

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

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**CASE NOS. 06-4410; 06-4484**

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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/Cross-Appellants,

v.

JENNIFER BRUNNER,  
OHIO SECRETARY OF STATE

Defendant-Appellant/Cross-Appellee.

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**FIRST BRIEF OF APPELLANT/CROSS-APPELLEE  
JENNIFER BRUNNER, OHIO SECRETARY OF STATE**

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Appellant requests oral argument. This case has far-reaching implications concerning federal elections in Ohio and the sovereignty of the State to conduct its elections free from ongoing federal judicial oversight. The District Court below assumed jurisdiction where none existed and attempted to extend that putative jurisdiction over the State of Ohio by declaratory and injunctive relief against the Secretary. Appellant submits that under the present circumstances, which do not demand expediency, oral argument would be of considerable assistance to the Court in its evaluation of this appeal.

## **JURISDICTIONAL STATEMENT**

Appellant maintains in this appeal that the United States District Court for the Southern District of Ohio (“District Court”) was without subject matter jurisdiction to adjudicate this case. Nonetheless, the District Court purported to exercise jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction), as this action was commenced pursuant to 42 U.S.C. § 1983. On September 26, 2006, the District Court entered an Opinion and Order: (i) granting summary judgment to Plaintiffs as to Counts I and III of Plaintiffs’ Second Amended Complaint, and denying it with respect to Count II, and (ii) granting summary judgment to Defendant as to Count II of the Second Amended Complaint and denying it with respect to Counts I and III. (R. 62, Order; J.A. 594.) The Judgment Entry was filed on September 27, 2006. (R. 64, Judgment Entry; J.A. 643.) On October 25, 2006, Defendant-Appellant J. Kenneth Blackwell, the Ohio Secretary of State (the “Secretary”) timely appealed.<sup>1</sup> This Court has jurisdiction over the appeal of the District Court’s decision pursuant to 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES PRESENTED**

The issues before this Court are (i) whether the District Court had subject matter jurisdiction over Plaintiffs’ claims, and (ii) whether the District Court

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<sup>1</sup> On January 8, 2007, Jennifer Brunner succeeded J. Kenneth Blackwell as the Ohio Secretary of State. Accordingly and pursuant to Fed. R. App. P. 43(c)(2), Secretary Brunner was automatically substituted as Defendant-Appellant/Cross-Appellee. *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 541 n.1 (6th Cir. 2004).

improperly granted summary judgment in favor of the Plaintiffs on their claims relating to exit polling in Ohio.

### **STATEMENT OF THE CASE**

On November 1, 2004, Plaintiffs commenced an action for injunctive and declaratory relief against the Ohio Secretary of State, challenging the enforcement of what Plaintiffs refer to as the Secretary's "Oral Directive," which as alleged by Plaintiffs was an instruction made by an unknown individual within the Office of the Secretary of State during a telephone conference call with unidentified local election officials on October 28, 2004. This so-called "Oral Directive" allegedly instructed local election officials not to permit "exit polling" within 100 feet of polling places during the 2004 election. (R. 44, Second Amended Complaint, at ¶ 22; J.A. 143.)

In the Complaint, Plaintiffs sought complete, unlimited and unrestrained access to voters within 100 feet of polling places during that election in order to conduct exit polling. To secure that relief, they asked for a declaration that the "Oral Directive" violated their First Amendment rights, and a preliminary and permanent injunction enjoining the Secretary from enforcing the "Oral Directive" against them. Plaintiffs also filed a Motion for a Temporary Restraining Order, which the District Court granted the same day the Complaint was filed. (R. 4,

Motion for Temporary Restraining Order (“TRO”); J.A. 26; R. 9, Entry Granting Motion for TRO.; J.A. 65.)

Shortly after the 2004 general election, Plaintiffs filed a First Amended Complaint, which added a claim for a declaratory judgment that Ohio’s “Loitering Statutes” (comprised of sections 3501.30, 3501.35 and 3599.24 of the Ohio Revised Code) were unconstitutional to the extent the statutes could, at some indefinite point in the future, be interpreted to prohibit exit polling within 100 feet of polling places. (R. 11, Amended Complaint). Nearly a year later, on October 18, 2005, Plaintiffs filed a Second Amended Complaint, adding a claim for injunctive and declaratory relief with respect to a directive issued by the Defendant on April 28, 2005, in advance of the May primary election. (R. 44; Second Amended Complaint; J.A. 137.)

Ultimately, Plaintiffs asserted three claims (set forth in Counts I, II and III of their Second Amended Complaint) against the Defendant, as follows: (I) the “Oral Directive” restricted Plaintiffs’ speech and ability to gather information in violation of the First Amendment; (II) Directive No. 2005-09 restricted Plaintiffs’ speech and ability to gather information in violation of the First Amendment, and is unconstitutionally vague in violation of their Fourteenth Amendment right to due process; and (III) to the extent they could be interpreted to prohibit exit polls within 100 feet of polling places, Ohio’s Loitering Statutes impermissibly restrict

Plaintiffs' right to freedom of speech in violation of the First Amendment. (R. 44, Second Amended Complaint, ¶ 44; J.A. 147.)

Eventually, the parties filed cross-motions for summary judgment on Plaintiffs' three claims. On September 26, 2006, the District Court issued its ruling, granting summary judgment to Plaintiffs on Count I of their Second Amended Complaint, concluding that the "Oral Directive" violated the First Amendment, and on Count III, concluding that the Loitering Statutes could not be interpreted to prohibit exit polling in the "Designated Area" (*i.e.*, within 100 feet of the polling place) without violating the First Amendment. On Count II, the District Court granted summary judgment to Defendant, rejecting Plaintiffs' assertion that the 2005 Directive violated Plaintiffs' First or Fourteenth Amendment rights. (R. 62; Opinion and Order; J.A. 597.)

On September 27, 2006, the final Judgment Entry was filed. (R. 64, Judgment Entry; J.A. 643.)<sup>2</sup> On October 25, 2006, Defendant filed a Notice of Appeal and on November 8, 2006, Plaintiffs filed a Notice of Cross-Appeal. (R. 67, Notice of Appeal; J.A. 644; R. 75, Notice of Cross-Appeal; J.A.673.)<sup>3</sup>

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<sup>2</sup> Oddly, the final Judgment Entry indicated that the case had been dismissed.

<sup>3</sup> In addition to challenging the District Court's Opinion and Order, the cross-appeal also challenges the District Court's Order of October 26, 2006, denying Plaintiffs' Emergency Motion to Enforce Judgment and Decree. (R. 72, Order Denying Motion to Enforce; J.A. 671.)

## STATEMENT OF FACTS

### A. The Loitering Statutes

Pursuant to section 3501.30 of the Ohio Revised Code, no person “other than election officials, witnesses, challengers, police officers, and electors waiting to mark, marking, or casting their ballots” shall “loiter, congregate, or engage in any kind of election campaigning” in the “Designated Area.”<sup>4</sup> Likewise, section 3501.35 of the Ohio Revised Code provides, in applicable part, that

[d]uring an election and the counting of the ballots, no person shall loiter or congregate within the [Designated Area, or] in any manner hinder or delay an elector in reaching or leaving the place fixed for casting his ballot. ...

And, as for enforcement of these provisions, O.R.C. 3501.35 expressly directs that “[t]he judges of election and the police officer shall strictly enforce the observance” of the prohibition against loitering, congregating, or hindering or delaying an elector within the Designate Area.<sup>5</sup> Finally, O.R.C. 3599.24 provides that

[n]o person shall ... [l]oiter in or about a registration or polling place during registration or the casting and counting of ballots so as to hinder, delay, or interfere with the conduct of the registration or election.

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<sup>4</sup> The “Designated Area” is the area within the two or more small flags of the United States which are placed at a distance of one hundred feet from the polling place on the thoroughfares or walkways leading to the polling place. See O.R.C. § 3501.30(A)(4).

