

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No.: 1:06cv22463– HUCK/SIMONTON

CBS BROADCASTING INC., *et al.*,

Plaintiffs,

v.

SUE M. COBB, in her official capacity as Secretary of State of the State of Florida, and LESTER SOLA, in his official capacity as the Supervisor of Elections of Miami-Dade County, Florida and as proposed representative of a defendant class of all county Supervisors of Elections in the State of Florida,

Defendants.

**DEFENDANT SUE M. COBB'S MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendant Sue M. Cobb, in her official capacity as Secretary of State of the State of Florida, respectfully submits this memorandum of law in opposition to the Plaintiffs' Motion for a Preliminary Injunction.¹

INTRODUCTION

To protect the orderly administration of elections and the election process, and to promote increased voter participation, the Florida Legislature acted to restrict all solicitation within 100 feet of polling place entrances. It did so to provide voters with an opportunity to enter and exit their polling places without being accosted by individuals distributing literature, collecting petition signatures, conducting exit polls, or soliciting commercial sales—solicitation whose cumulative effect has been to substantially impede voters' access to the polls.

¹ During the Court's October 5, 2006 telephone status conference, the Court suggested consolidating the preliminary injunction hearing with a final hearing on the merits, and all parties agreed to do so. Accordingly, for purposes of this Memorandum, the Secretary will treat the Motion for Preliminary Injunction as a Motion for Permanent Injunction.

The Plaintiffs, all media organizations, challenge the constitutionality of this regulation. They contend that the First Amendment guarantees their entitlement to conduct exit polling within 100 feet of polling places. Although the media enjoys First Amendment freedom of speech and freedom of the press, their First Amendment freedoms are not absolute, and they must be reconciled with competing—and in this case overarching—First Amendment rights, namely the right to vote. Because the Florida Legislature, through its recent enactment, has struck a reasonable balance of these competing interests, there is no constitutional violation, and the Plaintiffs are not entitled to injunctive or declaratory relief.

The Challenged Legislation

Section 102.031(4)(a), Florida Statutes, creates a 100-foot “no solicitation” zone around polling place entrances, inside which “[n]o person, political committee, committee of continuous existence, or other group or organization may solicit voters.” Before a polling place opens, a voting official is to mark the boundary of this no-solicitation zone. *Id.* The term “solicit” is defined by the statute to include, among other things, “seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item.” *Id.* § 102.031(4)(b). The legislation does not discriminate among various types of expression or solicitation—it applies equally to election-related political speech, non-election-related political speech, nonpolitical speech, and commercial speech. Its sole purpose is to ensure unimpeded and orderly voter access to polling places.

ARGUMENT

This case involves the fundamental right to vote—“a right at the heart of our democracy.” *Burson v. Freeman*, 504 U.S. 191, 198 (1992). And it also involves the Plaintiffs’ First Amendment rights involving free speech and free press. This is one of those instances in which “Legislatures must necessarily compromise between two competing First Amendment interests.” *Schirmer v. Edwards*, 2 F.3d 117, 124 (5th Cir. 1993), *cert. denied* 511 U.S. 1017 (1994); *accord Burson*, 504 U.S. at 198 (“[We must] reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.”). Through Section 102.031, the Florida Legislature has protected

voters' fundamental right of access to the polls, and it has done so without violating the Plaintiffs' First Amendment rights. The Legislature's balance was appropriate, justified, and constitutionally permissible.

States' efforts to limit activities around polling places—even constitutionally protected activities—are neither new nor uncommon. In fact, all fifty states limit access to areas around polling places in one form or another. *Burson*, 504 U.S. at 206. There is no longer a debate about *whether* states may restrict First Amendment activities around polling places—the debate centers on the extent to which such regulation is permissible. In *Burson v. Freeman*, the Supreme Court's most recent decision to consider the issue, the Court recognized the “necessity of restricted areas in or around polling places” and concluded that Tennessee's prohibition of solicitation within 100 feet of polling places was constitutionally permissible. 504 U.S. at 200, 211. Likewise, the 100-foot no-solicitation zone challenged in this case is consistent with the Constitution.

A. The Supreme Court's *Burson* Decision Supports a Finding of Constitutionality.

The *Burson* decision significantly changed the way courts approach constitutional challenges to polling place restrictions. Disregarding the decision almost entirely, the Plaintiffs rely on a handful of pre-*Burson* decisions whose reasoning is no longer applicable. *See infra*. They also rely on one unpublished post-*Burson* district court order, which misapplies the binding Supreme Court precedent and other controlling law. Despite some factual distinctions—distinctions shared with much of the authority relied on by Plaintiffs—the *Burson* decision demonstrates that Florida's polling place restrictions strike a proper balance between Florida citizens' fundamental right to vote and the Plaintiffs' First Amendment rights.

