IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CBS BROADCASTING INC., AMERICAN BROADCASTING COMPANIES, INC., THE ASSOCIATED PRESS, CABLE NEWS NETWORK LP, LLLP, FOX NEWS NETWORK, L.L.C. and NBC UNIVERSAL, INC.,

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.

Case No.: 06-22463-CIV
Huck, J./Simonton, MJ

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF**
**PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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Plaintiffs respectfully submit this reply memorandum in further support of their motion for an order enjoining defendants from enforcing Fla. Stat. Ann. §102.031(4)(a), (b) to prohibit plaintiffs from conducting exit polls within 100 feet of Florida polling places.[1]

**PRELIMINARY STATEMENT**

In her opposition brief, Secretary of State Sue Cobb (the "Secretary") does not deny that exit polling is speech protected by the First Amendment. To the contrary, she acknowledges explicitly that it is. Nor does the Secretary dispute that numerous courts, including this court, the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit, have struck down or enjoined restrictions similar, and in some cases nearly identical, to those at issue here. Nevertheless, the Secretary argues that, under the authority of Section 102.031, all exit polling may be prohibited within 100 feet of Florida polling places consistent with the First Amendment. The argument is based almost exclusively on the 1992 decision of the United States Supreme Court in *Burson* v. *Freeman*, which, the Secretary contends, permits the states to prohibit all forms of "solicitation" around polling places on election day. As demonstrated below, *Burson* defeats rather than advances the Secretary's case.

In *Burson*, the Supreme Court upheld a Tennessee statute that restricted last minute campaigning near polling places on election day. The Court found that Tennessee had a compelling interest in preventing voter intimidation and election fraud and that the statute was narrowly tailored to protect the important and fundamental First Amendment rights at stake. Although the Secretary seeks to minimize the "distinctions" between the statute challenged in *Burson* and the statute at issue here (Opp. Br. at 3), the differences are quite substantial. Whereas the statute at issue in *Burson* narrowly prohibited the display of campaign posters and the solicitation of votes, Section 102.031 makes it criminal for anyone to ask any questions of a

[1] Concurrent with their motion for a preliminary injunction, plaintiffs filed a motion to certify a defendant class represented by Lester Sola in his official capacity as the Supervisor of Elections of Miami-Dade County. Because neither Mr. Sola nor Secretary of State Sue Cobb have filed any opposition, the motion to certify a defendant class should be granted.

voter. As discussed in our opening memorandum and demonstrated further below, such a law cannot withstand any measure of constitutional scrutiny.

## ARGUMENT

### I. THE SUPREME COURT'S DECISION IN *BURSON* v. *FREEMAN* DOES NOT SUPPORT THE SECRETARY'S POSITION

The Supreme Court in *Burson* recognized that states may restrict *campaign activities* within 100 feet of polling places. 504 U.S 191 (1992). The plurality called it a "rare case" in which the State's interest in promoting elections "free from the taint of intimidation and fraud" was strong enough to overcome fundamental free speech rights. *Id.* at 211. In a critical passage cited in plaintiffs' opening brief but glossed over in the Secretary's response, the *Burson* plurality went out of its way to observe that its decision did *not* apply to exit polling. *Id.* at 207. ("[T]here is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud . . . [but] simply no evidence that political candidates have used other forms of solicitation *or exit polling* to commit such electoral abuses.") (emphasis added). Thus, while *Burson* stands firmly for the proposition that electioneering may be regulated to prevent fraud and intimidation, the case offers no support whatsoever for measures such as Section 102.031, which seek to prohibit exit polling and other reporting near polling places.

The Supreme Court's focus on electioneering in *Burson* is clear from the start of the plurality opinion, which includes a lengthy historical analysis of the twin evils of voter intimidation and election fraud. *Id.* at 200-06. The opinion describes the *viva voce* method of elections employed in the colonial period and explains how that system presented considerable opportunities for bribery and intimidation. *Id.* at 200. The opinion goes on to discuss the implementation of a paper ballot electoral system, revealing that it, too, was eventually corrupted. *Id.* Writing for the plurality, Justice Blackmun observed that not long after the formation of the Union, political parties began producing their own colorful and distinctive ballots which could be seen from a distance, thus opening the door again to bribery and intimidation. *Id.* at 200-01.