<sup>5</sup> Pursuant to O.R.C. § 3501.22, each local board of elections is responsible for the appointment of the precinct election judges.

Whoever violates either of the first two statutes is guilty of a misdemeanor of the first degree, and whoever violates the latter statute is guilty of a minor misdemeanor.<sup>6</sup>

Furthermore, section 3501.33 of the Ohio Revised Code imposes direct responsibility on the local precinct judges to enforce (with the aid of local police officials) all provisions of the election statutes in and around the polling places:

All judges of election shall enforce peace and good order in and about the place of registration or election. They shall especially keep the place of access of the electors to the polling place open and unobstructed and prevent and stop any improper practices or attempts tending to obstruct, intimidate, or interfere with any elector in registering or voting. ... In the discharge of these duties they may call upon the sheriff, police, or other peace officers to aid them in enforcing the law. They may order the arrest of any person violating such title, but such arrest shall not prevent such person from registering or voting if he is entitled to do so. The sheriff, all constables, police officers, and other officers of the peace shall immediately obey and aid in the enforcement of any lawful order made by the precinct election officials in the enforcement of such title.

Although the Secretary is the chief elections official for the State of Ohio, and as such is authorized pursuant to section 3501.05 to issue directives, advisories and instructions relating to elections matters under Title XXXV of the Ohio Revised Code, he has no direct enforcement authority over the Loitering Statutes. Only county prosecutors (and authorized municipal officers) have authority to

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<sup>6</sup> No state court in a reported decision has interpreted or otherwise construed any of the Loitering Statutes.

prosecute alleged violations of state criminal statutes, including the Loitering Statutes, and the enforcement at the precinct level is expressly given to the precinct election judges and local police officers.

**B. The Secretary’s Advisory and Directives Regarding Polling Place Access and Exit Polling.**

Of particular relevance in this lawsuit are an Advisory and four Directives issued by the Secretary on the topic of polling place access. Each is briefly described below.

**1. Advisory No. 2004-02**

On February 24, 2004, prior to the primary election in March of 2004, the Secretary issued to the county boards of elections Advisory No. 2004-02 (the “Advisory”). (R. 47, Affidavit of Warren Mitofsky (“Mitofsky Aff.”), Att. 13, Ex. D; J.A. 459.) The Advisory provided that:

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.

(*Id.*) The Advisory also specifically addressed exit polling, stating:

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 [*i.e.*, he has loitered, congregated, engaged in election campaigning, etc.], appropriate action should be taken.

(*Id.*) Plaintiffs have not objected to the substantive contents of this Advisory and, indeed, have intimated that it accurately summarizes the Loitering Statutes.

## **2. Directive No. 2004-40**

Prior to the general election in November of 2004, the Secretary issued Directive No. 2004-40, dated October 20, 2004. (R. 52, Defendant's Response in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant's MSJ Response"), Att. 1, Declaration of Dana Walch ("Walch Dec."), Ex. A; J.A. 576.) This Directive contained language identical to the language in the Advisory, the only difference being that the Directive included no specific discussion, one way or the other, concerning exit polling. In effect, however, the pre-primary Advisory and Directive No. 2004-40 were identical: both correctly interpreted the Loitering Statutes (correctly not just according to the Secretary, but the Plaintiffs as well), advising that no person on election day is permitted, within the Designated Area, to "loiter," "congregate," "hinder or delay a voter," or "engage in election campaigning." (*Id.*)

### **3. The telephone conference calls with local election officials and the alleged “Oral Directive”**

At the heart of this litigation is what Plaintiffs refer to as the “Oral Directive.” As acknowledged by the District Court in its summary judgment opinion, the evidence as to both the timing and the content of this alleged “Oral Directive” is not in harmony.

#### **a. The conference calls**

With the approaching 2004 election, Dana Walch, Director of Legislative Affairs for the Secretary, conducted a series of telephone conference calls with local election officials. In one of these conference calls on October 22, 2004, in response to an earlier inquiry regarding exit polling, Mr. Walch referred the participants of the call to Directive No. 2004-40. (R. 52, Walch Dec. ¶¶ 4-8, Ex. A; J.A. 576.) A subsequent telephone conference call with local election officials occurred on October 28, 2004.<sup>7</sup> (*Id.*) During this second telephone conference call, while the general topic of access to polling places on election day arose, at no time during this call did Mr. Walch or anyone else on the call refer to exit polling. (*Id.*) Furthermore, Mr. Walch did not offer any instruction to the local election

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<sup>7</sup> What allegedly occurred during this telephone conference call was the basis for the Plaintiffs’ original Complaint, as well as Count I of the Second Amended Complaint. It was during this telephone conference call that Plaintiffs contend that the Secretary’s office allegedly issued the Oral Directive—a direction to the local election officials (presumptively, the staff of certain local boards of election) to prohibit exit polling within the Designated Area. (R. 44, Second Amended Complaint; J.A. 137).

officials as to what was or was not permissible conduct within the Designated Area, other than providing a general reference to the 2004 Directive. (*Id.*)

Plaintiffs submitted less than reliable (double hearsay) evidence that in the October 28, 2004, conference call, an (unidentified) employee of the Secretary of State directed (unidentified) county election officials on the call that “exit polling” was not to be permitted in the Designated Area. (R. 47, Mitofsky Aff.; J.A. 459.) Mr. Walch, as explained above, asserts that he did not.

**b. Mr. Walch’s testimony at the TRO hearing**

At the TRO hearing, Mr. Walch’s testimony was consistent with the testimony in his Declaration, submitted in support of Defendant’s motion for summary judgment. At the hearing, he testified that the Secretary had instructed the county boards of elections that no person, other than those specifically identified in the Loitering Statutes, was allowed to be in the Designated Area. He did not testify that that instruction was limited to news media personnel conducting exit polls. (R. 14, Transcript of TRO hearing; J.A. 74.)

**c. Other evidence related to issuance of “Oral Directive”**

The record also reflects that on October 29, 2004, one of Plaintiffs’ attorneys had a telephone conversation with a “representative” of the Secretary of State’s office, who confirmed that the Secretary had instructed county election officials that “exit polling” was not permitted within the Designated Area. (R. 55,

Plaintiffs' Response in Support of Motion for Summary Judgment ("Plaintiff's MSJ Response"), Att. 1, Affidavit of Penny Windle; J.A. 581.) And on November 1, 2004, Eva Parziale, Chief of Bureau for The Associated Press (one of the Plaintiffs) in Ohio, received an email from an AP reporter, forwarding an email from Carlo LoParo, the Secretary's "official spokesman." The email included a press release from the Secretary of State which explained the Secretary's instructions to county boards of elections throughout the state to keep everyone, other than voters and election officials, out of the Designated Area. (R. 55, Plaintiffs' MSJ Response, Att. 2, Affidavit of Eva Parziale, Ex. A; J.A. 584.)

#### **4. Directive No. 2004-51**

On the morning of the election, after the District Court granted Plaintiffs' motion for a temporary restraining order, the Secretary issued Directive No. 2004-51. This Directive provided that news media personnel were permitted to conduct exit polling in the Designated Area. (R. 44, Second Amended Complaint, Ex. B; J.A. 154.)

#### **5. Directive No. 2005-09**

The Secretary, on April 28, 2005, issued Directive No. 2005-09 (the "2005 Directive"), again addressing the Loitering Statutes and the applicability (or, more appropriately, the inapplicability) of those statutes to "exit polling." (R. 52, Walch Decl., ¶ 8; J.A. 576.) This Directive was issued in advance of the primary election

on May 3, 2005, for the specific purpose of clarifying any anticipated questions or doubt that county election officials may have had as a result of the unsubstantiated allegations in this then-pending lawsuit.