In *Burson*, the Court considered a First Amendment challenge to a Tennessee statute that prohibited “the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes” within 100 feet of polling place entrances. *Id.* at 193. Applying strict scrutiny, the Tennessee Supreme Court struck down the challenged statute, finding that the state failed to demonstrate a compelling interest in regulating areas outside the polling places. *Id.* at 195.

In reversing the Tennessee Supreme Court, the United States Supreme Court began by observing that a State “‘indisputably has a compelling interest in preserving the integrity of its election process.’” *Id.* at 199 (quoting *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989)).² The Court then explored the long history of voting—and voting problems—in this country. It explained how election regulation has evolved to protect against voter intimidation and election fraud and to promote the States’ interest in “securing the right to vote freely and effectively.” *Id.* at 205-06, 208. A key development in that evolution was the introduction of the secret ballot, which reduced vote buying and other types of electoral abuses. And “the link between ballot secrecy and some restricted zone surrounding the voting area . . . is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter.” *Id.* at 207-08. Accordingly, the Court held “that *some* restricted zone around the voting area is necessary to secure the State’s compelling interest.” *Id.* at 208. It concluded that, given the conflict between the plaintiffs’ free speech rights and the right to vote, Tennessee’s 100-foot campaign-free zone was constitutionally permissible. *Id.* at 211.

Florida shares Tennessee’s interests. Florida has an undeniable interest in ensuring fair and orderly elections, including unimpeded access to polling places. As in *Burson*, the primary interest is in “securing the right to vote freely and effectively.” *Id.* at 208.³ In reliance on *Burson*, Florida advances its critical interests by providing a reasonable 100-foot zone around polling place entrances, inside which solicitation is restricted. Just as the 100-foot restriction in *Burson* was constitutionally permissible, so too is Florida’s.

² Justice Blackmun wrote the plurality opinion, joined by Chief Justice Rehnquist, and Justices White and Kennedy. Justices Kennedy and Scalia wrote separate concurrences, and Justice Stevens filed a dissenting opinion, joined by Justices O’Connor and Souter. Justice Thomas did not participate in the decision.

³ In enacting the challenged legislation, the Florida Legislature recognized as much: “The State of Florida has a vital interest in preserving the integrity of the election process.” Fla. H.R. State Adm. Council, CS/HB 1567 (2005) Staff Analysis 4 (April 20, 2005) (available at <http://www.flsenate.gov/data/session/2005/House/bills/analysis/pdf/h1567e.SAC.pdf>).

1. **The Regulation is a Reasonable Time, Place and Manner Restriction.**

Although the challenged legislation satisfies the standard articulated in *Burson*, it should be subjected only to a lower level of scrutiny because it is content-neutral. The challenged legislation in this case does not discriminate against any category of speech. It applies uniformly to *all* types of solicitation and speech. Unlike the statute at issue in *Burson*, which was limited to political speech and “[did] not reach other categories of speech, such as commercial solicitation, distribution, and display,” *id.* at 197, Florida’s law expressly includes these other types of speech. Indeed, in *CBS Inc. v. Smith*, 681 F. Supp. 794, 796 (S.D. Fla. 1988) (Marcus, J.), on which the Plaintiffs heavily rely, the Court characterized the statute as restricting “virtually every form of expression between persons within 150 feet of the polling place.”⁴ Accordingly, unlike the statute in *Burson*, the Florida statute is content-neutral. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (content-neutral regulations are those that can be “justified without reference to the content of the regulated speech.”). In considering a challenge to an earlier incarnation of Florida’s no-solicitation statute, the Eleventh Circuit apparently considered the statute content-neutral, as it applied time, place, and manner considerations. *See Clean-Up ’84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985).⁵

Content-neutral statutes that prescribe the time, place, and manner in which First Amendment rights may be exercised are analyzed under a lower standard of scrutiny than their content-based counterparts. *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005). They must be narrowly tailored to serve the State’s legitimate, content-neutral interests, but they need not be the least restrictive or least intrusive means of doing so. *Ward v. Rock Against Racism*, 491 U.S. at 798. “Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved

⁴ In that case, this Court considered a statute that preceded the statute challenged here. But as the Plaintiffs have said, the restricted zone in those two statutes had “striking similarities,” although the older statute restricted an area with a 150-foot radius instead of a 100-foot radius. PI Motion at 10.

