fact, in the course of attempting to show that Appellees’ have suffered no “injury in fact,” the Secretary admits that Appellees’ exit polling activities “are not proscribed by the Loitering Statutes.” Opening Br. p. 40. In that case, how can a “reasonable” interest ever be furthered by enforcing those statutes against exit polling activities? Of course the argument is also a concession that the Secretary’s decision to prohibit exit polling activities was content-based. If the Loitering Statutes do not prohibit exit polling activities — as Appellant now claims and as Secretary Blackwell announced in his first Directive on the subject, *see* February 2004 Advisory (R. 47-14, Mitofsky Aff’t ¶¶ 11-12; J.A. ) — his instruction to election officials to ban exit polling activities can only be said to have been directed to one constitutionally protected activity: the conduct of exit polls.

D. The Harm To Appellees Was Directly  
Attributable To The Secretary

The Secretary cannot seriously maintain that the harm to Appellees threatened by the Loitering Statutes is not directly attributable to his conduct. It is his conduct, and his alone, that brought the parties to court in the first place. The Secretary next makes the incredible assertion that Appellees lacked standing because there “is no causal connection between the claimed injury of the Appellees and the directives and guidance issued by the Secretary of State” because the “Secretary of State possesses no enforcement power or authority relative to the Loitering Statutes.” Opening Br. p. 40. This convenient assertion not only lacks any foundation in fact, but it also conflicts irreconcilably with the Secretary own prior statements in this case. Indeed, when he opposed entry of the district court’s TRO, Secretary Blackwell stated in no uncertain terms that:

The Secretary of State is authorized by law to issue instructions by directives as to the proper methods of conducting elections. It is the Secretary’s ultimate responsibility to ensure that a fair and organized election is held. *The county Board of Elections are required by law to follow those directives issued by the Secretary of State.* In his pronouncement the Secretary of State was well within his statutory authority to take those necessary steps to ensure the integrity of the election process. Denying him the right to do so will cause the Secretary of State to suffer substantial harm.

Def. TRO Mem. pp. 8-9, J.A. \_ (emphasis added).

The statutory conferral of authority, moreover, speaks for itself. The Secretary of State is authorized to:

- “Appoint all members of boards of elections”;
- “Issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections”;
- “Prepare rules and instructions for the conduct of elections”;
- “Compel the observance by election officers . . . of the requirements of the election laws”;

- “[I]nvestigate the administration of election laws . . . and report violations . . . for prosecution.”

Ohio Rev. Code Ann. § 3501.05. Indeed, the board of elections, whose members are appointed by the Secretary, are *required* to:

- “Appoint and remove its director, deputy director, and employees and all registrars, judges, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- “Make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters;
- “Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney.”

Ohio Rev. Code Ann. § 3501.11. The Secretary-appointed board of elections also appoints the election officials for each precinct. Ohio Rev. Code Ann. § 3501.22.

Moreover, the Secretary appoints the board members, who appoint the presiding judges and election officials. Police officers, as well, are required to obey the election officers. Ohio Rev. Code Ann § 3599.31 (“No officer of the law shall fail to obey forthwith an order of the [presiding election officers].”)<sup>14</sup> Thus, the assertion that the Secretary has no “appointment authority over the election judges or local police officers” (Opening Br. p. 26) is completely disingenuous.

The courts in this Circuit have repeatedly made clear that the Secretary of State of Ohio has authority to enforce the election laws and is the proper party

<sup>14</sup> The Secretary’s Web site also concedes that the Secretary “oversees the election process” in Ohio, “supervises the administration of [Ohio’s] election laws,” “appoints the members of the boards of elections in each of Ohio’s 88 counties” and “trains election officials.” See Ohio Secretary of State Homepage, About Our Office, <http://www.sos.state.oh.us/About.aspx?Section=100>. (last visited Feb. 12, 2007),

against whom suit should be brought when challenging the enforcement of those laws or the propriety of the Secretary's directives. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815 (N.D. Ohio 2004) (ruling in favor of Appellees who challenged an election directive issued by the Secretary Blackwell); *see also Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 579 (6th Cir. 2004); *Beacon Journal Publishing Co. v. Blackwell*, 389 F.3d at 685; *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 538 (S.D. Ohio 2004). This is so notwithstanding the Secretary's argument that local officials may have immediate control over enforcement of his directives. *See Futernick v. Sumpter Township*, 78 F.3d 1051, 1055 n.5 (6th Cir.), *cert. denied* 519 U.S. 928 (1996), *overruled on other grounds*.