The 2005 Directive summarized the prohibitions in the Loitering Statutes (similar to the Advisory and Directive No. 2004-40), and reiterated the advice contained in the Advisory that the Loitering Statutes do not preclude a person from conducting “exit polling” within the Designated Area, as long as that person is not loitering, congregating, hindering or delaying voters, or engaging in election campaigning. Additionally, the 2005 Directive advised that the Loitering Statutes should be interpreted and enforced to the extent possible to protect constitutional rights, and that it is the responsibility of county election officials, in coordination with local law enforcement, to enforce the Loitering Statutes. Finally, by its express terms, the 2005 Directive superseded all previous directives, advisories and instructions on polling place access and the Loitering Statutes.

#### **6. Directive No. 2006-75**

On October 13, 2006, the Secretary issued Directive No. 2006-75 to the boards of elections. This Directive was in most respects the same as the 2005 Directive. The one notable difference was the addition of 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.

(R. 70, Defendant's Response in Opposition to Motion to Enforce Judgment, Ex. 2; J.A. 646.)

### **SUMMARY OF ARGUMENT**

It is beyond ironic that the "Oral Directive" at issue in this litigation that has spanned more than two years, had a duration of only a few days. While the evidence is unclear when it was issued and what it said, it is undisputed that it was rescinded on the morning of the 2004 general election, only a few days after it had been issued. The evidence is also undisputed that the Secretary of State has, since the 2004 election, repeatedly instructed the boards of elections to allow exit polling in the Designated Area, and repeatedly indicated that he does not intend to instruct them otherwise. In other words, Plaintiffs' claim that the "Oral Directive" violates their First Amendment rights is moot. (Section II.A, pp. 16-29)

And if it is not moot, and the Court must rule on the merits of Plaintiffs' claim, the evidence before the Court is insufficient to determine the nature of the forum at issue and, absent such evidence, the Oral Directive First Amendment survives scrutiny as a reasonable viewpoint neutral restriction on speech (Section II.B, p. 29-37).

The Court likewise lacks subject matter jurisdiction to adjudicate Plaintiffs' claim challenging the constitutionality of the Loitering Statutes, for at least three reasons. First, Plaintiffs have not suffered (indeed, they fail even to allege that they

have suffered) an injury-in-fact relative to the Loitering Statutes (Section III.B.1, pp. 39-40). Second, any injury that Plaintiffs may have suffered would not be traceable to the Secretary of State (Section III.B.2, pp. 40-43;), who, for similar reasons, is immune from suit under the Eleventh Amendment (Section III.C, pp. 45-49). And third, Plaintiffs' challenge to the Loitering Statutes is not ripe for adjudication. (Section III.B.3, pp. 43-45)

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court reviews *de novo* a district court's decision to grant a motion for summary judgment. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003). The standard for evaluating motions for summary judgment motions is well established. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003). The facts and any inferences reasonably drawn therefrom must be viewed a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists and that it is entitled to

judgment as a matter of law. *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005).

“The fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate.” *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003). For “[w]hen reviewing cross-motions for summary judgment, [this Court] must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party.” *Westfield Ins.*, 336 F.3d at 506. Furthermore, “[i]f a denial of summary judgment is based on purely legal grounds, the appellate court also reviews the denial of summary judgment *de novo*.” *Federal Ins. Co. v. Hartford Steam Boiler Inspection and Ins. Co.*, 415 F.3d 487, 493 (6th Cir. 2005). “When a district court denies summary judgment to one party on the ground that it is granting summary judgment to another party, the denial of summary judgment is based on a legal conclusion rather than the district court’s finding of a genuine issue of material fact.” *Id.* (quoting *Westfield Ins.*, 336 F.3d at 506).

**II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON COUNT I OF THEIR COMPLAINT, CLAIMING THAT THE “ORAL DIRECTIVE” VIOLATES THE FIRST AMENDMENT.**

**A. The District Court lacked subject matter jurisdiction on Count I.<sup>8</sup>**

**1. Basic Tenets of Standing**

As is well established, Article III of the Constitution vests jurisdiction in federal courts to address only actual cases or controversies. *Gentry v. Deuth*, 456 F.3d 687, 693 (6th Cir. 2006); U.S. Const. art. III, § 2, cl. 1. One element of the “bedrock” case-or-controversy requirement is that plaintiffs must establish that they have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). For standing “is the threshold question in every federal case, determining the power of the court to entertain the suit.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

To establish standing, “Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1993). On many occasions, the Supreme Court has reiterated the three requirements that constitute the “irreducible constitutional minimum” of standing. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). First, a

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<sup>8</sup> Questions as to whether a federal court possessed subject matter jurisdiction are subject to *de novo* review. *Rodriguez v. Tennessee Laborers & Welfare Fund*, 463 F.3d 473, 475 (6th Cir. 2006).

plaintiff must demonstrate an “injury in fact” which is “concrete,” “distinct and palpable,” and “actual or imminent.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotation marks and citation omitted). Second, a plaintiff must establish “a causal connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] some third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotations omitted). Third, a plaintiff must show the “‘substantial likelihood’ that the requested relief will remedy the alleged injury in fact.” *Stevens*, 529 U.S. at 771.

The three elements of standing are “an indispensable part of the plaintiff’s case” and thus the plaintiff must support each element with the manner and degree of evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. at 561. For although “general factual allegations of injury resulting from the defendant’s conduct may suffice” at the pleading stage, at the summary judgment stage, a plaintiff “must ‘set forth’ by affidavit or other proper summary judgment evidence ‘specific facts’” to prove standing. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)). “If ... the plaintiff’s standing does not adequately appear from all materials of record, the complaint must be dismissed.” *Warth*, 422 U.S. at 501-02; see also *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 231 (1990) (“it is a long-

settled principle that standing alone cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.”).

Ultimately, it is the Court’s responsibility—indeed, its “*obligation*—essentially to search the pleadings on the core matter of federal court adjudicatory authority—to inquire not only into th[e] Court’s authority to decide the questions [] presente[d], but to consider, also, the authority of the lower courts to proceed.” *Arizonians for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

## **2. Count I of Plaintiffs’ Complaint is Moot.**

Without conceding that Plaintiffs ever had standing to challenge the “Oral Directive,” it is beyond dispute that they lack it now. The “Oral Directive” which is the subject of Count I of Plaintiffs’ Second Amended Complaint was rescinded on election day in November of 2004, and the Secretary since then has repeatedly instructed the boards of elections that exit polling is permitted in the Designated Area. Accordingly, even if Plaintiffs may have suffered an injury in fact on November 1, 2004, they are no longer suffering any injury and thus Count I of their complaint is moot.

### **a. Standard for mootness evaluation**

When the controversy between the parties ceases to be “definite and concrete” and “no longer touches the legal relations of parties having adverse legal interests,” the matter becomes moot, regardless of the stage in the proceedings.

*DeFunis*, 416 U.S. at 317 (internal quotation omitted). That the dispute was alive when the suit was filed, “cannot substitute” for the actual and ongoing case or controversy that jurisdiction requires. *Honig*, 484 U.S. at 317; *Coalition for Gov’t Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 458 (6th Cir. 2004) (federal courts “have a continuing obligation to enquire whether there is a present controversy as to which effective relief can be granted.”). “A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Evtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

The requirement of an ongoing case or controversy is not a mere formality; it is well-grounded in the efficient operation of the federal courts and necessitates strict observance. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Federal courts do not issue advisory opinions and are “not empowered to decide moot questions or abstract propositions.” *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). To do so would increase the workload of the courts by requiring them to adjudicate issues over which the parties may have some abstract disagreement, but whose resolution does not affect the legal relationship between the parties.

**b. The issuance of subsequent Directives by the Secretary mooted any residual aspect that may have existed with respect to the Oral Directive**

Here, in light of the Secretary's issuance of three directives after the "Oral Directive," including Directive No. 2004-51 (issued on November 2, 2004), Directive No. 2005-09 (issued on April 28, 2005) and Directive 2006-75 (issued on October 13, 2006), subsequent resolution of Plaintiffs' claims with respect to Count I of the Second Amended Complaint would have no effect on the legal relationship between the parties.