⁵ The challenged statute in that case, like the one in this case, restricted the distribution of campaign material, solicitation of votes or opinions, solicitation of petition signatures, and commercial sales. *Clean-Up ’84 v. Heinrich*, 759 F.2d at 1512, n.2.

less effectively absent the regulation.” *Id.* at 799 (marks omitted) (ellipses in original).⁶ The Florida statute undoubtedly promotes the substantial government interests of ensuring voter access to polling places, promoting orderly elections, and encouraging voter participation. These interests would be achieved less effectively if individuals were permitted to solicit voters immediately around the entrances polling places. Accordingly, the challenged legislation is narrowly tailored and a reasonable time, place, or manner restriction.

2. **Even if The Regulation is Content-Based, it Satisfies the Burson Modified Test.**

Even if this Court concludes that the challenged legislation is not content-neutral, the challenged legislation should not be evaluated under traditional strict scrutiny requirements. The *Burson* decision crafted a “modified ‘burden of proof’” for strict scrutiny cases like this one, “when the First Amendment right threatens to interfere with the act of voting itself [or] in which the challenged activity physically interferes with electors attempting to cast their ballots.” *Burson*, 504 U.S. at 209 n.11. In these cases, and with this modified burden of proof, states are held to a less exacting evidentiary burden in justifying legislative acts subjected to strict scrutiny. *Id.* at 208. As explained more fully *infra*, Florida more than satisfies this modified burden.

⁶ Indeed, in his concurring opinion in *Burson*, Justice Kennedy (who also concurred in the plurality) advocated applying the lesser scrutiny even though the statute in that case was not content-neutral:

[T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression.

Burson, 504 U.S. at 213-14 (Kennedy, J., concurring). Similarly, Justice Scalia would have applied the reduced scrutiny because he considers the areas around polling places to be non-public forums. *Id.* at 214 (Scalia, J., concurring.) Justice Scalia also noted that had the Tennessee statute been content-neutral, it could have been “covered by our doctrine of permissible ‘time, place, and manner’ restrictions upon public forum speech.” *Id.* at 216 (Scalia, J., concurring).

B. Plaintiffs' Reliance on Pre-Burson Authorities is Misplaced.

The Plaintiffs' argument relies on a number of pre-*Burson* authorities. The Plaintiffs rely on many of the same authorities used by the Tennessee Supreme Court—before it was reversed in *Burson*—and many of the same authorities used by the dissent in *Burson*. There can be no question that the *Burson* decision dominates this area of First Amendment jurisprudence. And without *Burson*, the analysis in this case admittedly would be different. But *Burson* may not be ignored, and the authorities that came before it must be examined carefully in light of it.

The primary cases on which the Plaintiffs rely are relatively few, many of which are from courts in this State. In *Clean-Up '84 v. Heinrich*, 582 F. Supp. 125 (M.D. Fla. 1984) (“*Clean-Up I*”), and *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fla. 1984) (“*Clean-Up II*”), the district court granted preliminary and permanent injunctions, respectively, against enforcement of a provision of Florida law that prohibited solicitation of signatures on petitions within 300 feet of polling places on election day. The Eleventh Circuit affirmed *Clean-Up II* in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985) (“*Clean-Up III*”). Later, the Middle District of Florida invalidated a no-solicitation statute with respect to petition signature collection. *Florida Committee for Liability Reform v. McMillian*, 682 F. Supp. 1536 (M.D. Fla. 1988) (“*FCLR*”). That statute, which the Plaintiffs describe as “strikingly similar” to the law challenged in this action, prohibited solicitation within 150 feet of polling places. *Id.* at 1538. Shortly thereafter, in *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988) (“*CBS*”) (Marcus, J.), the Court enjoined enforcement of that same statute with respect to media exit polling.⁷ In *Firestone v. News-Press Publishing Co.*, 538 So. 2d 457 (Fla. 1989) (“*Firestone*”), the Florida Supreme Court invalidated a fifty-foot restriction on all nonvoters, after a media photographer was arrested for operating too near a polling place.

The Plaintiffs also rely on a handful of out-of-state decisions: In *The Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (“*Munro*”), the Ninth Circuit invalidated a 300-foot limitation on exit polling. In *NBC v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988)

⁷ The Plaintiffs also cite an unpublished temporary restraining order. *Spanish International Communications Corporation v. Firestone*, Case No. 85-3453 (S.D. Fla. Nov. 1, 1985) (Hastings, J.).