According to an 1880 Senate Report cited in the opinion, "men were frequently marched or carried to the polls in their employers' carriages," were "furnished with ballots and compelled to hold their hands up . . . so they could be easily watched until the ballots were dropped in the box." *Id.* at 201 n.7 (citing S. Rep. No. 497, 46th Cong., 2d Sess., 9-10 (1880). The plurality compared the early polling place to "an open auction place" where voters were "met by various party ticket peddlers 'who were only too anxious to supply them with their party tickets,'" and often attempted "to keep away elderly and timid voters of the opposition." 504 U.S. at 202. (citing L. Fredman, The Australian Ballot: The Story of an American Reform 24 (1968)).

It was against the backdrop of this "widespread and time-tested consensus" that the plurality in *Burson* upheld Tennessee's 100-foot "campaign-free zone," concluding that "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." 504 U.S. at 206. While the Secretary misleadingly suggests that the plurality endorsed the prohibition of all "solicitation" near polling places (Opp. Br. 5), the opinion and the statute at issue were far narrower than that. The law in question, Tenn.Code Ann. § 2-7-111(b) (Supp.1991), provides in relevant part:

> Within [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

Thus, the law at issue in *Burson* did not prohibit solicitation generally; it prohibited solicitation *of votes* for a candidate, party or ballot question. The plurality did not, as the Secretary would have it, even begin to condone a ban on newsgathering.

As noted, the plurality was careful to circumscribe its opinion, explicitly observing that the statute did not cover exit polling and that there was "simply no evidence" that exit polling caused the same problems justifying Tennessee's electioneering restrictions. Even without this express carve-out for exit polling, however, *Burson* provides no support for the Secretary's position in this case. The fact that the Supreme Court recognized that states may regulate *campaign activity* near polling places says nothing about whether states may regulate *newsgather-*

*ing* near polling places. This is true particularly where, as here, there is no evidence that exit polling has caused any disruption at the polls. *See* Section II *infra*. Put simply, there is no basis for concluding that exit polling within 100 feet of polling places will interfere with the sanctity of polling places, will result in the harassment and intimidation of voters, or otherwise interfere with anyone's right to vote.

Previous attempts to conflate exit polling with electioneering have failed at first blush. In *American Broadcasting Cos.* v. *Blackwell,* Case No. 1:04cv0750, at *33 (S.D. Ohio Sept. 26, 2006) (Miller Aff't, Ex. 11), the federal district court in Ohio observed that "[u]nlike the speech in *Burson* . . . exit polling cannot reasonably be construed as a form of electioneering under any definition of that term." Similarly, in a pre-*Burson* decision, the federal district court in Kentucky found that "electioneering is a much different process from exit polling." *Journal Broadcasting, Inc.* v. *Logsdon*, No. C88-0147-L(A), 1988 U.S. Dist. LEXIS 16864, at *5 (W.D. Ky. Oct. 21, 1988)(Miller Aff't, Ex. 13). Moreover, following the decision in *Burson*, state attorneys general across the country were asked to formally opine on whether exit polling constitutes electioneering and repeatedly concluded that it did not. *See, e.g.*, Arkansas Op. Att'y Gen. 2004-268, 2004 WL 2270856, at *2 (Oct. 5, 2004), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) ("My predecessor concluded and I agree, that this subsection [banning 'electioneering' within 100 feet of polling places] has no applicability to exit polling activities"); Arkansas Op. Att'y Gen. 99-330, 2000 Ark. AG LEXIS 2, at *4-*5 (Jan. 27, 2000), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) ("The most relevant question is whether 'exit polling' can be classified as 'electioneering of any kind.' In my opinion the answer to this question is 'no'. . . . '[E]xit polling' does not fit within the definition of 'electioneering . . .'"); Maryland Op. Att'y Gen. 92-035, 1992 Md. AG LEXIS 49, at *4 n.3 (Oct. 20, 1992) ("The electioneering ban does not prohibit exit polling by the media within the 'depoliticized' zone."); Louisiana Op. Att'y Gen. 05-0101, 2005 WL 3556205, at *4 (Nov. 14, 2005) ("The conducting of interviews for polling purposes by the media would not constitute loitering, electioneering or the type of prohibited activity [under Louisiana law]). *See generally* Kentucky Op. Att'y Gen. 92-73, 1992

Ky. AG LEXIS 73, at *4 (Apr. 27, 1992) (exit polling did not fall within "the scope of electioneering, since exit polling occurs after a voter has cast his ballot and could not in any sense be deemed an effort to influence the voter's decision").