In the early hours of the morning on election day, in response to the Court's temporary restraining order, the Secretary issued Directive No. 2004-51, instructing the county boards of elections that "news media personnel ... may be within 100 feet of the entrance of polling places to conduct exit polling." This Directive remained in place throughout election day, and until the Secretary issued a new directive addressing the issue of "polling place access," just prior to the primary election in May of 2005.

On April 28, 2005, the Secretary issued Directive No. 2005-09, concerning "polling place access." Notably, this Directive was upheld by the District Court on Plaintiffs' challenge that it violates their First and Fourteenth Amendment rights. By its express terms, this Directive superseded all previous directives:

This [Directive] supercedes all previous directives, advisories or other instructions from this office concerning the [Loitering] Statutes or polling place access.

(R.44, Second Amended Complaint, Ex. C; J.A. 156.)

Finally, on October 13, 2006, in part to comply with the District Court's order on summary judgment, the Secretary issued Directive No. 2006-75, which was identical to Directive No. 2005-09 in all but one respect, adding the following sentence.

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.

The 2006 Directive, like its predecessor, expressly superseded all previous directives, advisories or other instructions from the Secretary of State concerning the Loitering Statutes or polling place access in general.

Accordingly, these succeeding occurrences—manifest examples of jurisdiction ousted by subsequent events—make it absolutely clear that the alleged violation of Plaintiffs' rights with respect to the Oral Directive would not occur. Thus, any further adjudication or determination with respect to Count I of the Second Amended Complaint would be improper, as outside the scope of the District Court's Article III jurisdiction. See *Friends of the Earth, Inc.*, 528 U.S. at 192 (noting that federal court's lack license "to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest").

**c. Count I of the Second Amended Complaint does not satisfy the requirements of the “capable of repetition, yet evading review” exception.**

An exception to the mootness doctrine has been recognized for those cases that are “capable of repetition, yet evading review.” This exception applies when (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation or a demonstrated probability that the controversy will recur. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The party asserting that this exception applies bears the burden of establishing both prongs. See *Friends of the Earth*, 528 U.S. at 190–91.

In the election context, the first prong of the “capable of repetition, yet evading review” inquiry is, typically, easily satisfied, for legal disputes involving election laws usually take more time to resolve than the election cycle permits. See *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). Whether the issues in a case satisfy the second prong is a “more complex question” involving a specific inquiry into the precise nature of the claims involved. *Libertarian Party of Ohio*, 462 F.3d 579, 584 (6th Cir. 2006). The danger of reversion must be a reasonable one—not just an allegation. See *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 187 (1979).

In *Socialist Workers Party*, the Supreme Court dismissed as moot a cross-claim brought by the Illinois State Elections Board against the Chicago Elections

Board, asserting that it lacked authority to enter into a settlement with the plaintiffs in an elections lawsuit. Despite the Chicago Board's vigorous opposition to the State Board's assertion (that it lacked authority to enter into the settlement), the Seventh Circuit Court of Appeals dismissed the State Board's appeal as moot, noting that the settlement order applied only to the June 7 election, which had long passed, and held that the question of the Chicago Board's authority for its actions was not "capable of repetition, yet evading review." *Id.* at 180. On appeal, the Supreme Court affirmed the Seventh Circuit, holding:

Although the first branch of the test is satisfied here, appellant has presented *no evidence* creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Appellant's conclusory assertions that the actions are capable of repetition are not sufficient to satisfy the *Weinstein* test, particularly since appellant does not contend that the Chicago Board has ever attempted previously to conclude litigation without its approval. The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue, *cf. United States v. New York Telephone Co.*, 434 U.S. 159, 165 n. 6 (1977), nor even a consistent pattern of behavior, *cf. SEC v. Sloan*, 436 U.S. 103, 109-110 (1978). And the Chicago Board's action patently was not a matter of statutory prescription, as was the case in other election decisions on which appellant relies, *e.g., Storer v. Brown*, 415 U.S., at 737 n. 8; *Moore v. Ogilvie, supra*, at 816. We therefore find that appellant's challenge was properly dismissed as moot.

*Socialist Workers Party*, 440 U.S. at 187-188 (emphasis added); see also *Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) (appeal dismissed on mootness grounds where plaintiff political party failed to submit evidence creating a reasonable

expectation that they would be subjected to the claimed constitutional denials at some future point); *Van Wie v. Pataki*, 267 F.3d 109, 114–15 (2nd Cir. 2001) (refusing to conclude that the second criterion of the exception to the mootness doctrine had been met when plaintiff voters failed to submit evidence demonstrating that they would again be subjected to the same voter enrollment dispute); *McCrary v. Poythress*, 638 F.2d 1308, 1310, n.1 (5th Cir. 1981) (holding that Appellant “has presented no evidence creating a reasonable expectation that the [Commission] will repeat its purportedly unauthorized actions in subsequent elections. Appellant’s conclusory assertions that the actions are capable of repetition are not sufficient ... .”); *Fed’n of Advertising Industry Rep. v. City of Chicago*, 326 F.3d 924, 932 (7th Cir. 2003) (“Because the City has repealed the challenged ordinance and because we find no evidence in the record creating a reasonable expectation that the City will reenact that ordinance, we affirm the district court’s holding that this case is moot”).

Here, although the first prong of the exception to the mootness doctrine is arguably satisfied, the “more complex” second prong clearly is not. The evidence in the record that is relevant to the determination of whether there is a “*reasonable expectation*” or a “*demonstrated probability*” that the controversy will recur is relatively scarce, and that evidence supports the conclusion that it is *not* reasonable

to expect that the Secretary will re-issue the “Oral Directive,” and thus the “capable of repetition but evading review” doctrine is not applicable.

Similar to the plaintiffs in *Socialist Workers Party*, Plaintiffs here do not contend that the Secretary has ever prohibited exit polling in the Designated Area in the past; this was a stand alone occurrence. Likewise, there is no evidence that the “Oral Directive” is a policy that the Secretary has continued or indicated an intent to continue. Indeed, the entirety of the evidence demonstrates that the converse is true. After the Court issued its TRO, the Secretary issued a formal directive to the county boards of elections instructing that exit polling is permitted within the Designated Area<sup>9</sup>, and since then he has issued two additional directives reiterating that instruction, and explicitly superseding any previous directives or instructions on the issue of exit polling (*i.e.*, explicitly superseding the “Oral Directive”). And in both of those directives, the Secretary affirmatively instructed the boards of elections not only to allow exit polling within 100 feet of polling places, but admonished them to interpret the Loitering Statutes in a manner consistent with the First Amendment right to freedom of speech.<sup>10</sup>

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<sup>9</sup> Pursuant to FED. R. CIV. P. 65(b), the District Court’s temporary restraining order expired on November 11, 2004. The TRO was neither extended (pursuant to Rule 65(b)), nor was it converted to a preliminary injunction. In other words, after November 11, 2004, the Secretary was free to re-issue the Oral Directive, had he desired. He did not.

<sup>10</sup> In addressing Defendant’s standing arguments, rather than view the Secretary’s directives for their actual content (as being protective of Plaintiffs’ First Amendment rights), or at the very least in accordance with Rule 56 (*i.e.*, in a

Moreover, the record also reflects several binding representations by the Secretary—made on his behalf through his counsel, the Ohio Attorney General—that he does not intend to prohibit exit polling in the Designated Area. (See, R. 52, Defendant’s Motion for Summary Judgment, at 18, 23 n. 28, 43 n. 38; J.A. 528.) These representations, in addition to being legally binding on the Secretary for purposes of this litigation, only serve to reinforce the Secretary’s actions which, as described above, consist of the issuance of numerous directives instructing the boards of elections to allow exit polling within the Designated Area.