(“*Cleland*”), the court invalidated a 250-foot limitation on exit polling. And in *NBC v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (“*Colburg*”), the court invalidated a 200-foot limitation on polling.⁸

At the outset, it is obvious that many of these cases are factually distinct; the majority of them involve challenges to significantly larger restricted areas. See *Clean-Up* (300 feet); *FCLR* (150 feet); *CBS* (150 feet); *Munro* (300 feet); *Cleland* (250 feet); and *Colburg* (200 feet). Perhaps Florida’s restriction could not survive if it were as large as these others; as the Supreme Court noted in *Burson*, at some distance from the polls, a solicitation regulation could become impermissible. *Burson*, 504 U.S. at 210. The Court refused to say where that line might fall; “it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.” *Id.* at 211. Likewise, regardless of whether a 200-foot or 300-foot restricted area might violate the Constitution, Florida’s 100-foot restriction does not.

Although many of the Plaintiffs’ authorities are factually distinct, the authorities’ more glaring deficiency is that they employ legal reasoning that has since been rejected by the Supreme Court in *Burson*. For the most part, the reasoning in these decisions is based on some combination of the four following arguments, each of which was soundly rejected in *Burson*.

1. “The Statute is Underinclusive Because it Permits Other Conduct in the Restricted Area.”

This underinclusiveness argument suggests that because the legislation does not regulate *all* activity in the restricted area, it may not restrict any. For example, in the *CBS* decision, this Court said: “Thus, to the extent that [the statute] was codified essentially to restrict the number of people who may enter the zone and thereby maintain the sanctity and decorum of the polling place, it does not go far enough to accomplish that task. The failure of the statute to include activity that could very well defeat its intent suggests that this interest is not at the heart of the statute’s purpose.” 681 F. Supp. at 803. The Plaintiffs present this argument in this case. PI Motion at 8, 13. But the *Burson* Court rejected the very same

⁸ The Plaintiffs also cite three out-of-state unpublished pre-*Burson* decisions: *CBS Inc. v. Growe*, No. 4-88-887 (D. Minn. Oct. 31, 1988); *Journal Broadcasting of Ky., Inc. v. Logsdon*, No. C 88-0147-LA (W.D. Ky. Oct. 21, 1988); and *NBC v. Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988).

argument. “We do not . . . agree that the failure to regulate *all* speech renders the statute fatally underinclusive. . . . States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” *Burson*, 504 U.S. at 207 (emphasis added); *cf. id.* at 225 (“Access to, and order around, the polls would be just as threatened by the congregation of citizens concerned about a local environmental issue not on the ballot as by the congregation of citizens urging election of their favored candidate.”) (Stevens, J., dissenting).

2. **“The Statute is Overinclusive Because it Includes Nondisruptive Conduct and Because the Restricted Area Includes Private Areas and Traditional Public Forums.”**

This overinclusiveness argument comprises two separate concepts. The first part of the argument suggests that when the state seeks to address disruptive conduct, any attempt to regulate nondisruptive conduct must render the law overbroad. *See CBS*, 681 F. Supp. at 804 (“To the extent that the statute is designed to prevent disruption at the polling place, the statute cuts too deep because it proscribes all exit polling and interviewing, whether disruptive or not.”); *Munro*, 838 F.2d at 385 (“The state argues that the statute’s purpose is to prevent disruption at the polling place, but the statute prohibits all exit polling, including nondisruptive exit polling. Prohibiting nondisruptive exit polling therefore does not advance the state’s interest, and also renders the statute overbroad because it applies to activities not implicating the interest.”); *Cleland*, 697 F. Supp. at 1211 (statute not narrowly tailored because it “proscribes all exit polling no matter how unobtrusive and non-disruptive”).

This overinclusiveness argument is likewise advanced by the Plaintiffs in this case, PI Motion at 7-8, 13, and is likewise enfeebled by *Burson*. In *Burson*, the challenged statute prohibited the distribution of *all* campaign materials in the 100-foot campaign-free zone. 504 U.S. at 193. The Court found no issue with the statute’s prohibition on even nondisruptive and inoffensive political activities. It did not suggest that Tennessee’s regulation must exempt peaceful or nonthreatening expression. Furthermore, if poll officials had to police the no-solicitation zone and evaluate the character of the solicitation taking place, “it would create two problems: (i) on-the-spot enforcement decisions about what was proscribed by the statute; and (ii) increased security needed to weed out those engaged in [impermissible

activities].” *Schirmer v. Edwards*, 2 F.3d 117, 123 (5th Cir. 1993) (applying *Burson*), *cert. denied* 511 U.S. 1017 (1994).