In this context, the Secretary's reliance on cases such as *First Westco Corp. v. School District*, 6 F.3d 108 (3d Cir. 1993), in which the officers that were sued lacked authority to enforce the statute in question and had made no indication that they would compel enforcement by others, is plainly inapposite. Here, the Secretary's authority and ability to block Appellees from conducting exit polls is beyond dispute, as is the fact that the Secretary attempted to do so in the past, restrained only by an Order of the district court.

E. The Secretary of State Was Not Immune From Suit

Finally, the Secretary's attempt to seek shelter under the Eleventh Amendment also must fail. As the Supreme Court and this Court have made clear, immunity only applies to actions seeking damages or other retrospective relief; "official-capacity actions for prospective relief are not treated as actions against the State." *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 73-74 n.10 (1989)); *Rossborough*

*Mfg. Co. v. Trimble*, 301 F.3d 482, 489 (6th Cir. 2002) (the Eleventh Amendment does not bar prospective, injunctive or declaratory, relief); *see also Nelson v. Miller*, 170 F.3d 641, 646 n.5 (6th Cir. 1999) (“state officers who are violating a federal law may *always* be sued for purely injunctive relief”)(emphasis in original) (citing *Will*, 491 U.S. 58 (1989)). *See also Verizon Inc. v. Public Service Commission*, 535 U.S. 635, 645-46 (2002); *Futernick*, 78 F.3d at 1055.

Here Appellees challenged the constitutionality of the Secretary of State’s actions and sought prospective declaratory and injunctive relief only. As such, Eleventh Amendment immunity is simply not applicable.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's grant of summary judgment in favor of Appellees.

Dated: February 12, 2007

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 12,563.

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Susan Buckley

## **CERTIFICATE OF FILING AND SERVICE**

The undersigned hereby certifies that a signed original of the foregoing Proof Brief of Appellees is being filed with the Clerk's Office by delivering the signed original to Federal Express, this 12th day of February, 2007, with instructions for overnight delivery to:

Office of the Clerk  
United States Court of Appeals for the Sixth Circuit  
540 Potter Stewart Courthouse  
100 E. Fifth Street  
Cincinnati, OH 45202-3988

The undersigned further certifies that a true and correct copy of the foregoing Proof Brief of Appellees is being served on counsel of record for the Appellants by delivering a true and correct copy to Federal Express, this 12th day of February, 2007, with instructions for overnight delivery to:

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## DESIGNATION OF JOINT APPENDIX CONTENTS

Plaintiffs-Appellees designate the following documents for inclusion in the Joint Appendix, in addition to those already so designated by Defendant-Appellant.

<i>Date Filed</i>	<i>R. No.</i>	<i>Description of Entry</i>
11/01/2004	R. 6	Defendant Blackwell's Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order
12/13/2004	R. 14	Transcript of Proceedings, November 1, 2004
12/29/2004	R. 18	Rule 26(f) Report of the Parties
11/07/2005	R. 47	Notice of Refiling of Affidavits in Support of Renewed Motion for Summary Judgment, attaching affidavits of John Moody, Kathleen Frankovic, Laurie Friedman, Mark Halperin, Michael Mokrzycki, Robert Y. Shapiro, Thomas Hannon, Warren Mitofsky, and William O. Wheatley.
1/03/2006	R. 55-2	Affidavit of S. Penny Windle dated 10/31/2004
1/03/2006	R. 55-3	Affidavit of Eva Parziale dated 12/20/2005
1/03/2006	R. 55-6	Affidavit of S. Penny Windle dated 12/30/2005

## UNPUBLISHED OPINIONS

*American Broadcasting Cos. v. Heller*, No. 2:06-CV-01268 (D. Nev. Nov. 1, 2006)

*CBS Broadcasting, Inc. v. Cobb*, No. 06-22463-CIV, 2006 WL 3913757 (S.D. Fla. Oct. 24, 2006)

*CBS Inc. v. Growe*, No. 4-88-887, 15 Media L. Rep. [BNA] 2275 (D. Minn. Oct. 31, 1988)

*Henry v. City of Cincinnati*, No. C-1-03-509, 2005 WL 1198814 (S.D. Ohio Apr. 28, 2005)

*Journal Broadcasting, Inc. v. Logsdon*, No. C88-0147-L(A), 1988 U.S. Dist. LEXIS 16864 (W.D. Ky. Oct. 21, 1988)

*National Broadcasting Co. v. Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988)