Nevertheless, the Secretary presses the point that *Burson* should be interpreted to cover all forms of polling place "solicitation," including exit polling. In support of this argument the Secretary cites *United Food & Commercial Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 747-48 (6th Cir. 2004), which applied *Burson* to uphold a ban on petition collecting, which, the Secretary argues, is different than electioneering. Opp. Br. 14. Thus, the argument goes, if *Burson* can be applied to non-electioneering activities such as petition collecting, it can also be applied to non-electioneering activities such as exit polling. The argument is not only a stretch, but its premise is also incorrect. In *United Food*, the court *did* characterize the solicitation of petition signatures as a form of electioneering. 364 F.3d at 751. In any event, whatever some courts have held with respect to petitioning, there is nothing in *Burson* or any other case to support the Secretary's attempt to apply *Burson* in the context of plaintiffs' newsgathering activities.

Indeed, the only exit polling case decided after *Burson* makes clear that *Burson* has no effect on plaintiffs' right to conduct exit polls. In *Blackwell*, the district court permanently enjoined the Secretary of State of Ohio from enforcing a directive prohibiting exit polls within 100 feet of polling places. The Secretary had argued, not unlike Secretary Cobb in this case, that *Burson*, along with the Sixth Circuit's decision in *United Food*, gave authority to restrict plaintiffs' exit polling activities. The court flatly rejected the argument, finding:

> The Court will first compare and contrast the nature of the speech in this case with the speech at issue in [*Burson* and *United Foods*]. As noted above, exit polling is a form of speech protected under the First Amendment. It concerns elections, and is a form of political speech. Unlike the speech in *Burson* and *United Food*, however, exit polling cannot reasonably be construed as a form of electioneering under any definition of that term. In contrast to the electioneering speech in *Burson* and *United Food*, there is no established history of exit polls corrupting or interfering with the voting process. Exit polling, as described by plaintiffs, simply does not implicate the State's interest in preventing voter intimidation and fraud. . . . Furthermore, both *Burson* and *United Food* refer to the sanctity of the "last 15 sec-

> onds" before the voter enters the polling place. By definition, exit polling affects only those who have already voted.

Slip Op. 33-34 (citation and footnote omitted). In fact, the court in *Blackwell* read *Burson* to suggest that public access to polling places actually *discourages* voter intimidation and fraud and, accordingly, found that "[t]he presence of the press at polling places would likely serve as a deterrent to fraud and intimidation." *Id.* The court in *Blackwell* also noted, among other things, that despite higher than normal turnout for the 2004 presidential election, "there is no evidence that Plaintiffs' exit polls caused disruption, overcrowding or interfered with the voting process in any way" and "[t]he impact of exit polls on the voter egress appears to be negligible." *Id.* at 38.[2] Ultimately, the court in *Blackwell* concluded that the Secretary of State's directive could not survive either strict scrutiny or intermediate scrutiny because it was not narrowly tailored to serve the State's purported interest in preventing overcrowding and disruption at Ohio polling places. As discussed in Section II, *infra*, Section 102.031 suffers the same critical flaw.

Here, the Secretary attempts to distinguish *Blackwell* on the basis that some of the rationales cited by the court in that case were rejected by the Supreme Court in *Burson*. The argument makes no sense. The critical holding of *Blackwell* is that *Burson does not apply* to a prohibition of exit polling because (i) electioneering leads to fraud and intimidation and exit polling does not, and (ii) the State's interest in a campaign free zone is far more compelling than the State's interest in a ban on exit polling. To suggest that the court in *Blackwell*, a case about exit polling, was bound to apply the same standards applied by the Supreme Court in *Burson*, a case about electioneering, misses the point of *Blackwell* entirely.