The second component of this argument is that the solicitation-free zone includes private areas as well as public areas traditionally open to expression. *See Clean-Up II*, 590 F. Supp. at 930 (the zone “in fact encompasses some sites, including private homes and businesses, where the gathering of signatures could impose no threat to the voting process”); *Clean-Up I*, 582 F. Supp. at 126 (statute applies in area which may include residences, businesses, union halls, etc.); *Clean-Up III* (same); *CBS*, 681 F. Supp. at 796 (“[The statute] neither exempts from its ambit streets or sidewalks or other public forums traditionally open to the public”); *FCLR*, 682 F. Supp. at 1541 (“[M]any traditional public forums and private dwellings fall within the 150-foot radius”); *Firestone*, 538 So. 2d at 459. This argument was advanced by the Tennessee Supreme Court, *Freeman v. Burson*, 802 S.W.2d 210, 213 (Tenn. 1990) (“In many instances this arc extends onto public streets and sidewalks.”), which the United States Supreme Court reversed. But in sustaining Tennessee’s 100-foot radius, the Supreme Court made no exception or provision for sidewalks or other traditionally public forums. The Court did not address the possibility of the campaign-free zone’s reaching into private areas, and it refused to address on the facial challenge possibilities such as cars with political bumper stickers passing on a public road through the campaign-free zone. *Burson*, 504 U.S. at 210 n.13.

3. **“Other Statutes are Sufficient to Protect the State’s Interest.”**

This argument simply suggests that enforcing criminal laws that prohibit disrupting polling places is a more narrowly tailored means of achieving the State’s goals of preventing disorder at polling places. *See Clean-Up II*, 590 F. Supp. at 931 (“Florida does have laws that prohibit disorderly conduct and interference with the election process.”); *Clean-Up I*, 582 F. Supp. at 126 (“Florida law already prohibits breaches of the peace and disorderly conduct.”); *Clean-Up III* (same); *FCLR*, 682 F. Supp. at 1541 (“Florida has a full set of statutes that appear to create adequate tools to prevent voter harassment.”); *CBS*, 681 F. Supp. at 804 (“If a pollster . . . harasses a voter, the deputy sheriff is available at each polling place to ensure order and arrest a violator.”); *Munro*, 838 F.2d at 385 (“The statute is unnecessarily restrictive because [another law] already prohibits disruptive conduct at the polls.”); *Cleland*, 697 F.

Supp. at 1212 (“[T]he disturbances mentioned in the record would have been prohibited by enforcement of these other Georgia statutory provisions.”). This argument, like the others, was rejected by the Supreme Court in *Burson*:

[R]espondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. We are not persuaded. Intimidation and interference laws fall short of serving a State’s compelling interests because they deal with only the most blatant and specific attempts to impede elections. Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.

Burson, 504 U.S. at 206-07 (marks and citations omitted).

4. **“The State Failed to Submit Hard Evidence that the Restriction Was Absolutely Necessary.”**

This final argument is willfully blind to the modified burden-of-proof test established by *Burson*. Not surprisingly, the pre-*Burson* decisions applied traditional strict scrutiny review and demanded strict proof regarding the state’s compelling interests. *See Clean-Up II*, 590 F. Supp. at 930 (“The State presented little in the way of hard evidence that could justify this restriction.”); *FLCR*, 682 F. Supp. at 1543 (“No evidence was presented that a single polling place would be lost if a preliminary injunction were issued.”); *CBS*, 681 F. Supp. at 803 (No “convincing proof that the presence of reporters near a polling place tends to discourage anyone from voting.”).

The *Burson* decision addressed the issue of strict proof head on:

[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that [are] produced by the voting regulation in question. Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation.

* * *

Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than

reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. We do not think that the minor geographic limitation prescribed by [the challenged statute] constitutes such a significant impingement.

Burson, 504 U.S. at 208-10 (footnote, citation, and marks omitted). This “modified burden of proof test” does not require the state to come forward with strict proof that its regulation will match perfectly with its potential needs:

The modified burden of proof is an important component of the *Burson* analysis, for it stands as the Supreme Court’s recognition of the deference due to the states in our federal system of government. The states’ ability to conduct elections—particularly for state officers—should not be usurped or interfered with by the federal courts absent a clear violation of the United States Constitution. . . . This modified burden therefore assures that the state’s interest in conducting elections is respected, while assuring that the First Amendment rights are not significantly burdened by overbroad regulations.