Finally, unlike this Court’s recent elections-related decisions (many of which involved the Defendant herein), the Secretary’s action in issuing the Oral Directive “patently was not a matter of statutory prescription.” See, *e.g.*, *Libertarian Party of Ohio*, 462 F.3d at 583–85 (challenging constitutionality of O.R.C. §§ 3517.012 and 3501.01(E)); *Lawrence v. Blackwell*, 430 F.3d 368, 370–72 (6th Cir. 2005) (challenging constitutionality of O.R.C. § 3513.257).

Based on this evidence (which must be viewed in a light most favorable to the Secretary), and the lack of any other evidence on the issue (let alone any *contrary* evidence), it is not reasonable to conclude that the Secretary will issue a

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light most favorable to the Secretary), the District Court instead erroneously characterized the Secretary’s issuance of the directives as reflective of “his proclivity to issue eleventh-hour directives affecting plaintiffs’ First Amendment rights.” (R. 62, Opinion and Order, at 15; J.A. 611.) In view of the Secretary’s statutory obligations to oversee elections (which includes the issuance of directives), coupled with the inevitable nature of election regulations (as virtually always “affecting” First Amendment rights), this is a patently absurd proposition.

directive or otherwise advise local election officials to prohibit exit polling in the Designated Area around polling places. Accordingly, this case does not fall within the “capable of repetition yet evading review” exception to the mootness doctrine, and Count I of Plaintiffs’ Second Amended Complaint should be dismissed for lack of subject matter jurisdiction.

**3. Plaintiffs have not suffered an injury-in-fact, because there is no credible threat that they would be prosecuted for violating the “Oral Directive.”**

As noted above, in order to establish the first element of standing—*injury-in-fact*—Plaintiffs must show an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Friends of the Earth, Inc.*, 528 U.S. at 180. The injury must be “distinct and palpable.” *Id.*

When a plaintiff brings a pre-enforcement challenge to a sanctioning statute, regulation, or ordinance (or, in this case, a telephone call), standing exists only if the plaintiff has submitted evidence indicating “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, *and there exists a credible threat of prosecution.*” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (emphasis added). Accordingly, when plaintiffs “do not claim that they have ever been threatened with prosecution,

that a prosecution is likely, or even that a prosecution is remotely possible,” they do not allege a dispute ready for adjudication by a federal court. *Id.* at 298.

In this case, Plaintiffs have not satisfied their burden to present evidence that they are subject to a real and credible threat of prosecution under the “Oral Directive.” In fact, as discussed above, the evidence shows that the Secretary neither had, nor presently has, any intention of enforcing the “Oral Directive.” (R. 52, Defendant’s Motion for Summary Judgment, at 18, 23 n. 28, 43 n. 38; J.A. 528.) “If no credible threat of prosecution looms, the chill [on the plaintiff’s First Amendment rights] is insufficient to sustain the burden that Article III imposes. A party’s subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.” *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996).

The only injury Plaintiffs are capable of averring in these circumstances is that, because the Secretary issued the “Oral Directive” in the past, they fear that the Secretary will at some indefinite time in the future issue another similar directive, and that that directive will be enforced against them at some indefinite time in the future, based on some presently unknown conduct. Yet, it is well settled that “[a]llegations of possible future injury do not satisfy the requirements of Art. III.” *Whitmore*, 495 U.S. at 158. For although a plaintiff need not “await the

consummation of threatened injury” before invoking a federal court’s jurisdiction, the threatened injury must at least be “certainly impending.” *Babbitt*, 442 U.S. at 298 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

Plaintiffs’ alleged injuries are neither certain nor impending because Plaintiffs fail to demonstrate any First Amendment injury whatsoever (see *infra*, Section II.C), let alone one “of sufficient immediacy and reality” to justify pre-enforcement judicial review and issuance of a declaratory judgment. *National Rifle Ass’n*, 132 F.3d at 280. In fact, Plaintiffs have put forth no evidence of any impending or threatened issuance of a directive similar to the Oral Directive, and enforcement thereof against exit pollsters. As such, Plaintiffs have failed to meet their burden of demonstrating the requisite injury-in-fact in order for Count I of the complaint to constitute an actual case or controversy under Article III. As such, the District Court was without jurisdiction on that Count. The judgment should be vacated and Count I of Plaintiffs’ Second Amended Complaint should be dismissed for lack of subject matter jurisdiction.

**B. The Oral Directive does not violate Plaintiffs’ First Amendment rights.**

**1. The record contains no evidence of the nature of the forum to which Plaintiffs seek access.**

“Exit polling” as described by Plaintiffs is a protected form of speech under the First Amendment. Yet, “the mere fact that a certain category of speech is

worthy of constitutional protection does not mean that it is ‘equally permissible in all places and at all times.’” *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 746 (6th Cir. 2004), quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The government is not required to grant access to all who wish to exercise their right to free speech on every type of government property “without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.” Rather, the existence of a right of access to government property and the extent to which such access may be limited by the government *depend on the character of the property at issue*.

*United Foods*, 364 F.3d at 746, quoting *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 44 (1983) (emphasis added).

In its efforts to address the recurring and challenging issue of the right the First Amendment gives to individuals and groups to engage in speech on government property, the Supreme Court has adopted a tripartite “forum” analysis. *Cornelius*, 473 U.S. at 815 (1985) (Blackmun, J., dissenting) (citations omitted). The consistent guideline followed by the Court is that the First Amendment does not allow for expressive activity on a government property that is incompatible with the important purposes of that property. *Id.* at 816 (citations omitted). Public places are generally categorized into three categories: traditional public forum, limited public forum, and nonpublic forum.

“Traditional public forums are those places ‘which by long tradition or by government fiat have been devoted to assembly and debate.’” *United Food*, 364 F.3d at 746, quoting *Perry*, 460 U.S. at 45. This type of forum includes “streets and parks which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Perry*, 460 U.S. at 45, quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). “Government may also create a public forum by its designation of ‘a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.’” *United Food*, 364 F.3d at 746, quoting *Cornelius*, 473 U.S. at 802. Finally, a non-public forum is a place neither traditionally used for expressive activities nor set aside or opened up in a substantial way for expressive activities.

To determine the extent to which the government may limit access to its property, then, the Court must first identify the relevant forum to which the speaker sought access, and next consider whether the relevant forum is public or nonpublic, “because the government’s ability to place restrictions on speech varies with the type of forum involved.” *United Food*, at 746, quoting *Cornelius*, 473 U.S. at 797.

[I]n defining the relevant forum [the Supreme Court has] focused on the access sought by the speaker. When speakers seek general access to *public* property, the forum encompasses that property.” *Id.* When speakers seek more limited access, however, we must take “a more

tailored approach to ascertaining the perimeters of [the relevant] forum within the confines” of the government property at issue. *Id.*

*United Food*, at 747, quoting *Cornelius*, 473 U.S. at 797 (emphasis added).

Naturally, “the decision as to whether a forum is public usually invokes a factual inquiry.” *Air Line Pilots Ass’n, Int’l v. Department of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995), citing *Stewart v. Dist. of Columbia Armory Board*, 863 F.2d 1013, 1018 (D.C. Cir. 1985) (emphasis in original) (internal quotations omitted). Likewise, determining what *type* of public forum exists requires development of the relevant facts that bear upon the character of the property at issue.” *Searcey v. Crim*, 815 F.2d 1389, 1392–93 (11th Cir. 1987)<sup>11</sup>, citing *Perry*, 460 U.S. at 44; see also *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) (“Whether SIU’s student organization forum is a public, designated public, or nonpublic forum is an inquiry that will require further factual development, and that is a task properly left for the district court”). For,

[t]he forum doctrine itself is not a taxonomy of ideal types; it is virtually impossible in most cases to identify a public forum by legal inquiry alone, confined to the intrinsic nature of government actions or purposes. A district court must therefore develop findings on matters such as the forum's past uses, the government’s *consistent* policy and practice and the forum’s compatibility with expressive activity.

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<sup>11</sup> In *Searcey*, the Eleventh Circuit concluded that, because the factual record was not sufficiently developed, “the district court should not have resolved at the summary judgment stage the constitutional question of whether appellants created a public forum.” *Id.* at 1392–93.