Casting aside the decision in *Blackwell* as wrongly decided, the Secretary goes on to cite the Fifth Circuit's decision in *Schirmer* v. *Edwards*, 2 F. 3d 117 (5th Cir. 1993), which, she claims, interpreted *Burson* to permit a broad prohibition of polling place activities beyond just

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[2] The Secretary's observation that "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" is disingenuous at best in light of these passages from *Burson* and *Blackwell*.

electioneering. The court in *Schirmer* said no such thing. In fact, given the actual text of the decision it is surprising that the Secretary decided to cite it at all. *Schirmer* involved a constitutional challenge to a Louisiana statute that made it unlawful to, among other things, "solicit . . . any other person to vote for or against any candidate or proposition . . . hand out . . . campaign literature . . . or display political signs . . . or other forms of political advertising." *Id.* at 118 (citing LSA-R.S. §1462). The statute was passed to combat a "common practice" in Louisiana whereby campaign workers would "bombard[]" and "inundate" voters "just prior to their entry to the polls." *Id.* at 121. Like the Tennessee statute upheld in *Burson*, the statute in *Schirmer* created a "campaign-free zone" around polling places. The law did not purport to regulate exit-polling and *Schirmer* cannot be characterized as an exit polling case.

Although the Secretary's brief makes no mention of it, the court in *Schirmer* actually went out of its way to distinguish Louisiana's ban on electioneering from unconstitutional restrictions on exit polling:

> We reject the application of the exit-polling cases to the present context because the underlying state interests differ in each case. While there is no evidence of widespread voter harassment or intimidation by exit-pollers, there is evidence that poll workers do create these problems. Consequently, the state's compelling interest is called to greater heights in creating a campaign-free zone.

*Id.* at 122. Thus, just like the Supreme Court in *Burson*, the Fifth Circuit in *Schirmer* expressly observed that its decision was limited to electioneering activities and pointed out that the State had no similar interest in prohibiting exit-polling activities. Neither *Burson* nor *Schirmer* provide any support for the Secretary's position in this case. The reality is that *Burson*, *Schirmer* and other cases upholding restrictions on electioneering activity (*see e.g. United Foods, supra*), have no application in this case except to the extent they distinguish electioneering (which may be regulated) from exit polling (which may not).

## II. THERE IS NO EVIDENCE BEFORE THIS COURT THAT EXIT POLLING HAS CAUSED POLLING PLACE DISRUPTIONS OR OTHERWISE INTERFERED WITH ANY FLORIDIAN'S RIGHT TO VOTE

No court has ever found that exit polling has caused disruption at polling places or otherwise interfered with anyone's right to vote. In *Burson*, as noted, the Supreme Court found

there was "simply no evidence" that exit polling had been used to commit electoral abuses. 504 U.S. at 207. In *Blackwell*, the court similarly found "no evidence that . . . exit polls caused disruption, overcrowding or interfered with the voting process in any way." Slip Op. at 38. And this court in *CBS Inc.* v. *Smith*, 681 F. Supp. 794, 805 (S.D. Fla. 1988), found nothing even to suggest that "exit polling or reporters' interviews within 150 feet would disrupt any polling place in any manner[.]" The same is true of the record in this case.

Before discussing the complete lack of evidence to support the Secretary's position, however, we first address the dispute between the parties as to the appropriate level of constitutional scrutiny. In our opening brief we urged the court to apply strict scrutiny on the basis that Section 102.031 is a content-based restriction on speech. Br. 13 (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)). The Secretary argues in response that intermediate scrutiny is more appropriate because the law is content-neutral. Opp. Br. 5. What the Secretary ignores is that application of Section 102.031 depends entirely on whether a reporter or some other person asks a question of a voter. It is *not* illegal under Section 102.031 for someone to make a speech about any subject, to ask questions of non-voters, or to sing the Florida Gators' fight song within 100 feet of polling places, but it *is* against the law to ask a voter about the ballot they cast. In other words, the application of the law turns completely on the content of speech. Accordingly, the intermediate level of scrutiny urged by the Secretary is not applicable. *See Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is 'justified *without reference* to the content of the regulated speech.'") (citation omitted; emphasis added).