Anderson v. Spear, 356 F.3d 651, 656 (6th Cir. 2004). In *Burson*, the Supreme Court found “[a] long history, a substantial consensus, and simple common sense [sufficient to] show that some restricted zone around polling places is necessary to protect [the] fundamental right [to vote.]” *Id.* at 211. In this case, it is equally obvious that restricting the area around polling place entrances will improve voter access to the polls. And as explained below, the Secretary has offered evidence that voter access to polls, voter satisfaction, and voter turnout have been burdened by the solicitation of voters. The Legislature acted to remedy that problem, and it did so without violating the Constitution.

* * *

The pre-*Burson* authorities are simply no longer controlling. Their legal bases have been rejected by the United States Supreme Court, and the Plaintiffs’ reliance on them is misplaced. The Florida Legislature was well aware of this fact when it enacted the challenged legislation. *See Fla. H.R. State Adm. Council, CS/HB 1567 (2005) at 17 (April 20, 2005)* (“The *Burson* case demonstrates that a state may legitimately create a no-solicitation zone . . .”). Had the *Burson* decision issued in 1982—instead of 1992—the decisions on which the Plaintiffs rely would have been substantially different. Indeed, the Tennessee Supreme Court’s decision in *Burson*—the decision reversed by the United States Supreme Court—cited nearly all of the same authorities relied on by the Plaintiffs. *See Freeman v. Burson*, 802 S.W.2d 210, 213-14 (Tenn. 1990) (“Several other courts have dealt with similar

attempts to insulate the environs of the polling place from political speech. With one exception these regulations have been held to violate the First Amendment, either because they were overbroad in reaching onto private property or because they insufficiently advanced the asserted governmental interest.”) (citing *Munro*; *FCLR*; *CBS*; *Cleland*; *Colburg*; and *Firestone*). The *Burson* dissent did as well. See *Burson*, 504 U.S. at 222-23 (Stevens, J., dissenting) (citing *FCLR*; *Clean-Up '84*; *Firestone*; *Munro*; and *Cleland*).

C. The Plaintiffs' Lone Post-Burson Authority is not Persuasive.

In addition to their several pre-*Burson* authorities, the Plaintiffs rely on one case decided after 1992. The Southern District of Ohio recently issued an unpublished decision declaring the Ohio Secretary of State's oral directive restricting exit polling to be unconstitutional. See *ABC, Inc. v. Blackwell*, Case No. 1:04cv750.⁹ Unfortunately, that decision misapprehends and misapplies *Burson* and other controlling authorities.

The Ohio court acknowledged that “an overcrowded and disruptive atmosphere at polling places might dissuade potential voters from going to the polls in the first place” and that “the avoidance of overcrowding and disruption at polling places is a compelling interest.” *Id.* at *37. But it went on to conclude that the directive was not narrowly tailored and that it violated the First Amendment. *Id.* at *39. Although the opinion could be more clear, it appears that the flawed decision was based on several defective theories. First, the decision relied on one of the standard pre-*Burson* arguments rejected by the Supreme Court. It stated that “there 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.” *Id.* at *38. Accordingly, the court continued, “the challenged measure is not narrowly tailored.” *Id.* But as explained in Section B(3), *supra*, that same argument failed in *Burson*: “[R]espondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election We are not persuaded.” *Burson*, 504 U.S. at 207.

⁹ The Plaintiffs in that case initiated the action the day before the 2004 presidential election. They sought and obtained a temporary restraining order that day, and the litigation continued until the final judgment issued September 27, 2006. Two days later, the same parties and counsel initiated this action.

Next, the Ohio court attempted to distinguish *Burson* because *Burson* did not expressly address exit polling. *ABC Order* at *13. Of course, neither did *Burson* expressly address petition collection, yet the Sixth Circuit Court of Appeals (which binds Ohio federal courts) properly applied *Burson* to laws restricting that activity, otherwise protected by the First Amendment. See *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 747-48 (6th Cir. 2004). The Ohio court attempted to justify its distinction by limiting *Burson*'s reach to "electioneering" and stating that exit polling is not electioneering. But neither is petition collection electioneering. The Merriam-Webster dictionary defines "electioneer" as "to take an active part in an election." *M-W Online Dictionary*, available at www.m-w.com. Petition collection is different than vote solicitation, which is different than exit polling. But they all involve pure speech, and they all may be restricted to protect the fundamental right to vote, notwithstanding their First Amendment protection.¹⁰