*Air Line Pilots Ass'n*, 45 F.3d at 1152.

Here, the record contains evidence that Plaintiffs sought to engage in “exit polling” in the Designated Area (*i.e.*, the 100 foot parameter) adjacent to “polling places” in Ohio.<sup>12</sup> But, unlike the plaintiffs in *Burson v. Freeman* and *United Food*<sup>13</sup>, these Plaintiffs have failed to identify or to present any evidence regarding the *specific* polling places at which they intended to conduct (or at which they actually conducted) exit polling. Thus, it remains unknown whether any of the “Designated Areas” adjacent to the generic “polling places” to which Plaintiffs claimed they desired access to conduct exit polling constitute or encompass a traditional public forum (*i.e.*, a street or public sidewalk), a designated public forum, a nonpublic forum, or private property.

Without any evidence of the physical characteristics of the Designated Areas adjacent to the polling places where Plaintiffs intend to engage in exit polling, this Court would be left to mere speculation and ultimately forced to hypothesize to

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<sup>12</sup> More specifically, Plaintiffs seek to conduct exit polling “within 100 feet of polling places in the State of Ohio on election days in the future.” (R. 44, Second Amended Complaint, at ¶ 41; J.A. 146.) Plaintiffs do not allege that they intend to conduct exit polls within the Designated Area at any specific polling place, or that they intend to conduct exit polls at polling places with Designated Areas that encompass public sidewalks or streets.

<sup>13</sup> In *Burson*, the Court noted that there was evidence that at some polling locations, the “campaign-free zone” included sidewalks and streets adjacent to the polling places. 504 U.S. 191, 196, n.2. Likewise, in *United Food*, the Plaintiffs challenged the prohibition on solicitation of signatures for referendum petitions at a *particular* polling location (Lowell elementary school) where the Designated Area included a public sidewalk.

reach a decision on Plaintiffs' First Amendment claim. This, of course, the Court may not do. Indeed, the mere fact that the Designated Area is adjacent to a "polling place" does not *ipso facto* mean that it is government property, let alone a traditional public forum or even a designated public forum.

With respect to the type of forum implicated by the Designated Area about polling places, the conclusion of this Court in *United Food* is equally applicable to this case:

There is no evidence in the record in this case that indicates that Ohio intended to open up nontraditional forums such as schools and privately-owned buildings for public discourse merely by utilizing portions of them as polling places on election day. ...

The forum at issue here is neither a traditional public forum nor a government-designated one. By opening up portions of schools and private property for use as polling places on election day, Ohio has not opened up a nontraditional forum for public discourse. In fact, there is no evidence in the record of discourse of any sort. There is no evidence of expressive activity occurring anywhere on the properties involved, other than "each voter's communication of his own elective choice[,] and this has long been carried out privately by secret ballot in a restricted space." See *Marlin v. District of Columbia Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) (holding that the interiors of polling places are nonpublic forums).

*United Food*, 364 F.3d at 749; see also *Burson*, 504 U.S. at 214–16 (Scalia, J., concurring) ("the environs of a polling place, on election day, are simply not a 'traditional public forum'—which means that they are subject to speech restrictions that are reasonable and viewpoint neutral.").

Accordingly, the District Court's decision granting summary judgment should be reversed.

**2. The "Oral Directive" is a reasonable, viewpoint neutral restriction on speech and thus does not offend the First Amendment.**

In the absence of evidence of the nature and characteristics of the Designated Areas to which Plaintiffs seek access to engage in exit polling, and conceding, *arguendo*, that the property at issue is government property, for purposes of completing the requisite forum analysis, the Designated Area constitutes a nonpublic forum. As such, any restriction on speech in the Designated Area adjacent to Ohio polling places is permissible so long as it is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 46-49.

It is not disputed that the Oral Directive is viewpoint neutral.<sup>14</sup> Thus, the only question is whether it is reasonable in light of the purpose which the forum at issue serves.

The purpose which the Designated Area adjacent to polling places serves, of course, is, at its core, to protect the fundamental right to vote. The Designated Area is a creature of the Loitering Statutes, which prohibit loitering, congregating,

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<sup>14</sup> Not only is the Oral Directive viewpoint neutral, it is also content-neutral, as it was aimed not at exit polling in particular, but rather more broadly at keeping everyone other than voters and election officials out of the Designated Area.

hindering (and so forth) within 100 feet of polling places. In light of the mere existence of these Statutes and their predecessors (both in Ohio and in other states), the Secretary's instruction to local election officials to prohibit anyone, other than voters and election workers, in the Designated Area, is reasonable. See *Burson*, 504 U.S. at 215-216 (Scalia, J., concurring).

Indeed, at the hearing on the temporary restraining order, Mr. Walch testified that the Secretary's instructions regarding access in and about the polling places during the 2004 election were aimed at "creat[ing] an environment in which people can come and vote and have as hospitable an environment as they possibly can. We feel that is [best accomplished by] keeping everybody except those statutorily allowed in Ohio Revised Code outside the 100 foot parameter." (R.14, TRO Transcript, at 34; J.A. 107.) The evidence demonstrates that all of the Secretary's actions prior to the 2004 election relative to polling places, in general, and the Designated Area, in particular, were motivated by the chaotic situation developing in advance of the highly contentious 2004 presidential election, especially with the national focus on Ohio. Again, on the day before the election, Mr. Walch explained: "within the last week things have become much more contentious about the election and it has raised additional concerns that Secretary Blackwell felt he needed to address to keep control of the polling places on election day. ... [W]e really look at this as an entirety of the entire polling location,

and the secretary believes that this issue before you tonight stays consistent with what he's done in keeping that order at the polling location." (R.14, TRO Transcript, at 43-44; J.A. 116-17.)

Based on the foregoing, the Oral Directive does not violate Plaintiffs' right to the freedom of speech, and summary judgment should not have been entered in favor of Plaintiffs on Count I of their Second Amended Complaint.

### **III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON COUNT III OF THEIR COMPLAINT CHALLENGING THE CONSTITUTIONALITY OF THE LOITERING STATUTES.**

#### **A. Introduction**

Beyond their challenge to the defunct "Oral Directive," the remainder of Plaintiffs' Complaint (Counts II and III) is aimed at (i) Directive No. 2005-09 (issued by the Secretary just prior to the May primary in 2005, addressing the topic of "Polling Place Access"), and (ii) the Loitering Statutes. In the 2005 Directive—which the District Court upheld over Plaintiffs' constitutional challenges—the Secretary set forth the relevant portions of the Loitering Statutes, and offered his interpretation of those statutes. He stated:

The Statutes do not necessarily prohibit a person from conducting "exit polls" within the designated area. However, 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. \*\*\*

Of course, to the extent possible, the Statutes should be construed [by local officials charged with their enforcement] to protect both the fundamental right to vote and the freedom of speech . . . .

In Count II of their Second Amended Complaint, Plaintiffs challenged this Directive as violative of their rights to the freedom of speech and to due process of law (as allegedly vague). The District Court properly rejected this challenge.

In Count III, Plaintiffs do not challenge any specific directive, instruction or act of the Secretary. Rather, Plaintiffs take aim at the Loitering Statutes themselves, asserting that, to the extent that they “are or could be applied to prohibit” Plaintiffs from conducting exit polls within the Designated Area, they violate Plaintiffs’ right to the freedom of speech.” (R. 44, Second Amended Complaint, ¶43; J.A. 147.)

**B. The District Court lacked subject matter jurisdiction to decide Count III.**

As elaborated below, the District Court lacked subject matter jurisdiction to adjudicate this claim, for Plaintiffs have not alleged an intent to violate the Loitering Statutes, and thus have not suffered the requisite injury-in-fact sufficient to afford them standing to challenge the Statutes. Further, even if they had suffered an injury-in-fact, that injury would not be traceable to any action of the

Secretary.<sup>15</sup> Finally, Count III of Plaintiffs' complaint is not justiciable, for it seeks an advisory opinion only.