In any event, the statute cannot survive whatever level of scrutiny is applied. Whether the applicable test is intermediate scrutiny or strict scrutiny, the Secretary still must demonstrate that Section 102.031 is "narrowly tailored" to serve the State's interest in maintaining the integrity of the electoral process. *Rock Against Racism*, 491 U.S. at 798. This the Secretary has not, and cannot, establish. While the Tennessee law at issue in *Burson*, the Louisiana law in *Schirmer*, and the Kentucky law in *United Food* covered a narrow category of speech and

activity related to electioneering at polling places, the law before this Court is far broader, prohibiting reporters and others from asking voters about any fact or opinion. The law is plainly not narrowly tailored.[3]

To support this expansive prohibition of indisputably protected speech, one might have expected the legislature in passing Section 102.031, or the Secretary in arguing in favor of its constitutionality, to proffer hard evidence that exit polling or similar reporting activities had caused disturbances at the polls. That is not the case. The official Florida House of Representatives Staff Analysis report does not mention exit polling or even so much as hint that plaintiffs' activities have caused a single polling place disturbance. *See* Florida House of Representatives Staff Analysis, H.B. 1567 (Apr. 20, 2005), attached as Exhibit 1 to the Oct. 17, 2006 Affidavit of Mark Workman. Moreover, the only piece of evidence submitted to this Court by the Secretary is equally devoid of proof that exit polling has caused any problems at Florida polling places. Indeed, the Affidavit of Pasco County Supervisor Kurt S. Browning references exit polling only once and even then in a vague and essentially meaningless way. Specifically, the affidavit observes in paragraph six that voters have complained they have been "impeded" at the polls by "various individuals soliciting or offering information." Browning Aff't ¶6. Then, in paragraph seven, Mr. Browing states that he has personally observed voters in Pasco County being approached by "individuals distributing various literature, collecting or attempting to collect petition signatures, *conducting exit polls*, soliciting commercial sales, and others." *Id.* at ¶7 (emphasis added). Plaintiffs take no issue with Mr. Browing's observation that some

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3 More narrow alternatives were available to the legislature. First, given the apparent lack of any specific evidence of any disruption having been caused by exit polling at Florida polling places, Florida's preexisting laws requiring order and decorum at polling places are sufficient to guard against any hypothetical disruptions in the future. Even if it could be argued that those laws were for some reason not sufficient, the law that was repealed in favor of section 102.031 already provided a more specific, but still narrowly tailored, alternative. That statute provided for a "restricted zone" of 50 feet, but permitted the solicitation of opinions from *any distance*, provided that such polling took place in a "separately marked area . . . so as not to disturb, hinder, impede, obstruct, or interfere with voter access to the polling place or polling room entrance" and was clearly identified as an activity in which voters may participate voluntarily. 1989 Fla. Sess. Law Serv. 89-338 (West).

voters have complained about "soliciting" at the polling place. Nor do plaintiffs dispute that voters in Pasco County have been approached by exit pollers. But what Mr. Browning does not say in his Affidavit is that any voters have ever complained about exit pollers at all. As was the case in *Burson*, *Blackwell* and *Smith*, there is "simply no evidence" before this Court that exit polling has caused any disruptions at Florida polling places.

Aware that she has not and cannot proffer specific evidence that exit polling has caused polling place disruptions, the Secretary attempts to rely on *Burson* for the proposition that no real evidence is required. Opp. Br. 15. What the Secretary fails to mention is that in *Burson*, the need for a "campaign-free zone" was supported by a "widespread and time-tested consensus" that electioneering near the polling place causes voter intimidation and electoral fraud — a consensus that, according to the Supreme Court, does not exist with respect to exit polling.

## CONCLUSION

For the reasons set forth above and in plaintiffs' opening brief and supporting affidavits, the Court should (i) declare that, as applied to plaintiffs' exit polling activities, Fla. Stat. § 102.031 (4)(a), (b), violates the First Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment and (ii) permanently enjoin defendants from enforcing the statute so as to prohibit Plaintiffs' exit polling activities within 100 feet of Florida polling places.

Dated: October 17, 2006

Respectfully submitted,

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By: /s/ Raymond V. Miller

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**CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail this 17th day of October, 2006, before 1:00 pm to the following:

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