Finally, the Ohio court noted the Plaintiffs' testimony that exit polling is less effective at 100 feet than it is from a closer distance. From this, the court concluded, the regulation "does not effectively leave open ample alternatives for expression." *ABC Order* at *39. This argument ignores the difference between the right to free expression and the right to the most effective exit polling (indeed the most effective election reporting and polling would require looking over a voter's shoulder in the voting booth). But more importantly, it ignores the proper balance between the competing First Amendment interests that informs *Burson*. That Court was well aware that electioneering would be more effective within 100 feet of a polling place than it would be from a greater distance. Yet it permitted the limited regulation in order to protect a narrow geographic area around polling places. At bottom, the *Ohio* decision reaches the wrong result because it applies the wrong analysis. It misapplies *Burson* and other authorities, and it should not guide this Court's analysis.

¹⁰ The Ohio court also attempted to distinguish *Burson* by noting that exit polling takes place *after* voting. *ABC Order* at *34. This misses the point. *Burson* protects the *zone* around a polling place—not just individuals headed one direction or the other. Furthermore, the *United Food* decision upheld the petition collection restriction even though petition collection—like exit polling—is likely to take place *after* a voter has cast his ballot.

D. Florida’s Interests in the Solicitation-Free Zone are Compelling.

The Supreme Court did not require exacting proof that vote buying or other fraud was prevalent in *Burson*, nor did it require proof that the 100-foot boundary was “perfectly tailored.” *See supra*. And despite Plaintiffs’ contrary plea, this Court should require no more. The Florida Legislature responded to an articulated need to protect voter access to polling places, and it responded with legislation that is substantially related to that need.

The Secretary has nonetheless submitted evidence that solicitation immediately around polling places has contributed to electoral problems. Kurt Browning, the Pasco County Supervisor of Elections since 1980 who served as President and Legislative Committee Chairman for the Florida State Association of Supervisors of Elections, testified that over the past twenty-six years, he and his staff have received complaints from voters who have had unsatisfactory and frustrating experiences at their polling places because of unwanted solicitation. (Browning Dec. ¶ 6.) Many complaining voters have compared their entrance and exit at the polls to “running the gauntlet.” *Id.* And many have indicated that they will no longer participate in elections unless their access to the polls is better protected by the law. *Id.*

This evidence alone is sufficient, under the modified *Burson* test, to satisfy the 100-foot restriction. But this Court can also rely on the same “simple common sense” applied by the Court in *Burson*. 504 U.S. at 211. It is obvious that restricting solicitation in a limited area around polling places will improve voter access to the polling place. It is equally plain that improving voter access improves voter experience, satisfaction, and turnout.

E. Burson is Equally Applicable to Exit Polling and Solicitation of Votes.

In disregarding *Burson* and ignoring its effect on lesser authorities, the Plaintiffs seize on the fact that the statute in *Burson* did not directly regulate exit polling. PI Motion at 17 n.3. But the Supreme Court’s reasoning—and its conclusion that states may restrict areas around polling places—applies equally to Florida’s restriction, which *does* affect exit polling. It is neither the content of the Plaintiffs’ speech nor the specific nature of their activities that informs the regulation. Instead, it is the cumulative effect of solicitation on the voter experience in the protected area that presented the problem the Legislature addressed. Regardless of the character of solicitation, it is the solicitation itself that threatened the voters’

unimpeded ingress and egress at their polling places. And so it was the solicitation itself that the Florida Legislature restricted.

The *Burson* decision recognized Tennessee’s two compelling interests in its restricted area—the “right of its citizens to vote freely for the candidates of their choice” and “the right to vote in an election conducted with integrity and reliability.” *Id.* at 198-99. Intertwined with these interests, of course, is the state’s interest in protecting polling place access and promoting voter turnout. *See id.* at 209 (considering negative impact on voter turnout if an election is repeated); *id.* at 207 (noting that undetected but improper polling place activities “may drive the voter away before remedial action can be taken”). A voter’s ability to vote freely for the candidate of his choice necessarily depends on that voter’s ability to enter and exit his polling place without unwanted interference. Accordingly, the Florida Legislature restricted *all* solicitation within the reasonable 100-foot radius of the polling place.