Each of these arguments is discussed below.

**1. Plaintiffs have not suffered an injury-in-fact.**

As discussed in Section II.A, *supra*, to have standing to challenge the Loitering Statutes, Plaintiffs must establish a viable "chilling" of their First Amendment rights as a result of the Loitering Statutes. That is, Plaintiffs must show that they have engaged or intend to engage in conduct that would violate the Loitering Statutes, but have refrained from doing so out of fear of prosecution. See *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 835 (6th Cir. 2001).

As explained in the Affidavit of Warren J. Mitofksy (R.46, Plaintiffs' Renewed Motion for Summary Judg., Mitofsky Aff., Ex. 13; J.A. 459), the type of exit polling in which Plaintiffs engage is accomplished by a single "polling reporter" who "unobtrusively approach[es] voters after they leave the polling place," whereby the voter elects whether to fill out a questionnaire, and the polling reporter does not interfere with the election process in any way. Based upon this explanation of the manner and methodology of conducting exit polls, it does not appear that the polling reporter would deliberately engage in "loitering" or "congregating" within the Designated Area or otherwise "hinder" or "delay" an

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<sup>15</sup> For similar reasons, the Secretary is immune from this claim under the Eleventh Amendment. (See Section III.C., *infra*.)

elector from leaving the polling place. And to eliminate any doubt on the matter, Plaintiffs specifically state that their pollsters do not loiter or congregate, or hinder or interfere with voters. (R. 46, Plaintiff’s Renewed Motion for Summary Judgment, at 7–9; J.A. 170-72.) As such, the self-defined “exit polling” activities of Plaintiffs are not proscribed by the Loitering Statutes, and thus Plaintiffs have not suffered an injury-in-fact sufficient to confer subject matter jurisdiction upon the court.

**2. Any potential injury-in-fact that Plaintiffs might have suffered is not fairly traceable to the conduct of the Secretary.**

Assuming, *arguendo*, that Plaintiffs satisfied the first prong of the standing analysis, they nonetheless have failed to establish, with appropriate evidence, “a causal connection between the injury and the conduct complained of . . . .” *Lujan*, 504 U.S. at 560–61. In other words, Plaintiffs have not demonstrated that their alleged injury is (or would be) “fairly trace[able] to the challenged action of the defendant, and not th[e] result [o]f some third party not before the court.” *Id.*

Under state law, the Secretary possesses no enforcement power or authority relative to the Loitering Statutes; furthermore, the Secretary has not expressed and there is no evidence of any intention on his part to attempt such enforcement. Consequently, there is no causal connection to any injury claimed by Plaintiffs. For, as noted above, by the express terms of section 3501.35 of the Ohio Revised

Code, enforcement of the Loitering Statutes is vested in the local election judges and local police officers; the Secretary possesses neither the enforcement authority nor the appointment authority over the election judges or police officers. The election judges are appointed for one-year terms by the local boards of elections, who also evaluate the qualifications of such judges and have the power to remove such judges. O.R.C. § 3501.22; see also O.R.C. § 3501.11. Additionally, it is the local prosecuting attorneys, not the Secretary, who serve as legal advisors to their respective boards of elections. O.R.C. § 309.09(A). And, with respect to the criminal aspects of the Loitering Statute (O.R.C. § 3599.24), it is the local prosecuting attorney who enforces this and all criminal statutes. O.R.C. § 309.08(A) (“[t]he prosecuting attorney may inquire into the commission of crimes within the county”); see also O.R.C. § 109.02 (“[t]he attorney general is the chief law officer for the state”). The Secretary is vested neither with authority or power to enforce the laws of the state, in general, nor the Loitering Statutes, in particular.

It is well-settled that when a plaintiff seeks to challenge the constitutionality of a state statute, the proper defendant for that suit is the state official or agency that enforced the allegedly unconstitutional statute against the plaintiff. See *Children’s Healthcare*, 92 F.3d at 1414–15. Accordingly, in *Ist Westco Corp. v. School District of Pennsylvania*, 6 F.3d 108 (3rd Cir. 1993), the Third Circuit found that the state attorney general could not be sued for issuance of a non-

binding opinion. The Third Circuit recognized that “the act of issuing an opinion about an abstract constitutional issue falls far short of enforcing, or threatening to enforce, a statute against a specific party.” *Id.* at 114. Thus, in *Ist Westco*, because neither the attorney general nor the secretary of education (i) had the express authority or duty to enforce the specific statute in question; (ii) had made any indication that they would directly enforce the statute against the plaintiffs; nor (iii) had made any indication that they would compel enforcement of the statute by those mandated to enforce the statute, the Third Circuit concluded there was no case or controversy, and, accordingly, the matter was dismissed due to lack of subject matter jurisdiction.<sup>16</sup>

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<sup>16</sup> Numerous other decisions clearly establish that the general power and authority to provide advice and direction to a local official is insufficient to generate the necessary causal connection establishing this Article III requirement of standing. See *Southern Pacific Transp.*, 651 F.2d 613 (9th Cir. 1980) (the jurisdictional requirements of Article III not met in a case challenging the advice given by the attorney general to state prosecutors about enforcing the challenged act because such advice did not mandate enforcement and therefore could not cause injury to the plaintiff; the attorney general’s power to advise and direct the district attorneys was insufficient to create an enforcement connection); *Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (*en banc*) (in challenge to constitutionality of statute whereby abortion providers could be liable to patients in tort action for damages from the abortion, the Court recognized “the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute”, and, thus, defendants governor and attorney general were dismissed due to lack of Article III case or controversy because they had no causal connection to the statute); *Long v. Van de Kamp*, 961 F.2d 151 (9th Cir. 1992) (“[t]he lack of threatened enforcement by the Attorney General also means that the ‘case or controversy’ requirement of Article III is not satisfied”); *Shell Oil Co. v. Noel*, 608 F.2d 208 (1st Cir. 1979) (no case or controversy between parties unless state officer has taken or threatened to take action under the challenged statute).

In this instance, directives issued by the Secretary of State provide, at best, guidance and direction to the local boards of election as they relate to the Loitering Statutes, but such directives do not command enforcement. Enforcement (and, more specifically, the discretionary decision whether certain conduct actually violates the Loitering Statutes) is left not to the Secretary, but to the local officials—the precinct election judges, local police and the local prosecuting attorney. There is no causal connection between the claimed injury of the Plaintiffs and the general directives or guidance issued by the Secretary. Thus, there is no case or controversy and Plaintiffs lack standing under Article III.

### **3. Count III is not ripe for adjudication.**

Another facet of the case-or-controversy requirement is the ripeness doctrine, which is “intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbot Labs v. Gardner*, 387 U.S. 136, 148 (1967). Determining whether a case is sufficiently ripe for adjudication often “bears close affinity to questions of [standing] ....” *Adult Video Ass’n v. United States Dep’t of Justice*, 71 F.3d 563, 567 (6th Cir. 1995) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). The function of the ripeness doctrine is to determine whether a party has brought an action prematurely, *Philadelphia Federation of Teachers v. Ridge*, 150 F.3d 319, 323 (3d Cir. 1998), and counsels abstention until such time as a dispute is sufficiently

concrete to satisfy the constitutional and prudential requirements of the doctrine. “Even when jurisdiction is technically present, however, the Supreme Court has recognized that ‘problems of prematurity and abstractness ... may prevent adjudication in all but the exceptional case.’” *Young v. Klutznick*, 652 F.2d 617, 625–26 (6th Cir. 1981).

In claims raising a First Amendment issue, courts sometimes relax the ripeness standards, even in the absence of a fully concrete dispute, because unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law’s very existence. This concern is particularly significant with regard to facial challenges to a statute or ordinance. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).<sup>17</sup> But the ripeness standards have never been completely abandoned, even in the First Amendment context. Additionally, in the present action, Plaintiffs do not maintain a facial challenge to the Loitering Statutes. Instead, Plaintiffs contend that in whatever manner these statutes may, in theory, be applied against them, the Loitering Statutes are unconstitutional.

Nevertheless, Plaintiffs invoke the jurisdiction of this federal court with a purported dispute that is devoid of any substantive facts, especially as it relates to Count III (seeking a broad and generic declaration that the Loitering Statutes

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<sup>17</sup> Plaintiffs have brought “in essence a *pre-application, as applied* challenge.” *Adult Video*, 71 F.3d at 567.

cannot be interpreted so as to prohibit exit polling). Plaintiffs' claims are not sufficiently concrete so as to allow for adjudication of the facts as presented. On the contrary, Plaintiffs seek an advisory opinion for an intangible and theoretical scenario. Furthermore, Plaintiffs fail to established a viable chilling of their First Amendment rights, let alone "the probability of the future event occurring [being] substantial and of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *National Rifle Ass'n*, 132 F.3d at 284.

Throughout the course of this litigation, Plaintiffs have attempted to accentuate a justiciable dispute when none existed. At a minimum, based upon Plaintiffs' own description of exit polling (see Section III.B.1, *supra*), the probability of Plaintiffs being prohibited in the future from engaging in exit polling as described in the Mitofsky Affidavit is remote and certainly not of the immediacy warranting issuance of a declaratory judgment or injunction. The District Court's engagement in substantive action with respect to Count III of Plaintiffs' Second Amended Complaint is akin to issuing an advisory opinion on a distant and abstract legal issue. As such, Count III is not ripe and should have been dismissed.

**C. Eleventh Amendment sovereign immunity precludes this action against the Secretary.**

And even if the Plaintiffs adequately presented evidence of their standing, Count III of Plaintiffs' Second Amended Complaint is barred by the Eleventh Amendment. The Eleventh Amendment "represents a real limitation on a federal

court's federal question jurisdiction.” *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). It not only protects states from suit but may also shield state officials with immunity. *Lee v. Western Reserve Psychiatric Ctr.*, 747 F.2d 1062, 1065–67 (6th Cir. 1984). For the Eleventh Amendment protection extends to suits against state officials in their official capacities. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984) (a suit against a state official “is in fact against the sovereign if the decree would operate against the latter.”). Therefore, “a suit against [a] state official[] that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.” *Id.* at 102.

The District Court, however, improperly determined that Count III satisfied the sovereign immunity exception to the Eleventh Amendment as established in *Ex Parte Young*, 209 U.S. 123 (1908), and progeny. *Id.*, at 23–24. But *Ex Parte Young* is inapplicable given that the Secretary lacks enforcement power with respect to the Loitering Statutes. For *Young* abrogates a state official’s Eleventh Amendment immunity when a suit challenges the constitutionality of a state official’s action. *Pennhurst*, 465 U.S. at 102. The reason for this “action” requirement is plain. In *Young*, the state officers held no

special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for ... testing the constitutionality of the statute, by an injunction suit brought against them, *then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the*

*attorney general ... . That would be a very convenient way for obtaining a speedy judicial determination of ... constitutional law ..., but it is a mode which cannot be applied to the states ... consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. ... In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, ... such officer must have some connection with the enforcement of the act, or else it is merely making ... the state a party. ... The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact ... .*

*Young*, 209 U.S. at 157 (emphasis added).

But, just because a state officer is “clothed with some duty in regard to the enforcement of the laws of the state” does not in and of itself abrogate sovereign immunity under *Young*. *Id.* at 155. Rather, only when state officers

*threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may [they] be enjoined by a Federal court of equity from such action.

209 U.S. at 155-56 (emphasis added); see also *Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910) (holding that *Young* applies precisely when a statute charges prosecutors with enforcement and they threaten and are about to commence proceedings to enforce the statute); *Dombrowski v. Pfister*, 380 U.S. 479, 483 (1965) (calling *Young* “the fountainhead of federal injunctions against state prosecutions” and noting that federal judicial power is properly exercised when state officers “threaten and are about to commence proceedings” (quoting *Young*)).

Contrary to the methodology employed by the District Court, courts have not read *Young* expansively. See *e.g.*, *Pennhurst*, 465 U.S. at 102 (citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974)). Indeed, *Young* does not apply, as in this case, when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute. See *Children’s Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415–17 (6th Cir. 1996) (citing *1st Westco Corp.*, 6 F.3d 108 (3d Cir. 1993)); *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 990-91 (6th Cir. 1987) (declining to apply *Young* when defendants were not threatening to enforce any unconstitutional act), *cert. denied*, 487 U.S. 1206 (1988); *Long*, 961 F.2d at 152 (requiring “a connection between the official sued and enforcement of the allegedly unconstitutional statute [and also] a threat of enforcement” (citing *Young*)); *Sperry-Hutchinson Co. v. Kuhn*, 212 F. 555, 556 (E.D. Mich. 1912) (declined to apply *Young* when an attorney general was not charged with enforcing a statute and had not threatened to enforce it). Consistent with the requirement of action on the part of the state official, the phrase “some connection with the enforcement of the act” does not diminish the requirement that the official threatened and is about to commence proceedings. See *Young* at 155-56. “General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law,” *Children’s Healthcare*, 92 F.3d at 1416 (quoting *1st Westco*, 6 F.3d at 113), and

any holding to the contrary “would extend *Young* beyond what the Supreme Court has intended and held.” *Id.* at 1416.

The Secretary has not threatened to commence enforcement proceedings against Plaintiffs. Indeed, as discussed *supra*, the Secretary does not have *authority* to enforce the Loitering Statutes against Plaintiffs. Accordingly, the *Ex Parte Young* exception to sovereign immunity is not applicable and the Eleventh Amendment bars Count III of Plaintiffs’ Second Amended Complaint.

### **CONCLUSION**

For the foregoing reasons, the District Court’s order granting summary judgment to Plaintiffs on Count I and Count III of the Second Amended Complaint should be reversed and the case should be remanded to the District Court with instructions to dismiss Plaintiffs’ Second Amended Complaint.

Respectfully submitted,

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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 12,135.

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Richard N. Coglianesi

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Final Brief of Defendant-Appellant Cross-Appellee Jennifer Brunner, Ohio Secretary of State, was served upon the following counsel of record by US Mail, postage prepaid, on this 16<sup>th</sup> day of April, 2007:

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## DESIGNATION OF JOINT APPENDIX CONTENTS

Defendant-Appellant will submit the following documents as part of the Joint Appendix:

<i>Date Filed</i>	<i>R No.</i>	<i>Description of Entry</i>
11/01/2004	1	Complaint against J Kenneth Blackwell
11/01/2004	4	Motion for Temporary Restraining Order
11/01/2004	9	Order granting Plaintiffs' Motion for Temporary Restraining Order
11/19/2004	11	Amended Complaint against J Kenneth Blackwell
10/18/2005	44	Second Amended Complaint against J Kenneth Blackwell
11/07/2005	46	Plaintiffs' Renewed Motion for Summary Judgment
11/07/2005	47	Plaintiffs' Affidavits in Support of Motion for Summary Judgment
12/02/2005	52	Defendant's Motion for Summary Judgment
09/26/2006	62	Opinion and Order granting Plaintiffs' Summary Judgment Motion as to Counts I and III of the Second Amended Complaint and denying it with respect to Count II, and granting Defendant's Summary Judgment Motion as to Count II of the Second Amended Complaint and denying it with respect to Counts I and III.
09/27/2006	64	Judgment Entry
10/25/2006	67	Notice of Appeal by Defendant J Kenneth Blackwell
10/26/2006	70	Defendant's Response in Opposition to Plaintiffs' Emergency Motion to Enforce Judgment and Decree
10/27/2006	72	Order denying Plaintiffs' Emergency Motion to Enforce Judgment.
11/08/2006	75	Notice of Cross-Appeal by Plaintiffs