There is, of course, nothing sufficiently different about exit polling to justify its special treatment around polling places. If Legislatures can constitutionally implement zones around polling places in which political solicitation and other pure speech are restricted—and *Burson* makes clear they can—so too can they restrict exit polling, even if the exit polling is otherwise constitutionally protected activity. Pure political speech, including political solicitation, is afforded “the broadest protection . . . in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (marks and citation omitted). But even that broad protection is insufficient to outweigh citizens’ fundamental right to vote. And neither is the Plaintiffs’ desire to conduct exit polling closer to polling place entrances sufficient to outweigh the fundamental right to vote.

More importantly, there is nothing about exit polling that makes it—as opposed to other restricted types of solicitation—less likely to cause problems around polling places. As Supervisor Browning’s declaration states, those approaching voters have included individuals distributing various literature, collecting or attempting to collect petition signatures, conducting exit polls, soliciting commercial sales, and others. (Browning Dec. ¶ 7.) “The cumulative effect of these activities has been to substantially impede voters’ ingress and egress at their polling places. The cumulative effect of these activities has also led to

substantial voter dissatisfaction.” *Id.* In other words, it was not just political solicitation that presented the problems. Accordingly, it is not just political solicitation that the Legislature restricted.

The Plaintiffs cite that portion of the *Burson* decision in which the plurality notes that there is “no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses.” 504 U.S. at 207. The plurality made that observation not because a state may not restrict exit polling, but because the dissent and the respondent argued that Tennessee’s decision *not* to restrict exit polling (along with political solicitation) rendered the statute fatally underinclusive. *See* Section B(2), *supra*. Indeed, the dissent argued that the failure to restrict other types of solicitation contributed to the statute’s unconstitutionality because “exit polling . . . surely presents at least as great a potential interference with orderly access to the polls as does the distribution of campaign leaflets, the display of campaign posters, or the wearing of campaign buttons.” *Id.* at 223-24 (Stevens, J., dissenting). The plurality rejected the underinclusiveness argument: “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” *Id.* at 207. Tennessee may not have had recognized problems with other forms of solicitation, but Florida has. *See supra*.

Although *Burson* relied in part on a history of voter fraud and vote purchasing, it did not limit a state’s authority to restrict activities around polling places to only those activities that could result in voter fraud or vote purchasing. It did not require the state to demonstrate that an individual distributing campaign materials was attempting to purchase votes, nor did it insist on proof that a campaign button would contribute directly to voter fraud. Instead, it simply recognized the need for a restricted area around polling places to protect the democratic process. 504 U.S. at 200. In *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied* 511 U.S. 1017 (1994), the court applied the *Burson* analysis to a restriction on the collection of recall petition signatures near polling places, even though there was nothing on that election’s ballot dealing with the recall effort. *Id.* at 119; *see also United Food*, 364 F.3d at 747-48 (same). *Schirmer*, which upheld a 600-foot radius around polling places, recognized the state’s interest in attempting “to secure its citizens’ right to vote in an environment free from intimidation, harassment, confusion, obstruction, and undue

influence.” *Id.* at 119. The Fifth Circuit, therefore, recognized that the *Burson* analysis applies whether the concern is vote buying, voter fraud, or simply confusion and unimpeded access to the polls.¹¹ Those interests are present in this case, and under *Burson*, those interests are sufficient to support Florida’s 100-foot geographical restriction. The Florida Legislature recognized the same interests the Tennessee Legislature did (voter protection) and it responded with the same solution (a protected zone around polling places). And it was constitutionally justified in doing so for the same reasons the Tennessee Legislature was.

¹¹ Moreover, if *Burson* is inapplicable to exit polling restrictions because it does not expressly address them, then so too are many of the pre-*Burson* authorities on which the Plaintiffs rely. None of the *Clean-Up ’84* decisions address exit polling. Neither do the *Florida Committee for Liability Reform* or *Firestone* decisions.

CONCLUSION

The Florida Legislature has an interest in protecting voters from unwanted solicitation at their polling places. And it has an obligation to protect the orderly administration of elections and the election process. Seeking to further these interests, the Florida Legislature acted to restrict all solicitation inside polling places or within 100 feet of their entrances. Although that restriction may have an incidental effect on the Plaintiffs' activities, it does not substantially infringe on the Plaintiffs' First Amendment rights. Instead, the Florida Legislature carefully reconciled the Plaintiffs' rights with its citizens' fundamental right to vote. The challenged legislation does not violate the Constitution, and this Court should neither declare it unconstitutional nor enjoin its enforcement.

Respectfully submitted this 13th day of October, 2006.

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**PHV Applications Pending*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile, email, and United States mail, this 13th day of October, 2006, before 10:00 a.m. to the following:

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